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JOHN LOCKE ON OBLIGATION: SENSATION, REFLECTION, AND THE  
NATURAL DUTY TO CONSENT

By

Emily Marie Crookston

A dissertation presented to the Graduate School of Arts and Sciences of  
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## Chapter One:

### Introduction: Locke on Moral and Political Obligation

#### *I. Introduction*

Locke's theories of moral and political obligation are instructive both in their successes and in their failures. Writing during a time in which previous assumptions were being widely challenged in science, religion, and politics, Locke resists this trend and judiciously accepts the wisdom of his predecessors as a firm foundation upon which to build his own arguments. Nonetheless, both Locke's theory of moral obligation and his theory of political obligation meet with serious criticism. On the moral obligation side, Locke faces the charge of internal inconsistency: his theory of natural law cannot meet the standards set by his naturalist empiricism. On the political obligation side, critics complain that consent theory is descriptively inadequate: if citizens could consent to their governments, then they would be morally bound, but most citizens have never consented nor have they ever been in a position to perform a genuine act of consent. So two of Locke's crucial arguments seem to be in trouble. In my dissertation, I take another look at these criticisms.

In the first half of the dissertation, I argue that though Locke's natural law theory is too vague to count as a decisive theory of moral obligation, he could enrich his account using features of a Kantian approach in order to develop a coherent and internally consistent theory of moral obligation. In the second half, I build upon this comprehensive theory of moral obligation in order to argue for a more charitable interpretation of Locke's theory of political obligation, which I think survives the toughest objections to

consent theory. According to my view, although consent is necessary and sufficient for political obligation, there are nonetheless universal moral constraints upon the individual choice to consent. Thus, though it is true that individuals are bound to obey *only those political institutions to which they have consented*, there is a natural moral duty<sup>1</sup> to consent when certain conditions are met. If I am correct, Locke comes closer to having a unified theory of obligation than most scholars give him credit for. By developing a credible theory of moral obligation, which Locke can then use to defend himself against critics of his consent theory of political obligation, I provide Locke with the tools to save both projects.

## *II. Part I: Moral Obligation*

Because Locke never published a treatise on morality, the challenging task of understanding his thoughts concerning moral obligation requires fitting together different pieces from different works. My main argument, though, focuses upon Locke's unpublished manuscript, later edited and titled *Essays on the Law of Nature* by W. von Leyden,<sup>2</sup> in which Locke sketches his early theory of natural law. According to his argument in the *Essays*, it is possible for human beings to discover the content of the universal moral law through the use of reason operating upon experience provided by sense perception. He envisions the process working in something like the following way:

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<sup>1</sup> Although some, such as R.B. Brandt (1964) and H.L.A. Hart (1958), have thought it important to distinguish between duties and obligations, the former referring to natural obligations and the latter referring to obligations that must be voluntarily acquired, I use the two terms interchangeably throughout the dissertation.

<sup>2</sup> First published in 1954 by Oxford University Press.

recognizing regularities in nature, e.g., the changing of the seasons, we infer that nature is governed by certain fixed laws; and further, we infer that human beings, as part of nature, must also be governed by certain fixed laws. But also, recognizing differences between human beings and the rest of nature—the most important of which being the human capacity for rational thought—we infer that human beings are governed not only by physical laws but also by moral laws. Still, from this picture, we get only a basic sense of Locke's moral theory. He must say much more in order to explain how human beings come to know the content of the natural law.

Though he struggled throughout his career to further develop this empiricist natural law theory into a theory of moral obligation that would fit with his metaphysics, epistemology, and religious beliefs, he never manages to fill in the details of his early theory. Beyond the issue of knowability, he also struggles with the problem of normativity. Even if Locke could explain how human beings come to know the natural law, he must also explain why it is binding upon them. Here Locke vacillates between two possibilities: either the natural moral law has authority because it is the manifestation of God's perfect will or because it is somehow intrinsically binding upon rational human beings who are capable of discovering it. Unfortunately, both Locke's explanation for how human beings come to know the content of the natural moral law and his explanation for why they are bound to obey its commands are incomplete. Thus, in part I (chapters two and three), I suggest a direction for filling out Locke's skeletal theory of moral obligation.



In chapter two, I look carefully at those natural law theories that most influenced Locke's own distinctive natural law theory with the hope that these theories might provide us with clues as to the direction that Locke was heading. As a result, the aim of this chapter is to place Locke's moral theory in its historical context and to examine the main interpretive debate springing from this analysis.

Locke witnessed, during his lifetime, a shift in emphasis between the Scholastic theory of natural law to the modern theory of natural rights. In his own moral theory, we see evidence that Locke wishes to mediate this split. Although he maintains, along with the Scholastics, the view that there is a pre-existing moral theory handed down by the supreme lawgiver, he also attempts to follow some of the Protestant figures and other of his contemporaries in agreeing that individuals have certain moral rights. From the older conception of natural law, Locke borrows the idea of man's subordination to a law, which is, in a sense, internal to him, though he rejects the Scholastic contention that the law is known by revelation or otherwise written on one's heart. Agreeing with the relatively recent trend toward secularizing the natural law, as first seen in the work of Grotius and later taken to its logical conclusion in Hobbes's *Leviathan*, Locke argues that the natural law must be known by human reason or "the light of nature." But whereas Hobbes's commitment to developing a secularized natural law theory leads him to an unlimited, though morally and politically decisive, natural right, Locke sees individuals as partaking, through their reasoning capacities, in a moral or divine natural law, which places certain limits upon their natural rights.

From the pre-Socratics and Aristotle, Locke adopts the notion of a hierarchy of being according to which the essential feature of human nature is the ability to control one's passions by allowing reason to guide one's desires. However, the ancient account of morality and natural justice seems to be missing a crucial element of natural law theory, a concept of natural duty. The Stoics supply this missing element and are the first to develop a complete theory of natural law recognizable as such. Unlike their predecessors, the Stoics take a cosmic view of what it means to be a human being as one who ought to live in accordance with nature. Therefore, the Stoics supply the idea that there is an objective right or system of law (i.e., reason) that supplies individuals with a duty to take others into consideration. Thus, Locke borrows from the Stoics the notion that living well involves more than simply individual success or human flourishing; living well also requires living in accordance with the natural order of things. However, Locke importantly breaks from the Stoic's deterministic, physicalist view of the natural law, accepting the view that the natural law is a moral law given by the divine lawgiver and is external to and discoverable by human beings.

This break with Stoic determinism marks Locke's acceptance of an aspect of yet another natural law theory, that of the Scholastics. Locke accepts the Scholastic notion that God creates and lends authority to the natural moral law. For Aquinas, man tends toward his natural end, which God has built into his very nature. Unlike the Stoics, Aquinas thinks that human beings ought to obey the natural law precisely because it is the manifestation of the divine will. Here Aquinas articulates the principle of divine right: God, as the omnipotent, omnibenevolent, omniscient creator of the universe, has proper

authority and dominion over his creation giving him a right to rule, which Locke accepts as well. So, in some passages, Locke seems to accept the voluntarism of the Scholastics, but in others he seems to side with the early Protestant thinkers such as Hugo Grotius, offering a more secularized justification for the authority of the natural law.

Given Locke's ambiguous and multi-faceted notion of the natural law, it is difficult to understand how he views the relationship between natural law and natural rights. Indeed, it is difficult to know whether he has a unified view about it at all. It is no wonder, then, that Locke scholars seize upon the opportunity for an interpretive debate. On one side, arguing that Locke's view is essentially the same as Hobbes's, is Leo Strauss. Strauss says that, for Locke, natural rights are prior to the natural law and the state of nature is a state of unlimited freedom ruled only by the natural right of self-preservation. On the other side are those such as John Dunn, James Tully, and Richard Ashcraft, who argue that the natural law is prior to natural rights and that natural rights derive from the natural law. Yet, recently, A. John Simmons advocates a third interpretation arguing that both natural law and natural rights are fundamental in Locke's view. I agree with Simmons's interpretation because I see no clear indication that Locke wishes to privilege either the principles of natural law or natural rights. Unfortunately, this interpretation gives us little insight into potential directions to expand Locke's theory.

From here, my daunting task in chapter three is to take the muddled beginnings of a natural law theory that Locke offers in his early work and form them into a coherent theory of moral obligation. However, it becomes increasingly evident that in order to

develop a comprehensive theory of moral obligation, Locke needs significant help from others. I argue that Kant's theory of moral obligation can supply the crucial elements that Locke needs.

There are two main barriers to Locke having a credible theory of moral obligation, to which I have already alluded. He fails to answer two important questions: (1) how can human beings discover their moral obligations? And (2) what gives the natural law moral authority? First, Locke maintains that it is possible to deduce or derive the moral law from sense data just as we might demonstrate the solution to a geometric proof from the principles of geometry; however, he never successfully produces such a moral demonstration. So initially, at least, the prospects look bleak for deriving normative rules from physical facts about the world. Secondly, Locke gives two different answers to the question about the natural law's moral authority. Either the moral law is binding because it is legislated by God (voluntarism) or it is binding because obedience to the moral law is intrinsically good for rational human beings who are capable of discovering it (realism). The problem here is that both responses seem to conflict with Locke's commitment to his naturalist empiricism. Thus, as it stands, Locke's natural law theory lacks crucial elements of a theory of moral obligation.

In the end, I argue that incorporating a broadly Kantian analysis of the Formula of Humanity would provide Locke with an example of a deduction from observation and reflection to a normative principle, i.e., a duty to respect humanity. Though it will require Locke to relax slightly his commitment to empiricism, I think Kant's rationalist deduction is of the sort Locke ultimately had in mind. Also, though I think Kant and

Locke are similarly imprecise about the source of moral authority, I find Christine Korsgaard's reconstruction of Kant's conception of normativity both compelling in its own right and not too far removed from Locke's naturalist empiricism. By using certain features of Kant's moral theory to enrich Locke's skeletal theory of natural law, I aim to provide Locke with a coherent and internally consistent theory of moral obligation.

### *III. Part II: Political Obligation*

Now having a comprehensive theory of moral obligation is important for the success of Locke's theory of political obligation as well because political obligation is a subset of moral obligation. Locke himself seems to recognize this, since arguments in the *Second Treatise* assume the existence of the law of nature as a premise. For example, in chapter five, in the argument showing how one might justly come to own property that is originally given by God to all mankind in common, Locke relies upon the following principle of natural law: that God has given to man the faculty of reason to be used to his best advantage. According to Locke, what follows from this is that man may acquire property at will, but only so much as reason tells him he might make proper use of. Hence, we see an example of a natural duty limiting a natural right. As we will later see, Locke relies upon similar moral concepts to bolster claims throughout his political works. Therefore, I argue that in order for Locke to have a plausible theory of political obligation, he must build upon a plausible theory of moral obligation. Thus, in part II (chapters four and five), I explore the implications of my reconstructed theory of moral obligation for Locke's political theory.

Political philosophers from Rawls to Simmons uniformly interpret Locke as a diehard consent theorist; it is vexing, however, that this nearly universal interpretation relies upon only a few chapters of the *Second Treatise of Government*. I argue that Locke's views on political obligation are actually more complicated than the traditional consent theory label suggests. Moreover, when we broaden our focus to include some of his nonpolitical works, a new interpretation emerges featuring a natural duty to consent as the foundation for his theory of obligation. To interpret Locke as a consent theorist according to the standard view, then, is to ignore the complexities of Locke's theory of political obligation and its connection with his natural law theory of moral obligation.

In chapter four, I begin by raising a conceptual challenge and two interpretive challenges to the standard consent theory view. First, supporters of consent theory cannot explain how consent, as the justification for political obligation, can avoid giving too much respect to those who fail to consent for immoral, irrational, and unprincipled reasons. I call this objection the over-permissive objection. I also show that an appeal to Locke's doctrine of tacit consent cannot solve the problem. Second, we see natural duties limiting individual consent in Locke's argument against selling oneself into slavery and in his conception of property acquisition calling into question Locke's status as a strict consent theorist. Next, I offer my reinterpretation of Locke's theory of political obligation arguing that were Locke to adopt a natural moral duty to consent, his theory of political obligation would be more consistent with his other commitments. Accepting this natural moral duty to consent, not only solves the two interpretive issues raised above, but it also neatly fits with his view of the relationship between citizen and state and his defense of a

remedial right to revolution. In addition to the interpretive advantages, such a reinterpretation adequately responds to the conceptual challenge and, as I show in the following chapter, gives Locke's theory additional conceptual advantages over other contemporary theories of political obligation.

I find support for this natural moral duty to consent in three sources. First, the seeds of a theory of civil government according to which the state actually helps individuals to fulfill their natural moral duties lie hidden in Locke's description of human nature and the state of nature. Second, if, as Locke contends in his theory of revolution in an argument based upon natural law principles, there are conditions under which dissent is obligatory, then it seems at least plausible that he would also accept that there are conditions under which consent is obligatory. Third, adopting such a natural moral duty could revive consent theory as a plausible solution to the problem of political obligation and charity recommends that we ought to attribute to Locke the strongest argument that is available. Therefore, we ought to make explicit the commitments that require Locke's acceptance of the natural moral duty to consent.

Finally, in chapter five, I move on from explaining my reinterpretation of Locke's consent theory to defending it as philosophically tenable in its own right. The contemporary debate concerning what has been called the problem of political obligation hopes to answer the following question: is there a moral duty to obey the law? This debate surrounds the issue of discovering the normative grounding for political obligation. Consent has been considered one plausible answer to the question because of its intuitive appeal and similarity to the social practice of making promises; however, as

we have seen, the consent theory of political obligation faces serious objections. I have already discussed the conceptual problem of consent being overly permissive, but the more common objection to consent theory is a practical one. While the principle of consent, being derived from the freedom of individuals in the state of nature, is an intuitively plausible way to explain the historical rise of political systems, critics are right to point out that it cannot be the basis for a contemporary theory of political obligation because it is impossible to show that most people, who are not born into the state of nature (with the possible exception of naturalized citizens), consent to their particular political systems. Unlike individuals dwelling in the state of nature, it looks like most do not have the opportunity to choose their forms of government, especially given the extreme costs of emigration. This is a practical objection to consent theory, which I refer to as descriptive inadequacy.

In response to this objection, three groups have emerged: those who wish to modify consent theory or to defend some other type of transactional account; those who argue for a moral obligation to obey the law on the basis of associative or natural duties; and anarchists who are not only convinced by the descriptive inadequacy objection to consent theory, but also reject all other attempts to prove that there are independent moral reasons to obey the law. They argue that though consent would theoretically justify the individual moral obligation to obey the law, no other theory offers a suitably general principle of morality that could explain one's duty to obey the particular state of which one is a member. I argue that because the anarchist challenge defeats all prevailing contemporary theories of political obligation, consent theory deserves another look.



My Lockean account of political obligation responds to the anarchist challenge because it provides a special duty to obey a particular state, being a voluntaristic account, while also acknowledging the general moral duty to politically obligate oneself. It is the natural duty to consent, which best respects autonomy, by allowing individuals to voluntarily incur an obligation to obey a particular state, while at the same time recognizing the duties that citizens owe to one another because it makes the responsibility to accept the authority of a particular government part of what we owe to one another. Therefore, in order to make Locke's theory of political obligation more palatable, it seems that he needs something like the natural moral duty to consent.

The position I advocate is Rawlsian in spirit. Rawls introduces the natural duty of justice as the duty requiring us to "support and comply with just institutions that exist and apply to us."<sup>3</sup> Because all human beings, regardless of their political allegiances owe a general duty of justice to their fellow human beings, they must do whatever they can to ensure that they act according to such a duty. However, this duty cannot meet the anarchist's particularity requirement because it does not explain why individuals have a special duty to discharge their general duty of justice *by obeying their particular state*. My Lockean theory has the advantage here. I argue that though Rawls, and others, are correct that (just) states are in a position to help citizens to fulfill their natural moral duties, because the state gains moral authority only when individuals voluntarily agree to accept certain limits to their autonomy, the natural duty of justice is not enough to give individuals a moral obligation to obey the law. However, because we do have a natural

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<sup>3</sup> *A Theory of Justice* (1999), p. 99.

moral obligation to do all that we can to fulfill our moral obligations, which we owe especially to those in close proximity to us, we do have the further natural moral duty to voluntarily politically obligate ourselves by consenting. Thus, individuals have a natural duty to transfer moral authority to the state, which they owe to their fellow citizens.

While some have argued that Locke the philosopher and Locke the political scientist ought to be carefully separated, such a view is clearly contrary to Locke's own intentions given that the foundation for his political philosophy is his theory of natural law and natural rights. Also, examining Locke's theory of morality and his theory of political obligation in conjunction and the ways in which they influence one another offers potentially valuable insight into Locke's larger philosophical ambitions. Therefore, an interpretive project paying equal attention to both of these aspects of Locke's work is long overdue.

## Part I, Chapter Two:

### Natural Law: The Search for Normativity

#### *I. Introduction*

The field of normative ethics has developed, largely within the twentieth and twenty-first centuries, devoid of much debate about natural law theory. At least since the publication of Smart and Williams' *Utilitarianism: For and Against*<sup>4</sup>, the focus has been upon the battle between consequentialists and deontologists and the attempt to find a more palatable theory combining the best elements of both. If natural law theory is mentioned at all, it is subsumed under virtue ethics. The main reason that serious discussion of natural law as an independent moral theory has languished recently is that many remain skeptical of its metaphysical and epistemological assumptions. Indeed, natural law theorists themselves are deeply divided about how best to characterize human nature (both metaphysically and epistemologically), even while maintaining that the standard of moral and political conduct is to be determined by and discovered in the very nature of human beings.

Most natural law theorists, following Aristotle and Aquinas, argue that rationality, understood as intimately linked with virtue, is the distinctive function of human beings. But others, following Hobbes, emphasize the quite regular failure of human beings to act according to the above narrow conception of reason, understood as opposed to prudence, and, as a result, find the passions or instinct to be a more accurate predictor and motivator of human action. Yet, despite disagreement within the natural law tradition, the

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<sup>4</sup> Cambridge: Cambridge University Press (1973).

theoretical aims of each distinctive approach coincide, such that it is possible to identify a unified natural law theory. Natural law theory, broadly speaking, aims at discovering a set of principles, which is based upon a theory of human nature and can guide human action in an effort to attain what is best for human beings. But beyond the discovery of moral principles, natural law theory strives to discover the origin and justification of these principles. When done properly, it is at its core a theory of moral obligation.

Now, by far the most difficult conceptual question for a natural law theory of moral obligation is how to derive moral rules from some set of relevant facts about the world and human nature without falling prey to the naturalistic fallacy. Virtually every natural law theory has been criticized for failing to answer this conceptual challenge sufficiently and for making unjustifiable metaphysical or epistemological assumptions. Thus, at least at the outset, skepticism about the possibility of developing a plausible moral theory based upon the natural law seems warranted. Still, it seems to me that any moral theory that makes claims about universal values, that is to say any moral theory, cannot avoid making some metaphysical and epistemological assumptions of its own. So, *that* natural law theorists make such assumptions is far from a decisive criticism. True, early natural law theorists had a very different view of crucial moral issues than we do today. True, most natural law theorists did not question the existence of God and many did not hesitate to use theological and teleological arguments. But we ought not let our

skepticism about these issues deter us from the study of a theory that might very well provide valuable insight into our own philosophical work.<sup>5</sup>

In what follows, I look closely at Locke's distinctive brand of natural law theory pointing out its strengths and weaknesses as well as the significance of his early moral theory for his later political work. Locke is no exception among natural law theorists, though I think he is more keenly aware of the skeptical opposition to natural law than earlier natural law theorists had been. He struggles throughout his career to develop a theory of moral obligation that would line up with his metaphysics, his epistemology, his religious views, and his political philosophy.<sup>6</sup> In 1660, Locke penned eight essays on the law of nature, not published until long after his death under the title *Essays on the Law of Nature*,<sup>7</sup> representing his first attempt to lay down his thoughts about morality. Although he never published these essays, or any other treatise on morality, it is evident that much of his later work depends upon a theory of natural law. So my task in the following chapter will be to discover whether one can build a coherent theory of moral obligation

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<sup>5</sup> Indeed, many of the debates taking place within normative ethics and meta-ethics today also concerned early natural law theorists, for example, the debate between realists and non-realists, the controversies regarding naturalism, intuitionism, and constructivism, the question of whether lawfulness or spontaneous goodness is central to morality, and so on. By tracing back the history of such issues, we gain valuable insight that helps us better to understand these contemporary debates (J.B. Schneewind. "Pufendorf's Place in the History of Ethics." in *Grotius, Pufendorf and Modern Natural Law*. Knud Haakonssen (ed.). Brookfield, VT: Ashgate Publishing Co. (1999), p. 226). If nothing else, the history of natural law teaches that we ought to think carefully about why human beings have generally thought themselves bound by moral rules.

<sup>6</sup> Locke believed that it must be possible to deduce the principles of natural law from the operation of reason upon data provided by sense experience, but many have criticized him for never actually providing such a demonstration. Locke seems aware of this shortcoming. He revisits the issue several times throughout his career first, in the *Essays on the Law of Nature*; later, in the *Essay Concerning Human Understanding* (1690); and finally, in the *Reasonableness of Christianity* (1695).

<sup>7</sup> One of Locke's earliest works, he wrote the eight essays in manuscript form during the early 1660's, probably 1664, but it remained unpublished until it was edited by W. von Leyden and published as the *Essays on the Law of Nature* in 1954.

from the bits and pieces that Locke offers throughout his corpus (and with a little help from Kant). But before turning to Locke's own theory of moral obligation in chapter three, we first must understand the many forces that influenced his particular brand of natural law. The main focus of this chapter, then, is first, to place Locke's natural law theory within its historical context and second, to examine the ongoing interpretive debate regarding the relationship between natural duties and natural rights as it plays a significant role in understanding the link between Locke's theory of moral obligation and his theory of political obligation.

Evidence suggests that Locke was influenced in varying degrees by nearly all of the major theorists of natural law and natural rights from antiquity to his own lifetime.<sup>8</sup> It would be, however, tedious and unavoidably speculative to catalogue all of the possible ways in which each of those theorists may have inspired the philosopher. Instead, I have chosen to discuss only those whose work best demonstrates the historical shift that took place between natural law and natural rights and those whose work most clearly guides Locke's unique theory of natural law and his doctrine of limited natural rights.

I begin, in section II, by examining the development of natural law thinking that precedes Locke. There is clearly a shift among those who were most concerned with questions of justice, or *jus*. Whereas the Scholastics were concerned with that which would make individuals virtuous according to a pre-existing moral theory, the modern theory of natural rights instead focuses upon the individual as an autonomous agent,

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<sup>8</sup> For a concise, yet comprehensive, summary of natural law theorists who influenced Locke's thoughts on the subject see von Leyden's introduction to *John Locke: Essays on the Law of Nature* Oxford: Oxford University Press (1954), pp. 30-43.

naturally free to pursue morally permissible, though not necessarily morally required, goals. Consequently, we find in Locke an attempt to mediate this split; I discuss his attempt to do so in the third section. But Locke's alleged ambiguity on the question of the relationship between natural law and natural rights has spawned a debate among Locke scholars, which I discuss in the fourth section. Ultimately, Locke needs a coherent theory of moral obligation relating the individual's natural freedom from others to both the natural limits imposed by others' natural freedom and the natural limits imposed by God's subjugation of mankind. But Locke never fully develops the moral theory that he provides in his earliest writings. So in the next chapter, I show how Kant's moral theory could be the basis for a Lockean theory of moral obligation that answers two important questions: how human beings know the content of their moral duties and what justifies the claims that morality makes upon us.

## *II. Locke's Predecessors*

In order to understand fully how Locke comes to articulate his moral theory, it is important first to look more carefully at the history of natural law prior to the seventeenth century and the important transition from natural law to natural rights. This tradition greatly influenced Locke's thoughts about the relationship between reason, justice, and the laws of nature.

Although nothing resembling a complete theory of natural law was written until the Hellenistic period, we find even in the work of the earliest Greek philosophers the seeds of a structured natural law theory. Recognizing an inherent regularity in the world

at large, the pre-Socratics deemed nature both metaphysically and philosophically prior to man-made objects and institutions. So the notion of a hierarchy among natural and non-natural goods was born.<sup>9</sup> Consequently, subsequent ancient philosophers begin to explore how man might best come into contact with the true nature of things, especially his own true nature. Socrates and Plato answer that human beings ought to cultivate the parts which participate most readily in the highest good, i.e., the unchanging, non-sensible, ideal world, and work toward controlling the parts which keep them bound to the uncertainties of the sensible world. Virtuous individuals, then, constantly strive to allow reason to regulate their desires because reason is connected to that perfect ideal, while desires for fleeting, material goods represent a void that can never be filled.<sup>10</sup> Additionally, according to Aristotle, it is the human capacity for reason that distinguishes men from beasts, which are solely ruled by their non-rational desires. It is in exercising this capacity for self-regulation that one is most fully human.<sup>11</sup> Hence, we see in the ancient tradition the development of a hierarchy of being or nature, which later becomes a central tenet of natural law theory.

Also, the above theory of human nature reflects another important ancient idea that later natural law theorists adopt, Aristotle's devotion to a general teleological theory of nature. According to Aristotle's teleology, everything in the universe can be described

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<sup>9</sup> Parmenides and Heraclitus were perhaps the first to make the hierarchy of being central to their metaphysical and epistemological views. For more about the pre-Socratics and the early development of metaphysics, see G.S. Kirk, J.E. Raven, and M. Schofield's *The Presocratic Philosophers*. Cambridge: Cambridge University Press (1983), chapter VIII "Parmenides of Elea" and G.S. Kirk's *Heraclitus: The Cosmic Fragments*. Cambridge: Cambridge University Press (1954).

<sup>10</sup> See book II of the *Republic*, for example.

<sup>11</sup> In book X of the *Nicomachean Ethics*, Aristotle defends the view that the philosophical life is best.



as dynamic, as constantly striving to attain its end. For human beings, the *telos* is virtue or well-being, which requires fulfilling one's function as a rational being to the greatest extent possible; virtue or excellence means actively making the right decisions based upon what right reason prescribes.<sup>12</sup>

From the ancient connection between reason and virtue, it is easy to see how a theory of natural justice might arise. According to Aristotle, a human being cannot attain excellence in isolation, but is by nature a political animal.<sup>13</sup> So the *polis* in providing protective laws, cultural life, and most importantly, moral education, offers the best environment within which human beings might cooperate with one another, thrive mutually, and develop the appropriate moral character. And just as each individual has a *telos*, so does each state. Therefore, attaining justice within civil societies requires discovering natural laws and making civil laws that best serve the function of that particular civil society.

Aristotle's teleology, his dynamic picture of human nature, his view of the ethical end of the *polis*, and his moral understanding of law and justice lead him to recognize the concepts of universal law and natural justice.<sup>14</sup> However, these concepts do not yet encapsulate a full theory of natural law. In Aristotle, natural justice remains subordinate to the final end of the individual: happiness or well-being. Aristotle's ethical picture,

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<sup>12</sup> *N.E.* 1097b22-1098a20.

<sup>13</sup> *Politics*. I., 2, 1253a1-7.

<sup>14</sup> Eterovich, Francis H. *Approaches to Natural Law from Plato to Kant*. New York: Exposition Press (1972), p. 35.

then, seems to be missing a crucial element of natural law theory: concern for others or the common good from which springs a concept of natural *duty*.

The Stoics first supply this crucial element and build a complete theory of natural law on the foundation laid by Plato and Aristotle. Like their predecessors, the Stoics thought that the moral ideal was to live in harmony with nature including one's own nature; and since they equate nature and reason, living in harmony with nature means living according to reason. However, the Stoic view of human nature differs importantly from that of Plato and Aristotle. Whereas Aristotle equates what is good for human beings with whatever allows them to flourish, e.g., health and education, the Stoics focus upon 'what is *appropriate*' for human beings. In opposition to Aristotle, they recognize that even things like health and education might not be beneficial for all individuals in all circumstances (e.g., a well-educated tyrant does not benefit anyone). Therefore, only the virtues, wisdom, prudence, justice, temperance, and courage, are truly called good. Consequently, while the Stoics agree that, all things being equal, goods like health and education are appropriate for me, they add that living among other rational human beings is also a good that is appropriate for me and that taking others into consideration will undoubtedly affect my choices about whatever allows me to flourish.<sup>15</sup> Thus, the Stoics recognize two basic and sometimes competing human inclinations: self-love and respect for the concerns of others, which they believe to be the driving forces behind all virtues and duties.

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<sup>15</sup> For example, Cicero argues that what is appropriate to me is not just the perfection of my own rational nature, but also relationships with others, when he says, quoting Terence: "nothing human is alien to me" (*On Duties* I. 30).

On the one hand, when an individual follows her impulses, she seeks her own satisfaction at the expense of all mankind; on the other hand, when she acts according to duty, she follows the established order of the universe. But it is only right reason that can establish order among these inclinations and give them the proper direction. Reason, then, is the unwritten law in the nature of the world and in human nature:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked.<sup>16</sup>

Like Aristotle, the Stoics thought that living in accordance with reason meant living a life of virtue, but they go so far as to say that there is no virtue without reason's insight and direction. Therefore, the Stoics supply a crucial element of natural law, the idea that there is an objective right or system of law (i.e., reason) that supplies individuals with a duty to take others into consideration. Notice that this notion of the objective right is different from Plato and Aristotle's view of the objective good as that which is good for the individual soul. The Stoics take a wider view of what it means to be a human being as one who ought to live in accordance with nature, where living in accordance with nature means living in agreement with the predetermined unfolding of the natural law.

In the Scholastic tradition, Augustine and others further build upon the Stoic theme of living in accordance with the natural order of things, but here end the similarities between the Stoics and the Scholastics. Augustine's notion of divine reason

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<sup>16</sup> Cicero. *De res publica*. George Holland Sabine and Stanley Barney Smith (trans.). Columbus: Ohio State University Press (1929), III. 22., p. 215. In the dialogue, Cicero has Gaius Laelius say these lines. Born in 186 B.C. Laelius was a soldier, a statesman, and a patron of literature. He was one of the chief members of the Scipionic Circle.

as belonging to the will of a personal God, who transcends nature, directly opposes the Stoic concept of an impersonal reasoning force permeating the whole universe and determining the natural order of things.<sup>17</sup> As a result, Augustine argues that human beings, using reason and free will, ought to follow divine reason, which is the source of every good and value including the natural law. In a moment we shall see how this idea of the natural law emanating from the divine will plays a crucial role in the transition from natural law to natural rights.

Because of the Scholastics' theological commitments, which are inescapably linked to their view of natural law, the stoic idea of objective right takes on a very different meaning in the Middle Ages.<sup>18</sup> For the Scholastics, natural law takes a decidedly legalistic turn. God determines what is objectively right and makes his decrees known in the content of the natural law. As the creator of the universe, God has the right and the power to sanction those who fail to fulfill their obligations. We shall later see Locke siding with the Scholastics against the Stoics on this point insofar as he partially defines natural law as a divine decree of God rather than a mechanistic system of natural reason.

Now let us turn to the most prominent natural law theorist in the Scholastic tradition, Thomas Aquinas. Aquinas accepts Augustine's voluntarism (his understanding of natural law as binding because it is willed by God) and is clearly influenced by the theology of the early Church Fathers, but he also adopts Aristotle's principle of teleology

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<sup>17</sup> Eterovich (1972), p. 47-48.

<sup>18</sup> Henrik Syse rightly points out that several different natural law traditions come to light during this time, such that, "one cannot speak of *the* natural-law tradition in the Middle Ages" (*Natural Law, Religion, & Rights* (2007), p. 194). I will distinguish the diffuse meanings of natural right (*jus*) among philosophers of the thirteenth-sixteenth centuries in due course.

blending these three elements together to create his own theory of natural law. For Aquinas, man tends toward his natural end, which God has built into his very nature. He famously defines the natural law as “participation of the eternal law in the rational creature,”<sup>19</sup> by which he means to explain that there is an eternal law that is God’s plan for the universe and all of creation participates in this eternal plan, in ways appropriate to its specific kind. But just what is this specific end toward which man strives? In contrast to the ancients, Aquinas does not describe it as a single end or object, such as happiness, well-being, or virtue, rather he says that all things toward which human beings are naturally inclined are understood by reason as being good and their contraries as evil.<sup>20</sup> He offers a list, though probably incomplete, of examples of what he takes to be natural inclinations: to preserve oneself, to procreate, to know God, to live in society, and to develop all of one’s faculties, particularly the intellect, whose object is truth.<sup>21</sup> Hence, natural law is the “natural inclination to [man’s] proper act and end.”<sup>22</sup> It is this natural end, along with God’s commands made known in the natural law, that dictates a system of objective right (i.e., what one can rightly do) according to Aquinas.

From this picture of natural law and natural right, we see how a system of subjective or individual rights, though far from the highly developed views of natural rights we later find in the sixteenth century, might begin to emerge. Aquinas’s

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<sup>19</sup> *Summa Theologicae*. I-II., q. 91, 2.

<sup>20</sup> *Ibid.*, q. 94, 3.

<sup>21</sup> In the next chapter, we will see Locke offering a list of natural moral duties similar to Aquinas’s list of natural inclinations here.

<sup>22</sup> *Summa Theologicae*. I-II., q. 91, 2.

voluntarism provides new ground for the obligation to obey the natural law setting up a relationship between rights-holder (i.e., God) and duty-bearer (i.e., an individual human being). Unlike the Stoics, Aquinas thinks that human beings ought to obey the natural law precisely because it is the manifestation of the divine will. Here Aquinas articulates the principle of divine right: God, as the omnipotent, omnibenevolent, omniscient creator of the universe, has proper authority and dominion over his creation giving him a right to rule. This right to rule creates corresponding duties for his subjects, both with regard to their creator and with regard to one another. Thus, Aquinas's principle of divine right introduces an element of subjectivity into the stoic understanding of objective right. However, he does not go so far as to acknowledge genuine subjective rights for individual human beings, in the liberal sense, for instance, because Aquinas does not think that a system of *right* or *law* can exist independent of a theory of the *good*.<sup>23</sup> Consequently, if an individual, subjective right is to have any legal or moral force, it must be a dictate of right reason; and since God is the only being who always acts perfectly in accordance with the dictates of right reason, he is the only individual with subjective rights.

The modern period in the history of natural law features the rise of the idea of genuine individual rights and a reaction against both Stoic and Scholastic approaches to natural law. Just prior to Locke's most productive period, Francisco Suarez (1547-1617) and Hugo Grotius (1583-1645), both important transitional figures in the history of natural law, did much to explain the relationship between objective and subjective senses

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<sup>23</sup> Syse (2007), p. 131.

of right. They point out that the original Latin term, *jus*, has two meanings: (a) that which is just or objectively right as in a system of law; and (b) that which signifies a subjective right, i.e., what belongs to one individual to the exclusion of all others, as in a personal right.<sup>24</sup> In other words, in dealing with questions of right and law, a distinction ought to be made between the right *by which* one acts in a certain way and the right *to* act in a certain way. It is this second sense of *jus* that Aquinas fails to recognize.

Suarez, as a committed Thomist, crafts a natural law theory, which makes use of the subjective sense of *jus* suggesting that Aquinas could have consistently supported the idea of subjective rights.<sup>25</sup> When Aquinas defines a right objectively as that which one can rightly do, i.e., that which one is allowed to do, thereby creating spheres of right within which individuals may permissibly act, he also inadvertently carves out some individual subjective rights. If, for example, I have a duty under the natural law to refrain from killing innocent people because killing innocents is outside of the sphere of permissible action, then it follows that all innocent people have a corresponding right (a “claim-right,” in Hohfeldian terms) not to be attacked, which they hold against me. However, not every objective right entailed by the natural law must have a corresponding subjective right. If, to use one of Aquinas’s examples, I have a duty to worship God, it is difficult to see what subjective right might correspond to my duty. It looks as if the obvious answer is that it is God’s right to be worshipped that corresponds to my duty and, indeed, this is consistent with what I have already mentioned above about Aquinas’s

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<sup>24</sup> *Ibid.*, p. 191.

<sup>25</sup> *De legibus*. I., II., §5.

assertion of the divine right to rule. But, it makes little sense to talk about God having claim-rights, in the Hofeldian sense, because our duties do not simply *correspond* to God's subjective rights; rather, our duties *derive* from God's divine right.<sup>26</sup> Suarez, then, cannot claim that every objective right (i.e., moral duty) under the natural law corresponds to some subjective right. Instead, he must make the more modest claim that some duties under the natural law imply individual rights.

But notice, also, that the rights under consideration here are not natural rights in anything like the Hobbesian sense, i.e., prior to the natural law or independent of a theory of the good; rather, we should understand these rights in the Thomistic sense, as stemming from the natural law itself. As a result, on Suarez's view, there can be no right to do evil because the natural law sets boundaries within which individuals have a right to do certain good things. Therefore, Suarez keeps Aquinas's idea that natural rights define the boundaries within which individuals may permissibly act, while observing that such demarcation also creates some individual, subjective rights for those who may be affected by my actions.

As an illustration of the above, let us look at the Thomistic theory of property in contrast to a liberal theory of property rights. On the one hand, the Thomists believe that because God gives all people common dominion over the earth and all things upon it, all property is naturally common. Now this makes certain actions impermissible for me; it seems clear that, since everyone shares ownership, I ought not interfere with others' attempts to make use of this common property. Hence, a natural right arises: "a right not

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<sup>26</sup> This is true, especially considering Aquinas's commitment to ethical voluntarism: all of the duties we have are the direct result of God's commands.



to be interfered with in the acquiring of property.”<sup>27</sup> But it is important to notice that this is far from advancing a liberal theory of private property rights. On the Thomistic theory, private ownership only occurs as an addition to the natural law. In other words, only human law can create an individual right to acquire property as one’s own; thus, it only makes sense to talk about private property within the context of civil society, governed by civil laws. On the other hand, according to Locke’s radically modern theory of a *right* to private property, it is possible to *change* the natural ownership status of a piece of property from commonly owned to privately owned by mixing one’s naturally owned labor with the land. Private property is an integral part of the natural law on Locke’s view. So we see the stark contrast between the medieval focus upon the common good and the modern focus upon individualism.<sup>28</sup>

Grotius, unlike Suarez, rejects all three elements of the Thomistic theory of natural rights: the voluntarism, the teleological approach to natural law, and the appeals to theological arguments, instead choosing to treat natural law within a purely philosophical framework.<sup>29</sup> To fully understand Grotius’s theory of natural rights, it is important to begin with a bit of context. Writing during the time of the Thirty Years’ War (1618-1648), Grotius personally observed the lack of restraint in war and thought that there was a special need to study the ethical and legal aspects of war; and, according to

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<sup>27</sup> Syse (2007), p. 195. Of course, Hobbes denies this. Knowing that all men have a common right to everything does not specify or imply anything about duties toward others. Contrary to the Thomist view, rights and duties are independent of a theory of the good for Hobbes.

<sup>28</sup> Syse (2007), p. 195.

<sup>29</sup> Eterovich (1972), p. 79.

Grotius, one cannot adequately study the ethics of war without first studying natural law and the law of nations.<sup>30</sup> Further, taking into account the growing need within a European society, increasingly wracked by religious wars, for a moral theory detached from sectarian doctrine, Grotius argues that the validity of reasoning concerning natural law should and does stand up to scrutiny even if God does not exist: “all we have now said would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs.”<sup>31</sup> Consequently, Grotius turns to the human desire for social interaction and the need for societal order as the basis for his moral theory.

In answer to a common objection to his theory, Grotius rejects the notion that private interest, rather than a regard for justice or virtue, rules human beings in all of their actions finding that the root of human conduct is rationality and sociability, which naturally lead individuals to establish mutually just relationships. There is no doubt that expediency or prudence motivates some to join together and form communities for their mutual benefit, but this is only a superficial description of human conduct. In fact, human beings look to one another to satisfy a more primal need for companionship even when

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<sup>30</sup> The fifteenth, sixteenth, and seventeenth centuries were some of the most tumultuous in European history. They were characterized by the rejection of authority both religious and political, the rediscovery of Greek and Roman art, literature, history, and philosophy, and the assertion of the autonomy of science from religion (Eterovich (1972), p. 60-61). But along with all of this cultural development came social unrest and increasing rivalry among political factions. Natural law theorists during this time recognized a need for more political and religious unity. Although they believed that only a strong central power could end the disintegration of the European nations, they also viewed political absolutism as a threat to order and stability. So early Protestant natural law theorists appeal to the natural law as a way to limit the sovereign power of kings and, as a corollary, establish the law of nations: rules which would guide interactions among nations toward peace and justice. They viewed natural law as the best hope for nations and individuals with competing interests to exist peacefully.

<sup>31</sup> Hugo Grotius. *De Jure Belli ac Pacis (The Rights of War and Peace) Natural Law and Enlightenment Classics*. Richard Tuck (ed.). Indianapolis: Liberty Fund (2005), “Preliminary Discourse.” I. xi., p. 89.

there is no immediate advantage to be gained. As Grotius says: “the Mother of Natural Law is human Nature itself, which, though even the Necessity of our Circumstances should not require it, would of itself create in us a mutual Desire of Society.”<sup>32</sup>

Grotius’s argument for this account of human action is reminiscent of Aristotle’s function argument. But, like the Stoics before him, Grotius’s understanding of human nature is very different from Aristotle’s. Grotius has a much expanded notion of the essential features of human nature. When he searches for the aspect of human nature that separates human beings from all other animals, he emphasizes that human beings have been created with a desire for society, facilitated by the capacity for speech and the ability to know and act in accordance with general moral principles. Thus, each human being as a social and moral agent is the proper subject of natural law.

Having grounded natural law in the sociable and moral aspects of human nature, then, Grotius goes on to offer his definition of this law: he says,

Natural Right is the Rule and Dictate of Right Reason, shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature, and consequently, that such an Act is either forbid or commanded by God, the Author of Nature.<sup>33</sup>

What distinguishes the natural law from other laws, and Grotius’s definition of natural law from Aquinas’s, is that Grotius’s natural law demands acts that are, *by their very nature*, obligatory and forbids those acts that are, *by their very nature*, unlawful. Just as the necessary characteristics of things remain basically unchanged from the moment of

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<sup>32</sup> *Ibid.* I., xvii., p. 93.

<sup>33</sup> *Ibid.* I., xxi., p.150-151.

their existence, so too the necessary characteristics of human nature remain basically unchanged. It follows, then, that actions judged by right reason to agree with human nature are always good and actions judged to disagree are always bad.<sup>34</sup> The above passage demonstrates one of Grotius's important breaks with his scholastic predecessors. Grotius rejects voluntarism arguing that it is the independent reasonableness of the natural law, rather than the will of God, which binds human beings to obey the law. This new theory about the bindingness of natural law, called intellectualism or realism, paves the way for the modern view of individual rights most familiar to us today. Natural law binds human beings precisely because it is a law that corresponds to the nature of human beings qua human beings. It prescribes what is permissible and impermissible for human beings; thus, creating both natural (or human) duties and rights under that law.

Now I turn to the natural law theory of another influential early Protestant thinker and follower of Grotius, Samuel von Pufendorf.<sup>35</sup> Unlike previous natural law theorists, Pufendorf adopts the distinctively modern thought that the origin of the natural law is irrelevant for analyzing the nature of law itself and human beings' obligation to obey that law. Pufendorf accuses his predecessors of indulging in metaphysical speculation and wishes instead, to shift the focus away from that which morally justifies our obedience to the law to the more practical study of the actual working legal system. So in order to get at what he sees as the heart of the matter, Pufendorf is happy to accept, without much discussion, some metaphysical assumptions, namely that God is the creator of the natural

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<sup>34</sup> Eterovich (1972), p. 83.

<sup>35</sup> For more on Pufendorf, see Knud Haakonsen's *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment*. Cambridge: Cambridge University Press (1996), pp. 37-43.

law who guarantees that human beings will discover, through their rational natures, the reasonableness of that law.<sup>36</sup> According to Pufendorf, understanding the concept of legal obligation, whose principles are inherent in the concept of legality itself, is the truly important issue.<sup>37</sup> All other basic concepts of morality derive from the concept of law.

For Pufendorf, human beings have an intuitive, not necessarily moral, sense of obligation that guides them when they make ordinary agreements and without this sense of obligation, the institution of legal contracts and agreements simply would not exist. Obligation, then, at base is a social relation in which one person directs the actions of another and ought to be distinguished from advice and coercion, where the one directing the actions of another has no real power over him, in the first case, because the one being directed is free to act or not according to his desire and, in the second, because the one directing has no right to require certain actions of the other. By contrast, obligation requires that the commanding power have good reasons to demand that the actions of the one being directed be limited, which when combined with the superior's ability to reward and punish, produce within reasonable creatures a combination of reverence and fear. This is just what it means to be obligated, the one demanding something of me has a right to demand it because he can offer good reasons for his demand; and, if I disregard his right to rule over me, then I expect and fear just punishment.<sup>38</sup> But, says Pufendorf, reverence alone ought to be sufficient for one to recognize his obligation to the superior

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<sup>36</sup> *On the Duty of Man and Citizen According to the Natural Law*. I., 3, §12.

<sup>37</sup> Michael Nutkiewicz. "Samuel Pufendorf: Obligation as the Basis of the State." in *Grotius, Pufendorf and Modern Natural Law*. Knud Haakonssen (ed.). Brookfield, VT: Ashgate Publishing Co. (1999), p. 191.

<sup>38</sup> *On the Duty of Man and Citizen According to the Natural Law*. II., 7, §2-3; 11, §1-13.

on the grounds of good judgment.<sup>39</sup> Once one recognizes that he is obligated to obey some command, the inherent sense of obligation takes over, so that the fear of punishment no longer motivates me to obey the command. Rather, I act upon my recognition of the reasonableness of the command according to my own free will.

Now Pufendorf admits that this picture does not always work as a justification for one's obligations to the natural law because the reasons for that law are not always immediately available to rational human beings who have only a limited perspective on the universe. Ultimately, Pufendorf thinks of morality as deontologically based, although he accepts a teleological picture of the universe as the justification for natural law from the perspective of an omniscient being. Therefore, because human beings cannot fully grasp the justification of the moral law, we must instead study positive law separately as a working model and metaphor for the natural law. As a result, Pufendorf argues that legal and moral language only makes sense within the context of the assumptions and principles of a working legal system.<sup>40</sup> In other words, without law no act would count as morally or legally pernicious. This view opposes Grotius's natural law theory, which argues that obligation springs directly from our rational human nature. But Pufendorf does not completely abandon human reason because it is our rational nature that determines the bounds of legal and moral claims in the first place.

So Pufendorf walks a fine line between the positions of Grotius and Hobbes. On the one hand, Pufendorf does not go as far as Grotius and the Stoics saying that the law of

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<sup>39</sup> Schneewind (1999), p. 219-220.

<sup>40</sup> Nutkiewicz (1999), p. 184-185.

nature is the dictate of right reason and entirely independent of divine command, nor, on the other hand, does he accept Hobbes's view that the natural law is purely prudential. Instead, Pufendorf maintains the existence of the natural law as the grounds for political obligation, while he accepts the artificial aspect of political society. He regards the study of law as an autonomous discipline and the laws themselves as a set of rules grounded in reason.<sup>41</sup>

Finally, before turning to Locke's own view of the relationship between the natural law and natural rights, I briefly examine Thomas Hobbes's contribution to the transition between natural law and natural rights. Hobbes is arguably the most influential figure participating in this modern debate; he is especially important given the context of understanding Locke's attempt to mediate the two positions.<sup>42</sup> Additionally, Hobbes puts forth a radical theory of political philosophy that continues to shape the field even today. Breaking more decisively with the Scholastic natural law tradition than anyone yet mentioned, Hobbes rejects both natural law (in the sense of a transcendent moral law or theory of the good) as necessary for the existence of natural rights and the Thomistic teleological framework. But at the same time, Hobbes embraces traditional natural law

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<sup>41</sup> *Ibid.*, p. 186.

<sup>42</sup> Although it is unclear whether Locke was directly acquainted with the *Leviathan* (first appearing in 1651), he certainly would have known of the infamous work by his contemporary through its critics. At any rate, Locke's *Essays* contain a number of covert references to Hobbes. Von Leyden explains Locke's reluctance to mention Hobbes by name suggesting that the issues under discussion would have been so well known in connection with the controversy surrounding Hobbes that to mention his name would have been almost redundant ((1954), p. 38). Indeed, it is quite clear that Hobbes's radical views interested and fascinated Locke during the seventeenth century.

terminology using it to found the modern doctrine of natural rights, which later becomes a key feature of modern liberalism.<sup>43</sup>

Yet, Hobbes's methodology is not the only unconventional aspect of his political philosophy. Because he rejects the notion of a transcendent moral law that governs human actions and dictates individual rights, understanding the role of natural rights in Hobbes's political philosophy also requires challenging traditional norms. For Hobbes, individual rights do not necessarily correspond to other individual duties; his most fundamental rule of nature, that everyone has "the right to everything," for example, does not entitle the right-holder to noninterference because that would be a logical contradiction.<sup>44</sup> Indeed, though it seems inconsistent, Hobbes's extreme individualism and contention that the natural state of man is a state of absolute liberty, leads him also to advocate the absolute power of the state over the individual because this absolutist picture of the state is the only possible means to ensure peace, i.e., the only condition guaranteeing the safety and security of all against the perils of the state of nature. So individual claim-rights with corresponding duties are not natural, but artificial.<sup>45</sup> According to Hobbes, it is precisely the urgent need to protect the natural right to self-preservation that justifies an authoritarian state and the rejection of individual liberty rights within civil society. This creates an unusual tension within Hobbes's work: figuring out how to combine an authoritarian political theory with an individualistic one. Hobbes's answer is, of course, the social contract.

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<sup>43</sup> Syse (2007), p. 148.

<sup>44</sup> C.f., Suarez's Thomistic theory of property above.

<sup>45</sup> *Leviathan.*, chapter XIII.



In this section, I have outlined the key contributions of Locke's predecessors to the natural law debate. This discussion serves as the background against which we may understand Locke's own place within the debate. As we shall next see, Locke draws upon many of the theorists mentioned above in developing his own theory about the relationship between natural law and natural rights.

### *III. Locke's Doctrine of Limited Natural Rights*

I now turn to Locke's own thoughts about natural law and natural rights. Because Locke can be read as a moderator of sorts endorsing some aspects of each of the above theories and rejecting others, the greatest difficulty he and his interpreters face is portraying his ideas as unambiguous and consistent. This is not an easy task. Still, I think we may find in Locke a common thread running through his work without which there would be no complete picture. This common thread is what I refer to as the doctrine of limited natural rights.

From the older conception of natural law, Locke borrows the idea of man's subordination to a law, which is, in a sense, internal to him, though he rejects the Scholastic contention that the law is known by revelation or otherwise written on one's heart. Agreeing with the relatively recent trend toward secularizing the natural law, as first seen in the work of Grotius and later taken to its logical conclusion in Hobbes's *Leviathan*, Locke argues that the natural law must be known by reason or "the light of

nature.”<sup>46</sup> But whereas Hobbes’s commitment to developing a secularized natural law theory leads him to an unlimited, though morally and politically decisive, natural right, Locke sees individuals as partaking, through their reasoning capacities, in a moral or divine natural law, which limits their natural rights. So Locke understands unlimited rights to be just as dangerous as unlimited rule and seeks a doctrine that strikes the correct balance between the power of citizens and the power of the state.

To this end, let us look at the specific ways in which the natural law tradition influences Locke’s work. First, Locke refers directly to the Stoic notion of natural law in the first book of the *Essays* equating the natural law with “that single good” which the Stoics thought was most praiseworthy, namely virtue.<sup>47</sup> Here Locke affirms his agreement with the general ancient belief in a universal standard for living well given in nature, but he also asserts his agreement with the Stoics, in contrast to Aristotle, that living well requires more than simply individual flourishing.

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<sup>46</sup> Locke distinguishes himself both from the Cambridge Platonists, who assert that human beings are rational in virtue of their possession of an innate set of moral principles, and from ancient and medieval proponents of natural law, who believe that human beings have reason insofar as they partake in some degree of divine reason. Unlike these, Locke was careful to distinguish between reason as the discursive faculty of human beings and ‘right reason,’ i.e., a set of moral principles that govern moral decisions. According to Locke, human beings are born with the former but not the latter. So Locke’s starting point is the simple biological or psychological fact that human beings are endowed with the ability to reason. For a thorough explanation of the opponents Locke has in mind at the beginning of Book I of *ECHU* and the seventeenth century debate surrounding innate ideas to which Locke takes himself to be responding see Douglas Greenlee’s “Locke and the Controversy Over Innate Ideas.” *Journal of the History of Ideas*. Vol. 33, No. 2. (Apr.-Jun., 1972), pp. 251-264. I return to this issue in sections II and IV of chapter 3.

<sup>47</sup> *Essays*. I., p. 109.

However, though Locke's view of natural law and virtue often sounds similar to that of the Stoics,<sup>48</sup> he also makes an important distinction that the Stoics do not. Locke distinguishes between right reason as "principles of action from which spring all virtues and whatever is necessary for the proper moulding of morals" and the faculty of reason in human beings, which "forms trains of thought and deduces proofs."<sup>49</sup> This is an important distinction because for Locke the law of nature must be a decree of divine will, which is discovered by human reason, rather than a deterministic system of scientific law; otherwise, Locke argues, the commands and prohibitions of the natural law would be in vain. As it stands, the Stoic's deterministic view of the natural law is unjust because it cannot account for why bad things happen to good people. But the natural law must be just, says Locke, if it is to be a reasonable guide to human action and given that the world contains so much apparent injustice, only a natural law that comes from God, who guarantees punishment for the wicked and rewards for the virtuous in the afterlife will be properly just.<sup>50</sup> Therefore, the law of nature is not the universal order of which human nature is merely a part; but it is a moral law given by a divine lawgiver, external to human beings, out in the world to be discovered by human reason.<sup>51</sup> Thus, we see Locke

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<sup>48</sup> In the *Second Treatise*, Locke often equates the law of nature with reason, which does not obviously mean man's reasoning faculty, but something more like the Stoic idea of an independent system of deterministic laws. Also, Locke says several times throughout his corpus that the natural law is discoverable by each individual (*T.T.* II.§6; *Essays* I), which is a recognizably Stoic idea.

<sup>49</sup> *Essays* I., p. 111.

<sup>50</sup> *Ibid.*, p. 111-113.

<sup>51</sup> *Ibid.*

using the voluntarism introduced by the Scholastics to correct for what he sees as lacking in the Stoic view of natural law.

Additionally, Locke's attempt to bring together different strands of natural law theory can be seen perhaps nowhere clearer than in his discussions about how human beings come to know the natural law. Although throughout the *Essays* Locke affirms Thomistic voluntarism embodied by the tenet that God both creates and lends obligatory force to the natural law, he also denies the equally Thomistic idea that one can gain knowledge of the laws of nature from tradition and faith.<sup>52</sup> The early Locke is thoroughly empiricist regarding the question of the capacity for human beings to know the natural law. Indeed, this is the most novel aspect of Locke's own natural law theory: that moral laws are capable of demonstration and knowable through the operation of human reason upon data gained by sense experience. John Hancey captures Locke's thinking quite well when he says: "Man was to be judged by a sovereign God, according to the law of nature. Therefore, it was only logical that the law be promulgated in such a manner as to make it intelligible to all who sought an understanding of it and the obligations it imposed."<sup>53</sup> In the *Essays*, Locke identifies only one path to knowledge of the natural law, the light of nature.<sup>54</sup> He says further that since the light of nature "is neither tradition nor some

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<sup>52</sup> *Ibid.*, p. 137-145.

<sup>53</sup> Hancey, James O. "John Locke and the Law of Nature," *Political Theory*, Vol. 4, No. 4, (November 1976), p. 441.

<sup>54</sup> *Essays*. IV., p. 147-159.

inward moral principle written in our minds by nature, there remains nothing by which it can be defined but reason and sense-perception.”<sup>55</sup>

Yet, when the later, more mature, Locke seriously considers whether the law of nature is universally known, he admits that not everyone is capable of knowing the universal law using the light of nature alone and for these, belief may be the only path to knowledge of the natural law.<sup>56</sup> So Locke appears to move back toward a more Thomistic view later in life, conceding the value of tradition and faith for those who are incapable or unwilling to use their reasoning faculty.<sup>57</sup> Locke’s slide from optimism about an empiricist theory of human knowledge of moral principles to a somewhat reluctant accommodation of tradition and revelation may indicate disillusionment with the capacity of human reason to grasp moral principles or it may indicate disappointment in his own method of conceptual analysis as a means to understanding the moral law. But whatever the reason for the shift in thought, it creates a disturbing tension, since the idea that the natural law is discoverable by reason and based upon empirical evidence is one of the most distinctive features of Locke’s natural law moral theory. And the early Locke, at least, believes that the possibility of discovering the moral law beginning from a morally neutral foundation is key to producing a plausible natural law theory. We will more thoroughly examine this important point in the following chapter.

Despite Locke’s late slide back toward a more traditional theological understanding of how one might come to know the content of the natural law, earlier in

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

<sup>56</sup> *The Reasonableness of Christianity* (1695).

<sup>57</sup> Hancey (1976), p. 442-43.

his career, we find the Protestant thinkers predominantly shaping Locke's view. Locke may have been inspired by both Grotius and Pufendorf in his description of the law of nature in the *Second Treatise*: "Reason, which is that Law [i.e., the law of nature], 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."<sup>58</sup> From this early version of the harm principle, it apparently follows that man is "bound to preserve himself" and "to preserve the rest of Mankind" assuming, as Locke seems to, that *failing to harm* someone in his life, health, liberty, and possessions is the same as *preserving* him. Here we see Locke following Grotius and Pufendorf in offering a more secularized justification for obedience to the natural law. However, if Locke, were to take this route, he, like all moral realists, would need to face an important question: how can reason discover the content of natural moral laws, e.g., that we ought not harm others? But Locke would face an even more difficult challenge: explaining how reason can discover the content of natural moral laws using empirical evidence alone. A critic, such as Hobbes, would object that the empirical evidence points in precisely the opposite direction: reason teaches us that there are no natural duties only natural rights. When we look around the world, we observe that the only rule seems to be survival or self-preservation and this description of human interaction is almost certain to include harming others in some way. Even Locke himself repeats several times that many people

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<sup>58</sup> *TT*. II., §6.

do not seem to recognize the natural law,<sup>59</sup> so it is clearly not self-evident and Locke has not yet shown that the natural moral law is demonstrable from sense experience.

To these critics, then, Locke has no plausible response. Indeed, it is difficult to see how he might square his acceptance of Scholastic voluntarism with his empiricist epistemology. His best attempt seems to involve providing an empiricist proof for God's existence, an astonishingly weak design argument, from which he derives the duty to preserve oneself and others.<sup>60</sup> Because man is the "workmanship" of God, human beings do not actually own their own bodies, so the duty to preserve oneself and one's fellow human beings is a debt of gratitude owed to the "one Omnipotent, and infinitely wise Maker."<sup>61</sup> But this is not convincing given that presumably even fewer people recognize the existence of God than recognize the harm principle or the duty of self-preservation. That Locke does not successfully demonstrate how reason provides the content of our duties is one great barrier to his development of a consistent natural law theory of moral obligation.

In the following chapter, I show how something similar to Kant's secular moral theory could fill the gap for Locke making consistent his natural law theory. But as it stands we find an awkward fit in Locke's development of a theory that incorporates both aspects of a natural law theory and aspects of a natural rights theory. Thus, it should be unsurprising that the interpretive battle, which I discuss in the next section, continues to rage.

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<sup>59</sup> See for example, *Essays*. III., p. 137-145.

<sup>60</sup> *Essays*. I., p. 108.

<sup>61</sup> *TT*. II. §6.

#### *IV. Natural Law and Natural Rights in Locke's Work*

Having examined the tradition out of which Locke develops his early moral theory, let us now turn to the role that natural law and natural rights play in Locke's own theory. Since von Leyden's publication of Locke's *Essays*, interpreters of Locke have been divided regarding the following question: are natural rights prior to or derivative of the natural law for Locke? Leo Strauss is the most prominent member of the former camp arguing that Locke is a radical individualist whose political theory is essentially the same as Hobbes's.<sup>62</sup> On this interpretation, human beings are born with unlimited freedom and political life is a social construct designed merely for the sake of protecting and promoting the primary natural right of self-preservation.<sup>63</sup> So, Strauss attempts to show that Locke's natural law is actually a Hobbesian rule of self-preservation based on one's natural right, not on obedience to the moral law or divine law. On the other side, John Dunn, James Tully, and Richard Ashcraft argue that natural law is the true basis of Locke's political theory and that individual rights derive from the natural law.<sup>64</sup> These interpreters stress Locke's deeply religious worldview and his appeals to natural law within his political theory.

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<sup>62</sup> *Natural Right and History*, Chicago: University of Chicago Press (1953), p. 227.

<sup>63</sup> Syse (2007), p. 207.

<sup>64</sup> *The Political Thought of John Locke*. (1969), chapter 18; *An Approach to Political Philosophy: Locke in Contexts*. (1993), chapters 1 and 9; and *Revolutionary Politics and 'Locke's Two Treatises of Government'* (1986), chapters 2 and 3, respectively.



More recently, A. John Simmons argues that neither group interprets Locke correctly.<sup>65</sup> On Simmons's view, natural rights and the natural law are equally fundamental for Locke because human beings, born into a world in which God places certain limits on their freedom, have both rights and duties naturally. This marks the crucial distinction between Hobbes and Locke. Since on Hobbes's view there are no (moral) duties in the state of nature, there can be only competing rights, i.e., liberty rights or privileges. Liberty rights are really only rights in a loose sense, in that there is an absence of an obligation to refrain from doing anything. Locke also acknowledges something akin to liberty rights, but his gentler picture of the state of nature relegates the operation of such rights to a "zone of indifference," argues Simmons, outside of the governance of the natural law.<sup>66</sup> This structure makes room for an additional, more robust type of right. In accepting natural duties, Locke's theory can accommodate claim-rights, protected rights that correspond to the duties of others.<sup>67</sup> As a result of their differing views of human nature and natural freedom, Hobbes and Locke also develop divergent views of the proper form of government. Both philosophers recognize that unlimited freedom is dangerous, but they see different solutions to the problem: for Hobbes, a state with absolute power is the only solution, while Locke prefers to understand human beings as psychologically capable of limiting their own natural freedom. So, for Locke, human beings are born with limits and his faith in those natural limits shape his theory of government just as much as his faith in individual freedom.

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<sup>65</sup> *The Lockean Theory of Rights* (1992).

<sup>66</sup> Simmons (1992), p. 76.

<sup>67</sup> Syse (2007), p. 209-210.

Now, in one sense, this interpretive debate amounts to little more than an intellectual exercise because each of the above positions trade upon textual ambiguities and much of the puzzle arises simply because Locke was less rigorous about his use of rights terminology than we might have liked. So we must carefully guard against reading back into the text the structure of a more sophisticated contemporary rights theory. We do well to keep in mind, then, that both Locke and Hobbes are treading on relatively new territory when they venture into ‘rights talk’ and it is not clear that either one gave much thought to what exactly he meant by ‘rights’ or worried much at all about making sense of the complex relationship between rights and duties. To the extent that such thought is necessary for developing a genuine theory of rights, neither Locke nor Hobbes can be properly characterized as natural rights theorists.

That being said, one need not have a perfectly worked out rights theory in order to say something interesting. What is clear is that Locke feared the excesses of both unrestrained freedom and unrestrained rule and both rights and duties play a role in striking the appropriate balance. Thus, I align myself with Simmons here insofar as he is correct that Locke uses rights terminology in several different contexts and not primarily as either prior to or derivative of natural duties. The approximate view, then, is that human beings are born with a natural right to freedom, but that freedom would be meaningless without certain limits; these limits appear in the form of duties to respect the rights of others and God’s commands.

First, it is fairly easy to show that Locke does not explicitly give rights the status ascribed to them by Strauss and his followers. Simply going by the numbers, whenever

Locke discusses morality or the natural law, virtually all of his observations and instructions concern duties.<sup>68</sup> At the least, this would be odd if Locke were relying upon natural rights as foundational. In fact, he hardly even mentions rights outside of the *Two Treatises* and even within the *Treatises*, textual support for rights being prior to duties is lacking.<sup>69</sup> Indeed, if any decisive relationship between rights and duties can be gleaned from Locke's political works, the evidence suggests that they are nearly coextensive. Though Locke talks about individuals seeking self-preservation in the law of nature, once one has secured this right for himself, he also has a duty to preserve the rest of mankind. In fact, Locke actually refers to the right to self-preservation, so central to Strauss's reading, as a *duty* coming directly from the natural law.<sup>70</sup> Moreover, in his discussion of property rights, Locke insists that acquisition of property is limited by one's duties to others. There are ample cases in which Locke refers to duties limiting rights, calling into question the idea that duties exist solely for the sake of securing one's natural rights.

Still, the Straussian line is not so easily cast aside given that this view relies more on what Locke does not say and what he fails to prove and less on what he does say and what he does prove. Strauss maintains that Locke's natural law theory is inconsistent because though Locke says that the precepts of the natural law are discoverable by

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<sup>68</sup> For example, in chapter IV of the *Two Treatises* on slavery, he says that freedom is not having a right to do anything you wish, but to be free from the rule of an earthly sovereign and subject to the natural law (§ 22-23).

<sup>69</sup> Even in the discussion of property rights (*TT*. II., chapter V), it is not clear that the right to private property is prior to the duties specified by the two provisos. Locke seems to argue that since God gives the land to all in common, it is God who dictates the terms of individual rights. But if, as Locke also asserts, human beings are the property of God, then how could my right to my body or to the land with which I mix my labor, be independent of divine reason or the duties specified by the natural moral law?

<sup>70</sup> Simmons (1992), p. 69.

reason, the validity of his argument relies upon a premise that could only be known by divine revelation. Locke emphasizes the necessity of divine sanctions backing the natural law; consequently, his theory requires proof of the afterlife, in which God rewards the virtuous and punishes the wicked, and human reason cannot provide such proof. Thus, Locke's natural law is not a law of reason; it cannot be known in the state of nature and so it cannot guide the actions of individuals. Fortunately, all is not lost because Locke does manage to hold a consistent view of the state of nature as one within which individuals constantly strive to preserve themselves, says Strauss. This natural right can and does serve as the basis for action in the state of nature. Therefore, Locke's natural law theory, despite appearances to the contrary, actually relies upon a Hobbesian right to self-preservation rather than obedience to an independent moral or divine law.<sup>71</sup>

There is some truth to what Strauss says. Certainly, it is not completely ridiculous to think of the *Second Treatise* as a book about individual rights.<sup>72</sup> Also, as I pointed out previously, Strauss is not the only one to criticize Locke's natural law theory on the grounds that it is internally inconsistent and I think, as we will see next, he is correct that explaining how the content of our natural duties may be demonstrated is a major problem for Locke. However, I do not think that it helps matters to ignore large portions of text assuming that Locke was being, at best disingenuous and at worse obtuse, whenever he says that individuals living in the state of nature have natural duties and must live

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<sup>71</sup> Syse (2007), p. 207-208.

<sup>72</sup> Nathan Tarcov, for example, points to many places where Locke emphasizes "rights talk" over "duty talk," both in the *Treatises* and in *Education* ("A 'Non-Lockean' Locke and the Character of Liberalism." in *Liberalism Reconsidered*. (1983), p. 185-86). He speculates that Locke recognizes a psychological tendency for people to act with less resentment on what we characterize as a right than on what we characterize as a duty.

according to the natural law. In the following chapter, I suggest a more reasonable way of making Locke's natural law theory consistent by searching for a more suitable secular moral law that can be discovered even while living within the state of nature (i.e., Kant's moral law).

The above doubts raised about interpreting Locke as a natural rights theorist lead others to suggest that perhaps it is duties rather than rights that take priority. There is more textual evidence to support this second view making it more difficult to argue against than the Straussian position, but, in the end, viewing Locke as a natural law theorist of a Thomistic stripe is nearly as problematic. Recall that Suarez, operating within a Thomistic framework, asserts that rights stem from the natural law and that there can be no rights besides those that are necessary for the fulfillment of God's commands. While Locke discusses rights, such as parental rights, which stem from the duties that one has in relation to the natural law, he does not view all rights as subordinate to the natural law. Simmons describes the different contexts within which Locke discusses rights and their complex relationship to duties. He begins by pointing to four kinds of rights in the *Treatises*: (1) liberty rights, (2) moral powers, (3) optional claim rights, and (4) mandatory claim rights.<sup>73</sup> The mistaken interpretation of Locke that sees him as deriving rights from natural duties comes from conflating the third and fourth types of rights. Mandatory rights are those that are held "as a direct consequence of duties that the rightholder has."<sup>74</sup> Basically, the idea here is that if I have a duty to do something, then I

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<sup>73</sup> Simmons (1992), p. 74.

<sup>74</sup> *Ibid.*

must have a right to do it and this correlates with others' duties to allow me to do my duty. Locke's commitment to mandatory rights can be seen most clearly in the way he derives parental rights from the parents' duty to care for their children or to "preserve what they have begotten."<sup>75</sup> Optional rights, on the other hand, are rights, whose exercise are protected by duties of noninterference, but are still optional for the rights-holder. For example, I have the optional right to grow apples or peaches on my land. Should I decide to grow apples, others are bound to allow me to exercise my right to do so. Interpreters, such as Dunn, Tully, and Ashcraft, who see moral duties as foundational and rights as secondary, hold either that all rights are mandatory claim rights, i.e., rights are simply a means to the fulfillment of our duties, or that rights are derivative of the natural law because natural duties always limit the extent of our optional rights.<sup>76</sup>

As Simmons argues, neither of the above reasons for understanding natural duties as prior to natural rights stands up to scrutiny. Mandatory claim rights are only one type of right on Locke's theory and he allows plenty of space within which one has a right, in spite of not having a duty, to perform actions according to one's own discretion. Simmons calls this a "robust zone of indifference," a zone of protected liberty within which others have duties to allow me to exercise my right.<sup>77</sup> If such optional rights are correlates of others' duties rather than consequences of my own duties, then there seems to be no reason to think that duties are prior to rights. Also, even though it is true that

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<sup>75</sup> *TT*. I., §88; II., §56 and §58.

<sup>76</sup> Simmons (1992), p. 75.

<sup>77</sup> *Ibid.*, p. 76.

Locke thinks that rights are always limited by the natural law, it does not follow that rights have a secondary status. The precepts of the law of nature define both duties and rights (e.g., the right to private property is part of the natural law, for Locke). We have both restrictive duties and protective rights as granted by Locke's natural law. In other words, natural duties on Locke's theory serve to protect my basic freedoms from the encroachment of others as much as they seek to limit my encroachment upon the freedoms of others.

In this section, I have examined the reasons for thinking that Locke is either a natural rights theorist or a natural law theorist. I think it is quite clear that we ought to reject both views as they stand and I agree with Simmons that the most accurate representation of Locke's considered thoughts regarding the relationship between rights and duties lies somewhere in the middle.

#### *V. Conclusion*

Although the influence of Locke's natural law predecessors is evident in much of his work, he uses elements of many different theories to create a unique view of his own. Unfortunately, it is tough to see how such a piecemeal theory could manage to be consistent and it remains to be seen whether a successful Lockean theory of moral obligation is available. Locke's natural law theory revolves around two main questions: (a) an epistemological one, how human beings come to know the moral law and (b) a normative one, what gives this law its binding force. Locke fails to answer both questions well. He argues that human beings come to know the moral law through the operation of

reason upon sensory data. Though Locke never shows how it is that the content of moral laws can be deduced from sensory data, he also never gives up on the idea that the laws of nature can be demonstrated in this way. As for the moral question, Locke's answer is equally ambiguous. He maintains, along with Aquinas, a voluntaristic view that God is the ultimate source of moral obligation, but also, with Grotius and Pufendorf, he holds that human reason operating upon sensory data plays an essential part in justifying the human obligation to obey God's commands. So, in the end, Locke's natural law theory points toward a complicated view of moral obligation. God commands the moral law, but because of God's wisdom and justice, he would never expect human beings to be obligated to follow his commands unless they were capable of understanding their duties. This is why human beings have been endowed with the ability to reason about moral laws and this is why the moral laws must be capable of being known through reason.

In the next chapter, I discuss these ambiguities and complexities in more detail. From the underdeveloped empiricist natural law theory that the early Locke espouses, but that the later Locke also seems to continue to endorse despite never offering any real proof, it is evident that in order to have a comprehensive theory of moral obligation Locke needs to borrow significantly from more plausible moral theories. I argue that Kant's theory of moral obligation can supply a more promising answer to the epistemological and normative questions raised above.



## Part I, Chapter Three:

### Moral Obligation: The Problems of Knowability and Normativity

#### *I. Introduction*

In Locke's earliest attempt to sketch a theory of moral obligation, the *Essays on the Law of Nature*, he searches for the source of the moral law, the source of our knowledge of moral duties, and the source and nature of the moral authority attached to them. Additionally, later works, such as the *Essay Concerning Human Understanding*,<sup>78</sup> contain references to the earlier work and are peppered with attempts to build upon and fill in the details of his early moral theory. Even some of Locke's most widely known arguments in his political writings, including the *Two Treatises of Government*,<sup>79</sup> assume the truth of his natural law theory.<sup>80</sup> So it would seem that Locke needs a comprehensive theory of moral obligation if his system is to be internally consistent.

As I understand it, however, there are two barriers to Locke's natural law theory being a credible theory of moral obligation. He fails to answer two significant questions satisfactorily: (1) how can human beings know their moral obligations? And (2) what makes the natural law morally binding? The first, is a puzzle about knowing the content of the moral law: if Locke's moral theory is to agree with his empiricist epistemology, he must show that the content of the moral law can be discovered by the operation of human

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<sup>78</sup> Alexander Campbell Fraser (ed.). Oxford: Oxford University Press (1894).

<sup>79</sup> *Two Treatises of Government*. Peter Laslett (ed.). Cambridge: Cambridge University Press (1960).

<sup>80</sup> Here I specifically refer to the arguments concerning political obligation, property rights, tyranny, and the dissolution of governments.

reasoning upon ideas gleaned from sense experience and cognitive reflection alone. Though Locke insists that it is possible to deduce the natural law from sensation and reflection, he never successfully carries out such a demonstration;<sup>81</sup> and without a specific example to evaluate it is difficult to imagine how Locke's conception of knowing moral obligations could avoid running afoul of the naturalistic fallacy. Initially, at least, the prospects look bleak for deriving normative rules governing human behavior from physical facts we observe in nature.

The second question that gives Locke trouble is a puzzle about the source of moral obligation: even if Locke could successfully show that we derive our moral obligations from sensation and reflection, he still would need to explain what gives these rules moral authority. What distinguishes moral obligations from, for example, familial obligations, which we also might derive from empirical data? As I mention in passing in the previous chapter, in some passages, Locke seems to defend a moral voluntarist position according to which the authority of the law comes from the legitimacy of the legislator.<sup>82</sup> In the case of the natural moral law, then, the legislator is the divine creator, who is perfectly legitimate giving the natural law perfect moral authority. So according to this divine command theory, the moral law, being God's command, is binding upon us

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<sup>81</sup> Note that whatever Locke meant by demonstration, he most certainly did not think of demonstration in terms of Aristotelian syllogistic logic (*ECHU*. IV.xvii., §4). In this passage, Locke makes the simple point that one need not know the rules of syllogism in order to be capable of rational deliberation. So, whatever he means by demonstration it must not be too sophisticated. For a good discussion of the ambiguity of Locke's concept of demonstration as it relates to his theory of moral obligation see Colman (1983), Chapter VI.

<sup>82</sup> For example, *Essays*. VI., p. 181.

because it is an expression of God's perfect will.<sup>83</sup> However, if being commanded by God is sufficient to make the natural law morally binding, Locke's commitment to empiricist epistemology puts him in a difficult position once again. In this case, Locke's naturalist empiricism would demand not only that human beings be able to discover the content of their moral obligations using only empirical evidence, but also that they be able to determine that the putative moral obligations they discover are indeed God's commands and that they are morally binding because of that fact. Making these determinations, though, would require empirically verifying several other claims, i.e., that God exists, that he is a perfectly legitimate legislator, that he has a perfectly good will, that human beings are not being deceived in some way, etc. Finding empirical evidence for all of this seems unlikely.<sup>84</sup>

In other passages though, Locke seems to defend a moral realist position, i.e., that there are moral facts in the world that constitute the natural law and knowing these moral facts along with certain facts about human nature makes the natural law binding upon us,<sup>85</sup> but while it is clear that Locke thinks having access to the content of a law is a necessary condition for being bound to obey that law, he does not think it is sufficient. Locke seems to hold a twofold view of the source of normativity: God's will gives the natural law external moral authority, while certain facts about human nature give the natural law internal moral authority. Still, successfully verifying the legitimacy of the

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<sup>83</sup> *Essays*. IV., p. 151-157; VI., p. 181-189.

<sup>84</sup> The only attempt at anything close to this comes at the very beginning of the *Essays*, but as I mentioned above, this is an astonishingly unconvincing attempt at a design argument.

<sup>85</sup> *Essays*. IV., p. 157-159.

sources of moral obligation using empirical data appears even less likely than being able to derive specific moral obligations from empirical observations.

Thus, as it stands, Locke's natural law theory lacks crucial elements of a theory of moral obligation and it seems doubtful that those crucial elements could be hidden somewhere within his corpus. Locke's treatment of the natural law and how it might line up with his naturalist empiricism simply lacks the appropriate level of detail. On this point virtually everyone who has looked into the subject agrees.<sup>86</sup> However, disagreement abounds regarding the broader implications of such a conclusion. Some, drawing attention to Locke's decision not to publish his eight essays on the law of nature and what they interpret as his later hedonistic theory of moral motivation, choose to ignore references to the natural law in his later published works or to dismiss such references as residual claims left over from Locke's misguided youth, which he was never able to substantiate, but which he ultimately found to have little bearing upon his most important arguments anyway.<sup>87</sup> Others point to Locke's final work, the *Reasonableness of Christianity*,<sup>88</sup> as evidence that, in the end, although he wished to disavow entirely his

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<sup>86</sup> Because of this, J.B. Schneewind suggests that Locke does not have a credible theory of moral obligation and questions the acceptability of assembling one from a variety of works: "we risk serious historical distortion if we insist on piecing together a comprehensive moral theory from writings Locke never suggested should go together. He may not have had any such theory" (*The Invention of Autonomy: A History of Modern Moral Theory*. Cambridge: Cambridge University Press (1998), p. 142).

<sup>87</sup> Interpreters such as D.E. Flage (2000) and J.B. Schneewind (1994) maintain that it is not possible to reconcile Locke's earlier and later thoughts on morality (Colman (2003), p. 125, fn. 2) and, as a result, attempt to explain away any references to natural law for the sake of consistency.

<sup>88</sup> In this final work (1695), Locke admits that perhaps not everyone is capable of discovering the natural law using reason and sensory data. He suggests that these individuals must instead rely upon belief to tell them what their moral obligations are (*Works* (1823), vol. 7, p. 140-143). This position contradicts his earlier claim in the *Essays* that the natural law cannot be known by divine revelation or tradition (III., p. 137-145).

early natural law theory because he recognized that he was unable to make it consistent with his empiricist epistemology, he also realized that he needed to replace the failed moral theory with one that he found to be more palatable.<sup>89</sup> Of course, both suggestions about Locke's reasons for effectively abandoning his early natural law theory are merely speculative, since he leaves no explanation for his failure to deliver on his promissory note.<sup>90</sup> Nonetheless, there are independent reasons for thinking that Locke should not simply discard his early natural law theory; he needs a convincing theory of moral obligation and, preferably, a convincing natural law theory.

In this chapter, I argue that though we have seen that Locke's natural law theory, in its present form, is too vague to count as a decisive theory of moral obligation, certain of Locke's central arguments, including the development of a reasonable theory of political obligation, require that he have some coherent theory of moral obligation. I maintain such a theory of moral obligation is available—one that adequately responds to the two questions I raise above and fits within Locke's metaphysical and epistemological framework. Moreover, this theory is also identifiable as a natural law theory, though it is not precisely the same type of natural law theory that the early Locke envisions. This complex moral theory has a surprising source: Kantian ethics. Incorporating a broadly Kantian analysis of the Formula of Humanity would provide Locke with an example of a deduction from observation and reflection to a normative principle, i.e., a duty to respect humanity. Also, though I think Kant and Locke are similarly imprecise about the source

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<sup>89</sup> Steven Forde. *American Journal of Political Science*. Vol. 45, No. 2 (Apr. 2001), pp. 396-409.

<sup>90</sup> *Essays*. I and II.

of moral authority, I find Christine Korsgaard's reconstruction of Kant's conception of normativity both compelling in its own right<sup>91</sup> and not too far removed from Locke's naturalist empiricism. Thus, by using certain features of Kant's moral theory to enrich Locke's skeletal theory of natural law, I aim to provide Locke with a coherent and internally consistent theory of moral obligation.

I organize the chapter as follows. In sections II and III, I explain the problems with the answers that Locke provides to the two fundamental questions concerning moral obligation. First, Locke asserts that we can deduce the natural law from sense experience, but without further details about how such a deduction might work, the naturalistic fallacy threatens to invalidate his assertion. Second, Locke is unclear about what justifies the claims that morality makes on us and whatever answer he gives requires empirical evidence that is not forthcoming. In the fourth section, I give my analysis of Kant's Formula of Humanity and a Kantian solution to the problem of normativity in order to respond to the two crucial questions and I show that, were Locke to adopt these responses, he would have the tools at his disposal for developing a plausible natural law theory of moral obligation. Finally, in the last section, I explore the broader implications for such a complete theory of moral obligation and the work it would do for Locke in his political arguments.

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<sup>91</sup> Korsgaard defends this view in the *Sources of Normativity*. Cambridge: Cambridge University Press (1996). I realize that there is some controversy among Kantians concerning the interpretive adequacy of Korsgaard's view. But I wish to remain as neutral as possible with regard to this question and leave the real debate to the Kantians. For a fair treatment of this issue see Michael Smith's review of the book in *Philosophical Quarterly*. Vol. 49, No. 196 (Jul. 1999), pp. 384-394.

## *II. Locke's Failed Moral Theory (Part A)*

As I note in the previous chapter, what is known as Locke's natural law theory has been pieced together from a variety of sources. Although Locke mentions the law of nature in several places, he presents his most detailed thoughts about the natural law primarily in the *Essays* and in the second and fourth books of *ECHU*. In these two works, Locke attempts to explain how human beings know their moral obligations and what gives these principles moral authority. In this section, I explain the problems with Locke's claim that the natural law can be deduced from sense experience in the same way that one might demonstrate a mathematical proof, e.g., a proof in Euclidean geometry.<sup>92</sup>

First, because of Locke's commitment to naturalist empiricism, which he defends in the first book of *ECHU*, Locke rejects the rationalist foundation upon which other natural law theories, both previous to and contemporary with his own, had been built and proposes an empirically based theory as an alternative.<sup>93</sup> Thus, the law of nature, which is discovered through sense experience, replaces the rationalist concept of innate moral principles as the guide for human behavior. Arguing primarily against Cambridge Platonists, such as Henry More,<sup>94</sup> Locke says that if moral principles are innate, they must be universally known. However, it seems that moral principles are not universally known because some individuals clearly demonstrate a better grasp of moral principles

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<sup>92</sup> *Essays*. VII., p. 199-201; *ECHU*. IV., iii., §18, IV., iv., §7 and 9; IV., xii., §8.

<sup>93</sup> Both medieval natural law theorists, such as Augustine and Aquinas, and the Cambridge Platonists, a group of seventeenth century moralists and theologians living in England during Locke's time, base their natural law theories upon innate moral principles (Greenlee (1972), p. 253-254).

<sup>94</sup> *An Antidote Against Atheism* (1653).

than others. Therefore, moral principles must not be innate.<sup>95</sup> According to Locke, the moral law is objective, i.e., exists independent of the human mind, and, consequently, is universally binding, even though it is not universally known; so, he thinks we need an alternative to the rationalist explanation for how human beings know moral principles that also accounts for the inequality in knowledge. The explanation says Locke, is that some faculty or faculties *within the agent's control* must be responsible for *discovering* moral obligations and this faculty is the reasoning capacity.<sup>96</sup>

Locke describes the process this way: we observe certain regularities in nature, e.g., the changing of the seasons, the process of germination and growth of plants, etc., and we infer that human beings also must be governed by certain fixed laws.<sup>97</sup> Further, because, like Aristotle, Locke presupposes that the essence of human nature is rationality and that the supreme exercise of rationality is virtue, he reasons that these fixed laws, governing creatures with a specifically rational nature, must include not only physical laws, but also moral laws.<sup>98</sup> Hence, in the second of his *Essays*, he argues that the objective moral law is derived from certain precepts observed through sense experience.<sup>99</sup> However, it is the responsibility of the individual to strive to discover these moral laws by exercising her reasoning capacity to the maximum extent and it is the failure to do so

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<sup>95</sup> Besides innate knowledge, Locke also rejects tradition and revelation as methods of knowledge upon which one might build a natural law theory (*Essays*. II., p. 122-135).

<sup>96</sup> Though Locke makes this point most forcefully in the earlier work (*Essays*. II. and VII.), he also maintains this idea in his later work (*ECHU*. II., xxi., §5-6).

<sup>97</sup> *Essays*. I., p. 109.

<sup>98</sup> *Ibid.*, p. 113.

<sup>99</sup> *Essays*. II., p. 131-133.



that explains how some know the natural moral law, while others do not. Says Locke, “if man makes use properly of his reason and of the inborn faculties with which nature has equipped him, he can attain to the knowledge of this law [the natural law] without any teacher instructing him in his duties, any monitor reminding him of them.”<sup>100</sup> Therefore, despite the disparity in the individual capacity for reason, the moral law is universally *discoverable* by all reasonable people at all times, because it is an objective principle and so always accessible to those with even the slightest capacity for reason. In short, the law of nature determines what is virtuous and valuable and it is discoverable through a process of turning the light of human reason upon precepts revealed by the senses.

At first, Locke’s narrative about how human beings know the moral law seems promising. It stays true to his empiricist epistemology; it explains, better than the rationalist picture, the disparity of moral knowledge among individuals; and it responds better to the moral skeptic since it promises to begin from the most neutral and accessible ground possible, i.e., sensory data. However, when we further examine and put this idea to the test, it begins to look less convincing. Notice that the above description of the process through which human beings discover the moral law says nothing specific about the content of this law. Also, the few details that Locke provides about what exactly he means when he says that the moral law is discoverable and demonstrable from sense experience do not survive criticism. Not only does he fail to illustrate how a demonstration of an actual moral principle from actual sense data might be possible, the

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<sup>100</sup> *Ibid.*, p. 127.

only way that I could see his method of conceptual analysis ever succeeding in producing the proper sort of demonstration would be an obvious violation of the naturalistic fallacy.

To see what I mean, let us look more closely at what Locke does say about the demonstration of the moral law. In the seventh of his *Essays*, Locke claims that so long as man makes proper use of his mental capacities he will attain knowledge, including knowledge of mathematical and moral truths. In the case of mathematics, the basis for reasoning is the nature and properties of figures and numbers; in the case of morality, reasoning begins from the idea of man as a rational being. Locke says:

Since man has been made such as he is, equipped with reason and his other faculties and destined for this mode of life, there necessarily result from his inborn constitution some definite duties for him, which cannot be other than they are. In fact it seems to me to follow just as necessarily from the nature of man that, if he is a man, he is bound to love and worship God and also to fulfil [sic] other things appropriate to the rational nature, i.e., to observe the law of nature, as it follows from the nature of a triangle that, if it is a triangle, its three angles are equal to two right angles.<sup>101</sup>

Here Locke draws a parallel between mathematical and moral knowledge: just as we might demonstrate from the concept ‘triangle’, as a figure having three sides and three angles, the sum of which is  $180^\circ$ , and from the concept ‘right angle’, as being equal to  $90^\circ$ , that the three angles of a triangle are equal to two right angles, so might we demonstrate from the concept ‘man’, as a rational creature, that he has particular duties, i.e., to love and worship God, to be just, to respect the property of others, not to murder, to live harmoniously with others in civil society, etc. Natural moral duties, then, follow

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<sup>101</sup> *Essays*. VII., p. 199-201.

by necessity, though perhaps not by logical necessity, from the correct definition of 'human being'.<sup>102</sup>

There is, however, a serious problem with Locke's idea of moral demonstration being analogous to mathematical demonstration. Unlike definitions of mathematical concepts, such as 'triangle' or 'right angle', there is considerable disagreement regarding definitions of moral terms and because Locke adopts Aristotle's thought that the defining characteristic of a human being is the ability to reason, he must also accept the teleological machinery that comes along with the view. The problem is that that teleological machinery presupposes a particular definition of the good, which is highly controversial. According to Aristotle, the final good for human beings is happiness, or living well and living well includes acting virtuously, i.e., acting in accordance with one's moral duties. So far there is not much to disagree with, but what is controversial is that Aristotle also thinks that the ability to reason is man's natural function and, therefore, one cannot achieve happiness or live well without exercising his reasoning capacity to the highest degree, but Aristotle does not fully explain the link between reason and virtue. So, if Locke wishes to convince us that the content of our moral duties can be derived from the proper definition of 'human being', as 'rational creature' in the Aristotelian sense, he must provide the missing link between rationality and virtue.

One possibility is that Locke means to say that acting rationally just is evidence that one is acting virtuously, i.e., in accordance with one's natural moral duties. However, if Locke's argument is that the idea of 'rational human nature' somehow contains or

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<sup>102</sup> Von Leyden. "Introduction." (1954), p. 54-56.

entails the content of our moral duties, then pointing to instances of acting in accordance with one's natural moral duties as evidence of rationality makes his definition circular. In order to avoid circularity and to remain consistent with his empiricism, Locke must show that 'rational creature' is the *proper* definition of 'human being' based upon independent empirical evidence. In other words, before Locke can even begin to think about deriving specific moral duties from the definition of 'human being', he must convince us, and the moral skeptic, that his definition is the correct one and he must do so using the most morally neutral and accessible ground possible, i.e., sensory data.

Now, the only external access to human nature available to us through empirical means is our observation of the behavior of others and ourselves. However, I doubt that observation of human behavior yields anything like scientific proof that human beings are essentially rational creatures with natural moral duties. At most, such observation reveals only general patterns of 'reasonable' behavior, for example, human beings tend to cooperate with others for their mutual benefit and most recognize cheating as a violation of some basic norm of fairness. But raw sense data simply cannot relate such 'reasonable' behavior to recognition of and obedience to the moral law in any meaningful way as Locke would need to prove that his definition of 'human being' as 'rational creature' is correct. In fact, recent findings of moral psychologists suggest that the empirical evidence actually disproves the very connection between rationality and virtue that Locke, Aristotle, and others had presumed.<sup>103</sup> Of course, Hobbes predicted this result during Locke's time arguing that observation of human behavior, far from indicating a

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<sup>103</sup> See, for example, John Doris's discussion of situationism in *Lack of Character* (2005).

predisposition to follow the moral law, actually suggests human beings are essentially self-interested,<sup>104</sup> which Hobbes thinks explains the reasonableness of exiting the state of nature.<sup>105</sup> Thus, it is difficult to see how one could prove, using empirical evidence alone, that human beings are essentially rational, where rationality relates to following the moral law. Therefore, if we reject Locke's definition of 'rational human nature', then we must also reject his conclusion that the content of our moral duties can be derived from his definition.<sup>106</sup>

In addition to presupposing obedience to the natural moral law as necessary for his definition of 'rational human being', Locke's description of moral demonstration falls short in another important respect. Suppose, for instance, I wish to know whether the

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<sup>104</sup> Although Hobbes and Locke agree that human beings act rationally, meaning that they act according to some natural law, they disagree about the content of the natural law. For Hobbes, the primary natural law is the duty of self-preservation, but for Locke the natural law is God's law, so the primary law might be something like the Golden Rule; consequently, since Hobbes and Locke disagree about the content of the natural law, they disagree about what it means for human beings to act rationally. But because Hobbes does offer a definition of 'rational human being' that rivals Locke's definition, he forces Locke to defend his account of human nature as the proper one from which we can derive the content of the natural law. Unfortunately, I think the only way that the moral law could be demonstrated from 'rational human nature' is if we assume that rationality entails morality and such a move clearly begs the question. As the Prisoner's Dilemma illustrates, the most rational choice is not always the most virtuous one.

<sup>105</sup> *Leviathan*. XIII-XV.

<sup>106</sup> Locke also presupposes knowledge of the natural moral law for definitions of other moral terms. In *ECHU*, Locke describes moral demonstration in a different way: he says if one first takes abstract moral propositions, such as "where there is no property there is no injustice," and analyzes them in such a way as to make the relations among the terms explicit, then it would be possible for one to demonstrate the truth of this and other moral propositions in just the same way that one would demonstrate the truth of a mathematical proposition, such as "a triangle has three angles equal to two right ones." Here again though, the supposed demonstration of the truth of these moral propositions is heavily dependent upon Locke's narrow definitions of particular terms. In reference to the above abstract moral proposition, Locke says, "for the idea of property being a right to anything, and the idea to which the name 'injustice' is given being the invasion or violation of that right, it is evident that...this proposition [is] true." But in order to establish that 'property' means having a right to anything and that 'injustice' refers to the violation of such a right, we would need to presuppose some rule or norm specifying particular rights and duties. Once again, Locke does not explain how we might demonstrate the content of the moral law, but instead assumes that our moral duties are clear to us from the idea of "a supreme Being...on whom we depend" and ourselves "as understanding, rational creatures" (*ECHU*. IV., iii., §18).

proposition “murder is wrong” is true. How might I analyze this claim according to Locke’s theory of moral demonstration? First, according to the metaphysical and epistemological framework that Locke develops in *ECHU*, all propositions or claims, including moral propositions, contain simple and complex ideas. On the one hand, simple ideas are concepts that we passively receive through sensation and reflection;<sup>107</sup> on the other hand, the mind actively constructs complex ideas from the simple ideas it receives.<sup>108</sup> Locke thinks individual moral concepts, such as ‘theft’, ‘lying’, ‘murder’, ‘dueling’, and ‘stealing’ are among the class of complex ideas and can be analyzed and broken down into their component parts, i.e., simple ideas and relations among simple ideas.<sup>109</sup> So, in order to determine whether the claim “murder is wrong” is true, we must break down the complex idea ‘murder’ into its simple ideas and then compare that set of simple ideas to the set of simple ideas composing the relevant moral law in something like the following way:

First, from *reflection* on the operations of our own minds, we have the ideas of willing, considering, purposing beforehand, malice, or wishing ill to another; and also of life, or perception, and self-motion. Secondly, from *sensation* we have the collection of those simple sensible ideas which are to be found in a man, and of some action, whereby we put an end to perception and motion in the man; all of which simple ideas are comprehended in the word murder...if I have the will of a supreme invisible Lawgiver for my rule, then, as I supposed the action commanded or forbidden by God, I call it good or evil, sin or duty...their [the moral

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<sup>107</sup> *ECHU*. II., vii.

<sup>108</sup> Either by: (1) combining simple ideas, (2) relating or comparing two simple or complex ideas, or (3) abstracting them away from even more complex ideas (*ECHU*. II., xii., §1).

<sup>109</sup> For Locke’s analysis of these terms see *ECHU* (‘theft,’ II., xii., §5); (‘lying,’ II., xxii., §9); (‘murder,’ II., xxviii., §14); (‘dueling,’ II., xxviii., §15); and (‘stealing,’ II., xxviii., §16).

terms'] rectitude or obliquity consists in the agreement or disagreement with those patterns prescribed by some law.<sup>110</sup>

If the pattern of simple ideas making up the action I identify as murder matches the pattern of the simple ideas composing the moral law (the moral law being something like: human beings ought not engage in the wrongful death of one by another), then the proposition “murder is wrong or vicious” is true.

By now the second problem with Locke's explanation of moral demonstration should be becoming clearer. If conceptual analysis of moral terms, such as, 'murder' yield simple ideas that are purely descriptive, then although Locke succeeds in staying true to his empiricist epistemology, he does not succeed in deriving moral duties from sense data. Nowhere in Locke's own analysis of the term in the first six lines of the passage quoted above does the idea 'wrong' or 'bad' or 'evil' or any other unequivocally normative indicator appear.<sup>111</sup> So I do not see how a comparison between the simple ideas contained in a moral concept and the simple ideas contained in the relevant moral law could provide information about the truth of a moral proposition, which is a normative statement. As it is, in the above analysis, Locke simply assumes the existence of God's law as the moral law and even this he states as a conditional, as only one option among many rules we might use to judge the truth of a moral proposition. If this is what Locke means by moral demonstration, namely, a comparison of the analysis of a moral term with some rule in order to determine whether it agrees or disagrees with the rule,

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<sup>110</sup> *ECHU*. II., xxviii., §14 (emphasis original).

<sup>111</sup> He uses 'malice' and 'wishing ill to another', but either these terms are complex ideas that need further analysis in order to make their normative import explicit, or they are purely descriptive terms as well and do not shed any light upon the truth of the proposition 'murder is wrong'.

then he certainly does not show that the moral law can be discovered from morally neutral precepts received through sensation and reflection.

So, could we demonstrate the natural moral law from the definition of 'human being' as 'rational creature' and an analysis of the simple ideas composing complex moral terms in some other way? In other words, could we determine that we have a moral duty not to murder by analyzing an act of murder? I think this is possible only if complex moral terms themselves contain simple ideas of 'right', 'wrong', 'good', 'bad', 'duty', etc. or we assume some principle of normativity prior to analysis and somehow read into the descriptive analysis our predetermined moral duties. We will examine whether the former possibility is a live option for Locke next in the discussion of moral realism, but, initially, this seems arbitrary because, even leaving aside the question of whether ideas like 'right' and 'wrong' are simple ones, if our minds actively construct complex ideas out of simple ideas, as Locke contends, then it seems as if we could toss the simple idea 'wrong' into any set of simple ideas in order to create a complex moral term.<sup>112</sup>

The latter possibility is almost certainly a non-starter because it is a clear violation of the naturalistic fallacy. Even if I assume that I have a duty not to murder, nothing in the physical description of an act of murder could clearly distinguish it from the physical description of, say, killing in self-defense. The problem here is not in using empirical evidence in order to explain why murder is wrong (this could be accomplished simply by

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<sup>112</sup> However, Locke also insists that the natural law be *discovered* by reason and not constructed by it. This is a crucial difference between Locke's theory of moral obligation and Kant's, as we shall see in the third section. But technically, for Locke, if we are using combination, relation, or abstraction to make complex ideas out of simple ones, we are not creating anything. We are simply passively receiving the building blocks provided by sensation and reflection and actively using our minds to expand our knowledge base. But this seems to imply that there is a right and wrong way to put simple ideas together, which seems odd.



referring to murder's sociological impact upon communities and individuals perhaps), but in identifying an act of murder in the first place. From an empirical standpoint, the physical description of acts of justified and unjustified killing are exactly the same.<sup>113</sup> Hence, I could not derive a normative conclusion about an act of murder from only the empirical description of such an act without illicitly deriving an 'ought' from an 'is'.

A final possibility that I would like to suggest here is that perhaps by demonstration, Locke means something analogous to the metaphysical theory of supervenience or emergence, according to which the concept 'object' supervenes upon a group of related properties arranged in a particular way.<sup>114</sup> If Locke were to borrow this idea, then, he might think that normativity supervenes on or emerges from a particular arrangement of purely descriptive simple ideas. For example, again taking Locke's conceptual analysis of the term 'murder': from the ideas of "willing, considering, purposing beforehand, malice, or wishing ill to another; and...life, or perception, and self-motion" and from the idea of an action resulting in "an end to perception and motion in [a] man" existing within two individual bodies in close proximity to each other, under specified circumstances, might emerge the complex idea of 'wrongful killing'. The arrangement certainly would be complicated, perhaps too complicated to conceptualize;

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<sup>113</sup> One might object that what distinguishes justified and unjustified killing is the killer's intention and though I think this is true, I do not think intention is the sort of thing that could necessarily be captured by empirical evidence. Also, even if we could know the killer's intent through empirical means, by asking him to take a lie-detector test or looking at MRI scans, for example, this would again be purely descriptive. So, although having a malicious intent might be the distinguishing mark of an act of murder, I do not see how this could help Locke to avoid the naturalistic fallacy. The murderer's state of mind can only be labeled wrong within the context of a normative theory.

<sup>114</sup> This view is especially popular among non-reductive physicalists, such as Donald Davidson. See his article "Mental Events" (1980) and for a survey, see Jaegwon Kim's *Supervenience and Mind* (1993).

nonetheless, I think something along these lines may yield a plausible account of moral demonstration and were we to include simple ideas describing the killer's state-of-mind as part of the arrangement, it would be even more promising. But there is no solid evidence that Locke had anything like this in mind in his discussion of deriving moral duties from sense data. Thus, we are forced to conclude at this point that, upon closer review, Locke's idea that the moral law may be derived from ideas gained through sense experience does not persuasively respond to the first question about how human beings might know their moral obligations.

### *III. Locke's Failed Moral Theory (Part B)*

Now let us examine whether Locke has more success answering the second question regarding the source of moral authority. The aim here is to explain what justifies the claims that morality makes upon us. As I have mentioned, Locke scholars debate two possible answers: either Locke is a voluntarist or he is a moral realist about the source of bindingness.<sup>115</sup> According to the Pufendorffian type of voluntarism (or divine command theory) that Locke seems to endorse, although the content of the moral law is independent of God's will and as a result, non-arbitrary and discoverable by human

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<sup>115</sup> There is a third possibility. Other Locke scholars, the most famous among them being Strauss, interpret Locke as a hedonistic utilitarian, no different from Hobbes. This fits with Strauss's interpretation of Locke as primarily a natural rights theorist, which I discussed in section IV of the previous chapter. Strauss argues that, for both Hobbes and Locke, the basis for the natural law is the natural right to self-preservation and the source of the civil law's bindingness is the capacity of the sovereign to enforce his will through the promise of reward and the threat of punishment (*Natural Right and History*. Chicago: University of Chicago Press (1953)). This view, if it can be properly characterized as a theory of *moral* obligation, is another type of voluntarism, but one in which the source of the obligation, when one exists, is wholly artificial and dependent upon the will of an earthly sovereign. Indeed, on this interpretation the natural world itself is morally indifferent, so there would be no sense of obligation or duty without the imposition of the sovereign's will; and, obviously, there are no obligations, moral or otherwise, governing the state of nature since it is not ruled by a sovereign.

reason, it only has the “force of law”—it is only obligatory—because it is legislated by God, who alone has the power to enforce the moral law.<sup>116</sup> By contrast, according to Grotius’s brand of moral reason, which Locke also appears to accept, we would have moral duties even if God did not exist and there were no effective sovereign because obedience to the moral law is obligatory independent of who the legislator is or how the law comes to be.<sup>117</sup> Moral realists deny that the natural world is morally indifferent claiming instead that there are moral facts in the world that make some actions right and some actions wrong. Thus, for realists, questions about moral authority reduce to questions about the moral facts in the world.

Now, it is tempting to read the early Locke in his writings on natural law as advocating a voluntarism of the sort Pufendorf defends. In one passage in the *Essays*, Locke appears to support this view explaining the following scenario: “at God’s command the binding force of this law [the natural law] can lapse, for this actually happened, as we read, in the case of the Israelites when they departed from Egypt and journeyed to Palestine.”<sup>118</sup> Here, Locke describes a time when God seems to suspend the Israelites’ natural moral obligation to respect the property rights of the Egyptians. So it looks as if the bindingness of the natural law is contingent upon God’s will and that God has the authority to change it. However, Locke goes on to point out that, actually, it is not the law or God’s will that has changed in this case. Rather, he says, because the circumstances have changed, it is the case that the natural law no longer applies in the

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<sup>116</sup> Korsgaard (1996), p. 23-24.

<sup>117</sup> *The Rights of War and Peace*. Richard Tuck, (ed.) Indianapolis: Liberty Fund (2005), p. 1748.

<sup>118</sup> *Essays*. VII., p. 201.

same way. In other words, were God ever to suspend or change the natural law on a whim and without good cause, then the law would be arbitrary. But because God can expect human beings neither to obey a law that they cannot predict nor to obey a divine legislator whose commands appear to them to be arbitrary and irrational, there must be a discernable reason that the Israelites were free to acquire the property of the Egyptians in this particular case.<sup>119</sup> This argument, admittedly, has problems, but what is important for the point at hand is that, like Pufendorf, Locke expressly avoids the strong voluntarist position, advocated by some moralists, for instance, during the Reformation that God could, at any time, change or suspend the natural law at his whim. Though Locke certainly thinks that the natural law expresses God's will and is at least externally binding for this reason, unlike Pufendorf, he also thinks that the commands of the natural law derive their binding force, at least in part, from their discoverability.<sup>120</sup> So, though he clearly thinks God's will plays an important role in making the natural law authoritative, God's legislative power is not in itself the entire explanation.

The second possible interpretation of Locke's justification for the natural law being morally binding is moral realism. There is at least one independent reason to interpret Locke as a realist. As I examined at some length above, Locke's early natural law theory depends upon his claim that human beings are capable of discovering the

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<sup>119</sup> It is important to notice that this is a point not about moral motivation, but about moral obligation. Locke does not argue that God would not command moral laws that contradict human reason or keep his commands concealed from human beings because such commands would fail to inspire the correct sentiments that cause human beings to act rightly. Rather, he thinks such commands would fail to be laws for human beings; reasonable creatures quite simply cannot be obligated to obey unreasonable or inconspicuous commands.

<sup>120</sup> In his sixth essay, Locke says that it is "a rational apprehension of what is right" that puts us under and obligation (*VI.*, p. 185).

natural law through sense experience and observation alone; and it seems to me that one way to make sense of the idea that moral obligations are demonstrable from empirical evidence is to read Locke as a moral realist. If this is right, Locke thinks that sense experience provides more than merely physical facts about the world; it also provides us with certain moral facts, which our reasoning faculty then uses to derive the moral law. I think that Locke may have such a view in mind in *ECHU* when he adds reflection to the list of faculties that help us to perceive our world. Looking back at the passage where Locke performs the conceptual analysis on the moral concept ‘murder’, we see that reflection provides us with certain simple ideas that emit at least a tinge of normativity, e.g., malice, or wishing ill to another, while sensation provides purely descriptive ones. Thus, it is not much of a leap to think that, through reflection, we receive simple ideas that are moral facts about the world showing that Locke tends toward a realist perspective regarding moral authority. In addition, Locke directly refers to reason’s recognition of the moral law as the source of moral authority in an earlier passage, which ties obligation to the will:

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.<sup>121</sup>

This passage is similar to Grotius’s definition of the natural law as a decree of the judgment made by right reason and *consequently* decreed by God.<sup>122</sup> Thus, it is also plausible to read Locke as agreeing with Grotius in thinking that moral authority just is

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<sup>121</sup> *Essays*. VI., p. 185 (emphasis mine).

<sup>122</sup> *The Rights of War and Peace* (2005), p. 150-151.

the comprehension of the moral law and the recognition of one's specific moral duties that binds the conscience.

Unfortunately, unless we decide this interpretive debate purely on the basis of the number of passages in support of each interpretation, looking at individual passages out of context will not help to settle the dispute about whether Locke is a voluntarist or a realist. He is simply unclear regarding the source of moral authority, making statements in support of both horns of this up-dated version of Euthyphro's dilemma. What is clear is that Locke wishes to avoid the extremes of each position. He fears both the arbitrariness, or at least inconspicuousness, of an ethical voluntarism that says the moral law has authority because it is God's command and conversely, the lack of strong moral authority of a moral realism divorced from some definite standard or judge of morality. Hence, I think that Locke's actual position may lie somewhere in the middle. But whatever interpretation of Locke's account of the source of moral authority one settles upon, Locke will need to deal with worries about consistency because his empiricism causes trouble for each.

First, I have already touched upon the problems with thinking that voluntarism and empiricism could be compatible. At the least, such a project would require an *a posteriori* proof of God's existence. While Locke does assume the truth of such an empirical proof (which takes the vague form of a design argument) one gets the distinct impression that this is merely an after-thought, not intended as support for a particular

argument.<sup>123</sup> Either Locke fails to recognize or he ignores the difficulty his empiricism causes for him when he claims that we are bound to obey the natural moral law because it is God's decree.

Second, although I think moral realism is compatible with Locke's naturalist empiricism, the difficulty with this interpretation is that moral realism itself offers a rather weak justification for the claims morality makes upon us. It seems that without an unambiguous measure or judge of the moral law, even if we could know that we have truly discovered a moral fact, it is at least arguable whether the mere recognition of one's obligation gives that obligation moral authority. In the following section, I look at Kant's defense of this type of moral internalism based upon an objective view of human nature. As I have already discussed, this seems to be a move that Locke attempts as well, but because he fails to develop a non-contentious definition of 'rational human nature', his view cannot serve as a credible basis for moral realism. We will see whether Kant has a more credible definition of human nature and whether it can serve as the basis for a plausible theory of moral authority in the next section.

In this section, I have shown that Locke's natural law theory fails to respond to the two crucial questions around which any complete theory of moral obligation must be built: (1) how do we know our natural moral obligations? And (2) what gives these obligations moral authority? To the first, he answers that we can demonstrate the moral law from sense experience. This response has two problems. First, he argues that we can

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<sup>123</sup> In addition to the statement of this view at the beginning of the *Essays*, Locke also waves his hand at a design argument in *ECHU* at IV., x., §3-6. But nowhere does he vehemently defend such a view suggesting that either he is unaware of the difficulties his empiricism causes for a voluntarist position, or he simply does not think of himself as a voluntarist.

derive our natural moral duties from the proper definition of ‘human being’ as ‘rational creature’, but his definition of ‘rational human nature’ is circular. Second, if conceptual analysis of complex moral ideas, such as ‘murder’, yields a purely descriptive set of simple ideas, then Locke cannot derive natural moral duties from moral propositions without committing the naturalistic fallacy. To the second question, Locke responds that the moral law is binding either because it is a manifestation of God’s will or because it is intrinsically binding for rational creatures who discover it. Both of these potential responses to the problem of normativity fail, however, when we try to understand how they might work with Locke’s naturalist empiricism. Therefore, Locke does not have a convincing account of moral obligation and my task in the next section is to prove that were Locke to adopt a broadly Kantian theory of moral obligation, he would be able to answer these two crucial questions.

#### *IV. A Kantian Solution*

In this section, I introduce a Kantian analysis of the Formula of Humanity that explains how we come to know our moral obligations and I discuss the merits of Korsgaard’s solution to the question about moral authority or what justifies the claims that morality makes upon us, which she calls “reflective endorsement.” In so doing, I begin to shape a comprehensive theory of moral obligation that answers the two crucial questions that we have been focusing upon throughout this chapter and, which Locke could use to correct and further develop his own moral theory. But, before turning to the Kantian solution, to ensure that, in the end, the compromise moral theory we have



remains, at its core, Lockean, i.e., one that Locke could endorse without giving up the key features of his own underdeveloped moral theory specified in chapter two, we must first identify key features of natural law theories in general.

As I see it, there are three minimum qualifications for classifying a theory of moral obligation as a natural law theory, in the broadest terms. First, a moral theory that is a natural law theory must be committed to a basic version of moral realism, i.e., the idea that some moral propositions are literally true because they correspond to facts in the world. Second, all natural law theories recognize an important or deep connection between human nature (however it is defined) and the natural moral law. This connection is important for the human capacity to know and to be bound by the natural law. Third, the natural law must be linked to practical reason; in other words, the natural law must be a sufficient guide to human behavior.

By now it should be clear that Locke's moral theory, rough as it is, more than meets these basic requirements for being a natural law theory. Though Locke talks a fair amount about God's authority with regard to the natural law, it is not God's authority (or, at any rate, it is not *only* God's authority) that gives the law its force; Locke is committed to moral realism thinking that the natural moral law may be derived from certain facts about human nature and the natural world.<sup>124</sup> And while the natural law certainly could

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<sup>124</sup> There is an ongoing debate in contemporary metaethics concerning whether one can consistently maintain both naturalism and moral realism. Naturalists believe that all facts about the world must be scientific facts. But because it seems impossible to prove true any moral proposition, such as, 'unlawful killing is wrong', by referring to a set of scientific (or empirical) facts only, it seems that the moral realist must claim that the relevant facts are not scientific facts, but facts of a different sort, i.e., normative. So moral realists cannot be naturalists. I actually think that in order for Locke to keep his natural law theory of moral obligation, he must relax his commitment to his naturalist empiricism somewhat. But I also think that the distinction between rationalists and empiricists is not as stark as many view it.

never conflict with God's will, the law of nature is morally binding and a proper guide to human behavior precisely because it is founded upon an unchanging human nature, in conformity with human rationality, and discoverable by human reason. It should also be clear that Locke's commitment to naturalist empiricism clashes with aspects of all three qualifications above. So I argue that saving Locke's natural law theory of moral obligation necessitates relaxing that allegiance and embracing more of a rationalist point of view.

Keeping all of this in mind, then, let us now examine Kant's moral theory. Recall that Locke says that the moral law is universally discoverable by and accessible to all reasonable people at all times, it is an objective law, and that the rational nature of human beings determines their particular duties. Kant says something similar about what he calls the "supreme practical principle" of morality for human beings: if such a principle exists, it must be "an end for everyone because it is an *end in itself*, [constituting] an *objective* principle of the will and thus can serve as a universal practical law."<sup>125</sup> According to Kant, this universal practical imperative, known as the Formula of Humanity, is the following: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."<sup>126</sup>

Now I think it is possible to read Kant's justification for this second formulation of the moral law as an example of a moral demonstration. But, unlike Locke, who insists upon deriving the content of the natural moral law from empirical evidence alone, Kant

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<sup>125</sup> *Groundwork of the Metaphysics of Morals*. Mary Gregor (trans. and ed.). Cambridge: Cambridge University Press (1997), 4:429, p. 37 (emphasis original).

<sup>126</sup> *GMM*. 4:429, p. 38.

offers an *a priori* demonstration of the content of the supreme practical imperative. He begins from a subjective conception of the imperative and moves toward an objective one. Kant says that human beings necessarily understand their own existence with reference to a basic assumption of the practical imperative: “rational nature exists as an end in itself;” in other words, each individual is compelled by her nature as a rational being to think of herself as being an end, i.e., having intrinsic value.<sup>127</sup> This realization is what Korsgaard calls having a “moral identity.”<sup>128</sup> Moreover, as a result of this realization attained through a process of self-reflection, one has certain expectations about the way she ought to be treated. Indeed, it is this deep understanding of oneself as having moral worth from which all other laws of practical reasoning governing the will are derived.<sup>129</sup> However, the demonstration of the moral law happens in the move from a purely subjective proposition, ‘I am a rational being existing as an end in myself and others should so act that they use my humanity always as an end and never merely as a means’, to the objective, universal practical imperative, which applies to all creatures with a rational nature. This is where Locke could most benefit from Kant’s wisdom. So what might a Kantian demonstration from the realization that ‘I am a being worthy of moral respect, who should be treated as such’ to the universal obligation that ‘I should treat all rational beings as worthy of respect’ look like?

First, this move from the subjective to the objective requires that I recognize myself not merely as a rational being, but as one among many members of a society of

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<sup>127</sup> *Ibid.*, p. 37.

<sup>128</sup> Korsgaard (1996), p. 132.

<sup>129</sup> *GMM*. 4:429, p. 37-38.

rational beings. Focusing upon our shared humanity shows that the Formula of Humanity is about respecting humanity in general, not just respecting any particular instantiation of humanity. Once I recognize, through a process of reflecting upon my own human nature, that because I am a rational being, I have intrinsic value and others owe me a duty of respect, I also recognize that those who owe me respect could not be bound by such a duty without themselves being rational.<sup>130</sup> Hence, if I truly believe that such a duty exists for others with respect to myself, then, in order to avoid contradiction, I must also believe that this duty applies to all rational beings, including myself, and in this way I have derived the objective, universal practical imperative: always treat oneself and others as an end, and never merely as a means.

Now my straightforward description of Kant's view above is based upon a rationalist doctrine<sup>131</sup> and although Locke rejects the rationalist idea that the natural

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<sup>130</sup> *GMM*. 4:448, p. 53-54. Korsgaard helpfully discusses the process of deriving the objective moral imperative from the subjective understanding. There is a worry about whether my explanation for the objectivity of the moral law could convince the egoist who is a committed solipsist. If consciousness is truly private and we have no access to the thoughts and intentions of others, then the exercise of putting ourselves in one another's shoes, so to speak, does not seem possible. And there is no contradiction in the thought 'well, the moral law may apply to you in this way, but I am an exceptional creature and so the moral law does not apply to me in the same way'. In response to this objection, Korsgaard denies that reasons and consciousness are internally illuminating, rather they are reflective; and she argues that human beings are "social animals in a deep way." So, when we expect someone to obey a duty, we think that there are reasons to obey the duty and we think those reasons are themselves objective; there is no need to move from the subjective to the objective on Korsgaard's view because the subjective is only a phenomenon, not part of the real explanation for the universal practical imperative ((1996), p. 132-145).

<sup>131</sup> *GMM*. 4:454, p. 58-59. However, Kant certainly does recognize 'human being' as a unique creature that must participate in both the noumenal and in the phenomenal worlds. That is why he explains that moral obligations must be principles of practical reason that are discovered through theoretical reason. They are synthetic *a priori* propositions (like the principles of mathematics). I think it is also worth pointing out that empirical evidence reinforces this rationalist demonstration because I can also reasonably suppose that others are rational and have a sense of the moral law by observing their behavior, interacting with them in different ways, and discussing reasons for acting. From the right type of observations and interactions, I can deduce that a particular individual has a rational nature; and, therefore, is deserving of my respect. Through these sorts of activities, individuals both express and affirm their humanity.

moral law is composed of innate moral principles, I think Locke actually accepts Kant's rationalism. For, in denying the possibility of innate moral principles, Locke does not deny the possibility of *a priori* knowledge; rather, what he finds objectionable about the earlier rationalist natural law theories is that their claims about how human beings know the moral law are inconsistent with our empirical observations of human behavior. If the moral law were, in truth, 'written on the hearts of men', then everyone would agree about its content and different cultures around the world would acknowledge the same basic moral principles. But this is not the case. By contrast, Locke seems explicitly to agree with Kant that the moral law can be demonstrated from the proper definition of 'rational human nature'; for example, Locke says that the law of nature is tied to the very essence of man. He says that man's moral duties "necessarily follow from his very nature...natural law stands and falls together with the nature of man as it is at present"<sup>132</sup> and this is a rationalist view.

However, Locke also asserts that we could find empirical evidence to substantiate the claim that human beings are essentially rational creatures who recognize that they have natural moral obligations, an assertion, which I rejected in section II of this chapter. Kant also agrees that there are limits to such an empiricist approach to the nature of morality. He argues that evidence from sense experience can neither prove that human beings are rational and autonomous, nor fully demonstrate the grounds for our moral duties; these ideas must be known *a priori*,<sup>133</sup> hence, my rationalist interpretation of

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<sup>132</sup> *Essays* VII., p. 201.

<sup>133</sup> *GMM*. 4:431, p. 39; 4:442-445, p. 48-51.

Kant's moral demonstration above. But while I think that rationalism provides a solid foundation for understanding human nature and demonstrating general moral obligations, or what Kant calls imperfect duties, I do not think we can rely upon rationalism to provide us with knowledge of the content of *specific* moral obligations, or what Kant calls perfect duties.<sup>134</sup>

Sense experience and observation reinforce *a priori* principles and provide facts about the world that are necessary for knowing our specific moral obligations and making the moral law a practical guide for human behavior. Although I can reason out the general moral obligation that I ought to respect humanity, knowing what that duty of respect entails in particular situations requires knowing some empirical data. For instance, given the correct definition of the term 'murder' I may be able to deduce *a priori* that murder is wrong from the Formula of Humanity. But in order to condemn a particular act of murder as a violation of the duty to respect humanity, I need to know some empirical information to help me identify the act as murder in the first place, e.g., physical facts gained through sensation and reflection (similar to those Locke offers in his description, which I cite in section II above); facts about human psychology and the psychology of the individual parties involved; and perhaps facts about the impact such an act would have upon society and its members. From all of this I would know that acting upon my desire to shoot Sally would be a violation of my duty to respect humanity. So, were Locke to accept a rationalist starting point for his demonstration of the natural moral

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<sup>134</sup> In fact, Kant admits this as well in the *Critique of Practical Reason* where he says "since the matter of a practical law, that is, an object of maxim, can never be given otherwise than empirically whereas a free will, as independent of empirical conditions...must nevertheless be determinable, a free will must find a determining ground in the law but independently of the *matter* of the law" (I., 1., §6, 5:29, p. 162 (emphasis original)).

law: the *a priori* definition of human being, as ‘rational creature’, and, following from that, my Kantian justification for the Formula of Humanity, he could then incorporate empirical data in order to derive specific moral laws. But without this rationalist foundation, I fail to see how Locke might demonstrate the moral law from empiricist precepts alone.

Thus far, I have established that Kant’s rationalist foundation for the moral law could help Locke to show that human beings come to know their moral obligations through a series of *a priori* and *a posteriori* demonstrations combining a rationalist definition of ‘rational human nature’ with empirical facts in order to derive specific moral obligations. In this final part of this section, I discuss Korsgaard’s solution to the problem of normativity because I think it is a credible theory of moral authority and I show that although Locke and Kant (via Korsgaard) fundamentally disagree about what justifies the demands that morality makes upon us, both think that normativity itself is part of the fabric of observation and reflection for rational beings. In other words, though Kant and Locke take the objects of observation and reflection to be different—for Kant, reason *creates* normativity by reflecting upon its fundamental rational nature and willing the moral law, while for Locke, one *discovers* the natural moral law by observing and reflecting upon objective facts about the world gained through sense experience *as a rational being*<sup>135</sup>—they agree that human beings cannot be obligated to obey the moral law unless they have the ability to recognize its commands as binding upon them and

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<sup>135</sup> On the difference between Locke and Kant, there is a clear statement of Locke’s view concerning reason’s role in morality’s authority at *Essays* I., p. 111.

they agree that that ability to recognize the moral law as authoritative, in turn, depends upon certain facts about human nature.

Kant is most often interpreted as a constructivist on the question of what gives the law moral authority.<sup>136</sup> According to this view, the claims that morality makes are binding upon us because, as rational creatures, we recognize a certain type of authority in ourselves (i.e., because I see myself as capable of self-conscious reflection concerning my own actions, I have the capacity to act autonomously, which gives me a kind of authority over myself) and the claims of morality are ones that I would will for myself.<sup>137</sup> So, I recognize the commands of the moral law as binding upon me and other rational beings because normativity comes from my own free will.

Korsgaard, filling in some of the details of the above viewpoint, offers a slightly modified version of Kantian constructivism. She calls her view “reflective endorsement.” The main feature of Korsgaard’s view is that the source of moral obligation is reason’s reflective endorsement of our desires; moral duties come from the will’s judgment of each desire according to a law that “arises from the nature of the will.”<sup>138</sup> She argues that, according to Kant, an autonomous moral agent deliberates about his actions by testing each of his desires or impulses to determine whether it is a *reason* to act. A desire or impulse is a reason to act if it stems from one’s consistent or genuine will and it is the

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<sup>136</sup> Rawls was perhaps the most famous proponent of this interpretation. Although, recently, Allen Wood (*Kantian Ethics*. Cambridge: Cambridge University Press (2007)) has argued for a realist interpretation of Kant, which might provide a better point of intersection between Locke and Kant.

<sup>137</sup> Korsgaard (1996), p. 19.

<sup>138</sup> *Ibid.*, p. 97-98.



sort of thing one could make public or will as a universal law. The difference between this and the more typical constructivist position is that the “reasons sought here are practical reasons; the idea is to show that morality is good for us.”<sup>139</sup> So, reflective endorsement is the test used to “establish the normativity of all [our] particular motives and inclinations” and to guide our actions in such a way as to give full expression to our very humanity.<sup>140</sup>

Now I think that Locke could make use of Korsgaard’s reflective endorsement view of moral authority in order to bolster his appeal to moral realism and his ability to solve the problem of normativity. What justifies morality’s claims upon us is that we are rational beings capable of evaluating our actions from an objective standard of the right or the good and as such, our judgments have a particular authority that the judgments of non-rational beings do not have. But for Locke, contra Korsgaard, that objective standard of the right or the good is independent of our rational nature. The light of reason or common sense is capable of discovering this independent standard, but Locke insists that our reasoning capacity in no way imposes a moral standard upon the world. Here Kant would object to Locke’s moral realism because if the moral law is external to the will, then the will is not absolutely free and freedom is the key to autonomy according to Kant.<sup>141</sup> But I do not see how the moral law’s being external to the human will threatens the autonomy of rational creatures. As rational beings, we are free to accept or to deny our obligations whether they come from reason reflectively endorsing our desires or from

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<sup>139</sup> *Ibid.*, p. 19.

<sup>140</sup> *Ibid.*, p. 89.

<sup>141</sup> *GMM*. 4:447-448, p. 52-54.

reason discovering the moral law from facts about the world and facts about human nature.<sup>142</sup> We are not free, however, to avoid the evaluation of our actions from that objective standpoint. This is something that rational beings do automatically or intuitively.

The process of observation and reflection is the distinguishing feature of a rational human nature that makes moral authority possible and because of this, human nature is such that knowing the law is enough to put one under an obligation. Again, it is this ability to reflect upon our actions and desires according to what is good for us that is the expression of our very humanity and, as such, it gives us access to a more complex level of conception, the moral realm. So, were Locke to adopt such a view, he would say that it is not just the ability to judge our actions against a moral law, but also the ability to judge our actions against a moral law, *obedience to which has been empirically proven to be what is best for us in the end*, that constitutes the source of normativity.

In addition, the natural law is not merely consistent with human nature; rather, by obeying the natural law, human beings develop their natures as rational creatures. So when an individual chooses to act against the law of nature by committing murder, for instance, he is not acting rationally; he is not obeying that which his reason tells him are his duties. But as long as human beings make proper use of their mental faculties and other essential features of their characters, they can arrive at certainty, i.e., moral and mathematical truths. The natural law helps human beings to fulfill their essential natures;

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<sup>142</sup> Kant's argument seems to be that there is a contradiction in denying our moral obligations. Rational creatures express their very natures in following the moral law, but in order to do this, they must also be autonomous and, therefore, free. But if the moral law is external to the will, then the will is not free; therefore, the law must be internal. In other words, the will itself must give the law to itself.

natural laws are good for human nature and certain duties do follow from man's constitution as a rational being. Locke argues that from the nature of man as a rational being we can derive certain duties: to revere God, to promote justice, to have regard for the property of others, to live in an ordered society with others.<sup>143</sup> Thus, it is reason that allows human beings both to ask and to answer the question about the source of moral bindingness.

In this section, I have shown that by relaxing his commitment to empiricism, Locke's natural law theory of moral obligation can be modified in such a way as to answer the two big questions: how do we know our moral obligations and what is the source of their authority? With regard to the first question, Locke must simply adopt Kant's definition of human being as a rational being and my description of the *a priori* demonstration of the general moral law as the rationalist foundation upon which to build his *a posteriori* demonstration of specific moral obligations. This is a complete explanation of how human beings come to know the natural moral law. With regard to the second question, the repair of Locke's theory is more complicated. Because moral realism is weak on the question of what gives the law moral authority, Locke must incorporate some standard for judging that the moral obligations that we derive are in fact principles that guide us to do what is best. Locke thinks that there is an objective moral standard that applies to us and is best for us because of certain facts about human nature and certain facts about the world. Korsgaard lays out facts about human nature that Locke can borrow to explain why it is good for us to do certain duties prescribed by the natural

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<sup>143</sup> C.f., Aquinas's list of natural inclinations in section II of chapter two above.

moral law. Human beings are the only creatures capable of evaluating actions according to an objective standard and this capability is intuitive, it is impossible for us not to evaluate our actions in such a way. Therefore, what gives the moral law authority is our evaluation of our own actions according to the objective, natural moral law.

Finally, going back to the Lockean test. This view remains a natural law theory because it relies upon the principles of moral realism; it maintains that the connection between human nature and the natural law is crucial for knowing and being bound by the law; and it provides principles of practical reason according to which human beings discover the guide to their behavior. Though Locke must give up his search for a pure naturalist empiricism, accepting a Kantian rationalist foundation makes it possible to demonstrate the natural moral law and given that the result is a more plausible natural law theory of moral obligation, I would say that relaxing his commitment to empiricism is a small price to pay.

#### *V. Broader Implications*

To conclude this chapter, I want to discuss some of the broader implications of the theory of moral obligation I have put forward for Locke's later works in order to make explicit the connection between the two parts of this project. First, several of Locke's remarks in the *Second Treatise* clearly originate from the *Essays*. He discusses the state of nature as having a law of nature governing it;<sup>144</sup> and that the law of nature

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<sup>144</sup> *TT*. II., §6, §7, and §19 should be compared with *Essays*. V., p. 63 and VIII., p. 115.

does not “cease in society,” rather, civil laws derive their justice from the natural law.<sup>145</sup> Most notably, in chapter five of the *Two Treatises* in his discussion of property there are several references to the early natural law theory. Here Locke builds his case that the right to private property is part of the natural law and prior to civil society, the seeds of which he sows in the eighth of his early essays.<sup>146</sup> Also, political obligation, as I discuss in the upcoming two chapters, is a species of moral obligation. So making sense of Locke’s theory of political obligation presupposes that he has a coherent theory of moral obligation as well. I will show that having a comprehensive theory of moral obligation is essential for Locke’s consent theory of moral obligation. In the following chapter, I argue for a natural duty to consent according to which individuals have a moral obligation to consent to be bound by the civil law.

If the view I have defended here is correct, Locke comes closer to having a complete theory of moral obligation than most scholars give him credit for. Thus, our ultimate goal in this and the previous chapter has been to distinguish the salvageable parts of Locke’s moral theory from those that cannot be saved and, using the precision of a skilled surgeon, to reconstruct a whole theory combining the healthier parts with those which Kant donates.

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<sup>145</sup> *TT*. II., §12 and §135.

<sup>146</sup> *TT*. II., §30, §31, §37, §51.

## Part II, Chapter Four:

### Locke's Theory of Political Obligation: A Reinterpretation

#### *I. Introduction*

According to the standard view, Locke endorses two separate theories of obligation, one absolutist and the other voluntaristic.<sup>147</sup> Whereas human beings are morally bound to obey the natural law by their rational natures, they are morally bound to obey civil laws only by their voluntary consent. On the surface, it seems that Locke cannot consistently maintain both theories because absolutism and voluntarism seem incompatible: if all moral duties derive from our shared rational human nature and bind us precisely because we are rational, then there is no room for voluntarism—no room for individual autonomy in deciding which moral duties are binding—at least not without encroaching upon the supposed absolute authority of the natural law.<sup>148</sup> If political obligations are a subset of moral duties, then should they not also derive from our shared rational human nature and bind us by nature, rather than by consent?

One obvious way to deal with the apparent incompatibility is to argue that natural law and civil law have authority over different domains. In other words, some moral

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<sup>147</sup> This type of voluntarism ought not be confused with the normative theological voluntarism (or divine command theory) I discuss in the previous two chapters with reference to the authority of moral obligations. For the purposes of this and the following chapter, voluntarism refers to the view that special obligations (i.e., those that are owed to a specific subset of people in contrast to natural duties that are owed to all people) can only be acquired through the voluntary act of the agent to whom obligations then belong.

<sup>148</sup> In fact, Locke himself acknowledges the incompatibility of voluntarism and the authority of natural duties in his prohibition against allowing an individual to voluntarily sell himself into slavery. Voluntarily choosing to hand over control of one's body to another is impermissible because slavery is fundamentally opposed to the natural law. According to the natural law we each have a natural right to private property, which includes a right to our bodies (*TT*. II., §23).

duties are absolute and binding upon us because they derive from a universal law of nature, while other moral duties are acquired and binding upon us only if we first voluntarily agree to be so bound. This is a central claim of the standard account. And, building upon this claim, advocates of the view argue that since natural laws neither dictate the proper form of government nor particular civil statutes, it follows that political obligation belongs to the latter category of special moral duties. Moreover, as a staunch supporter of voluntarism regarding political obligation, Locke must have intended that his consent theory exclude the universal moral imperatives associated with his natural law theory.<sup>149</sup> However, there is available a deeper interpretation of Locke's theory of political obligation which reveals this dichotomy to be perhaps one of the greatest misapprehensions about Locke.

In this chapter, I challenge the standard interpretation of Locke's theory of political obligation and I argue that although consent is necessary and sufficient for political obligation, there are nonetheless universal moral constraints upon the individual choice to consent. Thus, though it is true that individuals are bound to obey only those political institutions to which they have consented, there is a natural moral duty to consent when certain conditions are met. These conditions are as follows. First, consent must make it possible for an individual to satisfy more of his moral obligations than he would if he failed to consent. This first condition requires a second: the political institution in question, usually the state, must be reasonably just. Once these conditions

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<sup>149</sup> This is especially true with reference to those who wish to interpret Locke as a utilitarian or a philosophical anarchist. See, for example, Strauss's *Natural Right and History* (1957) and Simmons's *On the Edge of Anarchy* (1993).

are met, it is possible to criticize those who fail to consent for immoral, irrational, or unprincipled reasons. On my interpretation, then, Locke views consent as the necessary vehicle through which, most if not all, individuals living in civil society fulfill their natural moral duties.

I proceed as follows. In section II, I raise a difficult conceptual challenge to the standard view, i.e., consent is not a viable theory of political obligation because it gives too much respect to those who fail to consent for unacceptable reasons, and I show that appealing to Locke's doctrine of tacit consent cannot stave off the objection. I also point out two additional interpretive challenges to the standard view: natural duties limit consent in Locke's argument against selling oneself into slavery and in his views about property acquisition. These two examples call into question Locke's status as a steadfast voluntarist. Then, in the third section, I defend my reinterpretation of Locke's theory of political obligation arguing that in addition to the moral obligation to obey the law acquired through consent, he ought to introduce a meta-obligation governing the choice to consent. Adopting this natural moral duty to consent would solve several problems. First, it addresses the two interpretive challenges to the standard consent theory line raised in section II. Second, it makes Locke's theory of political obligation more consistent with his view of the relationship between citizen and state and his defense of a remedial right to revolution. In addition to these interpretive advantages, my reconstruction of Locke's theory of political obligation adequately responds to the conceptual challenge to standard consent theory and has additional conceptual advantages



over other popular contemporary theories of political obligation. Finally, in section IV, I raise and respond to two objections to my interpretation.

## *II. Challenges to the Standard View*

In the *Second Treatise*, Locke explains the origins of political society. This project primarily concerns the two closely related questions of how and why an organized community might emerge from a previously unorganized throng of individuals. The simple answer to both questions is consent: the self-interested agreement among the members of a putative group living in the state of nature to give up some of their individual rights in exchange for the safety and security of living in civil society. Says Locke, voluntary consent “*puts Men out of a State of Nature [and] into that of a Commonwealth.*”<sup>150</sup> So, Locke’s consent theory of political obligation is integral to his developmental story about the creation and evolution of civil society.

The above explanation for the original establishment of an organized commonwealth has the advantage of being simple and intuitively plausible; however, the full narrative about how consent might also ensure the continued existence of such a commonwealth is more complicated than this exchange of liberties for conveniences initially conveys. For, if it were only self-interest, which depends upon the *perceived* personal benefits gained from being a member of the group, that induced individuals to enter a political community, then once one decides that the benefits of living within civil society no longer outweigh the costs, it would seem that she is free to return to the state

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<sup>150</sup> *TT. II.*, §89 (emphasis original).

of nature regardless of whether the group has actually failed to uphold its part of the exchange.<sup>151</sup> This explanation, then, would leave open the real possibility of political anarchy, which Locke wishes to avoid.<sup>152</sup> Hence, in order to ensure the survival of organized political communities, the agreement to become a member of a particular community must carry certain responsibilities.

Fortunately, Locke recognizes this worry about self-interest as a motive for entering civil society and clearly intends for the act of consent to be more than merely a prudential exchange of liberties for conveniences. While one might initially choose to enter civil society because he is motivated by self-interest, this choice has significant normative consequences. The agreement among the members of a newly formed commonwealth establishes a social contract, which morally binds all parties to perform certain acts in accordance with their obligation to the group. Locke says that by choosing to enter into civil society one “authorizes the Society...to make Laws for him as the publick [sic] good of the Society shall require; to the Execution whereof, his own assistance (as to his own Decrees) is due.”<sup>153</sup> The choice to enter into a particular civil

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<sup>151</sup> This seems to be an especially difficult problem for Locke, as opposed to Hobbes, for instance, since Locke envisions the state of nature as one in which, at least some, individuals are capable of discovering and following the natural law (i.e., moral law). The “inconveniences” of living in the state of nature seem not to impose as much of a cost, especially if the alternative requires giving up certain liberties that one deems particularly important. Moreover, even if we take into account the severe costs of living among others in the state of nature without any established standard of justice, Locke still thinks that those potential costs (e.g., the risks of vigilante justice) would be easier to bear than the actual costs (e.g., the complete loss of individual freedom) associated with living under the rule of a tyrant. That some individuals who have lived within civil society could decide that it is more beneficial for them to return to the state of nature, then, is a real possibility for Locke, though it may not be for those who tend toward Hobbes’ nastier picture of the state of nature.

<sup>152</sup> He speaks of the “Patron[s] of Anarchy” with derision at *TT*. II., §94.

<sup>153</sup> *TT*. II., §89.

society is a sign that one accepts a moral obligation to obey the established rules of that society, regardless of whether those rules actually serve his immediate personal interests, and to treat those rules as if he himself had established them as a guide to his own behavior and the behavior of his fellow citizens. Thus, the decision to enter into civil society is not to be taken lightly. It is a pledge to recognize the authority of a particular government and so long as that government fulfills its correlative moral obligations, which it also acquires through the social contract, its constituents are not in fact justified in returning to the state of nature. In this way, personal consent explains not only the initial move from the state of nature into a commonwealth, but also the sustained existence of the commonwealth composed of the original members and their obligations to the group as a whole.<sup>154</sup>

The heart of the consent theorist's doctrine, then, is the claim that "no man is obligated to support or comply with any political power unless he has personally consented to its authority over him."<sup>155</sup> Simply put, consent is necessary and sufficient for political obligation. Thus, according to the standard interpretation of Locke's consent theory of political obligation, if we wish to know whether an individual is obligated to obey the law of his state, the only relevant question to ask is whether he has consented. Stated as such, consent theory has several advantages. First, consent is a simple and direct way to evaluate whether an individual is politically obligated. Second, it provides some indication of state legitimacy. Third, it explains government's obligation to respect

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<sup>154</sup> Notice that explaining the sustained existence of the commonwealth and establishing the obligation to obey the law for those born after the initial social contract will require the consent of future generations.

<sup>155</sup> Simmons. *Moral Principles and Political Obligations* (1979), p. 57.

individual autonomy, which is central to the argument for representative democracy. Of course, whether these admittedly oversimplified advantages are sufficient to recommend consent as *the* solution to the problem of political obligation will depend upon a comparison with the advantages of other possible solutions, but I do not wish to dwell on the issue here. Suffice it to say that the advantages of consent theory are significant enough to warrant consideration as a plausible theory of political obligation.<sup>156</sup>

However, despite its advantages there are also some serious objections to consent theory. Perhaps the most widely known objection is what I call descriptive inadequacy: the charge that most citizens living within any particular political society have not consented and are, therefore, not obligated to obey their government. This objection challenges the validity of actual consent on practical grounds. It says that although a genuine act of consent, theoretically, would bind citizens to obey their governments, the way in which actual citizens usually find themselves subject to a particular regime does not allow for such acts of genuine consent and any proposed theory of political obligation that fails to explain how most people are politically obligated surely ought to be rejected. I address this first objection elsewhere.<sup>157</sup>

Here, though, I wish to focus upon a different objection: the charge that consent is too permissive a theory of political obligation. The problem is that being committed to political voluntarism means that there can be no moral constraints upon the choice to consent. So, the objection goes, even if individuals could perform acts of genuine

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<sup>156</sup> I treat this issue in more detail in chapter five.

<sup>157</sup> Again, see chapter five.

consent, consent itself is invalid as a theory of political obligation because it gives too much credence to “immoral, irrational, and unprincipled failures to consent.”<sup>158</sup>

This second objection challenges consent on theoretical grounds. If consent is necessary and sufficient for political obligation and there are no moral constraints upon the choice to consent, then it seems that people could avoid acquiring certain moral obligations without having any justification or even giving it any thought. But if the obligation to obey the law can be so easily circumvented, then it is difficult to see in what sense it is a moral obligation at all. That consent theory cannot adequately distinguish between dissenters, who genuinely wish to withhold consent for principled reasons and, therefore, arguably ought to be free of any political obligation, and non-consenters, who simply fail to consent without having (good) reasons that might release them from their political obligations, is a serious barrier to explaining how anyone might acquire a moral obligation to obey the law.

The complaint that consent theory is too permissive can be fleshed out further in terms of a type of free-rider problem, but not as it is usually understood. Hobbes clearly lays out what we recognize as the classic free-rider problem in chapter XV of the *Leviathan* where he discusses the fate of “the Foole.” The free-riding fool exploits others’ willingness to fulfill their moral obligations by strategically and, whenever possible, surreptitiously violating his own moral obligations. He willingly breaks contracts that he has voluntarily agreed to honor when doing so would be to his benefit and, consequently, cannot be trusted to abide by the fundamental principles of a secure political community.

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<sup>158</sup> Christiano, Thomas. “Political Authority.” *Stanford Encyclopedia of Philosophy* (online). Paraphrasing Joseph Raz’s *Morality of Freedom* (1986).

Thus, allowing the free-rider to remain in civil society would be a violation of the natural law of self-preservation and when he is discovered, Hobbes says, he must be cast out.

Now, the situation that best characterizes those who fail to consent without adequate reasons is slightly different, though I think it is still correct to say that non-consenters are free-riders of a particular sort. Similar to Hobbes's description of the free-rider problem and its exemplar, "the Foole," the non-consenter seems to exploit those who accept the moral authority of the law because she benefits from the security of a system in which most individuals morally bind themselves. But, according to the standard interpretation, non-consenters have not acquired a moral obligation to obey the law precisely because they, unlike Hobbes's "Foole," have not voluntarily agreed to be so bound. So on what grounds can we criticize those who fail to consent without offering good reasons? What moral obligation have they violated if not the obligation to obey the law?

An advocate of the standard view might answer the above questions by appealing to Locke's doctrine of tacit consent. He might argue that these so-called 'non-consenters' are free-riding in precisely the Hobbesian sense because by living within civil society and enjoying the benefits that such an arrangement affords them, they are in fact implicitly demonstrating their agreement to obey the laws of that political community. So-called 'non-consenters' have acquired the obligation to obey the law through tacit consent. Therefore, when they subsequently fail to obey the law, they breach the social contract that they have implicitly agreed to and they violate the corresponding moral obligation

that they have acquired by their “very being” within that civil society.<sup>159</sup> And again, society has every right to criticize those who ignore their moral obligations.

In essence, the advocate of the standard consent view responds to the objection that consent is overly permissive by saying that alleged ‘non-consenters’ cannot hide behind the excuse that they have not (expressly) consented and are, therefore, not bound to obey the law because they have in fact implicitly, but no less actually, consented in choosing to remain. Being a non-consenter, according to the standard view, then, requires more than merely failing to acknowledge that one is bound to obey the law; it requires opting out of the system altogether it seems and because of the severe risks attached to such a move, it is unlikely that anyone would do so without principled reasons. But even if someone did opt out for immoral, irrational, or unprincipled reasons, he clearly would not be free-riding. So, when we take into consideration Locke’s doctrine of tacit consent, the over-permissive objection seems to lose its force; the standard view, in point of fact, does not give too much respect to unjustified failures to consent. Instead, those who do not expressly consent face two options: either they must demonstrate their genuine dissent by openly protesting or leaving entirely or if they choose to remain in civil society without voicing dissent, they must understand that they leave themselves open to being treated as if they have actually consented.

However, this response does not entirely disarm the objection. First, tacit consent is overly permissive in the opposite direction because rather than saying that no one or almost no one consents to the state, it assumes that everyone in the territory at any given

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<sup>159</sup> *TT*. II., §119.

time has consented. Though advocates of the standard view are correct to pursue the intuition that we can criticize non-consenters for somehow free-riding upon the backs of those who openly consent, it is not true that non-consenters who remain within society have, in any sense, agreed to obey the law. It seems that, according to Locke's account of tacit consent, one could unintentionally, but somehow voluntarily, accept the authority of the state. However, one could easily drive on the highway, own a house, and reside within the territory of a state (for example, if one were a political dissident) without ever intending to consent or even recognizing that one might be politically obligated on account of such actions. If Locke thinks that one may unintentionally consent, he surely holds the wrong conception of consent.<sup>160</sup> I maintain that consenting requires just as much moral, rational, and principled reasoning as dissenting. By relying upon tacit consent, the advocate of the standard consent theory view responds to the charge of over-permissiveness with over-permissiveness in the direction of the opposite extreme. The more plausible solution lies somewhere in the middle.

Second, given the above difficulties with tacit consent, it may help to describe Locke as advocating a slightly different view of political obligation whereby citizens acquire a moral obligation to obey the law in exchange for the benefits gained from living within society. This benefit view would allow Locke to avoid worries about whether supposed 'non-consenters' have actually agreed to be politically obligated, while at the same time remaining completely unaware of their obligation. The problem for advocates of the standard interpretation, however, is that this would move Locke away from consent

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<sup>160</sup> Here I agree with Simmons's suggestion that Locke seems to be confusing consent with assent in his decisive critique of Locke's doctrine of tacit consent (1979), p. 83-94.



theory and toward a theory of political obligation based upon the benefits one gains from living in civil society, a reciprocation theory.<sup>161</sup> Whereas the essential feature of consent theory is the voluntariness of one's obligation, the essential feature of the reciprocation theory is one's having received certain benefits, regardless of whether she wishes to be so benefitted.<sup>162</sup> Thus, the advocate of the standard view cannot explain how it is possible to criticize non-consenters, who free-ride by failing to politically obligate themselves, without compromising Locke's commitment to political voluntarism because both Locke's account of tacit consent and the modification of it as a reciprocation theory eschew voluntarism.

It certainly looks as though the objection that consent is too permissive a theory of political obligation cannot be easily addressed by the standard interpretation and I think that this theoretical objection threatens consent theory in a way that advocates of that view have overlooked. If this objection cannot be answered, Locke's theory of political obligation is in serious trouble. So a more plausible interpretation must explain how Locke can avoid this objection. In the next section, I offer a reinterpretation of Locke's theory of political obligation and explain its advantages in this regard. But before I move to my own interpretation, I wish to point out two other problems with the standard view.

In addition to the above conceptual issue, there are some perhaps surprising interpretive problems with the standard view. First, it is not obvious that Locke is the diehard voluntarist that proponents of the standard view make him out to be. Focusing

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<sup>161</sup> Simmons (1993), p. 249.

<sup>162</sup> Nozick develops his long-standing criticism of the benefit or reciprocation view precisely along these lines in *Anarchy, State, and Utopia* (1974), p. 90-95.

upon consent as the only indication of whether one is bound to obey the law overlooks the important role that moral duties play as a check upon individual choice in Locke's theory. He clearly recognizes that there are and ought to be limitations upon consent when he argues that one cannot voluntarily sell oneself into slavery, for instance.<sup>163</sup> Locke's explanation for this position is as follows: because freedom is necessary to fulfill one's natural duty of self-preservation, one cannot consent to give up his freedom and become the slave of another. Being bound by the natural law to preserve oneself, he says, entails that human beings are not free to hand over absolute control of their lives to another: "No body can give more Power than he has himself; and he that cannot take away his own Life, cannot give another power over it."<sup>164</sup> Here we see the natural duty of self-preservation trumping free choice. So, according to Locke, consent does not exclude universal moral imperatives associated with natural law theory; on the contrary, one's natural moral duties limit the power to consent.

Additionally, even during his discussion of property—often cited by the most ardent defenders of Locke's voluntarism—natural duties play an important role. Because Locke seems to argue so vehemently that property is such that "*without a Man's own consent it cannot be taken away from him*"<sup>165</sup> and since he places so much emphasis upon the protection of private property as a main reason for individuals to enter into civil society in the first place, it is tempting to claim that he also thinks consent ought to be the

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<sup>163</sup> *TT*. II., §23.

<sup>164</sup> *Ibid.*

<sup>165</sup> *TT*. II., §193 (emphasis original).

sole basis for political obligation. Indeed, this has been almost exclusively the reading of Locke's theory of political obligation; however, there are good reasons to question this as an overgeneralization.

Advocates of the standard view often have an exceedingly shallow account of Locke's state of nature as a state where individuals live according to their own rules. But it is more than simply a state in which men are born free from political coercion; for individuals living in the state of nature importantly are not absolutely free. They are obligated by the law of nature to obey their natural duties, among them, to preserve themselves and others, to treat people with respect, and to keep promises.<sup>166</sup> Also, as I mentioned at the end of the previous chapter, Locke does not intend for the natural law to loosen entirely its grip upon man's will once he crosses the threshold into civil society.<sup>167</sup> On the contrary, Locke's optimism about the influence of natural moral duties within the political realm and the ability of human beings to limit themselves through their rational natures, leads him to argue for the sufficiency of a limited and unobtrusive government.

According to Locke, natural duties limit all of our rights in the state of nature, including the right to own property. In the first case, because God gave the resources of the earth to all in common as necessary for their survival, making use of those resources cannot be a matter requiring consent. In a sense, everyone has an equal claim to as much as he needs for his own survival, but anything beyond the basic minimum must be limited

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<sup>166</sup> *TT*. II., §6. Also, unlike Hobbes, Locke distinguishes between the state of nature and the state of war the main difference being that in the state of war, there is no moral law binding the parties living under such circumstances (*TT*. II., §16-18).

<sup>167</sup> Laslett, Peter. "Introduction" in *Two Treatises of Government* (1998), p. 100.

by natural duties. So although it is not consent that limits our natural right to acquire property in the state of nature, that right is not totally without boundaries. Locke expresses this by specifying the two provisos limiting one's right to acquire property. First, the sufficiency proviso: that we must leave "enough, and as good...in common for others."<sup>168</sup> Secondly, along the same lines, one must also be guided by the spoilage proviso: no one may acquire more than he can make use of before his supply spoils. He says that we are to keep within the "*bounds*, set by reason, of what might serve for [our] *use*."<sup>169</sup>

Though Locke relies heavily upon consent and natural rights in developing his theory of property ownership, his basic position is this: in the state of nature where there is a vast supply of unclaimed territory it is not necessary to secure the consent of others in order to lay claim to property.<sup>170</sup> However, once one has laid claim to a plot of land by increasing its value through physical labor, he removes that piece of land from the common and it then falls under the principle of consent. Once the piece of land is privately owned, someone else may claim it only if the current owner agrees to transfer his right of ownership to that other.<sup>171</sup> Thus, our right to the acquisition of property in the state of nature is not solely guided by consent; instead, it is the principle of justice and the

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<sup>168</sup> *TT*. II., §27.

<sup>169</sup> *Ibid.*, §31 (emphasis original).

<sup>170</sup> *TT*. II., §28-30. I realize that, technically speaking, what I refer to as "unclaimed" territory in the state of nature is actually owned by everyone in common. According to Locke, God gives the resources of earth to everyone to use as necessary for his or her survival.

<sup>171</sup> For a thorough, analytic examination of Locke's labor theory of property acquisition see Lawrence Becker's *Property Rights: Philosophic Foundations* (1977), p. 32-56.

bounds set by reason that determine the natural moral duties limiting our right to acquire property. It is this natural sense of moral duty that I examine in the next section in order to show that there is another more plausible interpretation of Locke's political theory.

In this section, I have laid out a theoretical challenge to the standard consent theory of political obligation and raised additional challenges to this view in the spirit of Locke's own reliance upon natural moral duties as limits to the individual power to consent. The limits that Locke places upon consent as seen in his rejection of the possibility of voluntarily selling oneself into slavery and in his principled limitations on property acquisition in the state of nature call into question Locke's unfaltering commitment to voluntarism. Still, those who wish to read Locke as a consent theorist about political obligation are right to emphasize the role that the state of nature plays in his theory. It is his conception of the state of nature, where human beings live together, their actions being bound by the law of nature, without any common superior (besides God), that Locke understands as the background against which the aims of civil government should be understood. Now I turn to my interpretation of Locke's theory of political obligation, which attempts to take into account the above problems with the standard view and to place consent theory back on solid ground.

### *III. The Natural Moral Duty to Consent*

In this section, I argue for a reinterpretation of Locke's theory of political obligation, which not only has interpretive advantages over the standard view, acknowledging the limitations that Locke himself places upon consent and making his

theory of political obligation more consistent with his general account of the relationship between citizen and state and his support of a remedial right to revolution, but also has distinct conceptual advantages as it is a better theory of political obligation overall. In order for advocates of the standard consent theory line to maintain their view, they must turn a blind eye toward anything that challenges Locke's commitment to voluntarism and in so doing, they adhere to a superficial account of Locke's political theory.

On the one hand, the conventional account ignores the role that natural duties play in defining the aims of the state. It emphasizes the personal safety and material security offered by the state, but overlooks the important moral benefits that the state also provides its citizens. This characterization makes the state seem primarily valuable only as a tool for survival and increasing prosperity, as a sort of necessary evil, rather than as an entity having moral value and being at least partially responsible for the moral improvement of its members. While it is certainly the case that Locke views the state as an instrument for securing life, liberty, and property,<sup>172</sup> I argue that he also views it as having a moral purpose. On the other hand, consent ignores the role that natural duties play in defining the aims of citizens. Citizens are never completely free from the imperatives of the natural law and so it is always possible to evaluate their actions on the basis of their natural moral duties. But consent treats individuals as absolutely free with regard to deciding whether to accept the moral obligation to obey the law. So the basic standard consent account leaves some explanatory gaps and I aim to fill these gaps in what follows.

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<sup>172</sup> *TT*. II., §131.

To begin, I sketch a rough comparison between my interpretation and the interpretation I have been discussing in order to help us find our bearings. Like proponents of the standard interpretation, I retain Locke's categorical commitment to actual, personal consent being necessary and sufficient for political obligation. But, unlike proponents of the standard interpretation, I argue that over and above the moral duty to obey the law that one acquires only after she has consented, given his other commitments, Locke should accept an additional natural moral duty that guides the individual decision to consent. This second, meta-obligation is a natural moral duty to consent when certain conditions obtain and is key to condemning, as morally impermissible, the failure to consent without (good) reasons.

I find support for this natural moral duty to consent in three sources. First, the seeds of a theory of civil government according to which the state actually helps individuals to fulfill their natural moral duties lie hidden in Locke's description of human nature and the state of nature. Though it is true that according to Locke's vision of the state of nature it is possible for individuals to be moral, it is also true that, given a relatively just civil society, the majority of us would be morally better off living in civil society than we would be living in the state of nature. The reason for this is not merely that the state has the power to coerce individuals to comply with the law, but that the state empowers individuals to make better moral decisions and recognizing the authority of the state boosts individual accountability providing an additional reason to fulfill one's moral obligations. Thus, it is rational for individuals to consent in order to improve their opportunities to be moral. Second, the natural moral duty to consent fits well with

Locke's remedial right to revolution according to which revolution is only permissible when the state has done something unjust. If there are conditions under which dissent is obligatory, then it seems reasonable that there would be conditions under which consent is obligatory. Third, my reconstructive approach is more charitable to Locke saving his theory of political obligation from the charge of over-permissiveness and reviving consent, albeit a qualified version of consent, as a plausible solution to the contemporary problem of political obligation.

Making sense of a natural moral duty to consent first requires returning to Locke's vision of human nature and understanding how this affects Locke's view of the natural state of human beings. A close look at these features also will help clarify the relationship between citizen and state. First, in his political works, Locke emphasizes that human beings living in the state of nature are all born free from and equal to one another. Beginning from what he regards as a common sense starting point, namely, that humans are the creatures, dependents, and servants of God, Locke goes on to argue that God, as the all-powerful creator, is in fact the only natural superior with the absolute right to demand that his subjects do his will.<sup>173</sup> So although human beings are naturally subject to God, they are naturally subject to no earthly sovereign.<sup>174</sup> Yet, even the earthly freedom

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<sup>173</sup> *TT*. II., §6. Locke echoes this sentiment in many places throughout his writings. We have already seen that he makes similar statements in the *Essays*. III., p. 111-113; IV., p. 151-157; and VI., p. 118-189.

<sup>174</sup> Locke directs this argument against Sir Robert Filmer, who was famous among Locke's contemporaries for arguing for the divine right of kings: the idea that political power is naturally owed to the direct descendents of Adam (*Patriarcha* (1680)).



that human beings enjoy is not absolute<sup>175</sup> because in addition to being born with the natural rights of freedom and equality, human beings are, by nature, rational and, as we have seen, this reasoning capacity is a precondition for moral obligation.<sup>176</sup> According to Locke, the natural law is morally binding upon individual human beings because it is discoverable by human reason and from this it follows that there is a natural moral law governing the state of nature.<sup>177</sup> Thus, human beings are born naturally subject to God and their rational nature, combined with certain empirical facts about the world, makes them naturally obligated to obey the natural moral law.

Recall that Locke's naturalist empiricism briefly mentioned in the preceding paragraph and examined at length in chapter three, exhibits a unique optimism about the ability of human beings to uncover the content of the natural moral law simply by observation and reflection. However, the previous examination of the problems with Locke's underdeveloped natural law theory and my reconstruction of a Lockean moral theory shows that this optimism does not take us very far. Still, though Locke thinks that knowing one's moral obligations is sufficient for moral authority, he need not be committed to the stronger claim that knowing one's moral obligations is also sufficient to motivate one to fulfill those obligations. While Locke certainly thinks that discovering

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<sup>175</sup> For, absolute freedom has no meaning, as Locke says: "*where there is no Law, there is no freedom*" (*TT*. II., §57 (emphasis original)), which I take to mean that were there no rules governing behavior, freedom would be practically meaningless. If, for example, there were no laws against stealing, then I would need to spend more time and energy defending my property and, consequently, I would be less free.

<sup>176</sup> *TT*. II., §57, §60, and §63.

<sup>177</sup> *Ibid.*, §12 and §124. Indeed, he says that to rational creatures, the natural law is quite plain and intelligible, actually plainer and more intelligible than the civil law. The problem lies in trying to apply the natural law to specific circumstances and being able actually to fulfill one's moral obligations.

basic moral principles may be nearly an automatic task for rational beings, he also acknowledges that actually living up to these principles is far from automatic. We can imagine three potential problems arising: those who fail to fulfill their moral obligations do so either because (1) they fail to discover the *general* principles of natural law; or (2) they discover the general principles of natural law, but fail correctly to apply those principles to specific circumstances in order to discover their *particular* moral obligations; or (3) they manage both to discover general principles and particular moral obligations, but through *weakness of will* are unable to perform the actions required by their moral obligations. Each of these potential moral failures is a failure of rationality.

On Locke's view, ordinary human beings rarely make the first mistake because the general principles of natural law are precepts of common sense, principles such as 'do justice' and 'be charitable.' He thinks that such general imperatives, what Kant calls imperfect duties, are quite obviously correct and necessary for even minimal cooperation among human beings living in common. Far more frequent are failures of the second and third types, namely, problems related to applying general principles to specific circumstances, e.g., 'recognizing the just thing to do' or 'understanding what the principle of charity demands given this particular set of circumstances', and mistakes arising from a weak will. Not only must individuals contend with an epistemic challenge: applying an unwritten, general natural law to everyday scenarios with many different and constantly changing variables, but they must also deal with several will-defeating factors. Various opinions, contrary interests, and the instinctual drive toward partiality all hinder

the ability of individuals to fulfill their moral obligations, natural or otherwise.<sup>178</sup> So while Locke is clearly optimistic about the ability of all individuals to discover the basic principles of the natural moral law through their natural reasoning capacities, he is also aware of the features of human nature that can become barriers to living according to these principles.

Nonetheless, some, the most rational among us, are able to know the natural law, properly apply it, and set aside personal biases, etc. in order to fulfill their moral obligations. Admittedly, such reasonable persons are few, but if even ideally rational creatures were neither able to properly apply the natural law nor fulfill their moral obligations, it seems that Locke could not intelligibly speak about the differential moral capacities of individuals<sup>179</sup> or the applicability of the natural law in the state of nature. Evidently, then, not all are misled by their inability to apply the natural law or by their passions and interests.<sup>180</sup> Yet, because the reasoning capacity varies so widely among individuals, others, and perhaps the majority of individuals fail to fulfill their moral obligations when faced with ordinary moral challenges. Thus, it is not skepticism about the ability to know the imperatives of the natural law, but rather doubt about the ability to apply them and to maintain control over one's passions that Locke thinks is the main cause of moral failure.

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<sup>178</sup> *TT*. II., §13, and §123-125.

<sup>179</sup> *Ibid.*, §54.

<sup>180</sup> Seliger "Locke's Natural Law and the Foundation of Politics." *Journal of the History of Ideas*. Vol. 24, No. 3 (Jul.-Sept., 1963), p. 352.

Moreover, certain aspects of the state of nature intensify these difficulties. Locke says that in the state of nature every person is judge for himself and every person has the executive power to enforce the law of nature;<sup>181</sup> these factors surely increase the potential for individuals to fail to satisfy their natural moral duties. Were all human beings ideally rational, the natural state of man, in which each individual judges himself against the natural law but is also subject to all others insofar as everyone has the power to punish him if he violates the law, would be a perfectly just and peaceful state. However, all human beings are not ideally rational and I think Locke underestimates the difficulty of being moral given the wealth of individual control and the scarcity of individual accountability in the state of nature. If all have equal rights to both judge and enforce the law of nature without limitation, there is little incentive to hold oneself to high moral standards and injustices will inevitably occur. The two most common barriers to fulfilling one's moral obligations, the epistemic challenge and weakness of will, have no remedy within the state of nature as Locke envisions it; rather, the state of nature appears to be a prisoners' dilemma as Hobbes describes it. Thus, in the state of nature there is no security against either the innocent being punished or the guilty being disproportionately punished.

Whereas there is little doubt that the state of nature poses special challenges to the capacity for individuals to fulfill their moral obligations, organized civil society actually helps to alleviate the most common problems that prevent citizens from fulfilling their moral obligations. In the state of nature, the laws are not written down and there is no

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<sup>181</sup> *TT*, II., §13.

impartial judge to adjudicate disputes; for Locke makes it clear that because the natural law is “unwritten, and so nowhere to be found but in the minds of Men, they who through Passion or Interest shall mis-cite it, or misapply it, cannot be so easily convinced of their mistake where there is no establish’d Judge.”<sup>182</sup> Therefore, those who are most rational have a distinct advantage over those who are less astute in applying the general principles of the natural law to particular situations. By contrast, civil society minimizes the effects of this disparity among rational individuals. By consulting civil laws that are written by those who are most capable of figuring out which laws best serve the natural law and, thus, the common good, ordinary individuals can gain access to particular moral laws. Civil laws, when they are properly generated, then, serve as the particular application of the general natural law providing plain access to individual moral obligations.

Additionally, epistemic challenges plague even the most well-intentioned individuals in the state of nature because, without an impartial judge to adjudicate interpretive disputes, disagreements are bound to arise and given the universal executive power to enforce the law of nature, even these relatively minor disputes could have grave and far-reaching consequences, as enemies rarely agree upon the definition of a proportional response. However, just states give individuals an opportunity to settle their disputes about the law in court in front of an impartial third-party, who has the authority to clarify the law and settle interpretive disagreements. Also, with all individuals transferring to the state their universal executive right to enforce the law of nature by punishing those who violate it, minor disagreements concerning what an appropriate

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<sup>182</sup> *Ibid.*, §136.

punishment for a particular crime might be are contained and settled before they cause major harm. Institutionalizing judgment and enforcement of the law simply allows members of a group to avoid coordination problems stemming from epistemic mistakes that would otherwise result in escalating tensions.

Also, the state helps to make individuals moral by minimizing the affects of particular will-defeating aspects of human nature. I mentioned above the variety of opinions, the contrariety of interests, and the drive toward partiality, all of which encourage individuals to focus upon themselves and those closest to themselves; such focus can easily lead to disputes in the state of nature. Here again the influence of the state counteracts the effects of these natural differences among individuals by taking on some of the responsibility for security and by settling disputes. The state also provides an extra incentive to strengthen the will, i.e., the fear of punishment. One of the great advantages of civil society over the state of nature is that a just civil society guarantees that one's moral obligations line up with one's self-interests much of the time. Therefore, entering into civil society makes satisfying one's moral obligations easier. In fact, Locke says: "were it not for the corruption, and vitiousness of degenerate Men, there would be...no necessity that Men should separate from this great and natural Community, and by positive agreements combine into smaller and divided associations."<sup>183</sup>

Now although the above proves that through the enforcement of *compliance* with civil laws, the state solves coordination problems that create injustices and provides incentives for less rational individuals to fulfill their moral obligations, I have not yet

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<sup>183</sup> *Ibid.*, §128.

proven that citizens have a natural moral duty to agree to be morally obligated to *obey* the law. So it is not enough to show that there is a natural moral duty to consent. Compliance with the law and obedience to the law are distinguished by two different psychological states within the mind of the agent. Whereas it is possible for me to comply with the law purely by accident, e.g., when my actions happen to correspond with the law's command, or for reasons completely unrelated to recognition of the authority of the state, e.g., fear of punishment, I only obey the law when I take the existence of the law itself as a reason to do what the law requires. But whereas the actions of one who complies with the law and one who obeys the law often coincide, it is the intentions that indicate one's level of commitment to the law.

To illustrate this important distinction further, let us look at an analogy. Suppose I decide to hire a personal trainer at my gym who gives me advice about how to stay healthy and keep my body in good condition. He tells me that for best results I should eat a balanced diet, drink at least eight glasses of water each day, get plenty of rest, and do at least an hour of cardiovascular training four days each week and an hour of weight training two days each week. Now I could follow his advice for several reasons. I might simply enjoy working out and eating well; I might want to take care of my body to impress my friends; I might want to relieve stress and become healthier so I can live longer; or I might recognize that by following the recommendations of the trainer, who is an expert in his field, I am most likely to meet goals such as improving my health and staying in shape.

Only acting upon the final reason listed would count as an act of obedience because here I recognize the trainer's authority and I see that his expertise gives me what I need to meet my goals. But beyond the fact that it would be prudent for me to hire the trainer, since statistically I would be more likely to succeed following his recommendations than I would be going for it on my own, there is another reason that I might hire a personal trainer. Having to check-in each week with a trainer, whose job it is to hold me accountable to work to meet my goals, provides a psychological component: an additional incentive for me to obey the rules that I would not have were I accountable only to myself. This psychological component can be the crucial difference between success and failure; indeed, this is surely a common rationale for hiring a personal trainer. Therefore, just as I might choose to hire a personal trainer to provide expertise and accountability in order to help me to do what is required to become healthier, I might also choose to consent to the state because it also provides expertise and accountability to help me do what is required to become more moral.

The difference between the two cases is that while I do not have a natural moral duty to keep my body in excellent condition,<sup>184</sup> I do have a natural moral duty to do what I can to make myself more moral. If I recognize the general moral principle that I ought not cause harm to others<sup>185</sup> and I recognize that I sometimes fail to satisfy my moral obligations because I incorrectly apply this general principle to particular situations or my

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<sup>184</sup> Although I suppose Locke may think it is possible to derive a natural moral duty to stay healthy from the natural moral duty of self-preservation, I do not think we could derive a natural moral duty to stay maximally healthy, i.e., in excellent shape, from this natural moral duty.

<sup>185</sup> As we saw in the preceding chapter, Locke himself states the harm principle at *TT*. II., §6.



will succumb to my passions, then I should also recognize an obligation to do whatever I can to prevent these, and similar, failures of rationality. As we have seen, entering into civil society is one successful strategy for preventing these types of failures of rationality, but merely agreeing to comply with the law is not enough, since compliance is unreliable being contingent upon accidental factors, such as whether my self-interests coincide with the demands of the law. Instead, I owe to my fellow citizens an obligation to obey the law. Only a promise to obey the law of one's state provides the requisite stable psychological component ensuring others that I respect the harm principle and that I am committed to limiting the harm that my failure to fulfill my moral obligations could cause them. Therefore, Locke is committed to thinking that most, if not all, individuals living in civil society owe their fellow citizens a natural moral duty to politically obligate themselves—a natural duty to consent.

The natural moral duty to consent also makes Locke's theory of political obligation more consistent with his defense of a remedial right to revolution. According to Locke, the only way in which ordinary individuals can directly check the political judgment of their governments is by means of revolt. The decision to start a revolution ought not to be taken lightly, however, for it is justified or condemned by the natural law and is not a matter of will, but of right.<sup>186</sup> Once again, we see Locke using the natural law to limit the individual's decision; here, though, the topic is not the individual choice to consent but rather the circumstances under which it would be appropriate to dissent. Thus, I agree with the overwhelming majority of Locke scholars who argue that he

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<sup>186</sup> *TT*. II., §176. We find further evidence that Locke supports a remedial right in §207 where he argues that rebellion ought to be a last resort and in §233 where he says it is justified on the basis of self-defense.

embraces a remedial right to revolution meaning that revolution is only justified when the state has egregiously harmed those who have agreed to its authority.<sup>187</sup>

Nevertheless, it is the most important political right that human beings enjoy because it rests upon the principle of self-preservation and is justified by the principle of natural equality. Giving up their unlimited individual rights to enforce the laws of nature, members of a community, instead, agree to be bound by a contract under which they transfer some of their individual authority to the sovereign ruler. As a result of this social contract, then, the ruler has certain obligations in virtue of his authority, namely to protect basic rights and to guard the common interest of the citizens living within the commonwealth. As long as the ruler continues to uphold his end of the agreement, his authority remains legitimate and citizens are bound to obey the laws. However, whenever the ruler governs according to his own interests, rather than those of the governed, he effectively forfeits his right to rule; and whenever he demonstrates his intention to usurp the basic rights of the governed, he forfeits something much more serious, his right to be treated as a peace-loving individual.<sup>188</sup> This constitutes an injustice done to those whom the state is most required to protect and guide and demonstrates Locke's defense of a remedial right to revolution. Says Locke, "*Force* is to be *opposed* to nothing, but to unjust and unlawful *Force*; whoever makes any opposition in any other Case, draws on

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<sup>187</sup> For instance, Allen Buchanan interprets Locke this way in "Theories of Secession." *Philosophy and Public Affairs*. Vol. 26, No. 1 (Winter, 1997), pp. 31-61.

<sup>188</sup> *TT*. II. §219. The debate about whether one can forfeit one's basic rights has a long-standing history in political philosophy. Locke's position is not without problems, but these can be set aside for the purposes of this paper. Jeremy Waldron offers an excellent overview of the problems with Locke's view of forfeiture as it relates to his theory of punishment. See his *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (2002), p. 143-150.

himself a just Condemnation both from God and Man.”<sup>189</sup> When the ruler breaks the contract by overstepping the bounds of his authority, he has set himself up as a tyrant—of no more use to the community than a pirate or a robber.

Finally, this reinterpretation of Locke’s theory of political obligation has several advantages over the standard interpretation and charity urges that we attribute to Locke the best interpretation available. First, the natural moral duty to consent responds to the theoretical and interpretive challenges raised in the previous section. It allows us to criticize those who fail to consent for unacceptable reasons because such individuals really are failing to uphold a particular moral obligation that does in fact bind them. Because this moral obligation is a natural moral obligation, we need not worry about whether non-consenters have acquired such an obligation. The moral obligation to consent binds all rational individuals by nature. Still, we cannot criticize non-consenters for failing to uphold their moral duty to obey the law; rather it is the meta-obligation of the duty to consent that they fail to uphold and it is on the basis of this that we may criticize them as free-riders. Also, this interpretation not only responds to the objection that consent theory is too permissive and is consistent with the qualifications that Locke himself places upon consent (in his doctrines of the impermissibility of selling oneself into slavery and property acquisition), but also is neither divorced from nor opposed to his early natural law theory of moral obligation. So it also has the advantage of making Locke’s corpus more internally consistent nicely blending his natural law theory with his theory of political obligation.

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<sup>189</sup> *TT*. II., §204.

Second, the natural duty to consent is the best theory of political obligation given all of the options. All of the prevailing theories supporting the contention that there is a moral obligation to obey the law have serious flaws, the most important of which being that even theories that explain the obligation to treat one's fellow citizens well, cannot explain how that obligation could be owed to the state. In other words, they cannot explain the moral authority of the state. The natural moral duty to consent has the advantage of giving the state independent moral authority because though individuals owe the duty to consent to their fellow citizens, they cannot fulfill that duty without also becoming obligated to obey the state. I do not have space to defend this claim further here, but I fully defend it next, in chapter five.

In sum, were it possible for all individuals to observe and apply the natural law perfectly, we would all live together in the state of nature united by universal obedience to the natural law. But as it is, the majority of individuals need civil laws to guide them in their quest to fulfill their moral obligations. Indeed, the less rational ones, who tend to make mistakes that prevent them from fulfilling their moral obligations, would have virtually no chance at being moral were it not for the existence of the more rational. But in order for the more competent students of the natural law to teach those who are less competent, they need a suitable instrument to convey their wisdom. Political obligation is such an instrument.

#### *IV. Objections*

In this final section, I address two objections to my view. First, even if I have shown that the less competent student of natural law has a moral obligation to consent, why should the more competent one politically obligate herself? After all, if the more competent individuals are capable of fulfilling their moral obligations without the psychological benefit of consenting to the state what moral reason do they have for entering into civil society or politically obligating themselves? Second, if the less competent student of the natural law is less competent because she has trouble applying the natural law, how can she determine whether the civil laws of her state have been properly written to reflect the natural law or whether her state is just or whether her state has the expertise or can even provide the accountability ensuring that obedience will make her more moral? In short, how can the morally inept individual be certain that the conditions are met under which she has a natural moral duty to consent? Determining the correct answer to any of these questions seems to require the ability to apply the natural law.

I respond, first, that the moral saints among us, obviously, have prudential reasons to enter into civil society. So it is not as if they would have absolutely no reason to leave the state of nature or be tempted to cloister themselves away from the rest of civil society. But beyond the merely prudential, they too have moral reasons. As extraordinarily competent students of the natural moral law, they should recognize that even if consenting to the state would not make them personally more moral, they have an interest in increasing justice in the world by helping those to whom satisfying their moral

obligations does not come so easily. They have a duty as moral exemplars to provide the expertise and accountability that others require in order to fulfill their moral obligations. Furthermore, Locke recognizes a moral duty not only to self-preservation, but also to the preservation of mankind<sup>190</sup> and it is difficult to see how one might discharge such a duty without entering into civil society. Of course, even in the state of nature I could discharge this duty by feeding my starving neighbor, once I have provided for my family and myself, but it seems clear that, especially regarding this particular moral duty, more justice could be done collectively. So it is reasonable to think that the pursuit of justice would lead the most rational as well as the least rational to enter into civil society.

As for the second objection I reply first, although those who are less rational often fail to properly apply the natural law, they are not necessarily incapable of recognizing when others apply the natural law properly. Just as I might know certain nutritional guidelines and rules of exercising, but fail to apply those rules properly, and nonetheless be capable of distinguishing better and worse trainers, e.g., by the results I see in others who employ them, those who often fail to apply the natural law correctly may nonetheless be capable of distinguishing just and unjust states. Also, though some may have trouble discerning the just thing to do in specific and complicated circumstances, they may have no trouble discerning justice in the broad strokes. Remember that, according to Locke, even those who make mistakes in applying the natural law, or fail due to weakness of will, are as capable as others of discovering the general principles of natural law. Given that Locke thinks that everyone is capable of recognizing when the

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<sup>190</sup> *TT*. II., §6.

natural law is being correctly interpreted, there is no reason to presume that those who need the state for moral improvement will be incompetent judges of justice, especially when it comes to recognizing whether their state has engaged in an injustice against themselves.

Also, although each particular society will contain only a few of the nearly ideal reasoners, not all of those will end up in positions of leadership within the government. So rational individuals outside of such leadership positions have a responsibility to educate their fellow citizens about the moral benefits of the state and the best ways to fulfill their moral obligations to others. It is up to them to help others to recognize their natural moral duty to consent.

In conclusion, the civil law is the instrument by means of which most individuals succeed in satisfying their moral obligations. Without the existence of civil laws and the prevalence of those who are competent to derive civil laws from the natural law, most would be incapable of exercising justice except, perhaps, by accident. Therefore, there is a natural moral duty to consent that will allow ordinary individuals to fulfill their moral obligations and placing this limit upon consent makes Locke's theory of political obligation more palatable.

## Part II, Chapter Five:

### Political Obligation: The Anarchist Challenge and the Natural Duty to Consent

#### *I. Introduction*

In the previous chapter I offer an alternative interpretation of Locke's theory of political obligation according to which Locke's concept of consent is more accurately understood as a natural duty than as a prudential exchange of liberties for conveniences. Though perhaps interesting in its own right, this interpretive point would be of little consequence if the theory itself turns out to be philosophically untenable. Thus, in this final chapter, I move beyond the interpretive question to assessing the credibility of the natural duty to consent as a theory of political obligation. I argue that, in light of the anarchist challenge, we ought to revisit the possibility that express consent could ground political obligation and I show that the natural duty to consent stands as a formidable contender in the political obligation debate.

The contemporary debate concerning what has been called the problem of political obligation hopes to answer the following question: is there a duty to obey the law? At first blush, the answer seems so obvious as to be trivial. Of course individuals have a duty to obey the law, since that just is what it means for there to be law: laws bestow duties upon the individuals to whom they apply.<sup>191</sup> However, the substantive

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<sup>191</sup> This is one answer to the general philosophical question: what is law? It assumes that there are more or less universal characteristics of the nature of law and the rule of law that can be discerned through philosophical analysis. So long as a law is formulated correctly, according to whatever social conventions have been agreed upon, it has the authority to obligate those to whom it applies. These were the terms in which the earlier debate among legal positivists and natural law theorists took place (e.g., H.L.A. Hart and Lon Fuller in the *Harvard Law Review* in 1958).



philosophical issue that I wish to discuss here does not concern the nature of law or the rule of law; rather, the true controversy driving this debate surrounds the *normative grounding* for legal duties. So the real question is: is there a *moral* duty to obey the law? The task, then, for those, including myself, who wish to defend an account of political obligation, is to explain this moral obligation by answering several additional questions: how is it that one is obligated to obey the laws of one's state? Does such an obligation come about because of the nature of political institutions or the nature of citizenship, neither, both? Is the individual obligation to obey the law grounded in one's transactions, one's associations, or one's natural duties?<sup>192</sup>

The worry about justifying obedience to the law is nothing new; in fact, it is nearly as old as philosophy itself. Plato raises the issue in the *Crito* when Socrates refuses to escape from prison after having been convicted and condemned to death by an Athenian jury. In defense of his decision to remain in prison and face execution, Socrates offers several arguments, which, though admittedly underdeveloped, hint at various theories of political obligation that remain live options still today.<sup>193</sup> Of the various theories suggested by Plato, the one that has received perhaps the most attention from later philosophers is social contract or consent theory, the full development of which occurs in the seventeenth century with Hobbes and Locke.

Consent may be described as the most intuitively appealing and purest form of political obligation because of its similarity to the social practice of making promises.

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<sup>192</sup> This division of approaches to political obligation was introduced by Simmons in his article "Civil Disobedience and the Duty to Obey the Law" (2003), pp. 50-61.

<sup>193</sup> Plato's *Crito* (54c and following).

Just as promising involves one individual granting moral authority to another, thereby establishing for himself a moral obligation, consenting involves an individual directly transferring moral authority to a political institution, thereby establishing a moral obligation for himself. In both cases, one party deliberately and voluntarily accepts moral obligation by granting moral authority to the other party. It is difficult to deny that such a deliberate and voluntary act could bestow moral obligation upon the actor.<sup>194</sup> If I promise to water your plants while you are on vacation, for example, it seems clear that I have bound myself to water your plants every so often and it seems clear that if I fail to do so, I have wronged you; I have failed to discharge one of my moral obligations. Similarly, if I consent to obey a law that says I may not smoke in hospitals, but later decide to light up while visiting my hospitalized cousin, I fail to discharge one of my moral obligations. By consenting, I have morally bound myself to obey the law and if I disobey, I have morally wronged the state. So consent seems to explain well how one might acquire a moral duty to obey the law.

But despite its initial appeal, we have seen that the consent theory of political obligation faces serious objections. In the previous chapter, while discussing a theoretical objection to consent theory, i.e., the over-permissive objection, I mentioned that the main objection to consent theory is a practical one. The worry is not that consent differs from promising in that an act of genuine consent might somehow fail to create moral

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<sup>194</sup> Although Hume raises an additional theoretical objection (different from the over-permissive objection I raise in chapter four) to consent and the practice of promise-keeping in general arguing that one cannot voluntarily *acquire* moral obligations, but that moral obligations are natural belonging to one regardless of her agreement (“Of the Original Contract” (1752)).

obligation; but rather, that consent is not a “suitably general ground for political obligation”<sup>195</sup> because, unlike the social practice of making promises, few, if any, citizens actually perform such acts of genuine consent. In other words, consent theory, as a theory of political obligation, is descriptively inadequate because it fails to accurately represent the way most individuals find themselves under the jurisdiction of political institutions. In the second section below, I discuss this practical objection to consent theory.

Recently and largely in response to the descriptive inadequacy claim against consent theory, three main camps have emerged. First, there are those who defend the concept of political obligation by attempting to modify consent theory<sup>196</sup> or by offering other transactional accounts of political obligation.<sup>197</sup> Second, there are political philosophers who accept the descriptive inadequacy objection as fatal not only for consent theory, but for all transactional accounts alike and so argue for a moral duty to obey the law on other grounds, i.e., norms tied to citizenship<sup>198</sup> or some natural duty.<sup>199</sup> Finally, there are anarchists who are skeptical of the whole concept of political obligation

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<sup>195</sup> Simmons (1979), p. 79.

<sup>196</sup> For example, Hanna Pitkin (1965 and 1966) defends hypothetical consent and similarly, David Estlund (2008) offers a unique version of hypothetical consent, which he calls normative consent. Also, Harry Beran (1987) defends a reform consent view according to which he argues that consent ought to ground political obligation and that it would do so provided certain conditions are met (e.g., improved civic education, citizens being granted the right to *initiate* changes to the constitution, etc.).

<sup>197</sup> George Klosko (1992) offers a theory according to which one’s political obligations are due in exchange for the benefits gained from living in civil society; and A.D.M. Walker (1988) is a proponent of gratitude as the basis for political obligation.

<sup>198</sup> Here I refer to associative theories, such as Ronald Dworkin’s (1986).

<sup>199</sup> John Rawls (1979, revised ed. 1999) was the first to defend a theory of political obligation based upon the natural duty of justice and C.H. Wellman defends a hybrid view based upon samaritan duties and the principle of fairness (2001, 2005).

and reject any theory claiming that individuals have independent moral reasons to obey the law and, more importantly, any theory claiming that states have moral authority as a result of these independent moral reasons.<sup>200</sup>

In what follows, I explain the descriptive inadequacy objection to consent theory in the second section. Then, beginning with section III, I evaluate the prevailing attempts to show that there is a moral duty to obey the law and I conclude that while some possible theories of political obligation clearly have advantages over others, none is completely successful. So the anarchist challenge looms large (section IV). I argue that, in light of this, we ought to revisit the possibility that express consent could ground political obligation. Finally, I explain the advantages of my own theory, the natural duty to consent, and offer reasons for thinking that this evolution of standard consent theory deserves further attention as a possible solution to the problem of political obligation in the fifth section.

## *II. The Case Against Consent Theory: Descriptive Inadequacy*

Since the emergence of modern liberal democracies, the belief that political authority depends upon the consent of the governed has gained wide acceptance. However, relatively few political philosophers actually defend consent as a viable theory of political obligation. In this section, I explore the reasons for this disconnect.

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<sup>200</sup> Robert Paul Wolff (1970, revised ed. 1998) defends philosophical anarchism on the grounds that, in principle, political obligation fails because it violates the absolute obligation of individual autonomy. Simmons is perhaps the most avid proponent of philosophical anarchism today (see, e.g., 1979, 2001, and 2005 (co-authored with C.H. Wellman)).

According to Locke's familiar account of consent theory, there are two ways one may consent: expressly or tacitly. On the one hand, express consent consists in one performing an explicit, voluntary act demonstrating agreement to the terms of a contract and acknowledgment of one's obligations, e.g., signing a lease to rent an apartment or swearing an oath. On the other hand, one tacitly consents by withholding dissent, but only under the right conditions, e.g., the home owners' association votes to repave all of the driveways in my neighborhood unless someone objects, and the group notifies everyone who may be affected that any objections must be put in writing and delivered before the end of the month. If at the end of the month no one has objected, everyone in the neighborhood has tacitly consented to having her driveway repaved.<sup>201</sup> In these and similar ordinary scenarios, consent proves to be a quite common and reasonable way of accepting certain types of obligation. However, it seems that the same cannot be said for consent in political contexts. Those who criticize Locke's view argue that, even leaving aside the question of whether citizens actually perform acts of genuine consent, it is simply not clear that citizens ever even find themselves in circumstances under which it would be appropriate to consent, either expressly or tacitly, to their governments.<sup>202</sup> Still, before we accept defeat so quickly on Locke's behalf, we ought to investigate the merits of actions often pointed to as indicative of one's consent and acceptance of political obligation.

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<sup>201</sup> As Simmons rightly points out, tacit consent is best understood as a "mode of expression," rather than the lack of expression ((1979), p. 83-84).

<sup>202</sup> Simmons (1979), p. 79.

First, political participation is often taken to be a signal of express consent.<sup>203</sup> The claim is that, given that certain fairness conditions are met, anyone who participates in a political procedure by, for instance, voting in a presidential election, demonstrates his intent to abide by the results of that procedure and his acceptance of the moral duty to obey the law. According to this argument, casting a ballot on election-day is the political equivalent of signing a contract promising to abide by the rules and regulations of the particular political community of which one is a member. More specifically, voting is a sign of one's agreement with the presupposition that the majority decision binds all participants, even those who happen to be in the voting minority. This account contains elements of a reasonable model of political voluntarism because assuming that the election is fair and effective, voting is a voluntary undertaking and a fair procedure for political decision-making. Nevertheless, the most that the political participation account can show is that political participation creates an obligation to abide by the outcome of a particular election, but it is neither necessary nor sufficient for political obligation in general.<sup>204</sup>

There are four main criticisms of the political participation view. (1) Voting cannot be necessary for political obligation because we do not think that individuals who do not have the legal right to vote (e.g., immigrants or foreign visitors) or who do not have the opportunity to vote in some elections (e.g., individuals who come of voting age between election years) are, as a result, free from political obligation. (2) Further, voting

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<sup>203</sup> See, for instance, John Plamenatz's *Man and Society*, Vol. 1 (1967). p. 220-224.

<sup>204</sup> Beran (1987), p. 70-71.

is not necessary for political obligation because if (1) is correct, it is not the act of political participation that creates the obligation, but rather something about the fairness of the procedure itself and voting in democratic elections is surely not the only fair political procedure available. (3) Along the same lines, voting cannot be sufficient to ground political obligation; for, it is not the voting itself, but rather the *agreement* to abide by the outcome that creates the obligation. While voting for Barack Obama may be an indication of one's willingness to grant *him* moral authority over oneself, political obligation requires more than agreeing to abide by the commands of a particular ruler. This is precisely the concern that gives rise to the fourth and strongest criticism of the political participation view. (4) Voting is not sufficient because it cannot explain why citizens are bound to obey the founding documents or signify agreement with the fundamental principles or *form* of their governments. Even if we assume that voting in a particular election indicates one's acceptance of an obligation to abide by the outcome of that election and maybe even the outcomes of other sufficiently similar elections, that does not imply that one accepts the outcomes of all other democratic procedures.<sup>205</sup> As a result, if I do not have the opportunity to change the system by which political decisions are made, I cannot accept those decisions as binding because I have not consented to the system itself.

The four above claims cast doubt upon the idea that political participation is either necessary or sufficient to create political obligation. So with the soundness of this account called into question, the descriptive inadequacy claim against consent theory is

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<sup>205</sup> *Ibid.*, p. 71-74.

strengthened. While express consent may work in the context in which Locke most readily discusses it, i.e., for individuals born into the state of nature, who then decide to join together to form a commonwealth and government from the ground up, the prospects for using consent as a justification for political obligation in general look grim. No citizens existing after this initial social contract (except perhaps naturalized citizens) have ever expressly consented to their governments. Therefore, it appears that, unless we can find an alternative theory of political obligation, no citizen existing after this initial social contract is politically obligated.

Because of the glaring problems with express consent, it is tempting instead to turn to tacit consent and this is precisely the move that Locke makes in response to the descriptive inadequacy objection;<sup>206</sup> however, as we have already seen, tacit consent has problems of its own. In the preceding chapter, I show that tacit consent cannot solve the theoretical objection that express consent theory is overly permissive (releasing individuals from their moral obligations to obey the law without sufficient reason) because Locke's doctrine of tacit consent seems to allow that one could unintentionally, though somehow voluntarily accept the authority of the state. Tacit consent, then, is overly permissive in the opposite direction because it assumes that everyone has in fact consented. For similar reasons, tacit consent cannot save Locke's theory of political obligation from the practical objection here. Recall that Locke contends that ordinary acts, such as using the roads, owning land, and residing in a territory, either temporarily or permanently, are examples of tacit consent. In short, he says that it is the "enjoyment"

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<sup>206</sup> *TT*. II., §119-122.



of any conveniences resulting from a stable political system that bind citizens to obedience.<sup>207</sup> But, once again, this view assumes that one's enjoyment of conveniences is an indication of one's acceptance of an obligation and without the awareness of having given one's acceptance, I fail to see how such ordinary actions could be indications of one's tacitly consenting to anything. Such a conception of tacit consent lacks the element of voluntarism that supposedly justifies the state's moral authority on this view.<sup>208</sup>

Today, few political theorists continue to claim that enjoying the benefits of residency is a sign of consent<sup>209</sup> because most recognize that there are a number of contingent, but no less decisive, factors that severely limit or in some cases completely eclipse one's exit options making *voluntarily* residing in a particular territory all but impossible. Individuals have strong reasons for not leaving their homeland even when there is severe oppression: some may believe that it is better to work to change the system from within, many do not want to leave their families, neighbors, and homes behind, many cannot afford to pack up everything and move, neighboring states may be unwilling to take in immigrants, etc. Because of these hardships, many argue that the excessive

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<sup>207</sup> *Ibid.*, §119.

<sup>208</sup> Simmons argues that Locke's mistake comes from confusing acts that are "signs of [genuine] consent" with acts that "imply consent." According to Simmons' distinction, the context in which the act is performed determines whether the agent intended the act to be an expression of consent and whether such an act would normally be understood as a sign of consent. Hence, real consensual acts are "signs of consent," while an act that resembles a real consensual act, but is disqualified because of the context in which it occurs, is an act that merely "implies consent" ((1987), p. 88).

<sup>209</sup> As far as I can tell, W.D. Ross was the last to defend an unqualified view of consent through residency in *The Right and the Good* (1967), p. 27.

sacrifices attached to emigration make the choice to remain a choice in name only.<sup>210</sup> Once again it appears that the conditions that must be in place in order for one to consent simply do not hold. Thus, it seems that tacit consent meets the same fate as express consent; both fail to be adequate explanations for the alleged political obligation of most citizens.

### *III. Responses to Descriptive Inadequacy*

Many political philosophers are convinced that, despite its intuitive appeal, the descriptive inadequacy of consent theory takes it completely out of the running as a prospective theory of political obligation. The main worry is that if we accept what seems undeniable, that under the status quo few citizens ever have an opportunity to voluntarily consent to obey their own states, we must also grant that most are in fact not obligated to obey the law. And, at this point, we concede the debate to the anarchists. So, virtually all recent defenders of political obligation assume that all citizens of at least reasonably just states are *non-voluntarily* obligated to obey the law and they take their task to be explaining how this could be the case.

As I say in the first section, the descriptive inadequacy claim against consent has met with responses from three different groups: those who defend modified versions of consent or other transactional accounts, those who seek grounding for political obligation outside of transactional accounts, and those who altogether deny that individuals are politically obligated. In this and the following section, I make the case for each of the

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<sup>210</sup> Hume first raises this criticism of social contract theories in “Of the Original Contract” (1752). See also, Simmons (1979), p. 98-100.

prevailing attempts to solve the problem of political obligation and I identify the main anarchist criticisms of each.

First, because Locke's concept of tacit consent amounts to very little—becoming so watered down that he takes almost any action or at least any exercise of freedom within an organized state to be a sign of consent and, thus, a grounding of political obligation—some who study Locke question his status as a traditional consent theorist. Hanna Pitkin is perhaps the most well known of those who hold such a view.<sup>211</sup> She argues that if Locke thinks that residing within a particular territory is sufficient to demonstrate consent, he is committed to an absurd position. Consent through residency entails that those living in a territory controlled by a tyrant consent to tyranny, but Locke claims that it is impossible to be bound to obey any despotic government, since tyrannical actions strip a ruler of his political authority rendering the social contract between ruler and citizen null and void.<sup>212</sup> Therefore, holding such a view would be a contradiction for Locke.

In order to save Locke from such absurdity, Pitkin argues that he must intend tacit consent to be a special type of consent given only to “the terms of the original contract which the founders of the commonwealth made.”<sup>213</sup> Therefore, one may agree to obey certain laws within the territory of a tyrannical government (i.e., those just laws that resulted from the original contract) without consenting to the rule of the current regime in

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<sup>211</sup> “Obligation and Consent, I and II,” in *American Political Science Review*. Vol. 59 and 60, (December 1965 and March 1966).

<sup>212</sup> *TT*. II., §23.

<sup>213</sup> Pitkin (December 1965), p. 995.

power. She concludes that Locke did not really intend personal consent to be the ground of political obligation; instead, she interprets Locke as claiming that our obligations arise from the merits of the original contract. In other words, the basis of political obligation is not an actual voluntary agreement, but the moral quality of the government or laws in question, which is determined by what current rational citizens would hypothetically agree to and by what past rational citizens did in fact agree to. In this way, Pitkin's interpretation bypasses descriptive inadequacy because she grants that individuals do not actually consent, but argues that they need not do so in order to be bound. Instead, citizens are bound by hypothetical consent, i.e., what they would have consented to if they had been given the opportunity.

David Estlund in his recent book, *Democratic Authority*,<sup>214</sup> defends a variation of Pitkin's hypothetical consent theory, which he calls normative consent. According to Estlund, (just) governments have the moral authority to enforce the laws they create because individuals are bound to obey certain forms of government for normative reasons. Since there is no moral reason to think that one should escape the obligation to obey by *immorally* withholding one's consent, individuals are bound on the basis of what they would be expected to consent to if they were acting morally.<sup>215</sup> Relying upon the principle of epistemic proceduralism, Estlund argues that it is the tendency of democratic procedures to yield correct decisions that accounts for "the degree of authority that we

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<sup>214</sup> Estlund (2008).

<sup>215</sup> *Ibid.*, p. 7-12. Notice that such a view would work as a response to the over-permissive objection as well.

think [they] should have.”<sup>216</sup> Thus, he takes seriously the fourth criticism raised in the previous section against the political participation view: if citizens are politically obligated, it cannot be because the outcome of any particular political procedure is correct, rather, it must be because the procedure itself, being fair and effective, generally yields correct or just results.

The final modification of consent theory that I want to look at here is Harry Beran’s reformed consent theory. Beran argues that consent could be a viable basis for political obligation provided that we make certain significant, but feasible reforms to the structure of our political systems.<sup>217</sup> Among the reforms required to make consent a reasonable grounding of political obligation, he mentions (a) there must be a legal right to emigrate; (b) secession must be constitutionally permitted; and (c) a dissenters’ sub-territory ought to be created.<sup>218</sup> Beran also thinks that such reforms could be achieved only within representative democracies that have a political education system that teaches the importance of membership in democratic societies, the elements of which include: (a) that the democratic state is a voluntary association; (b) that the ultimate right of political decision-making rests with all of the adult members of the society; (c) that remaining in the territory after one legally comes of age reflects acceptance of membership and thereby is an expression of political obligation; (d) that taking part in elections places one

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<sup>216</sup> *Ibid.*, p. 7.

<sup>217</sup> Michael Walzer makes a similar argument in *Obligations: Essays on Disobedience, War, and Citizenship* (1970).

<sup>218</sup> Beran (1987), p. 125.

under an obligation to accept the outcome determined by the majority vote; and (e) that the obligations mentioned in (c) and (d) may be overridden by other moral considerations.<sup>219</sup> His conclusion is that these reforms are necessary to make consent descriptively adequate. Were such reforms put into practice, being a member of a political system would be an appropriate indication of consent and acceptance of political obligation.

Besides variations on consent theory, there are other theories of political obligation belonging to the same category known as transactional accounts. One such transactional view is the fairness or benefit theory.<sup>220</sup> George Klosko, the main proponent of this view, argues that one is obligated to obey the state because of the benefits gained from living within civil society and such benefits would not be possible without the existence of the state.<sup>221</sup> Obedience to the law, then, is our share of the exchange of legal protection for legal obligations; and were we to live within an orderly society without recognizing that we are obligated to obey the law, we would be unfairly free-riding on those who do accept such an obligation.<sup>222</sup>

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<sup>219</sup> *Ibid.*, p.137.

<sup>220</sup> Given the similarities between the transactional accounts of consent theory and benefit theory, it is easy to see how Locke might slip from tacit consent to a benefit view. In both cases certain obligations are required in expectation of receiving certain benefits. The significant difference between the two is that the bindingness of consent theory lies in the voluntary acceptance of an obligation, whereas the bindingness of the benefit view consists in the acceptance (either voluntary or involuntary) of certain benefits.

<sup>221</sup> Klosko (1992).

<sup>222</sup> Notice that Klosko's characterization of the free-rider problem is a classic free-rider problem, unlike the characterization of the over-permissive objection from section II, chapter four, because according to the benefit view, individuals are bound to obey the law without having voluntarily acquired the obligation.

The benefit view is especially attractive because obeying the law seems a relatively easy burden to bear in exchange for the safety and security of living within an orderly society. Immediately we see, also, that benefit theory has an advantage over consent theory on the descriptive adequacy front because whereas few, if any, actually consent to their governments, quite nearly everyone living in civil society benefits from political order and others' obedience to the law. In other words, the benefit view sidesteps the requirement that citizens register their acceptance of such an obligation; those who receive certain benefits gained from living within civil society simply owe a debt of obedience to the state. So the benefit view seems to be a promising explanation for how most people could be obligated to obey the law.

Now there is a second camp that wishes to defend the concept of political obligation. However, members of this camp, recognizing the often questionable moral status of historical transactions between states and citizens,<sup>223</sup> locate the basis of political obligation not in the transactional history, but in some intrinsic connection between citizen and state. Such theories are called associative accounts of political obligation. First, those who defend associative accounts, such as Ronald Dworkin, argue that one's duty to obey the laws of one's state derive from the particular role that individuals, *as citizens*, play.<sup>224</sup> On the associative view, the individual as a member of society is bound

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<sup>223</sup> For example, historically many states have gained territory by waging unjust wars and, as a result of such injustice, many citizens of occupied states have become citizens of occupying states by default.

<sup>224</sup> Dworkin defends an associative view based upon an analogy between a child's relationship to his parents and a citizen's relationship to the state: just as a child being a member of a family and dependent upon his parents to provide him with food, shelter, and clothing ought to obey his parents, so should a citizen obey the state, which provides her with similar necessities ((1986), p. 176-224).

to obey the state because at least part of what it means to be a member of any group involves abiding by the rules that govern the group. Furthermore, it is natural for members of a particular group to desire that their group flourishes and to wish to contribute to the achievement of their group's aims. And because, like any other organization, the success of a state depends upon the cooperation of its members, citizenship appears to include a duty of obedience to the law.

Second, natural duty accounts of political obligation base the moral duty to obey the law in some broader moral duty, such as the duty of justice or beneficence. Those who espouse natural duty accounts, such as John Rawls<sup>225</sup> and Jeremy Waldron,<sup>226</sup> argue that fulfilling our natural moral duties, at least in part, requires that we support institutions that promote corresponding moral principles. So by obeying the laws laid down by just institutions that apply to us and by working toward creating other just institutions yet to exist, we fulfill our natural duty to do justice. These accounts rely upon the simple assumption that one may fulfill a general moral duty by performing particular moral acts.

Both associative and natural duty accounts have an advantage over transactional accounts in that the duty to obey the law belongs to citizens in virtue of the type of being that they are rather than in virtue of the type of action that they take. This allows associative and natural duty theories to avoid the descriptive inadequacy complaint because citizens are, in a sense, automatically bound; if it can be shown that the duty to

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<sup>225</sup> Rawls (1999), p. 99.

<sup>226</sup> Waldron (1993), pp. 3-30.



obey attaches to an essential feature of citizenship or humanity, then that duty must be universally binding. Also, it is at least initially plausible that membership in a political community carries with it certain responsibilities toward one's fellow citizens and that human beings naturally have certain moral duties, the least of which being a duty to do justice. But as we shall later see, the anarchist turns these apparent advantages into liabilities for associative and natural duty accounts. Having now sketched the basic responses to the descriptive inadequacy objection, I turn, in the following section, to the daunting challenge posed by skeptics of political obligation.<sup>227</sup>

#### *IV. The Anarchist Challenge*

Descriptive inadequacy is only one challenge for theorists of political obligation to overcome. But there lurks a weightier challenge from a more formidable opponent. The anarchist, who remains altogether skeptical of political obligation, agrees that consent fails because too few citizens actually, intentionally, and voluntarily accept political obligation; and because he also thinks that consent is the *only* theoretically adequate ground for political obligation, he rejects each of the alternative accounts as well. In this section, I review the anarchist's challenge to each of the standard approaches to political obligation and I discuss one attempt to respond to the anarchist. Ultimately, I suggest that given the persistence of deep theoretical difficulties with other theories of political obligation, express consent may actually turn out to be the most promising basis

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<sup>227</sup> I wish to mention one additional theory that falls outside of the classification scheme used above: C.H. Wellman's samaritanism. Wellman also defends a theory of political obligation, but his is a hybrid view that does not fit as neatly into the standard categories as I have laid them out. So, I'll address it, instead, in the following section as a potential response to the anarchist challenge.

for political obligation, even despite the charge of descriptive inadequacy. This sets the stage for an analysis and assessment of my own theory, the natural duty to consent, in the final section.

The anarchist criticizes both transactional and associative accounts on the basis of the moral principles each relies upon to justify political obligation. First, transactional accounts falter because the moral principles invoked are not actually related to particular transactions between states and individuals. Those who wish to defend the benefit view of political obligation, for example, do so on the basis of the principle of fair play, which says that anyone who benefits from participation in a cooperative practice has an obligation to bear her share of the burdens associated with the practice. Advocates of this view claim that one's fair share of participation in the cooperative practice known as civil society is obedience to the law, but the benefit account encounters a disquieting dilemma. Either the exchange of benefits for obligation is voluntary or it is non-voluntary. If it is voluntary, then citizens must be aware of the precise terms of the exchange and it is difficult to see how the obedience to obey at least some laws directly relates to particular benefits gained by the law-abiding. But, on the other hand, if the exchange of benefits is non-voluntary, then it would seem that individuals or institutions could place others under obligations simply by benefitting them. This certainly seems misguided. Nozick criticizes the benefit view precisely along these lines. He argues that in order for one to be obligated because of certain benefits he has gained from another, he first must be given the right of refusal and, for various reasons already mentioned, this may not be

possible within the cooperative scheme of civil society.<sup>228</sup> So, the receipt of benefits or conveniences gained by living in civil society does not seem to be enough to ground a moral obligation to obey the law.

Additionally, anarchists criticize associative theories also for invoking questionable normative principles. The sort of patriotic feelings that come from being closely associated with one's compatriots may stir within us a sense of obligation to the state, but feeling a sense of obligation ought to be distinguished from actually having such an obligation. Just as a utilitarian might argue that, in spite of how one might feel, there is no relevant moral reason to count the well-being of one's parent or one's child above the well-being of any other person, we might argue that nationalism, or the mere feeling of closeness to one's compatriots, does not and should not constitute a moral reason to obey the law. This seems correct especially when we consider the numerous historical examples of atrocities perpetrated by members of one group upon those deemed to be outsiders. In addition, were membership sufficient to generate an obligation to obey, then defenders of associative theories would be forced to accept the unpalatable conclusion that oppressed group 'members' living within unjust nations are obligated to obey the regime that is oppressing them. This is decidedly not in the spirit of what we expect a theory of political obligation to explain. Thus, membership, at least non-voluntary membership, in a particular state is not sufficient to generate an obligation to obey either.

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<sup>228</sup> Nozick (1974), p. 90-95.

The objections raised in opposition to transactional and associative accounts make it reasonable to reject these approaches<sup>229</sup> and to consider another type of approach in the search for a plausible theory of political obligation. As mentioned above, natural duty accounts have the advantage of appealing to natural moral duties, such as justice or beneficence, that belong to human beings not in virtue of their transactional or associative histories, but in virtue of the sort of beings they are. Hence, if the natural duty theorist can show that the duty to obey the law derives from one of our natural moral duties, he immediately avoids worries about connecting moral principles to transactions or associations. And since not even the anarchist denies that human beings have some non-voluntary, natural moral duties, this seems not a bad place to start. Still, though defenders of natural duty accounts may have an advantage on this point, natural duty theories certainly are not without their own difficulties.

The most troublesome objection to this approach is the particularity requirement. Simmons raises this objection arguing that any theory of political obligation relying upon the natural duty of justice must explain not only why we have an obligation to support just institutions, but why we have an obligation to support a *particular* just institution, i.e., our own state, because the obligation to obey the law is a special obligation owed to a particular group rather than to humanity in general.<sup>230</sup> Even if one grants that we have natural moral duties and even if supporting and complying with just institutions is one

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<sup>229</sup> For a brief, but comprehensive, breakdown of the problems with transactional, associative, and natural duty theories see C.H. Wellman's "Political Obligation and the Particularity Requirement" *Legal Theory* (2004), p. 97-98.

<sup>230</sup> *Is There a Duty to Obey the Law?* Co-authored with C.H. Wellman (2005), p. 166-168.

valid way to satisfy our natural moral duties, those duties do not seem to require that we support and comply with any particular political institution. For example, why should we think that I am failing to fulfill my natural duty of justice if instead of sending a fair share of my income to the IRS, I send it to some other equally just nonpolitical institution? In short, there are numerous ways to fulfill our natural duty to do justice besides obeying the (just) laws of the United States. But, claims the anarchist, it is precisely this type of special bond between community and citizen that theories of political obligation must account for.

One account of political obligation that attempts to respond to Simmons's particularity requirement is Wellman's samaritanism.<sup>231</sup> This hybrid view combines a natural duty account with a fairness theory. According to Wellman, the natural duty of justice fails to meet the anarchist's objection because the value of justice "lacks the *urgency* necessary to empower others to create institutions that unilaterally bind us."<sup>232</sup> However, if there were an alternative natural duty that was sufficiently urgent and relevant to the question of political obligation, it would better serve as a basis for political obligation. That natural duty, Wellman argues, is a duty of beneficence or what he calls samaritan duties: our duties to rescue others from harm when such assistance is not unreasonably burdensome. Further, because the state is in a unique position to rescue many from the dangers of the state of nature and because the state is only in such a

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<sup>231</sup> See "Toward a Liberal Theory of Political Obligation" *Ethics* (Jul. 2001), pp. 735-759 and "Political Obligation and the Particularity Requirement" *Legal Theory* (2004), pp. 97-115. Also, for a more complete version of the response, see *Is There a Duty to Obey the Law?* (2005), p. 3-89.

<sup>232</sup> Wellman (2004), p. 105 (emphasis mine).

position so long as there is a system of political order in place, citizens have a duty to obey the laws of their state as their fair share of the contribution to that invaluable political order.<sup>233</sup>

Now Wellman believes samaritanism satisfies Simmons's particularity requirement because political stability is the only just way to avoid the dangers of the state of nature and political stability is not something that any one individual can achieve in isolation; it requires the social cooperation of those living in one place.<sup>234</sup> As a citizen of the United States, then, I have a special duty to obey the laws of the U.S., and not any other just political system, because only the U.S. federal government is in a position to help me fulfill my samaritan duties. Consequently, I cannot simply choose to send my tax money to Oxfam because the burden of paying my income tax to the IRS is my share of the United States citizens' collective duty to save others from the perils of the state of nature. And that burden includes allowing the government to limit my discretion about which political and non-political institutions I might support.<sup>235</sup>

While I agree that samaritanism has advantages over pure natural duty of justice accounts, I maintain that it too falls short of answering the anarchist's challenge. Understanding samaritanism's shortcomings, though, first requires setting out an important distinction: there is a crucial difference between a state wielding moral authority over its constituents and a state justifiably coercing its constituents. In order for

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<sup>233</sup> *Ibid.*, p. 107.

<sup>234</sup> *Ibid.*, p. 109.

<sup>235</sup> *Ibid.*, p. 110.

a state to have moral authority and correlatively, for citizens to have an independent moral obligation to obey the law, the duties invoked must be owed to the state directly. Otherwise, the state is merely justified in coercing its citizens to fulfill duties that they owe to others. This distinction marks the crucial point of disagreement between the anarchist and the proponent of political obligation. While Simmons and Wellman can both agree that we all have samaritan duties and that avoiding the severe threat posed by the dangers of the state of nature requires political order and even that the existence of the state is necessary to bring about political order,<sup>236</sup> they can and do also disagree about what follows from their acceptance of these propositions. According to Simmons, the above amount to the state having a strong, perhaps even an extremely strong, justification for coercing its citizens; they do not, however, result in the state having moral authority or citizens having political obligation, as Wellman contends.

The problem is that Wellman thinks the urgency of avoiding the perils of the state of nature combined with the principle of fairness and his claim that no single individual can fulfill her moral obligation to rescue others, without the existence of a strong state, gives the state moral authority.<sup>237</sup> However, that the state plays an instrumental role, even perhaps an urgent instrumental role, in my fulfillment of one of my moral duties does not also give me a moral obligation to obey the state. Though obedience to the state happens to be practically necessary for the performance of my duty to rescue, it remains

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<sup>236</sup> None of these propositions is inconsistent with Simmons's philosophical anarchism.

<sup>237</sup> "In the end, even if not all samaritan obligations require a specific action, the perils of the state of nature create the perfect duty to obey the laws of one's state because the problems of the state of nature can be solved only via social cooperation" (2004), p. 110.

theoretically only incidental to my fulfillment of my moral duty because even urgent moral duties, such as the duty to rescue, are owed to the individuals who are potentially at risk and not to the state itself. My duty is to rescue others and that I could fulfill that duty without, at least intending to fulfill an additional moral duty to obey the state (e.g., by complying with the law for purely prudential reasons) calls into question the independent moral authority of the state.<sup>238</sup> In other words, facilitating justice is not enough to give the state moral authority, though it may justify the state's use of its coercive power.

To illustrate this point, take as an analogy the following example. In the novel, *Dr. Jekyll and Mr. Hyde*, by Robert Louis Stevenson,<sup>239</sup> Dr. Jekyll discovers a potion by which he transforms himself into a sinister creature, Mr. Hyde. At first, he enjoys the moral freedom the metamorphosis affords him, but eventually Jekyll begins spontaneously turning into Hyde, even without taking the potion, and he vows never to intentionally become Hyde again. One night, though, the urge overtakes him and after the transformation, Hyde violently kills Sir Danvers Carew.

Now suppose that Jekyll, rather than passively writing a letter detailing his desperate cry for help, which he knew would be found only after his death, had instead

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<sup>238</sup> I think Hobbes would agree with this analysis. Because the state of nature is incredibly dangerous and because the sovereign is the only one with enough power to guarantee the coordination necessary to avoid the state of nature through enforcing his will, individuals have strong prudential reasons to obey the sovereign. According to one interpretation of Hobbes's view, then, avoiding the state of nature is so important as to justify giving the sovereign coercive power. Additionally, the utilitarian argument for the state relies upon a version of the justified coercion argument: because the state is the only institution with enough power and influence to organize society in such a way as to effectively bring about the greatest good for the greatest number, it is justified, on utilitarian grounds, in punishing those who break the law. Nevertheless, justified coercion is not the same as having moral authority. That the state is justified in coercing its citizens on instrumental grounds does not mean that its citizens necessarily have a *moral* obligation to obey its commands.

<sup>239</sup> Signet Classics (2003).



explained everything to his butler, Mr. Poole. Then suppose further that he had asked Mr. Poole, in the event of a spontaneous transformation, to restrain Hyde until his assistant were able to deliver the antidote and transform him back into the benevolent Jekyll. In my alternative ending, Jekyll has an urgent duty not to harm others and the only way for him to fulfill that duty is to enlist the help of Mr. Poole. Poole then acquires moral authority over Hyde through Jekyll's consent. But without his consent, things would be different. Poole would be merely justified in coercing Hyde (e.g., by tying him up) because Jekyll's unfortunate predicament alone is not enough to invest Poole with increased moral authority. Jekyll has a moral duty to others not to harm them, but he does not also have a duty to obey Poole unless he first consents.<sup>240</sup> In the same way, the moral duty that I owe to my compatriots may justify the state having the power to legislate behavior because of the cooperative scheme in which we find ourselves, but it does not give the state independent moral authority.

The supposedly fatal charge of descriptive inadequacy raised against consent theory is born of a worry about anarchism: accepting a theory of political obligation that cannot explain how the majority of citizens are obligated to obey their states certainly cannot respond to a theory that denies that individuals have such an obligation. However, in focusing upon descriptive inadequacy, the alternative theories fail to respond to the anarchist's stronger theoretical objections. The largely unsuccessful campaign waged by defenders of political obligation force us to admit that further work defending political

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<sup>240</sup> Of course, the analogy only works if we leave aside questions of personal identity. I understand Hyde as Jekyll's alter ego and I assume that Jekyll has the same relevant moral obligations both when he embodies the aspect of himself and when he embodies the aspect of the sinister monster, Hyde.

obligation is needed. And because I agree that all of the contemporary accounts have deep theoretical flaws, I propose, in the following section, that we revoke the dismissal of consent on the grounds of descriptive inadequacy and instead, face the objection straight on taking consent seriously as a theory of political obligation once again.

#### *V. The Case for the Natural Duty to Consent*

In the previous section, I established that natural duty accounts have a distinct advantage over other non-voluntary approaches to political obligation. Nevertheless, because of the tough challenges from the anarchist, I ruled out two candidates for particular natural duties upon which to build a theory of political obligation: Rawls's natural duty of justice and Wellman's samaritan duties. In fact, I doubt that any non-voluntary account of political obligation could satisfy the anarchist. What the anarchist requires of the defender of political obligation is a "suitably general" moral principle, for instance, a natural duty, which could provide a *special* obligation binding all individuals living within a particular state to obey the laws of that state. If this is what is truly required to establish a moral duty to obey the law, anarchism is clearly the only reasonable option, since it seems obvious that no general moral principle could ever meet the particularity requirement. But I think there is one final move available to the weary defender of political obligation, combining a general moral duty with a voluntaristic account of political obligation. If we can show that there is a natural duty to voluntarily accept an obligation to obey a particular state, we can meet Simmons's particularity requirement and successfully explain the moral obligation to obey the law. In this final

section, I show how my reinterpretation of Locke's consent theory of political obligation based upon the natural moral duty to consent, which I defended in chapter four, responds to the anarchist challenge and supports the idea that individuals have a moral duty to obey the law.

My Lockean theory has several advantages over other theories of political obligation. First, it clarifies the relationship between citizen and state. The state is in a unique moral position with respect to us, as Rawls and Wellman, among others, rightly recognize. In addition to the obvious social, cultural, and financial benefits, the state provides moral benefits; for instance, it is in a position to help us to fulfill our duties toward others, as Wellman's argument for samaritanism demonstrates. Another important moral benefit provided by the state is avoidance of injustices that occur purely out of a lack of social cooperation and epistemic disputes. Perhaps the best illustration of the state's power in this regard is in the case of natural disasters. During these emergencies, if there is not a unified centralized authority making decisions and disseminating information, massive numbers of casualties will occur purely as a result of confusion caused by the lack of information distribution and cooperation. Additionally, there are other times when the moral action to take is not always immediately obvious. While common sense and the light of reason can often allow us to discern the action that will satisfy our natural moral duties, there are many cases in which the action prescribed by our duty not to harm others is not so obvious, for example, discerning the appropriate speed limit on a particular road. Thus, the state, unlike other entities with less broad-

reaching power, such as individuals or private associations, is in the right position to be able to prevent these sorts of harms.

Furthermore, as I mentioned in the preceding chapter, the state offers the opportunity to settle disputes more fairly by providing an impartial judge and a legal system ensuring that the punishment for failing to fulfill one's obligations is justly carried out. Contrast this with Locke's description of the state of nature in which all individuals have the executive right to judge and enforce punishment upon those who wrong others.<sup>241</sup> Having a uniform system in place governed by an authoritative body, at the least, offers greater potential to uphold the values of fairness and equality by preventing the worst consequences of partiality, such as vigilantism and mob rule. Hence, it seems that entering into civil society gives individuals more opportunities to uphold certain values and to fulfill certain moral duties.

However, as I illustrated with the Jekyll and Hyde example above, this important or even urgent moral role that the state plays is not enough to give it moral authority. Though I think I have a natural moral duty to leave the state of nature because I have a natural moral duty, which I owe to those who might be affected by my actions, to do whatever is in my power to prevent failures of moral rationality or to benefit them in whatever way is not unfairly burdensome to me, an additional step is required to give me a moral duty to obey the state.<sup>242</sup> As I made the case for in chapter three, the capacity for

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<sup>241</sup> *TT*. II. §7-8.

<sup>242</sup> Thus, the difference between my view and Wellman's view is that while I think individuals are bound to discharge their samaritan duties, that fact alone is not sufficient to give the state moral authority. Even if we add in the principle of fairness, this is still a duty owed to other *individuals* and not directly to the state.

justice combined with the freedom to choose good over evil (i.e., the combination of rationality and autonomy) gives human beings natural moral authority. Moral authority belongs to individual human beings naturally because they can exercise this authority apart from the laws of civil government and because ultimate moral authority rests with the individual even within civil society, the state gains moral authority only when individuals voluntarily agree to accept certain limits to their autonomy through consent. Yet, though one retains discretion in choosing to consent, one's exercise of autonomy is not utterly free from moral restraint. Indeed, as I have emphasized throughout, freedom and obedience to the natural moral law are continually competing values for Locke. Therefore, although the notion that the state provides more and better opportunities for individuals to fulfill their natural moral duties does not quite justify a direct duty to obey the state, it can ground a duty to consent, i.e., a general duty to support just institutions, which requires my voluntarily acquiring a moral duty to obey the law.

Perhaps the most important reason that individuals ought to consent to their states, though, is because the duty not to harm others requires that individuals demonstrate a willingness to obey the law. Like Ulysses, they tie themselves to the mast in consenting to the state; and in so doing they gain the trust of and increase the security of those around them. As I argue in the preceding chapter, Locke's consent theory of political obligation ought to be modified to show that he is also committed to there being a natural duty to consent and I think that this duty is the key to any successful theory of political obligation. It is the natural duty to consent, which best respects autonomy, by allowing individuals to voluntarily incur an obligation to obey a particular state, while at the same

time recognizing the duties that citizens owe to one another because it makes the responsibility to accept the authority of a particular government part of what we owe to one another. Thus, individuals have a natural duty to transfer moral authority to the state, which they owe to their fellow citizens.

By now my response to the anarchist should be clear. Mine is a thoroughly voluntaristic theory meaning that one is bound to obey the state only if one consents to obey. It is consent that binds because although I argue that one has a natural duty to consent, the obligation to a particular state comes only when one voluntarily transfers some part of his moral authority to that state. In addition, the voluntarism of the natural duty to consent meets the particularity requirement. Because consent requires directly transferring moral authority to a particular state, it explains the deep connection between the individual and her community. Finally, consent gives the state moral authority, rather than merely justifying its coercion. Again, when individuals consent, they directly transfer moral authority to a particular state; in other words, they agree to give up some of their independent moral authority to that state.

As a consequence of my theory of political obligation, the state has no moral authority over those who do not voluntarily consent, but the state is justified in coercing non-consenting individuals in the service of the common good. So while I admit what many other contemporary theorists of political obligation are afraid to admit, namely, that under the status quo a majority of individuals are not morally obligated to obey the law, I do not think that such an admission gives the game away to the anarchist. Though the vast majority of individuals are not morally obligated to obey the law due to their lack of

consenting, it is not true that they ought not be so obligated. I suppose my position could be characterized as conditional anarchy, to borrow an adjective from the just war literature. Like conditional pacifists, who oppose war on the grounds that though it is theoretically possible to wage a just war, the loss of innocent lives that has been endemic of all actual wars makes it practically impossible, I argue that though very few, if any, actually manage to meet the standard of political obligation set by consent theory, there is no reason to disregard such a standard altogether.

Lastly, I address two objections to my view. First, I seem not only to have opened the door for descriptive inadequacy, but also to have embraced it like one would embrace a long-lost child. Consent simply cannot explain how the majority of citizens are bound to obey the law because a majority of citizens have never had the opportunity to consent to their governments. However, this objection is not as strong as it initially seems.

First, people do have the opportunity to consent to their governments in limited ways. For example, when one appears at the DMV to receive a drivers' license, he has the opportunity to consent to obey the traffic laws of his state. Also, when individuals participate in local government by becoming members of the school board, for instance, they demonstrate their willingness to obey the rules of their district, or at least their willingness to work within the system to change the rules with which they disagree. Another opportunity to display one's acceptance of political obligation is through voluntary enlistment in the military or other nonmilitary civil service organizations.<sup>243</sup> In

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<sup>243</sup> Although some would argue that the disproportionately high number of poor people and minorities who join the military in the U.S. casts doubt upon the claim that it is truly voluntary, I do think most who enlist take themselves to be choosing to do so, thus accepting the obligation to obey a particular set of rules.

these and similar examples, the individuals who participate in these aspects of their governments understand that they are bound to obey particular rules as a direct result of their participation. Thus, I think that the state has limited moral authority at least in these and other cases while operating under the status quo.

Still, the strongest version of the descriptive inadequacy objection need not deny that people consent in such ways, but only that this is sufficient to bind them *generally* to obey the state or that this is sufficient to bind most people. Basically, opponents of consent theory argue that there is simply no social contract between modern citizens and their states. Recall that the reasons for this are primarily that, unlike the original parties to the contract of whom Locke speaks, modern citizens have no say over the *form* of their governments and that due to the hardships of leaving home, modern citizens lack exit options. So even if they have fundamental disagreements with the structure of their governments, they have no real ability to challenge the foundation upon which their states were built and they have no chance to register their dissent by voting with their feet, so to speak. The objection is not that individuals do not ever have opportunities to consent, but that they do not have the opportunity to consent in the right way—the way that would bind them to obey the state.

My response to the strong form of descriptive inadequacy follows. First, there is an ambiguity in the idea that there is no social contract between modern citizens and their states. Either the objector is making a theoretical claim: it is not possible to create a social contract under the conditions that actually obtain; or he is making a descriptive claim: people simply do not consent under the conditions that obtain. If he means the former, the



objection is false. If, after due consideration, one recognizes the justice of one's state and accepts the state's laws, then there is no need to have the opportunity to change the form of one's government or to exit from one's state. It is possible to consent if such a situation obtains. If, on the other hand, he means the latter descriptive claim, I grant that he is correct that currently few individuals consent to their governments. However, I fail to see how this might be an objection to my view because the descriptive fact that individuals do not consent does not mean that they ought not. I doubt seriously that the majority of those who do not accept the state's moral authority consider themselves so free because of some philosophical position or that they have ever actually given it much thought at all. I think the more likely cause is simply apathy toward the system. While apathy is a serious problem, it does not preclude more motivated individuals from consenting. And were there a sufficient number of individuals refusing to consent on such philosophical grounds, they would be justified in protesting, seceding, or revolting; in which case, they would have the opportunity to form a more perfect union to which they actually consent.

The second objection questions whether the natural duty to consent is superfluous: if the state is justified in coercing individuals who refuse to consent, then does not a duty to consent reduce to a duty to obey the state? What real work is consent doing in my theory that an ordinary natural duty of justice binding one to obey the state cannot do? First, I go some distance toward forestalling this objection when I show that a state being justified in coercing its citizens ought to be distinguished from a state having moral authority over its citizens. So when I say that the state is justified in coercing those

who do not consent, I do not also mean to imply that the state is justified because individuals have a moral duty to obey. The state is justified in coercing those who fail to consent because it is acting as an instrument of the citizens to whom non-consenters do have a genuine moral obligation. Also, the state has an obligation to protect those who *have* consented to its authority and it must do so by punishing those who fail to comply with the law.

Further, consenting to obey the state is not equivalent to agreeing to comply with the law. Whereas one may be forced to comply with the law, obedience requires the freedom to understand and evaluate the law for oneself before choosing whether to consent. Yet, this does not give one the absolute freedom to consent to some laws and not to others because once one consents to a state or a system of laws, if she disagrees with a particular law, she must register her dissent through protesting or some other means. But it is in the flexibility needed for personal autonomy that consent does the heavy lifting. Consent allows individuals to retain their natural right to autonomy while fulfilling their natural duty to obey the moral law.

## *VI. Conclusion*

Despite the nearly universal disregard for consent theory in the contemporary debate regarding political obligation, there are some credible reasons to return to the idea. First, consent theory is intuitively appealing and the purest form of political obligation. Consent is intuitively appealing because, of all the theories of political obligation, it best respects the autonomy of individual human beings and it provides a straightforward

standard for evaluating political obligation. Secondly, the consent account is theoretically adequate or at least it raises the standard of theoretical adequacy on the other accounts. Consent is theoretically adequate because the moral principle invoked, i.e., that one ought to keep one's promises, is valid. If one transfers moral authority and the choice to do so is sufficiently autonomous, then there is no doubt that he is bound; not even the anarchist denies this. Therefore, if I have been successful at showing that individuals have moral reasons to consent and that it is theoretically possible for them to do so, then there can be no doubt that they are morally obligated to obey the law.

In the previous chapter, I challenge the standard reading of Locke's consent theory of political obligation and I offer my own interpretation, which emphasizes Locke's use of the natural law as a limit to his political voluntarism. Consent is not merely a prudent means of avoiding the inconveniences of the state of nature, but rather individuals have a natural moral duty to leave the state of nature, which they owe to those with whom they associate, and consent is the vehicle through which they must fulfill that duty. Once they have consented, they then have a moral duty to obey the laws of a particular state. In this final chapter, I have shown, at the very least, that the natural duty to consent stands as a formidable contender in the debate concerning political obligation and that Locke has something important to say to contributors to the contemporary debate.

## Conclusions

I said at the outset that Locke's theories of moral and political obligation are instructive both in their successes and in their failures. Now, I want to take stock and offer some concluding remarks about exactly what I see as instructive in these theories. First, I think it is fair to say that both Locke's early natural law theory and his later consent theory of political obligation are successful in their vision, but fail in their execution. I think that although Locke has many important ideas that continue to influence contemporary philosophers in fields from metaphysics to political theory, virtually all of those ideas could have been more detailed and more carefully explained and his theory of obligation is no exception. The ambiguities in many of Locke's works are equally frustrating and fascinating as fertile ground for interpretation. Nonetheless, one gets the sense that Locke certainly put his finger on many important philosophical puzzles and did manage to articulate problems that had not been previously articulated, which, in itself, is a valuable service for posterity.

Concerning his natural law theory, Locke ought to be commended for recognizing that the theological natural law theory associated with the Scholastics could never satisfy the moral skeptic and for being aware that any natural law theory that aims to be widely accepted must begin from ground that is as morally neutral as possible. Although the influence of Locke's natural law predecessors is evident in much of his work, he uses elements of many different theories to create a unique view of his own. Unfortunately, it is tough to see how such a piecemeal theory could manage to be consistent. Though, as I argued in chapter three, I do not think a plausible natural law theory could be built upon

data given to us from raw sense experience alone, I also think that a theory of moral obligation completely divorced from human nature and the experiences of human beings is bound to fail. So, Locke's empiricism does have a lesson to teach us about moral obligation.

Additionally, Locke's natural law theory revolves around two main questions: (1) an epistemological one, how human beings come to know the moral law and (2) a normative one, what gives this law its binding force. Although Locke fails to answer both questions well, he does seem to be asking the right ones. Any credible theory of moral obligation must begin from a rationalist foundation, such as Kant's rational demonstration of the Formula of Humanity, and from that general moral principle of respecting humanity combined with ordinary experiences it is possible to discover more specific moral rules that constitute the application of the natural moral law. I also think there is something to the idea that morality is intuitive and knowable in most cases through common sense. Human beings are essentially rational, and though human nature is difficult to define precisely, Locke is right to point out that there is a particular element of our nature that leads us to evaluate the world in a normative way. Finally, Locke hints at moral realism as the justification for the claims that morality makes upon us and I think any credible solution to the problem of normativity must be a realist position.

Regarding political obligation, though the traditional consent theory view has received some well-deserved criticism, it has demonstrated remarkable staying power. Also, since all other theories of political obligation receive at least as much, if not more, valid criticism, I think Locke's consent theory is worth another look. Despite the nearly

universal disregard for consent theory in the contemporary debate concerning political obligation, there are some credible reasons to return to the idea. First, consent theory is intuitively appealing and the purest form of political obligation. Consent is intuitively appealing because, of all the theories of political obligation, it best respects the autonomy of individual human beings and it provides a straightforward standard for evaluating political obligation. Secondly, the consent account is theoretically adequate or at least it raises the standard of theoretical adequacy on the other accounts. Consent is theoretically adequate because the moral principle invoked, i.e., that one ought to keep one's promises, is valid. If one transfers moral authority and the choice to do so is sufficiently autonomous, then there is no doubt that he is bound; not even the anarchist denies this. Therefore, if I have been successful at showing that individuals have moral reasons to consent and that it is theoretically possible for them to do so, then there can be no doubt that they are morally obligated to obey the law. So I think Locke was right to pursue consent as the justification for the moral duty to obey the law.

Also, I hope that I have shown that, with some very reasonable clarifications, Locke's consent theory is a formidable contender in the contemporary political obligation debate. Consent is not merely a prudent means of avoiding the inconveniences of the state of nature, but rather individuals have a natural moral duty to leave the state of nature, which they owe to those with whom they associate, and consent is the vehicle through which they must fulfill that duty. Without the existence of civil laws and the prevalence of those who are competent to derive civil laws from the natural law, most would be incapable of exercising justice except, perhaps, by accident. Therefore, there is

a natural moral duty to consent that will allow ordinary individuals to fulfill their moral obligations and placing this limit upon consent makes Locke's theory of political obligation more palatable. I think consent is the most promising place to look for an adequate response to the anarchist challenge. Therefore, Locke has something important to say to contributors to the contemporary debate.

I hope I have given voice to some helpful responses to the toughest of Locke's critics. More work needs to be done to explain the relationship between natural duties and natural rights, but something like Locke's doctrine of limited natural rights seems to be the right place to begin in constructing a plausible political theory. At the very least, I think I have demonstrated that though incomplete, Locke's theories of moral and political obligation offer valuable insight into the way in which human beings come to know their moral and political obligations and how they might be bound to obey the moral law and the laws of their own political institutions.

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