Phil 176/276G: Historical Philosophers—American Philosophy

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Studies of philosophy in America should start with an investigation of the philosophical aspects of the belief systems of indigenous people: the Native Americans who lived in distinct tribes with distinct languages and cultures for the roughly twelve thousand years before Europeans crossed the Atlantic. But our focus in this course will be the philosophy of the USA, insofar as there is such a thing.

Many accounts of the philosophy of the settlers focus on John Edwards and the impact of Calvinist ideas about "predestination" and "election" by God. Grappling with Calvinism led early American thinkers to philosophical reflection on the nature of a person's will (or capacity for choice, decision and intentional action) and the degree to which our wills are determined by our creator and so "unfree." Similar concerns shape the contemporary debate about free will, though worries about predestination by God have been largely replaced with worries about the determining force of the universe's initial conditions and the laws of nature as described by the theories that constitute contemporary academic physics.

We are not going to focus on these issues however as the founders didn't embrace Calvinism as a group, and Calvinism doesn't seem to play a large role in the country's founding documents: the Declaration of Independence, the Federalist papers and the US Constitution.

John Locke's theory of natural rights was formulated one hundred years before the American Revolution to argue for the illegitimacy of a Catholic king he did not want forced upon England. (See the Exclusion Crisis.) But it was Locke's theory (among other things) that the founders seized upon when arguing they had good reason or just cause for declaring and fighting for independence from the homeland. And it was this same theory that abolitionists seized on when providing a comprehensive rationale for ending slavery in America. Indeed, Locke's ideas continued to find their echoes in the struggle for civil rights after reconstruction.

We begin this course with an assessment of Locke's philosophy and the degree to which it is encoded in our founding documents. Since this philosophy assumes the existence of a God (or intelligent designer) who created humans (with a certain purpose or function her intended them to execute or fulfill), an examination of it will help set the stage for our discussion of Darwin's theory of evolution and its impact on the philosophy encoded in our founding documents, which was a major preoccupation of American philosophers in the subsequent century.

Handout #1: Notes on John Locke's *Two Treatises of Government*

A. 1st Treatise

1. The Goal: Locke begins by telling us his goal: to argue that William has "consent of the people; which [is] the only one of all lawful governments." The William of whom he writes is King William III of Orange Nassau who assumed the throne in the "Glorious" Revolution of 1688.

https://en.wikipedia.org/wiki/Glorious_Revolution

William overthrew James II of England, who was a Tory and the last Catholic king of Britain.

According to Locke, in arguing for the legitimacy of James II (or the right of James I to appoint his successor, who would turn out to be James II), Sir Robert Filmer is "an advocate for slavery; or the weakness to be deceived with contradictions dressed up in a popular style and well turned periods. For if any one will be at the pains himself, in those parts which are here untouched, to strip sir Robert's discourses of the flourish of doubtful expressions, and endeavour to reduce his words to direct, positive, intelligible propositions, and then compare them one with another, he will quickly be satisfied there was never so much glib nonsense."

CF. 2.14.179 "It being out of a man's power so to submit himself to another as to give him a liberty to destroy him; God and Nature never allowing a man so to abandon himself as to neglect his own preservation. And since he cannot take away his own life, neither can he give another power to take it."

<u>1st Questions</u>: Locke says he is opposing an argument for "slavery" to the monarch James II. This slavery is supposed to consist in James' lacking the consent of those he commands. What does slavery have to do with James II's unpopularity (i.e. the lack of consent in question)? What does governance by an unpopular ruler have to do with the practice of buying and selling people for profit and commanding them as people command domestic farm animals? More generally we can ask for an analysis of the concept of slavery or sufficient conditions for being enslaved. Is political representation necessary for freedom from enslavement?

<u>Here's one way to think of this issue</u>: Were white women enslaved in the US before earning the right to vote with the ratification of the 19th Amendment in August of 1920? If so, how does "enslavement" so understood compare with the condition of those African-Americans who were owned in the US before the explicit abolition of "slavery and involuntary servitude" with the ratification of the 13th Amendment in December of 1865?

Though Filmer is already dead at this point, Locke tells us that the doctrines Filmer formulated to justify James' rule are then being "preached up for Gospel," by the church authorities, "though they had no better an author than an English courtier."

2. Locke's Rendering of Filmer's Case for James II

Premise: "No man is born free"

Conclusion: "All government is absolute monarchy."

"Men are not born free, and therefore could never have the liberty to choose either governors, or

forms of government." Princes have their power absolute, and by divine right; for slaves could never have a right to compact or consent. Adam was an absolute monarch, and so are all princes ever since.

The monarch is supposed to have the rights of a father over his family, having inherited this right from Adam or Noah (after the flood). But Locke complains that Filmer's case for inheritance is silly and Filmer does not adequately describe the nature of fatherhood and its relation to the norms in question: i.e. a father's prerogatives (ignoring his duties or obligations).[1] Nor has Filmer explained how a father's authority might change as the size of his "family" grows in size and complexity.

3. Locke's Case Against Filmer's Defense of James II in Some Detail

According to Locke, Filmer asserts, "Adam and the patriarchs had absolute power of life and death, p. 35. Kings, in the right of parents, succeed to the exercise of supreme jurisdiction, p. 19. As kingly power is by the law of God, so it hath no inferior law to limit it; Adam was lord of all, p. 40. The father of a family governs by no other law than by his own will, p. 78. The superiority of princes is above laws, p. 79…. A perfect kingdom is that, wherein the king rules all things, according to his own will, p. 100. Neither common nor statute laws are, or can be, any diminution of that general power, which kings have over their people, by right of fatherhood, p. 115. Adam was the father, king, and lord over his family; a son, a subject, and a servant or slave, were one and the same thing at first," and §50 "every man that is born is so far from being free, that by his very birth he becomes a subject of him that begets him."

First Objection: The nature of fatherhood could hardly offer the kind of justification that would lead men not already dominated by a monarch to consent to that domination. If the sons of an abusive father have the power to rid themselves of his abuses, by freeing themselves from him in

[1] Locke posits "natural" obligations to children at §89, "For children being by the course of nature born weak, and unable to provide for themselves, they have by the appointment of God himself, who hath thus ordered the course of nature, a right to be nourished and maintained by their parents; nay, a right not only to a bare subsistence, but to the conveniences and comforts of life, as far as the conditions of their parents can afford it." Indeed, at T2 §58, Locke argues that parental authority (understood as a right to order their children to do things children don't want to do) is entirely epistemic or dependent on the parent's better understanding than children themselves what will serve the long-term interests of children or make them happy. This is why, according to Locke, parental authority dissolves when children arrive at the age of reason and come to understand what is good for them and what bad. At that stage, the obligations of children to obey their parents give way to obligations of gratitude: to honor and respect but no longer to obey. "The power, then, that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood. To inform the mind, and govern the actions of their yet ignorant nonage, till reason shall take its place and ease them of that trouble, is what the children want, and the parents are bound to."

one way or another, they cannot be expected to reconcile themselves to his abuses on the grounds that, after all, he is their father.

Fully General Questions about the Power or Force of "Normative" Arguments that Appeal to Something Other than the Self-Interest of those at Whom They are Directed: When, if ever, do justifications of existing circumstances persuade people not to exercise their power to alter those circumstances? Must all effective justifications appeal to the interests of those to whom they're addressed? We should try to keep these questions in mind when we discuss Jefferson's justification of the revolution and the Federalists arguments for incorporation as a United States with a founding constitution. It is one thing for the Loyalists to argue against revolution on the grounds that it is unlikely to be successful or the prediction that the colonists will be worse off in economic terms if they revolt. An argument of this sort appeals to nothing beyond self-interest. It is quite another thing for a Loyalist to admit that revolution would be both feasible and economically advantageous while arguing that the colonists nevertheless owe King George their allegiance because he has a divine right to rule over them.

Filmer is making the latter sort of argument in favor of King James more than 100 years earlier: an argument that is not grounded in an appeal to the self-interest of those at whom it is directed. It is important to note that Locke's response does not reject natural moral norms or obligations (that go beyond self-interest) altogether. Instead, (a) In Treatise I, Locke claims that Filmer's arguments for an absolute right of kings and a similarly absolute obligation by subjects to obey their king are incoherent, and (b) in Treatise II, Locke offers an alternative vision of our "natural" or pre-political rights and obligations.

Locke's 1st Objection to Filmer deepened: Parents do not make their children in the way an artisan makes a craft; they don't have the rights to destroy a creation that is not truly their own in the way an artifact is owned by the artisan who created it. "Those who desire and design children, are but the occasions of their being, and, when they design and wish to beget them, do little more towards their making than Deucalion and his wife in the fable did towards the making of mankind, by throwing pebbles over their heads."

On Deucalion and his wife.

Further deepened with a feminist element: Mother and father share equally in creation. There is no argument from joint creation to absolute *paternal* power. Cf. Treatise 2 §65.

3a. The Nature of Parenthood and Its Relation to the Rights of Parents and the Duties of Children

Locke's 2nd Objection to Filmer: The relationship between (a) y's merely being the father of x and (b) the propriety or justice of anything y should do to x, is obscure.

Principle of Absolute Paternal Authority: If y is the father of x, then nothing y does to x can be unjust.

Locke: This is an is-ought principle. The factual or descriptive or "is" antecedent is the fact or claim that Y is the father of X. This is a matter of biology according to Filmer (though Locke prioritizes child-care in his definition of "fatherhood" see T1 §100 and T2 §65 where foster parents and their rights and duties in comparison to those of biological parents is discussed.)[2] The normative or evaluative or moral consequent of the principle is the claim that x ought to obey y and that nothing y does to x can be unjust or contrary to x's rights. In his Essay, Locke argues that **there are no self-evident moral is-ought principles**. Not even the Golden Rule is self-evident (though there are intra-moral self-evident definitions: e.g. that there is no unjust taking or theft without property). At the outset of the First Treatise, Locke criticizes Filmer for failing to argue for this Principle of Absolute Parental Authority, which he regards as not entirely coherent. "What such necessary connexion there is betwixt Adam's creation and his right to government, so that a 'natural freedom of mankind cannot be supposed without the denial of the creation of Adam,' I confess for my part I do not see."

Fully General Questions (in Moral Epistemology) to which we will return: Are there any self-evident "is-ought" principles? What about the (Lockean) claims that Jefferson described as self-evident in his Declaration of Independence? Are these self-evident? Did Locke think of them as self-evident?

So as a general matter, Locke rejects the claim that moral principles (or is-ought principles) can be self-evident. But he also rejects the principle of absolute parental authority in particular. Indeed, **according to Locke parental authority is entirely epistemological. It derives from the parents having a better understanding of what is good for their children than their children possess. It is not metaphysical. Parents do not have their authority merely in virtue of the role they played in the creation of their children.** This would suggest the liberal view that children only have an obligation to obey the fair, just or wise rules of their parents and that despotic parents exceed their authority. **The "natural law" is the moral code we can learn**

[2] T2 §65 "Nay this power so little belongs to the Father by any peculiar right of Nature, but only as he is Guardian of his Children, that when he quits his Care of them, he loses his power over them, which goes along with their Nourishment and Education, to which it is inseparably annexed, and it belongs as much to the Foster-Father of an exposed child, as to the Natural father of another."

without revelation and without knowledge of the constitution, statutes and other sources of the law of the state. Our parents can use their reason to articulate and teach this moral code to their children. But **once their children can "think for themselves," they can discriminate right from wrong for themselves, and at this stage** <u>**parental authority**</u> (and a child's obligation to obey his or her parents) <u>**gives way to natural freedom or autonomy**</u> (though children still have an obligation of gratitude to honor and respect their parents – see T2 §66).

Treatise 2 §57: The law that was to govern Adam was the same that was to govern all his posterity, <u>the law of reason</u>. But his offspring having another way of entrance into the world, different from him, by a natural birth, that produced them ignorant, and without the use of reason, they were not presently under that law. For **nobody can be under a law that is not promulgated to him**; and **this law being promulgated or made known by reason only, he that is not come to the use of his reason cannot be said to be under this law**; and Adam's children being not presently as soon as born under this law of reason, were not presently free. **For law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law**. <u>Could they be happier without it, the law, as a useless thing, would of itself vanish; and that ill deserves the name of confinement which hedges us in only from bogs and precipices</u>. <u>So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom</u>. For liberty is to be free from restraint and violence from others, which cannot be where there is no law; and is not, as we are told, "a liberty for every man to do what he lists." For who could be free, when every other man's humour might domineer over him? But a liberty to dispose and order freely as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own."[3]

<u>Questions</u>: Locke argues here that good laws do not erode our freedoms. Instead, they create freedoms. If the law "hedges me from bogs and precipices" it does not constrain me, because <u>freedom is the ability to do what serves my interests or satisfies my desires</u> and falling off cliffs or getting stuck in bogs, neither serves my interests nor satisfies my desires (unless I'm suicidal). According to Locke, properly crafted law creates freedom: **freedom from attacks on my person and property** which freedom is necessary to instill **freedom to pursue the good things in life**, things we can only pursue if we are already secure in our lives and property. <u>Is Locke right about this or is there such a thing as the freedom to act contrary to our interests, the freedom to destroy ourselves or others through imprudence or immorality?</u> Consider libertarians who argue against the "nanny state" and so argue against the justice of laws that require us to wear seat belts or refrain from the use of harmful recreational drugs. Don't libertarians of this stripe contradict

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[3] Locke reiterates this view at length in T2 "On Paternal Power." See, e.g., "The Freedom then of Man and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will. To turn him loose to an unrestrained Liberty, before he has Reason to guide him, is not the allowing the privilege of his nature to be free; but to thrust him out amongst Brutes, and abandon him to a state as wretched, and as much beneath that of a Man, as theirs" §63.

what Locke is saying at §57? Which party to this dispute is correct?

3b. <u>Locke's Moral Epistemology</u>: How We Use Reason to Discover the Natural Law

<u>Locke's 2nd Objection Deepened</u> — OBJECTION from NATURAL LAW: Nature teaches that parents do not have absolute power over their children. Indeed, **if we try to read our obligations off the natural order**—as Locke does—we will infer that parents are obliged to advance their children's wellbeing over even their own.

§56 "The dens of lions and nurseries of wolves know no such cruelty as this: these savage inhabitants of the desert obey God and nature in being tender and careful of their offspring: they will hunt, watch, fight, and almost starve for the preservation of their young; never part with them, never forsake them, till they are able to shift for themselves. And is it the privilege of man alone to act more contrary to nature than the wild and most untamed part of the creation? Doth God forbid us under the severest penalty, that of death, to take away the life of any man, a stranger, and upon provocation? And does he permit us to destroy those he has given us the charge and care of; and by the dictates of nature and reason, as well as his revealed command, requires us to preserve? He has in all the parts of creation taken a peculiar care to propagate and continue the several species of creatures, and makes the individuals act so strongly to this end, that they sometimes neglect their own private good for it, and seem to forget that general rule, which nature teaches all things, of self-preservation; and the preservation of their young, as the strongest principle in them, overrules the constitution of their particular natures. Thus we see, when their young stand in need of it, the timorous become valiant, the fierce and savage kind, and the ravenous, tender and liberal."

Locke adds to this the bible's report of God's growing disgust and eventual prohibition of child sacrifice.

"Be it then, as sir Robert says, that anciently it was usual for men "to sell and castrate their children," O. 155. Let it be, that they exposed them; add to it, if you please, for this is still greater power, that they begat them for their tables, to fat and eat them: if this proves a right to do so, we may, by the same argument, justify adultery, incest, and sodomy, for there are examples of these too, both ancient and modern; **sins, which I suppose have their principal aggravation from this, that they cross <u>the main intention of nature</u>, which <u>willeth the increase of mankind, and the continuation of the species in the highest perfection,</u> and the distinction of families, with the security of the marriage-bed, as necessary hereunto.**"

I have bolded this passage, because I want you to see how <u>Locke's case against absolute monarchy</u> is premised in (1) **a creationist biology** (or divine anthropogeny), which is in turn

wedded to (2) **a moral epistemology of natural law**. According to Locke, we can figure out what is good for us by figuring out what our creator intended for us and we can figure out what our creator intended by carefully studying his creation. The most relevant parts of this creation are the animal world. So Locke winds up arguing from **biological premises** (describing the behavior of humans and other animals when they are functioning properly) to various normative or **moral/political conclusions** including the injustice of absolute monarchy.

See especially Treatise 2, §79-§80, where Locke discusses the different parenting arrangements of different animals and marvels at how God has crafted them to suit the means these animals have of eating and surviving. He concludes with an argument for maintaining marriages until all children have left home. "Wherein one cannot but admire the wisdom of the great Creator, who, having given to man an ability to lay up for the future as well as supply the present necessity, hath made it necessary that society of man and wife should be more lasting than of male and female amongst other creatures, that so their industry might be encouraged, and their interest better united, to make provision and lay up goods for their common issue, which uncertain mixture, or easy and frequent solutions of conjugal society, would mightily disturb."

NATURAL RIGHT: See too §86 where our desire for self-preservation is interpreted as God's way of communicating our right to the means of self-preservation to us.

"Man had a right to an use of the creatures, by the will and grant of God: for **the** desire, **strong desire, of preserving his life and being, having been planted in him as a principle of action by God himself, reason, "which was the voice of God in him," could not but teach him and assure him that pursuing that natural inclination he had to preserve his being, he followed the will of his Maker**, and therefore **had a right to make use of those creatures which by his reason or senses he could discover would be serviceable thereunto**. And thus man's property in the creatures was founded upon the right he had to make use of those things that were necessary or useful to his being."

NATURAL RIGHT: And §88 where a natural desire for the welfare of one's children is used by Locke to argue for their natural right to an inheritance (a prime source of economic inequality).

"**God planted in men a strong desire also of propagating their kind, and continuing themselves in their posterity; and this gives children a title to share in the property of their parents, and a right to inherit their possessions**."

NATURAL RIGHT: And §101, where inheritance is again grounded in natural law.

"If one should ask, by what law has a father power over his children? it will be answered, no doubt, by the law of nature, which gives such a power over them to him that begets them. If one should ask likewise, by what law does our author's heir come by a right to inherit? I think it would be answered, by the law of nature too."

NATURAL RIGHT: And §2.16.190 "Every man is born with a double right. First, a right of freedom to his person, which no other man has a power over, but the free disposal of it lies in himself. Secondly, a right before any other man, to inherit, with his brethren, his father's goods."

A question that will persist: How good is observation of "nature" as a premise from which to argue for a policy recommendation or normative claim of obligation? Do other animals (and/or early humans) teach us what is natural for us? Does an action or institution's being (in some sense) "natural" for us increase or provide evidence in favor of its being good or rational for us to pursue that action or retain that institution? Is this inference helped if we infer, with Locke following Grotius et al., what God has planned for us from our observations of animal behavior and other aspects of "nature"? These questions become paramount when we consciously observe Hume's dictum that we must always articulate and scrutinize inferences from "is" to "ought."

Difference with Pragmatism: Locke articulates a positive theory of natural rights in the 2nd Treatise, but he does not offer his ideas (or assert them) as one ethic among many: i.e. one way of thinking about what is valuable and why we should pursue it that his audience can accept or explore or work into their current moral thinking if they are sufficiently convinced of its attractiveness. Instead, **he argues for his theory of natural rights as *the truth about morality*, a truth he thinks he can infer from his observations of nature because they provide ample evidence of our creator's intentions**. One of the things we'll want to discuss is whether Darwin's theory of our origins undermined not just Locke's particular theory of our rights and their origins, but *any* attempt to articulate a single scheme of values, rights and so on. Does Darwinism leave us with moral relativism or at least "pluralism" of one form of another? Might Darwinism even imply "fatalism" understood as the thesis that natural selection explains historical change, nature does not select on the basis of virtue (as we conceive of virtue), and so the adoption of a morality (whatever its impacts on the life of this or that person) could never explain historical change at some relevantly expansive time-scale?

Darwinian Fatalism: People will embrace whatever moral theory or guide to action best promotes their reproductive fitness (or the reproductive fitness of their kin group) in the context in which they find themselves. If moral truth or validity is not defined in terms of reproductive fitness, the truth or validity of a moral view is irrelevant to its adoption. Though individuals may try their best to figure out what is really right and really wrong, such thinking is either irrelevant to what they do or predictable on the basis of natural selection for reproductive-fitness-enhancing moral ideologies (and against fitness-diminishing ideologies) irrespective of their truth or validity (unless these semantic concepts are defined in terms of reproductive fitness).

Darwin actually thought that "*natural" forces of selection lead to the evolution of greater virtue*, where the virtue in question is not defined in terms of reproductive fitness but was instead left at

the intuitive level where it more or less aligns with the list we have from Aristotle: courage, honesty, fairness, etc.

"When two tribes of primeval man, living in the same country, came into competition, if (other circumstances being equal) the one tribe included a great number of courageous, sympathetic and faithful members, who were always ready to warn each other of danger, to aid and defend each other, this tribe would succeed better and conquer the other. Let it be borne in mind how all-important in the never-ceasing wars of savages, fidelity and courage must be. The advantage which disciplined soldiers have over undisciplined hordes follows chiefly from the confidence which each man feels in his comrades. Obedience, as Mr. Bagehot has well shewn, is of the highest value, for any form of government is better than none. Selfish and contentious people will not cohere, and without coherence nothing can be effected. A tribe rich in the above qualities would spread and be victorious over other tribes: but in the course of time it would, judging from all past history, be in its turn overcome by some other tribe still more highly endowed. Thus the social and moral qualities would tend slowly to advance and be diffused throughout the world….It must not be forgotten that although a high standard of morality gives but a slight or no advantage to each individual man and his children over the other men of the same tribe, yet that an increase in the number of well-endowed men and an advancement in the standard of morality will certainly give an immense advantage to one tribe over another. A tribe including many members who, from possessing in a high degree the spirit of patriotism, fidelity, obedience, courage, and sympathy, were always ready to aid one another, and to sacrifice themselves for the common good, would be victorious over most other tribes; and this would be natural selection. At all times throughout the world tribes have supplanted other tribes; and as morality is one important element in their success, the standard of morality and the number of well-endowed men will thus everywhere tend to rise and increase…. In regard to the moral qualities, some elimination of the worst dispositions is always in progress even in the most civilised nations. Malefactors are executed, or imprisoned for long periods, so that they cannot freely transmit their bad qualities. Melancholic and insane persons are confined, or commit suicide. Violent and quarrelsome men often come to a bloody end. The restless who will not follow any steady occupation—and this relic of barbarism is a great check to civilization—emigrate to newly-settled countries; where they prove useful pioneers. Intemperance is so highly destructive, that the expectation of life of the intemperate, at the age of thirty for instance, is only 13.8 years; whilst for the rural labourers of England at the same age it is 40.59 years. Profligate women bear few children, and profligate men rarely marry; both suffer from disease. In the breeding of domestic animals, the elimination of those individuals, though few in number, which are in any marked manner inferior, is by no means an unimportant element towards success. This especially holds good with injurious characters which tend to reappear through reversion, such as blackness in sheep; and with mankind some of the worst dispositions, which occasionally without any assignable cause make their appearance in families, may perhaps be reversions to a savage state, from which we are not removed by very many generations. This view seems indeed recognised in the common expression that such men are the black sheep of the family." Darwin, *Descent of Man and Selection in Relation to Sex,* New York: D. Appleton and Co. (1875), Chapter 5, pp. 130-1.

But Darwin's thesis is based on an incredibly "Panglossian" or overly optimistic reading of history. Did the European colonists really succeed in their "competition" with native Asians, Africans and Americans because of the greater virtue of Europeans in contrast with native Asians, Africans and Americans, as Darwin maintained they did? Why think the trajectory of life on

Earth "bends toward justice" as MLKJ maintained? Is this an overly optimistic view, once it is stripped of its theological justifications?

3c. Filmer Misconstrues Scripture

Locke's 3rd Objection to Filmer: The bible says God gave humans as a species full power over the "irrational animals," but it cannot be justly interpreted to have given Adam (and his male successors) political power over all people.

"If God made all mankind slaves to Adam and his heirs, by giving Adam dominion over "every living thing that moveth on the earth," ch. i. 28, as our author would have it; methinks sir Robert should leave carried his monarchical power one step higher, and satisfied the world that princes might eat their subjects too, since God gave as full power to Noah and his heirs, ch. ix. 2, to eat "every living thing that moveth," as he did to Adam to have dominion over them; the Hebrew word in both places being the same."

4th Objection: The bible says that after the flood God gave the Earth to Noah and his sons in common and commanded them to be fruitful and multiply. It did not give the Earth to Noah to distribute as he pleased.

§41-2: "God, who bid mankind increase and multiply, should rather himself give them all a right to make use of the food and raiment, and other conveniencies of life, the materials whereof he had so plentifully provided for them; than to make them depend upon the will of a man for their subsistence, who should have power to destroy them all when he pleased, and who, being no better than other men, was in succession likelier, by want and the dependence of a scanty fortune, to tie them to hard service, than by liberal allowance of the conveniencies of life to promote the great design of God, "increase and multiply:" he that doubts this, let him look into the absolute monarchies of the world, and see what becomes of the conveniencies of life, and the multitudes of people…we know **God hath not left one man so to the mercy of another, that he may starve him if he please: God, the Lord and Father of all, has given no one of his children such a property in his peculiar portion of the things of this world, but that he has given his needy brother a right to the surplusage of his goods; so that it cannot justly be denied him, when his pressing wants call for it: and therefore no man could ever have a just power over the life of another by right of property in land or possessions; since it would always be a sin, in any man of estate, to let his brother perish for want of affording him relief out of his plenty**. As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another's plenty as will keep him from extreme want, where he has no means to subsist otherwise: and **a man can no more justly make use of another's necessity to force him to become his vassal,**

by withholding that relief God requires him to afford to the wants of his brother, than he that has more strength can seize upon a weaker, master him to his obedience, and with a dagger at his throat offer him death or slavery."

<u>**Questions**</u>: Locke further elaborates this theory of property rights and their limits in the 2nd Treatise. But we can ask here whether Locke's claims about the nature of justice and our natural charitable obligations do not provide him with a biblical argument against both colonialism and slavery.

<u>5th Objection</u>: According to the bible, children are obliged to honor their parents. This is in fact inconsistent with an absolute fatherly authority that is retained in the absence of explicit delegation to another, as it would have to be were it to ground the absolute power of a monarch descended from Adam. *This can be shown (§64) by the inability of a grandfather to release his grandson from honoring said grandson's father. Cf. §75-77.*

§65 "If therefore this command, "Honour thy father and mother," concern political dominion, it directly overthrows our author's monarchy: since it being to be paid by every child to his father, even in society, every father must necessarily have political dominion, and there will be as many sovereigns as there are fathers: besides that the mother too hath her title, which destroys the sovereignty of one supreme monarch. But if "Honour thy father and mother" mean something distinct from political power, as necessarily it must, it is besides our author's business, and serves nothing to his purpose."

CONCLUSION: <u>At various points Locke summarizes his argument against Adam's having been given the moral authority to rule over all men</u>:

1st Treatise §67 "If creation, which gave nothing but a being, made not Adam prince of his posterity: if Adam, Gen. i. 28, was not constituted lord of mankind, nor had a private dominion given him exclusive of his children, but only a right and power over the earth and inferior creatures in common with the children of men: if also, Gen. iii 16, God gave not any particular power to Adam over his wife and children, but only subjected Eve to Adam, as a punishment, or foretold the subjection of the weaker sex, in the ordering the common concernments of their families, but gave not thereby to Adam, as to the husband, power of life and death, which necessarily belongs to the magistrate: if fathers by begetting their children acquire no such power over them; and if the command, "Honour thy father and mother," give it not, but only enjoins a duty owing to parents equally whether subjects or not, and to the mother as well as the father: if all this be so, as I think by what has been said is very evident; then **man has a natural freedom**, notwithstanding all our author confidently says to the contrary; since **all that share in the same common nature, faculties, and powers, are in nature equal, and ought to partake in the**

same common rights and privileges, till the manifest appointment of God, who is "Lord over all, blessed for ever," can be produced show any particular person's supremacy; or a man's own consent subjects him to a superior."

Cf. 2nd Treatise §1 "That if [Adam's] Heirs had [a right to absolute obedience] there being no Law of Nature nor positive Law of God that determined, which is right Heir in all Cases that may arise, the Right of Succession, and consequently of bearing Rules, could not have been certainly determined."

3d. Locke's Claim that Men are Equal in Nature

An Important Note on Locke's Moral Epistemology and the Interpretation of his Assertion of Natural Equality: Locke's critics will deny his claim that all men are created equal by pointing to differences in intelligence, strength and virtue between children. But Locke here makes clear that the equality of which he speaks is in general faculties so that all (non-defective or disabled) humans are equal in these. Importantly, according to Locke, no human is morally or intellectually or physically superior to other humans to the extent that humans are superior to other animals. This is the sort of equality Locke needs to argue that we are perfectly justified in enslaving, killing and using the other animals as we want, but that we are not justified in doing this to one another. Again, he premises his argument for this in a creationist biology. We can infer from our relative or rough equality to one another and our relative or rough superiority to the other animals that our creator intended us to use them as inferiors but cooperate with one another as equals. That Locke treats this an inference from what we can observe of the creation (rather than a self-evident matter as Jefferson would claim) is made apparent by Locke's admission that God or the creator could declare one amongst us a "natural ruler" to whom we "naturally" owe allegiance or obedience (prior to contract or consent) through a "manifest appointment."

3e. The Impossibility of Discerning the Heir to the Supposed Divine Rights to Rule Possessed by Adam and Noah

6th Objection to Filmer: Even if Adam had an absolute power or right to rule in virtue of (a) his fatherhood or (b) the grant of his creator, (c) there is no coherent story of how this right might have passed from Adam to James II. (§98 "paternal power, being a natural right rising only from the relation of father and son, is as impossible to be inherited as the relation itself.")

§111"Our author informs us, that the divine ordinance hath limited the descent of Adam's monarchical power. To whom? To Adam's line and posterity," says our author. A notable limitation, a limitation to all mankind: for if our author can find any one amongst mankind that is

not of the line and posterity of Adam, he may perhaps tell him who this next heir of Adam is: but for us, I despair how this limitation of Adam's empire to his line and posterity will help us to find out one heir. This limitation indeed of our author will save those the labour who would look for him amongst the race of brutes, if any such there were; but will very little contribute to the discovery of one next heir amongst men, though it make a short and easy determination of the question about the descent of Adam's regal power, by telling us that the line and posterity of Adam is to have it, that is, in plain English, any one may have it, since there is no person living that hath not the title of being of the line and posterity of Adam and while it keeps there, it keeps within our author's limitation by God's ordinance."

It isn't even true that first-born sons have a "natural" right to whatever political power (or dominion over others) their fathers' have managed to acquire.

§93 "All that a child has right to claim from his father is nourishment and education, and the things nature furnishes for the support of life: but he has no right to demand rule or dominion from him: he can subsist and receive from him the portion of good things and advantages of education naturally due to him, without empire and dominion. That (if his father hath any) was vested in him, for the good and behoof of others: and therefore the son cannot claim or inherit it by a title, which is founded wholly on his own private good and advantage."

B. 2nd Treatise

1. Locke's Goal: To Explain the Origins and Extent of Political Authority

<u>**Locke's definition of Political Power**</u>: §1 "I think it may not be amiss to set down what I take to be **political power**. That **the power of a magistrate over a subject may be distinguished from that of a father over his children**, a master over his servant, a husband over his wife, and a lord over his slave. …**Political power**, then, I take to be **a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and all this only for the public good**."

<u>Questions</u>: Isn't this an overly normative definition of "political power"? If a ruler or set of rulers exercise their power in enacting and enforcing laws that do not serve the common good, does that entail that they lack political power? The Founding Fathers seem to have agreed that rulers cannot be trusted to serve the common good. They seem to have designed the US gov't so that political power was distributed among several people, composing several different institutions (legislative, executive and judicial) so that the political power of some might be checked by the political power of others. Doesn't Locke conflate "is" and "ought" in a potentially confusing way when he equates political power with a **right** rather than an **ability**?

A Less Normative Definition of Political Power: Social power is the ability to shape or dictate the behavior of others: to make people act as one wants them to act. If political power is to be distinguished from other forms of social power (as Locke intends above), **political power is the ability to shape or dictate the behavior of others by making, interpreting and enforcing laws.**

With the "ought" thus segregated from the "is" we can then describe Locke's normative project in the 2nd Treatise.

Locke's Normative Question: **When is political power rightly or justly possessed and administered?** Though it strains common usage somewhat, we can say (with many political theorists) that **someone who possess and exercises her political powers in a just or morally acceptable way has political *authority* rather than "brute" political *power*.**

Locke's Theory of Political Authority: (1) Political power is justly possessed by X only if (a) X's aim in exercising that power is the good or welfare of those over whom she exercises it, and (b) she limits herself to the defense, regulation and distribution of the lives and property of these same people.

2. The State of Nature

Locke begins by positing a "state of nature" in which people are equal in "rank" (or normative status) because equal in ability to coerce.

§2.2.2 "A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty."

The Most Historically Common Criticism of Locke on this Score: Surely children don't have the same abilities as their parents. We can agree with Locke against Filmer as a general matter: there is no direct derivation of the justice of monarchy (much less the monarchy of James II) from the nature of fatherhood or even parenthood. But human families (understood as interacting composites of adults and children) are biologically natural units. A human child cannot survive to reproductive age without the assistance of her parents, as Locke himself argues in his 1st Treatise. Insofar as the first tribes were extended family units, they contained these natural inequalities and whatever inegalitarian consequences flow from them. For example, bad or unjust

parents allow or instill further inequalities by favoring some children over others. So how can Locke feel justified in positing a state of nature with social powers equally distributed among those persons living within it? There has never been such a state.

Locke's Response to this Criticism: §55 "Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them when they come into the world, and for some time after, but it is but a temporary one. **The bonds of this subjection are like the swaddling clothes they are wrapt up in and supported by in the weakness of their infancy. Age and reason as they grow up loosen them, till at length they drop quite off, and leave a man at his own free disposal.**"

Locke compares the dependencies of children to their diapers and the natural freedom of men to their ability to control their bladders. We are not born "potty trained" but this is nevertheless a natural ability that is "innate" in the sense that it emerges over the course of a human's development regardless of how they are raised. A better comparison might be the secondary sexual characteristics that emerge during puberty. These are "natural" and "innate" in the same biological sense: they are not manifest at birth but they are necessary parts of human biology that are essential to the persistence of the species from one generation to the next and they emerge at a fairly regular interval during human development in all or almost all the varying environments in which humans live. Freedom is supposed to be natural in this same sense, according to Locke. All teenagers want their freedom as a matter of human biology. The relative freedom of young men and women from their parents is intended by the creator.

T2 §61 "Thus we are born free as we are born rational; not that we have actually the exercise of either: age that brings one, brings with it the other too. And thus we see how natural freedom and subjection to parents may consist together, and are both founded on the same principle. A child is free by his father's title, by his father's understanding, which is to govern him till he hath it of his own. The freedom of a man at years of discretion, and the subjection of a child to his parents, whilst yet short of it, are so consistent and so distinguishable that the most blinded contenders for monarchy, "by right of fatherhood," cannot miss of it; the most obstinate cannot but allow of it"

Rebuttal to Locke: This is not right as either a descriptive or normative matter.

Descriptive: Inequalities in social power mark family structures from beginning to end as childhood gives way to marriage (typically arranged by parents or even grandparents) and parenthood (which is typically unplanned). There is no point in the normal course of development in which people are free (or without obligations and dependencies) or equal (or capable of negotiating agreements on equal terms). Social power is unevenly distributed in all familial relationships. There is no equality in social power amongst siblings, husband and wife (or wives) or offspring.

Normative: Duties and rights are worked out within the family structure (and then tribal culture) without explicit concern for full equality (except in liberal, post-Enlightenment households where attempts are made in this regard). Nor does full equality result as the inevitable (if unintended) consequence of tribal life. It is consistent with this that the members of hunter-gatherer tribes are **more** equal in both roles and resources than members of larger societies and that non-human primates are averse to unequal distributions of resources that do not reflect their social hierarchies. Economists have long held that the division of labor that marks agricultural, commercial and industrial societies is itself a source of inequality as are inheritance and marriage practices, which further concentrate resources.

Indeed, Locke gives a (more or less) plausible (if euro-centric) account of this process in his own explanation of how fathers become "political monarchs" of their extended families at §75-§76.

Questions: **How equal** are people after they have gone through puberty and so "thrown off their swaddling clothes" in the sense intended by Locke? **How free** are people at this stage? How free and equal do people need to be to support Locke's argumentative aims? Is it enough that there is no one more superior to the rest of us (in intelligence and virtue) than we supposedly are to the other animals? Is it enough that teenagers could support themselves to some degree without the aid of their parents? (Doesn't this depend on the economy in which they find themselves? Who among us could survive in nature: i.e. without the goods and services produced and provided by other people? Isn't this dependency a "natural" limit on our "natural" freedoms? We are social animals.) Is Locke right that freedom doesn't require complete independence from constraints but only the ability to do what is consistent with prudence and morality as we can discern them through the use of observation and reason?

The Minimal Freedom and Equality Locke Needs to Argue for His Theory of the Social Contract: *To argue for a state of nature in the sense he intends, Locke does not have to argue that we are completely free and equal in the most unqualified or fully general senses that can be given to these terms*. He does need to argue, however: (a) that as a historical matter, people were organized as extended families with no formal division of political power; (b) that the heads of these families were sufficiently equal in social or physical power that no family could enslave or control the others; (c) that civil societies were at least sometimes formed when the relatively equal heads of these families agreed to vest their military or police powers in a neutral judge (to put an end to endless feuds and cycles of violence between families) where, as part of the agreement, the heads of these tribes retained the other rights and powers they enjoyed before agreeing to this arrangement with one another**. Locke's claim is that societies shaped by such a contract are the only just societies.**

The Most Common Response to the Traditional Objections to the State of Nature Posited by Orthodox Social Contract Theories: The state of nature is a hypothetical construct useful for *normative* purposes: i.e. the idea can help us figure out which social/political arrangements are **just** or **right** or **moral** for us to institute today. Unless one thinks that norms or ideals must be read off of God's creation (i.e. nature) one can argue that a state of equality is **ideal** without thinking it is or was **real**. (A hard question pops up here, though: how do you argue for embracing an egalitarian ideal without appealing, as Locke does, to a creator whose intentions are made manifest in his creation? More generally, how can you get powerful people to adopt an ideal when doing so would make them less powerful? How effective are moral arguments in comparison to appeals to self-interest?)

But at §101-106 **Locke reiterates his belief in the historical reality of the social compact that took free and equal men out of the state of nature**, when he argues that the father may have been chosen as the best candidate for magistrate but when this was not practicable common consent of free and equal men took place instead.

"It is not at all to be wondered that history gives us but a very little account of men that lived together in the state of Nature. The inconveniencies of that condition, and the love and want of society, no sooner brought any number of them together, but they presently united and incorporated if they designed to continue together. And if we may not suppose men ever to have been in the state of Nature, because we hear not much of them in such a state, we may as well suppose the armies of Salmanasser or Xerxes were never children, because we hear little of them till they were men and embodied in armies. Government is everywhere antecedent to records, and letters seldom come in amongst a people till a long continuation of civil society has, by other more necessary arts, provided for their safety, ease, and plenty…. reason being plain on our side that men are naturally free; and the examples of history showing that the governments of the world, that were begun in peace, had their beginning laid on that foundation, and were made by the consent of the people; there can be little room for doubt, **either where the right is, or what has been the opinion or practice of mankind about the first erecting of governments.**"

He also gives several examples of civil societies formed through social contracts of the sort he has in mind at T2 §102

"Who will not allow that the beginning of Rome and Venice were by the uniting together of several men, free and independent one of another, amongst whom there was no natural superiority or subjection. And if Josephus Acosta's word may be taken, he tells us that in many parts of America there was no government at all. 'There are great and apparent conjectures,' says he, 'that these men [speaking of those of Peru] for a long time had neither kings nor commonwealths, but lived in troops, as they do this day in Florida—the Cheriquanas, those of Brazil, and many other nations, which have no certain kings, but, as occasion is offered in peace or war, they choose their captains as they please' (lib. i. cap. 25)."

Normative Social Contract Theory: The just distribution of political powers in a community C can be inferred by figuring out what distribution of powers in C *would* be established by a contract agreed to by equally powerful people (or the heads of families) seeking to coordinate their activities for mutual advantage.

Tough Question: How might a social contract theorist argue for this normative claim? Must she **presuppose** the equal value of humans or humanity? (See Kant.) Connect this to the framer's claim that the equality of men in their original state is "self-evident" and that we therefore need no argument or extra evidence to compel an audience's belief or assent to the natural equality of men. Indeed, when Locke confronts this challenge, he seems to assert that people *deserve* equal social power in a state of nature without trying to derive, prove, establish or even argue for this equality from some more descriptive, value-neutral kind of equality they might then be thought to have. For example, equal normative authority is not derived from equal power but conflated with it in the following passage.

§54 "**Age or virtue may give men a just precedency. Excellency of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom Nature, gratitude, or other respects, may have made it due; and yet all this consists with the equality which all men are in respect of *jurisdiction* or *dominion* one over another, which was the equality I there spoke of as proper to the business in hand, being that *equal right* that every man hath to his natural freedom, without being subjected to the will or authority of any other man**" (emphasis added).

Big Questions: Isn't Locke just **asserting** what is in fact a point of *contention* between Filmer and himself: i.e. that men are, "by nature," obliged to respect the lives, basic liberties and properties of each other? Does Locke have a good argument for this normative claim? *Does anyone?*

More general epistemological questions: Can one give a "good" or convincing argument for a moral claim of this sort without assuming some moral claim as a premise? If a speaker's audience differs significantly from her in embracing monarchical or fascistic values, does that mean that any argument for equality in political standing will "beg the question" against that audience?

Locke Provides Another Common Response to Critiques of the Unrealistic Nature of the State of Nature When He Argues that the State of Nature Still Exists Today and Can be Observed Today: A state of nature still exists: (a) in war-torn countries without effective government, (b) between countries, tribes or factions that are not ruled by a common power.

§14 "It is often asked as a mighty objection, where are, or ever were, there any men in such a state of Nature? To which it may suffice as an answer at present, that **since all princes and rulers of "independent" governments all through the world are in a state of Nature, it is plain the world never was, nor never will be, without numbers of men in that state**. I have named all governors of "independent" communities, whether they are, or are not, in league with others; for it is not every compact that puts an end to the state of Nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises and compacts men may make one with another, and yet still be in the state of Nature. **The promises and bargains for truck, etc., between the two men in Soldania, in or between a Swiss and an Indian, in the woods of America, are binding to them, though they are perfectly in a state of Nature in reference to one another for truth, and keeping of faith belongs to men as men, and not as members of society.**"

T2 § 89 "This puts men out of a state of Nature into that of a commonwealth, by setting up a judge on earth with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth, which judge is the legislative or magistrates appointed by it. And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of Nature."

Problem: There may be a sense in which these conditions approximate Locke's state of nature, but the people or groups that find themselves in this state are usually (always?) unequal in social and physical power. Are they nevertheless sufficiently equal to one another to serve Locke's argumentative purposes?

And he provides still another response when arguing that conquest could not provide the leader of the successful force with rights over those who fought with him and that subsequent generations can claim to be descendants of the conquering force (even granting, what Locke denies, that conquest can give a ruler right over a subjected people).

"We are told by some that the English monarchy is founded in the Norman Conquest, and that our princes have thereby a title to absolute dominion, which, if it were true (as by the history it appears otherwise), and that William had a right to make war on this island, yet his dominion by conquest could reach no farther than to the Saxons and Britons that were then inhabitants of this country. **The Normans that came with him and helped to conquer, and all descended from them, are free men and no subjects by conquest, let that give what dominion it will. And if I or anybody else shall claim freedom as derived from them, it will be very hard to prove the contrary; and it is plain, the law that has made no distinction between the one and the other intends not there should be any difference in their freedom or privileges.** But supposing, which seldom happens, that the conquerors and conquered never incorporate into one people under the same laws and freedom; let us see next what power a lawful conqueror has over the subdued, and that I say is purely despotical. He has an absolute power over the lives of those who, by an unjust war, have forfeited them, but not over the lives or fortunes of those who engaged not in the war, nor over the possessions even of those who were actually engaged in it" (T2 §177-8).

3. Natural Law

Locke's conception of nature is pre-Darwinian. Instead of random mutations leading to phenotypic variations "selected" when they aid reproduction or survival to reproductive age, Locke thought the members of animal species were each united by a common essence. When an animal is functioning properly it is acting in accord with its essence. So **the natural law is a kind of descriptive/normative hybrid. By observing how animals act, we can figure out how they act when functioning properly, which will tell us how they *should* act (in a sense of "should" tied to the intentions of their designer who is also conceptualized by Christian philosophers like Locke as morally perfect). If we describe how animals act when they are functioning properly, we therein describe the "natural laws" that govern them. Humans are the only animals who are sufficiently intelligent and self-aware to articulate and contemplate these natural laws for themselves. When we know how we should act, or how we would act were we functioning properly, we can then decide whether to act as we should, or act immorally instead.**

(Do Calvinists and other determinists deny this variety of free will? Some do, but others argue that we can make decisions as to whether or not to act as we know we should even though these decisions are themselves determined by antecedent states of the universe over which decision makers have no control.)

Humans can then consciously act immorally or irrationally: i.e. contrary to the laws of nature: the laws that describe proper human functioning. Because we use reason to become aware of God's natural laws (i.e. in figuring out how we ought to act), Locke follows the tradition in calling natural laws "Laws of Reason."

§57-8 "The law that was to govern Adam was the same that was to govern all his posterity, the law of reason**…. For nobody can be under a law that is not promulgated to him; and this law being promulgated or made known by reason only, he that is not come to the use of his reason cannot be said to be under this law**[4]; and Adam's children being not presently as soon

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[4] Locke is here referring to the other animals or "brutes" and children and the mentally incompetent. These beings cannot be justly or fairly held responsible for acting immorally or acting contrary to moral rules because they cannot understand the rules in question. The thought here is that it is unfair or pointless to hold beings responsible for breaking rules they cannot understand because it is only when we understand a rule that we can use our capacities for self-control to conform our behavior to that rule as we understand it. This distinction is still encoded in our laws as young children cannot be imprisoned and youthful offenders (and the mentally incompetent) are held to a different standard than adult offenders. §60 "But if through defects that may happen out of the ordinary course of Nature, any one comes not to such a degree of reason wherein he might be supposed capable of knowing the law, and so living within the rules of it, he

as born under this law of reason, were not presently free. For law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law…For God having given man an understanding to direct his actions, has allowed him a freedom of will and liberty of acting, as properly belonging thereunto within the bounds of that law he is under."

Locke conjoins his belief in natural law (so understood) with his belief in the substantive equality (in power, intelligence and virtue) of humans prior to the institution of governments to derive some normative claims about our ***pre-political obligations****.*

§2.2.6 "The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order and about His business; they are His property, whose workmanship they are made to last during His, not one another's pleasure. And, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorise us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another."

Locke's Moral Epistemology Revisited: Locke acknowledges both **reasoning from our observations of biological nature** and **revelation** as putative sources of moral knowledge (understood as knowledge of natural law). The former is more secure and allow us to correctly interpret scripture and other putative sources of God's laws and wishes.

See §2.5.24 "Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence, or "revelation," which gives us an account of those grants God made of the world to Adam, and to Noah and his sons, it is very clear that God, as King David says (Psalm 115. 16), "has given the earth to the children of men," given it to mankind in common."

is never capable of being a free man, he is never let loose to the disposure of his own will; because he knows no bounds to it, has not understanding, its proper guide, but is continued under the tuition and government of others all the time his own understanding is incapable of that charge. And so lunatics and idiots are never set free from the government of their parents."

Locke makes it clear that reasoning from nature is a superior source of knowledge of morality (understood as natural law) though belief in God (whether based in revelation, prophetic testimony, or an argument from design) is necessary to give us belief in the binding force of morality.[5] We know from nature that people desire food, family, freedom etc. This allows us to infer that these things are good for us and their deprivation bad. But we need to know that there is a God in order to know that we **ought** to respect the food, family, freedom of another, as the "ought" implies the existence of a power who can punish those who knowingly or intentionally do to another what we know (by observation of our natures) to be bad. *According to Locke, the **authority** of a rule depends on the existence of someone or some body of people with **the power to enforce** that rule.* This is why **we all must enforce the natural laws** in the state of nature, when a state or government has not been established granting this right and obligation to police, judges, etc.

4. Execution of Natural Law

In the 1st Treatise we saw a number of cases in which Locke infers natural law from instincts and desires, the idea being that our good can be inferred from our nature as with all of God's creations. But there is an important difference between: (a) natural law understood as a description of a (properly functioning) animal or plant, and (b) natural law understood as God's command. God enforces his or her commands with Earthly punishments (smiting Sodom and Gomorrah, refusing to allow Moses into the Holy Land for his hubris, etc.) or punishments in the afterlife. The Jewish religion posits a week between Yom Kippur and Rosh Hasannah (the New Year) when amends can be made for wrongdoing, the idea being that God writes the "book of life" for that year and decides who will live and who will die, who will prosper and who will languish, etc. The Christian tradition goes further: perhaps the most famous idea of God's enforcement of natural law is the description of judgment in Revelation.

Revelation 20:11-15: "Then I saw a great white throne and him who was seated on it. From his presence earth and sky fled away, and no place was found for them. And I saw the dead, great and small, standing before the throne, and books were opened. Then another book was opened, which is the book of life. And the dead were judged by what was written in the books, according to what they had done. And the sea gave up the dead who were in it, Death and Hades gave up the dead who were in them, and they were judged, each one of them, according to what they had done. Then Death and Hades were thrown into the lake of fire. This is the second death, the lake of fire. And if anyone's name was not found written in the book of life, he was thrown into the lake of

[5] Locke accepts the argument from design at T1 §53: *Shall he that made the eye not see?* Says the Psalmist, *Psalm 94.9*. See these men's vanities; The structure of that one part is sufficient to convince us of an All-wise Contriver, and he has so visible a claim to us as his Workmanship, that one of the ordinary Appellations of God in Scripture is, God our Maker, and the Lord our Maker."

fire."

Question: Who enforces the Natural Law in Locke's State of Nature?

§2.2.7 "That all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of Nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of Nature is in that state put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation."

Epistemological Question: Suppose that one man harms, enslaves, or imprisons another in a state of nature, how can we **tell** whether he is (justly) punishing another for a violation of the law of nature or (unjustly) violating the laws of nature himself or doing neither?

Locke's answer: We must consult our prior knowledge of the law of nature, which are God's commands, which can be inferred from human nature (essence) and the norms of proper functioning discernible from it. From the fact that all people (except the suicidal) want to survive and it is species-typical to desire to reproduce, move and secure the means to one's survival (food, water, shelter, etc.) we can infer that these things are naturally good, that we all have a natural right to them, and that, in consequence, others have a natural obligation to respect our right to them. Moreover, we can **justly** punish anyone who violates these rights. And if someone damages us (or steals the possessions we naturally acquire in the pursuit of our natural ends), he or she owes us reparation as our natural right. It is **naturally right** or just to punish violations of person and property and insist on reparation for the same. These are natural laws insofar as they are discoverable by observation of nature and the inference from that observation (i.e. the use of reason). They are in this sense independent of scripture and so "writ in the hearts of all mankind."

§2.2.8 "In transgressing the law of Nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men for their mutual security, and so he becomes dangerous to mankind; the tie which is to secure them from injury and violence being slighted and broken by him, which being a trespass against the whole species, and the peace and safety of it, provided for by the law of Nature, every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and, by his example, others from doing the like mischief. And in this case, and upon this ground, every man hath a right to punish the offender, and be executioner of the law of Nature."

When we move from a state of nature into a civil society we give up our right and obligation to punish those who violate our natural rights. We cannot engage in "vigilante justice" but must trust in the state to exact justice for us. **But the state then owes us justice for violations of our rights and the rights of our family**. If they do not discharge this obligation, they are failing to live up to their side of the social contract that institutes a civil society. This is why a victim can decide to show mercy and therein decide not to prosecute someone for a harm done to him, but a judge cannot decide to do this on the victim's behalf.

§2.2.11 "From these two distinct rights (the one of punishing the crime, for restraint and preventing the like offence, which right of punishing is in everybody, the other of taking reparation, which belongs only to the injured party) comes it to pass that the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority, but yet cannot remit the satisfaction due to any private man for the damage he has received. That he who hath suffered the damage has a right to demand in his own name, and he alone can remit."

§2.2.12 "Each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."

5. Vesting Executive Power in the Gov't or Magistrate

"It is easy to discern who are, and are not, in political society together. Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them and punish offenders, are in civil society one with another; but those who have no such common appeal, I mean on earth, are still in the state of Nature, each being where there is no other, judge for himself and executioner; which is, as I have before showed it, the perfect state of Nature" (T2 §88).

Locke acknowledges that people are largely self-interested and often take a partial view of any disagreement to which they are a party. These provide ample reason for vesting the power to punish natural wrongs and compensate for natural injuries in a "neutral party" made representative of the community as a whole.

5a. The Inconveniences of the State of Nature: The Main Reason for Instituting Civil Society

According to Locke, the original polities were military in origin and purpose. A man was chosen as chief or king or ruler in order to organize the men and lead them in war. And his authority dissolved at the end of hostilities. §2.8.108-110. But there are more "domestic" rationales for

extending this rule arising from disputes among the members of a tribe in contrast with disputes between peoples.

T2 §13 "Civil government is the proper remedy for the inconveniences of the state of Nature, which must certainly be great where men may be judges in their own case, since it is easy to be imagined that he who was so unjust as to do his brother an injury will scarce be so just as to condemn himself for it."

Three Reasons Are Given at T2§124-6. I quote the second given at T2 §125: "In the state of Nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. For every one in that state being both judge and executioner of the law of Nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence and unconcernedness, make them too remiss in other men's."

Locke uses this reasonable conjecture to argue that the magistrate must himself answer to an external authority, adding another plank to his case against Filmer's justification of absolute monarchy.

§2.2.13 "What kind of government that is, and how much better it is than the state of Nature, where one man commanding a multitude has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases without the least question or control of those who execute his pleasure? ... If he that judges, judges amiss in his own or any other case, he is answerable for it to the rest of mankind."

T2 §88 "But though every man entered into society has quitted his power to punish offences against the law of Nature in prosecution of his own private judgment, yet with the judgment of offences which he has given up to the legislative, in all cases where he can appeal to the magistrate, he has given up a right to the commonwealth to employ his force for the execution of the judgments of the commonwealth whenever he shall be called to it, which, indeed, are his own judgements, they being made by himself or his representative. And herein we have the original of the legislative and executive power of civil society, which is to judge by standing laws how far offences are to be punished when committed within the commonwealth; and also by occasional judgments founded on the present circumstances of the fact, how far injuries from without are to be vindicated, and in both these to employ all the force of all the members when there shall be need."

5b. Explicit v. Tacit Consent of Future Generations to the Social Contract of their Ancestors

Question: Suppose Locke is right that the State in which I live was formed via a social contract of the sort he describes. **How do future generations come to be bound by that contract given the natural freedom they acquire at the age of maturity?**

"It is true that whatever engagements or promises any one made for himself, he is under the obligation of them, but *cannot* by any *Compact* whatsoever bind *his Children* or posterity. For his

son, when a man, being altogether as free as the father, any *act of the Father can no more give away the liberty of the Son* than it can of anybody else" (T2 §116).

"It is plain, then, by the practice of governments themselves, as well as by the law of right reason, that a child is born a subject of no country nor government. He is under his father's tuition and authority till he come to age of discretion, and then he is a free man, at liberty what government he will put himself under, what body politic he will unite himself to" (T2 §118).

"*Every man* being, as has been shewed, *naturally free*, and nothing being able to put him into subjection to any earthly power, but only his own consent, it is to be considered what shall be understood to be a *sufficient declaration* of a man's consent to make him subject to the laws of any government" (T2 §119)

Locke's Accounts of "Submission to Government":

(1) **Explicit Consent**: Locke claims that people are not automatically citizens of their country of origin. He argues for this on the basis of both "the law of right reason" (i.e. natural law) and "the practice of governments themselves" with an analysis of how children born in a foreign country gain citizenship in the state in which their parents are citizens.[6] They can elect to become a citizen of that nation "by Positive Engagement, and express Promise and Compact" (T2 §122). "It is plain, then, by the practice of governments themselves, as well as by the law of right reason, that a child is born a subject of no country nor government. He is under his father's tuition and authority till he come to age of discretion, and then he is a free man, at liberty what government he will put himself under, what body politic he will unite himself to" (T2 §118).

(2) **Tacit Consent**: "every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as anyone under it, whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and, in effect, it reaches as far as the very being of any one within the territories of that government…. But since the government has a direct jurisdiction only over the land and reaches the possessor of it (before he has actually incorporated himself in the society) only as he dwells upon and enjoys that, the obligation any one is under by virtue of such enjoyment to submit to the government begins and ends with the enjoyment; so that **whenever the owner, who has given nothing but such a tacit consent to the government will, by donation, sale or otherwise, quit the said possession, he is at liberty to go and incorporate himself into any other commonwealth, or agree with others to begin a new one in vacuis locis, in any part of the world they can find free and unpossessed; whereas he that has once, by actual agreement and any express declaration, given his consent to be of any commonweal, is perpetually and indispensably obliged to be, and remain unalterably a subject to it, and can never be again in the liberty of the state of Nature, unless by any calamity the government he was under comes to be dissolved**."

Questions: Is Locke's account of consent to government convincing or adequate? Does it entail that those who do not inherit property they are reluctant to abandon and who do not explicitly decide to accept citizenship in their country of origin are not bound by the social contract and therefore retain their right to use violence to enforce their natural rights? Is this an unappealing consequence of the view? Why, according to Locke, are the rights and duties of citizenship irrevocable? Is a lifetime of loyalty owed to the government in exchange for its having

[6] See Laslett's note 7 on p. 347.

discharged its executive functions (and my having enjoyed the benefits of its having done so) for a limited period of time?

5c. How Rights Change After the Institution of a Civil Society

Human Rights in the State of Nature: (1) The liberty of "innocent delights" (T2 §128). (2) The right to promote his own life and the lives of others to fulfill God's command to be fruitful and multiply and otherwise promote humanity on Earth. (3) The power to enforce natural laws with violence through self-defense and punishments.

Locke argues that to enjoy the benefits of a civil society, **people entirely give up the right of punishing**, **but only limit their right to promote humanity.**

Partial Limitation of Legislative Right: "The first power—viz., of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of Nature" (T2 §129).

Full Alienation of Executive Right: "The power of punishing he wholly gives up, and engages his natural force, which he might before employ in the execution of the law of Nature, by his own single authority, as he thought fit, to assist the executive power of the society as the law thereof shall require."

6. State of War

§2.3.16 "One may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion, because they are not under the ties of the common law of reason, have no other rule but that of force and violence, and so may be treated as a beast of prey, those dangerous and noxious creatures that will be sure to destroy him whenever he falls into their power."

For this reason, Hobbes argues we have no natural obligation to agree to capital punishment even if we are guilty of the crime and the gov't that seeks to execute us is a good and just gov't.

According to Locke, *the attempt to enslave institutes a state of war just as surely as the attempt to kill.* §2.3.17 "He who makes an attempt to enslave me thereby puts himself into a state of war with me. He that in the state of Nature would take away the freedom that belongs to any one in that state must necessarily be supposed to have a design to take away everything else, that freedom being the foundation of all the rest."

§2.4.21 "The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it."

7. Natural Rights to Life, Liberty and Property: How Acquired and How Alienated

§2.4.22 "This freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together. For a man, not having the power of his own life, cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his own life cannot give another power over it. Indeed, **having by his fault forfeited his own life by some act that deserves death, he to whom he has forfeited it may, when he has him in his power, delay to take it, and make use of him to his own service; and he does him no injury by it. For, whenever he finds the hardship of his slavery outweigh the value of his life, it is in his power, by resisting the will of his master, to draw on himself the death he desires.**"

Locke here argues that X is justified in enslaving Y if Y tried to kill or enslave X and X is forgoing X's power to justly kill Y for the offense in question to impose the lesser evil of slavery.

<u>Question</u>: If I need to use deadly force in self-defense when you are assailing me without provocation, then I am justified in killing you to protect my life. (At any rate, that is the "intuition" of everyone except the "purest" pacifists.) But if I am able to enslave you at a given time, I cannot be under mortal peril from you at that same time, so I cannot satisfy the "necessity" component of the conditions on just killing in self-defense. But then it will never happen that I can be poised to justly kill an assailant and at that same time offer him slavery as a lesser evil. Once he's under my control, there is no longer the option of justly killing him and so no just evil to which he might prefer slavery.

Perhaps Locke derives his doctrine of justified enslavement from his belief in the justice of capital punishment rather than the right to self-defense. The idea would be that we have a right to kill someone for killing our compatriots in war and can offer enslavement as a lesser penalty with the understanding that the slave can kill himself if he prefers. But is capital punishment morally justifiable? And what if the enemy combatant hasn't killed any of our compatriots but has only tried to do so? Is it fair or just to kill someone as punishment for attempted murder?

<u>Another Question</u>: Despite the critique contained in this line of questioning, does Locke here provide a good justification for the enslavement of an assailant? Might Locke's reasoning have provided a rationale for those then embroiled in the slave trade?

On Slavery: Consider §2.16.178-9: "But supposing, which seldom happens, that the conquerors and conquered never incorporate into one people under the same laws and freedom; let us see

next what power a lawful conqueror has over the subdued, and that I say is purely despotical. He has an absolute power over the lives of those who, by an unjust war, have forfeited them, but not over the lives or fortunes of those who engaged not in the war, nor over the possessions even of those who were actually engaged in it….the conqueror gets no power but only over those who have actually assisted, concurred, or consented to that unjust force that is used against him. For the people having given to their governors no power to do an unjust thing, such as is to make an unjust war (for they never had such a power in themselves), they ought not to be charged as guilty of the violence and injustice that is committed in an unjust war any farther than they actually abet it, no more than they are to be thought guilty of any violence or oppression their governors should use upon the people themselves or any part of their fellow- subjects, they having empowered them no more to the one than to the other."

Question: How could anyone think these rather limited conditions of just enslavement satisfied by the vast majority of those Africans bought and sold at the time?

§2.5.26 "Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others."

Question: It is one thing to say that consent of mankind is not necessary to have a right to the acorns or apples one has gathered, and another to say that one has a right simply in virtue of having gathered them. Locke says gathering is a kind of labor that one "mixes" with the tree's produce or adds value to that produce and seems to argue that someone's mixing her labor with something and therein improving its value gives her a right to that thing "at least where there is enough, and as good left in common for others." This last proviso renders controversial the application of this principle to any actual case of claimed ownership (or *almost* any actual case); see below.

§2.5.27 "The grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place, where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them."

Question: “The turfs *my servant* has cut”? Why doesn’t this give the right over the turfs to the servant? Is Locke’s here assuming that labor can be alienated by contract?

§2.5.31 “As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common.”

But Locke qualifies these claims with two conditions:

(1) Condition of Abundance: X’s mixing her labor with Y gives X a right to Y only when “there is enough and as good left in common for others.”

(2) Condition of Thrift: X’s mixing her labor with Y gives X a right to Y only if *X can make use of Y* before it spoils.

§2.5.37 “In the beginning, before the desire of having more than men needed had altered the intrinsic value of things, which depends only on their usefulness to the life of man, or had agreed that a little piece of yellow metal, which would keep without wasting or decay, should be worth a great piece of flesh or a whole heap of corn, though men had a right to appropriate by their labour, each one to himself, as much of the things of Nature as he could use, yet this could not be much, nor to the prejudice of others, where the same plenty was still left, to those who would use the same industry.”

Questions: How are these two conditions best interpreted? Does a wealthy person not have a right to estates she never visits or cars she never drives? The “sunset view” for which people pay thousands or millions of dollars “spoils” (in some sense) every time a beachside condo or lakeside estate goes empty for a weekend because its owner is sleeping in her penthouse apartment. Do these conditions render Locke’s theory inapplicable to the conceptualization of property rights today?

On alienation and consent: According to Locke, we each begin life with the same natural rights we possessed in the state of nature. We are not obligated to the civil society—and its transference of coercive power to the sovereign—until we reach maturity and then either consent to the social contract or signal dissent by leaving the society in which we were raised.

§2.9.118-9 “It is plain, then, by the practice of governments themselves, as well as by the law of right reason, that a child is born a subject of no country nor government. He is under his father’s tuition and authority till he come to age of discretion, and then he is a free man, at liberty to what government he will put himself under, what body politic he will unite himself to….naturally free, and nothing being able to put him into subjection to any earthly power, but only his own consent.”

The only limitation on this is the "tacit consent" to the social contract implied by one's accepting its protections and other advantages (§2.9.119).

Questions: Do we consent to the social contract? How free are we in fact to move to another state with a contract we do want to "sign"? Aren't our political obligations inherited rather than chosen?

8. The Value Added By Labor – The Introduction of Currency

§2.5.40 "Let any one consider what the difference is between an acre of land planted with tobacco or sugar, sown with wheat or barley, and an acre of the same land lying in common without any husbandry upon it, and he will find that the improvement of labour makes the far greater part of the value. I think it will be but a very modest computation to say, that of the products of the earth useful to the life of man, nine-tenths are the effects of labour. Nay, if we will rightly estimate things as they come to our use, and cast up the several expenses about them—what in them is purely owing to Nature and what to labour—we shall find that in most of them ninety-nine hundredths are wholly to be put on the account of labour."

§2.5.46 "It was a foolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to anybody else, so that it perished not uselessly in his possession, these he also made use of. And if he also bartered away plums that would have rotted in a week, for nuts that would last good for his eating a whole year, he did no injury; he wasted not the common stock; destroyed no part of the portion of goods that belonged to others, so long as nothing perished uselessly in his hands. Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much of these durable things as he pleased; **the exceeding of the bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it.**"

§2.5.47 "And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life."

§2.5.48 "And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them."

§2.5.50 "Since gold and silver, being little useful to the life of man, in proportion to food, raiment, and carriage, has its value only from the consent of men—whereof labour yet makes in great part the measure—it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth—I mean out of the bounds of society."

9. The Legislative Power

§2.8.96-9 "When any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority. For that which acts any community, being only the consent of the individuals of it, and it being one body, must move one way, it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority, or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it agreed that it should; and so every one is bound by that consent to be concluded by the majority. And therefore we see that in assemblies empowered to act by positive laws where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines as having, by the law of Nature and reason, the power of the whole. …And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact if he be left free and under no other ties than he was in before in the state of Nature.…**that which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of majority, to unite and incorporate into such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world**."

Remember, however, that though Locke thinks the majority must be given the authority to determine the laws for all, that legislative authority is nevertheless constrained by the natural rights that the contractors retained for themselves.

"**The law of Nature stands as an eternal rule to all men, legislators as well as others**. The rules that they make for, other men's actions must, as well as their own and other men's actions, be conformable to the law of Nature—i.e., to the will of God, of which that is a declaration, and **the fundamental law of Nature being the preservation of mankind, no human sanction can be good or valid against it**" (T2 §135).

The legislative power, so instituted, is "supreme" according to Locke. It derives directly from the consent of the governed who are represented in that legislature. As we saw above, it is constrained by the natural rights retained by the parties to the social contract and it is further constrained by Locke's insistence that the social contract must have included some provision: (a) that **the laws be made public**, and (b) that **no one be "above the law"** so that those who write and enforce law must also be subjected to its constraints.

"I will not dispute now whether princes are exempt from the laws of their country, but this I am sure, they owe subjection to the laws of God and Nature. Nobody, no power can exempt them

from the obligations of that eternal law. Those are so great and so strong in the case of promises, that Omnipotency itself can be tied by them. Grants, promises, and oaths are bonds that hold the Almighty, whatever some flatterers say to princes of the world, who, all together, with all their people joined to them, are, in comparison of the great God, but as a drop of the bucket, or a dust on the balance- inconsiderable, nothing!" (T2 §195).

"For the law of Nature being unwritten, and so nowhere to be found but in the minds of men, they who, through passion or interest, shall miscite or misapply it, cannot so easily be convinced of their mistake where there is no established judge; and so it serves not as it aught, to determine the rights and fence the properties of those that live under it, especially where everyone is judge, interpreter, and executioner of it too, and that in his own case… To this end it is that men give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature" (T2 §136).

Task: Connect these provisions to the idea of moral agency Locke invokes to explain the sense in which men are naturally free. Recall one of these key passages.

"Reason" as a Precondition for Right: §2.6.60 "But if through defects that may happen out of the ordinary course of Nature, any one comes not to such a degree of reason wherein he might be supposed capable of knowing the law, and so living within the rules of it, he is never capable of being a free man, he is never let loose to the disposure of his own will; because he knows no bounds to it, has not understanding, its proper guide, but is continued under the tuition and government of others all the time his own understanding is incapable of that charge. And so lunatics and idiots are never set free from the government of their parents."

9b. Necessarily Democratic Origins Permit Other Forms of Subsequent Rule

§132. "The majority having, as has been showed, upon men's first uniting into society, the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time, and executing those laws by officers of their own appointing, and then the form of the government is a perfect democracy; or else may put the power of making laws into the hands of a few select men, and their heirs or successors, and then it is an oligarchy; or else into the hands of one man, and then it is a monarchy; if to him and his heirs, it is a hereditary monarchy; if to him only for life, but upon his death the power only of nominating a successor, to return to them, an elective monarchy. And so accordingly of these make compounded and mixed forms of government, as they think good. And if the legislative power be at first given by the majority to one or more persons only for their lives, or any limited time, and then the supreme power to revert to them again, when it is so reverted the community may dispose of it again anew into what hands they please, and so constitute a new form of government; for the form of government depending upon the placing the supreme power, which is the legislative, it being impossible to conceive that an inferior power should prescribe to a superior, or any but the supreme make laws, according as the power of making laws is placed, such is the form of the commonwealth."

Question: According to Locke, we cannot alienate or get rid of our natural rights to life, liberty and property unless we try to rob others of their enjoyment of these rights. Why then is the same not true of our right to determine the political structure wherein rules are established to protect the

lives, liberties and properties of those who live within it? Locke maintains that we give up our right to enforce our rights with violence because our knowledge of men's partiality allows us to see the wisdom of establishing a "neutral" 3rd party for this purpose. Does he have a similar story to explain why natural democrats would consent to be governed by a monarch? See here *the necessity of establishing peaceful transitions of executive power*.

9c. No Taxation Without Representation

"It is true governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent—i.e., the consent of the majority, giving it either by themselves or their representatives chosen by them; for if any one shall claim a power to lay and levy taxes on the people by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government. For what property have I in that which another may by right take when he pleases to himself?" T2 §140

Task: Explain the application of this doctrine to the case for Revolution as made by Jefferson in his Declaration of Independence.

9d. CONCLUSION: Five requirements that Must Be Met by a Just Legislature (i.e. one that does not exceed the authority granted it by the social contract that institutes a civil society)

(1) Uniform rules for governed and government; (2) Rules must be set for utilitarian ends; (3) No Taxation without representation; (4) No legislative transference of legislative power to an unrepresentative person or body; (5) Separation of Legislative from Executive into distinct persons or bodies of people.

§2.11.142-3. "These are the bounds which the trust that is put in them by the society and the law of God and Nature have set to the legislative power of every commonwealth, in all forms of government. **First**: They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough. **Secondly**: These laws also ought to be designed for no other end ultimately but the good of the people. **Thirdly**: They must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves. **Fourthly**: Legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have….Because those laws which are constantly to be executed, and whose force is always to continue, may be made in a little time,

therefore there is no need that the legislative should be always in being, not having always business to do. And [**Fifthly**] because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government.[7] **Therefore** in well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them to take care that they make them for the public good."

<u>A Question to Keep in Mind Moving Forward</u>: How well are these principles exemplified in the writings of Jefferson and the Federalists? How well are they embodied in the US Constitution and the governmental structure the founding fathers erected with the guidance of this constitution?

10. Apportionment

We have seen that Locke grants supreme authority to the legislative body which is supposed to serve as representatives of the people; to determine and execute the will of the majority as far as they can determine. But what scheme of representation will facilitate this function? How should a legislative body be constituted or elected? For how long should they serve? Locke's answers to these questions are guided by his vision of the legislative function and they seem to have direct relevance to the unrepresentative nature of the US Senate as it is constituted today (where each state is given 2 representatives in the senate, regardless of population), which, in conjunction with the role of the electoral college in presidential elections, has led to a series of US Presidents who

[7] Though Locke states four provisions the fourth contains two distinct claims: the necessity of both a fully general rule of law and the separation of legislative from executive power. The latter is more expressly articulated at T2 §143: "because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government. Therefore in well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them to take care that they make them for the public good."

were elected despite their opponents receiving a majority of the vote.

"People, riches, trade, power, change their stations; flourishing mighty cities come to ruin, and prove in time neglected desolate corners, whilst other unfrequented places grow into populous countries filled with wealth and inhabitants. But things not always changing equally, and private interest often keeping up customs and privileges when the reasons of them are ceased, it often comes to pass that in governments where part of the legislative consists of representatives chosen by the people, that in tract of time this representation becomes very unequal and disproportionate to the reasons it was at first established upon. To what gross absurdities the following of custom when reason has left it may lead, we may be satisfied when we see the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheepcote, or more inhabitants than a shepherd is to be found, send as many representatives to the grand assembly of law-makers as a whole county numerous in people and powerful in riches. This strangers stand amazed at, and every one must confess needs a remedy though most think it hard to find one, because the constitution of the legislative being the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people, no inferior power can alter it….but it being the interest as well as intention of the people to have a fair and equal representative, whoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community" (T2 §157-8).

Locke here argues that an unequal apportionment of representatives is so unjust, the executive can use his or her power to reapportion representatives to reestablish equality in representation and therein promote the connection between the will of the majority and the content of legislation enacted by the legislature. Recall, that Locke thinks the legislature is supreme, so his allowing the executive this power is a large and important concession which reveals the seriousness of the problem for which it is supposed to provide a remedy.

<u>Questions</u>: What would Locke say about the Senate and the Electoral College? Do they betray his principles of just governance? Do they undermine the authority of a government that can no longer claim the consent of a majority of its citizens for its laws and decisions?

11. Locke's Theory of the Just Revolution

§149 "Though in a constituted commonwealth standing upon its own basis and acting according to its own nature—that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet **the legislative being only a fiduciary power to act for certain ends**, **there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them**. <u>For all power given with trust for the attaining an end being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security</u>. And **thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of**

anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."

Question: Can the American Revolution be justified as an application of Locke's theory of the just revolution to the context in which the founding fathers found themselves when they declared their independence from British rule?

Some Important Passages

Articulating the Question to be Answered: The Nature of Political Authority: §81 "A man can never be obliged in conscience to submit to any power, unless he can be satisfied who is the person who has a right to exercise that power over him. If this were not so, there would be no distinction between pirates and lawful princes; he that has force is without any more ado to be obeyed, and crowns and sceptres would become the inheritance only of violence and rapine. Men too might as often and as innocently change their governors, as they do their physicians, if the person cannot be known who has a right to direct me, and whose prescriptions I am bound to follow. To settle therefore men's consciences, under an obligation to obedience, it is necessary that they know not only that there is a power somewhere in the world, but the person who by right is vested with this power over them."

The Common Good as the End for Which the Executive Power Must be Employed to Conform to the Social Contract that Created that Power: §92 "Property, whose original is from the right a man has to use any of the inferior creatures, for the subsistence and comfort of his life, is for the benefit and sole advantage of the proprietor, so that he may even destroy the thing, that he has property in by his use of it, where need requires: but government being for the preservation of every man's right and property, by preserving him from the violence or injury of others, is for the good of the governed: for the magistrate's sword being for a "terror to evil doers," and by that terror to enforce men to observe the positive laws of the society, made conformable to the laws of nature, for the public good, i.e., the good of every particular member of that society, as far as by common rules it can be provided for; the sword is not given the magistrate for his own good alone."

Political Authority is Limited and Conditional Upon the Consent of the Governed — The Rationale Behind the Social Contract is Inconsistent with Absolute Authority: §90 "It is evident that absolute monarchy, which by some men is counted for the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil government at all. For the end of civil society being to avoid and remedy those inconveniences of the state of Nature which necessarily follow from every man's being judge in his own case, by setting up a known authority to which every one of that society may appeal upon any injury received, or controversy that may

arise, and which every one of the society ought to obey. Wherever any persons are who have not such an authority to appeal to, and decide any difference between them there, those persons are still in the state of Nature. And so is every absolute prince in respect of those who are under his dominion."

<u>The Limits of the Legislative Power</u>: §2.121 "Whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people."

<u>The Authority of Men in the State of Nature is Limited by the Natural Rights of Others as is the Authority of the Government in a Civil Society</u> – the latter being derived from the former" §2.135 "A man, as has been proved, cannot subject himself to the arbitrary power of another; and having, in the state of Nature, no arbitrary power over the life, liberty, or possession of another, but only so much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power in the utmost bounds of it is limited to the public good of the society. It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects; the obligations of the law of Nature cease not in society, but only in many cases are drawn closer, and have, by human laws, known penalties annexed to them to enforce their observation. Thus the law of Nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for, other men's actions must, as well as their own and other men's actions, be conformable to the law of Nature— i.e., to the will of God, of which that is a declaration, and the fundamental law of Nature being the preservation of mankind, no human sanction can be good or valid against it."