Interpretation
A JOURNAL OF POLITICAL PHILOSOPHY

Winter 1989-90 *Volume 17 Number 2*

165	Joseph Cropsey	The Whole as Setting for Man: On Plato's *Timaeus*
193	Govert den Hartogh	Made by Contrivance and the Consent of Men: Abstract Principle and Historical Fact in Locke's Political Philosophy
223	Richard Myers	Christianity and Politics in Montesquieu's *Greatness and Decline of the Romans*
239	Christopher Kelly and Roger D. Masters	Rousseau on Reading "Jean-Jacques": *The Dialogues*
255	Mark S. Cladis	Emile Durkheim and Provinces of Ethics
275	Leslie Paul Thiele	Nietzsche's Politics
291	T. F. Morris	The Argument in the *Protagoras* that No One Does What He Believes To Be Bad
	Book Reviews	
305	Robert R. Sullivan	Horst-Jürgen Gerigk, *Unterwegs zur Interpretation Hinweise zu einer Theorie der Literatur in Auseinandersetzung mit Gadamers* Warheit und Methode
309	Will Morrisey	Catherine H. Zuckert, editor, *Understanding the Political Spirit: Philosophical Investigations from Socrates to Nietzsche*
313		Patrick Coby, *Socrates and the Sophistic Enlightenment: A Commentary on Plato's* Protagoras
317		Mary P. Nichols, *Socrates and the Political Community: An Ancient Debate*

Interpretation

Subscriptions Subscription rates per volume (3 issues):
individuals $21
libraries and all other institutions $34
students (five-year limit) $12
Postage outside U.S.: Canada $3.50 extra; elsewhere $4 extra by surface mail (8 weeks or longer) or $7.50 by air.
Payments: in U.S. dollars AND payable by the U.S. Postal Service or a financial institution located within the U.S.

Single copies available.

CONTRIBUTORS should send THREE clear copies with their name, affiliation of any kind, address with full postal/ZIP code, and telephone number on the title page only; follow *The Chicago Manual of Style*, 13th ed., or manuals based on it; and place notes in the text or follow current journal style in printing notes.

Composition by Eastern Graphics

Inquiries: Maddy Canestra, Assistant to the Editor, INTERPRETATION, Queens College, Flushing, N.Y. 11367-0904, U.S.A. (718)520-7099

Made by Contrivance and the Consent of Men: Abstract Principle and Historical Fact in Locke's Political Philosophy

Govert den Hartogh
University of Amsterdam

In the *state of nature* no one person holds authority over another. People however prefer to leave this state because of its *inconveniences*. They therefore agree unanimously to enter into a *civil* or *political society*, and by majority decision delegate their united powers to particular officials, who henceforward have the right to be obeyed by every citizen. How are we to absorb this story? Recent interpretation tends to accept it, not as a description of presumed historical fact, but as a theoretical justification of limited government on the basis of abstract principles within the framework of a hypothetical contract. The historical element is ornamental and superfluous, or at best polemical and subordinate. This reading is attractive, I suggest, mainly because the principal element in Locke's account which seems to require a historical interpretation, is identified as individual consent, and this seems not to play a major theoretical role, nor of course a particularly convincing one. If it is history, it is bad history; if it is fiction, it may be illuminating.

In opposition to this exegetical trend I will argue:

1. That the principal historical element in Locke's account is social convention, not individual consent;
2. That it is of fundamental importance to Locke's concerns;
3. That it is the element which makes his theory philosophically superior to any exclusively hypothetical contract theory of political obligation.

Certainly, Locke looks at politics as a field of rational action, and this enables him to use the kind of a priori reasoning associated with hypothetical contract theory. But this is supplemented in an interesting way by the introduction of contingent historical conditions. As a political philosopher Locke is not so much a follower of Hobbes as a predecessor of Hume. (As a politician, of course, he is neither.)

But for the time and the facilities made available at the Netherlands Institute For Advanced Study in the Humanities and Social Sciences at Wassenaar, this article would not have been written. The critical comments of Frans Jacobs were very useful to me.

1. THE STATE OF NATURE

How should we conceive the state of nature? Two alternative interpretations present themselves.

(a) In opposition to Filmer, Locke wants to outline *another rise of Government, another Original of Political Power, and another way of designing and knowing the persons that have it (Second Treatise* [hereafter II],1*)*.* This seems to be a historical enterprise (cf. the terms *original, first erecting, beginning, infancy* in: II, title, 104, 105, 106, 110, 111, 162; *remain . . . till*, II,15, *are left*, 95, *entring into society*, passim). So perhaps Locke believes the state of nature to be a condition always, everywhere and necessarily preceding civil society. In that case it makes sense to ask which motives induced people to exchange the one state for the other. But the answer to this question does not seem to have any normative consequences. Not all actual motives are good reasons. And whatever the explanation for the introduction of government by our ancestors, why should we feel bound by it? If this is Locke's intention, he clearly confuses a question of justification with a genetical one.

(b) On the other hand Locke might only wish to conduct a thought experiment. He sets himself the task to justify the existence of political society, with its binding laws and authority. So let us imagine for a moment that law and authority do not exist. What reasons could people have under such hypothetical circumstances to re-introduce them? If we could think of any decisive reasons, they might suffice as a justification. This is the basic argument scheme of hypothetical contract theory: If people were rational and in such-and-such circumstances, they would choose or agree to certain rules; therefore, people actually living under those rules ought to obey them. If people objected against them, this would show that they want to exploit to their advantage the differences between the actual and the hypothetical situation, and the hypothetical situation is construed precisely in order to identify such morally suspect biases. (Kavka 1986, 22, 398ff; cf. Grice 1967, 95ff; Rawls 1971, 12f, 18f; Richards 1971, 79–91; Harsanyi 1976, 4, 14, 38; Brandt 1979, ch. x, xi; Scanlon 1982; Habermas 1983; Jacobs 1985, 246; Gauthier 1986, ch. viii.)

By putting people into such conditions, albeit hypothetically, two things are done at the same time. We are assuming a situation of choice. In the first place then, we are describing one of the alternatives, and asking whether we can think of any superior ones. The alternative described is the condition of anarchy, and what we need is a realistic assessment of its advantages and disadvantages. But in the second place we are stating which criteria should govern the choice. For what Locke wants to know is whether there is a *moral* justification for government's claims to authority. He has therefore to describe his hypothetical state of nature as a condition in which all moral obligations hold which

*In this article, passages in italic are from works of John Locke and of David Hume.

do not depend for their validity on the existence of the state. This is done in II, 4, in which the state of nature is described in terms of the rights, obligations and powers which are valid in it.

It is the fundamental mistake in Dunn's account (Dunn 1969, 101 ff), to identify the state of nature with this "jural condition" only. It then follows, of course, that it is a trans-historical concept: "no portion of social history could serve as normative criterion for any other" (103). But even the expression *the inconveniences of the state of nature* would then make no sense at all.

What Locke on this interpretation wishes to do with the concept of the state of nature, is to present an order of justification. The task is to justify political society against the alternatives, on the basis of some more fundamental values.

How should the choice be made between those interpretations? It cannot be denied that Locke's exposition has a historical aspect. He presents us with examples from the bible, from ancient history, and from travellers' tales—to his mind historical sources of equal value, for *In the beginning all the World was America* (II,49, cf. 108)—in order to prove the existence of situations corresponding to his description of the state of nature and of the institution of civil government by mutual consent (II, 14,102–104, 115). *This has been the practice of the World . . .* (II, 116). He asks himself the question why the distant past should bind people in the present, and gives what looks conspicuously like a historical answer: because each of them, at one moment or another, has himself consented to the existing arrangements. And he formulates (I, 83, 94) a criterion of "apostolic succession" for legitimacy: a legitimate ruler has to succeed a legitimate ruler in a legitimate way. Such a theory of lawful transfer obviously has to be supplemented by a theory of lawful acquisition.

But on the other hand, in II,103 he interrupts a historical argument to distinguish explicitly between a question of justification and one of origin: *at best an Argument from what has been, to what should of right be, has no great force.* And this insistence on the gap between *is* and *ought* is not exceptional. (II, 180: *. . . the practice of the strong and powerful, how universal soever it may be, is seldom the rule of Right,* 179, 184, 186; *First Treatise* [hereafter I], 106, 57, 58, 59: *Be it then as sir Robert says, that Anciently, it was usual for Men to sell and Castrate their Children . . . 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, justifie Adultery, Incest and Sodomy . .*) At the same time he treats the historical issues he addresses with notorious casualness. On the question of when the transition from the state of nature to civil society took place, he remarks that it was before remembrance, the state of nature being such an ill condition that *men are quickly driven to society* (II,127, cf. 74,101,105, I,145). As though that fact could discharge him from the burden of proof! And when he is asked when exactly you and I gave our consent to the existing regime, his answer seems to amount to the contention that we could hardly ever fail to do so.

This is not accidental, or so recent interpretation contends. For the alleged historical facts have no real weight at all to bear in the argument. Locke starts describing the state of nature in order to pay attention to the reasons men would have for leaving that state and entering into civil society. It is to those reasons, and not to any actual historical agreement, that he appeals for his delimitation of the tasks of government. Historical evidence, scantily given, is strictly irrelevant: there is only one possible contract rational people could agree to, to remedy the inconveniences of the state of nature. So, if the government is acting within the bounds of that agreement, it is lawful, and its citizens have to obey it, whether the agreement was actually made or not. Hence, and this seems to decide the matter, when Locke discusses the right to resistance, he at no time allows it to depend on the maintaining or retracting of consent. Only if government does not properly acquit itself of its job, is it divested of its authority. If people resist, they do not automatically have right on their side: they *appeal to Heaven,* and . . . *he that appeals to Heaven, must be sure he has Right on his side; and a Right too that is worth the Trouble and Cost of the Appeal* . . . (II, 176, cf. 21, 168, 241–242). Otherwise Heaven may put them in the wrong. On the other hand, if they slavishly continue to consent to a despotical government, this goes no way to rendering that government legitimate. The critical point is reached, not when government ceases to win the consent of its subjects, but when it ceases to earn it.

But if consent and contract are only hypothetical, then neither is the state of nature a historical condition; it is nothing more than the condition people would be in, timelessly, if no Government existed. Significant (von Leyden 1982, 100) is the present time in II, 4 *(what State all Men are naturally in)*, 9 *(every Man hath . . . a Power to punish Offences)*. The concept of the state of nature summarizes what *belongs to Men, as Men, and not as Members of Society* (II, 14). (Pitkin 1972, 53–57; Seliger 1968, 82 ff; Dunn 1969, ch. ix; Rawls 1971, 112; Steinberg 1978, ch. 3; Parry 1978, 18–19; Pateman 1979, ch. 4; Bookman 1984.)

It is undeniable that Locke relies heavily on a rational reconstruction of the "agreement" from the reasons people have for making it. But this does not answer the question what it is that he intends to reconstruct: an actual (conjectural) or a hypothetical agreement. The second answer cannot be the complete truth about Locke's intentions, even if it were about his achievement. For once, on this interpretation Locke could simply *define* the state of nature as a condition without authority, as indeed he seems to do in II, 19, 87, 89–91, 125, 131. But as a matter of fact this is a proposition he wants not so much to assume as to prove. For it is the point of issue between him and Filmer. This argument makes no sense at all if it does not concern a matter of fact.

Locke's fundamental conception of the original condition of mankind is, like Filmer's, a theological one. It is the condition of man within the order of the

Creation, having at his disposal the faculties God equipped him with, and being under the commands God imposed on him. What is controversial is whether *the Lord and Master of them all* has *by any manifest Declaration of his Will set one above another* (II, 4).

If we take this theological conception as basic, the historical and the theoretical interpretation no longer exclude each other. The state of nature on the one hand is a trans-historical reality: all men sharing the same nature and subject to the same divine laws. That nature and that calling provide them generally with decisive reasons for subjecting themselves to political authority. This essential part of the argument contains no genetic aspect: it simply "sets human beings in the teleology of divine purposes" (Dunn 1969, 103). But the Creation is supposed to be a divine activity with a beginning; so immediately after having been created (but not necessarily only then) people really lived in a state of nature. God did not, by explicit legislation, give any of them authority over all the others (not even Adam over Eve! I, 47). This has been proved on biblical and rational grounds against Filmer. But nowadays most of them most of the time don't live in natural freedom but under legitimate authority. Ergo this has been instituted at one time or another. Locke believes he is in a position to postulate the transition of the state of nature to civil society as a historical phenomenon, not so much on the strength of the historical evidence, but rather by a theological argument a priori.

In II, ch. vii, he develops his definition of political society, as distinguished from other types of society, and concludes (87) that it can only come into existence by individuals resigning their natural power of the execution of the law of nature. In ch. viii he then treats this as a historical event (cf. the relation between II, 99, last sentence, and the argument of 102ff). The genre is that which Dugald Stewart called "conjectural or theoretical history" (Aarsleff 1969, 104; cf. Laslett in Locke 1970, 97).

This explains also why Locke can permit himself to be careless about the burden of (empirical) proof. *Tis often asked as a mighty Objection, Where are, or ever were, there any Men in such a State of Nature?* (II, 14.) What is played down here, is the importance of the historical evidence, not of the historical truth. (The two are confused when it is argued that, because the terms of the original contract are fully determinable by reason, it does not matter whether it is actually made. Pitkin 1972, 57; Parry 1978, 102.) For similar reasons no evidence needs to be given for the thesis that the use of money derives from consent (II, 36, 47, 50). Locke's argument receives only additional support from the evidence: the *manifest footsteps* (II, 101; the term is Filmer's) which the postulated development has left in history.

But to conclude, Reason being plain on our side, that Men are naturally free, and the Examples of History shewing, 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. (II, 104.)

The *First Treatise* therefore accepts Filmer's use of the bible as a historical document, but disputes his reading. The style of the argument is summarized by Locke's remark that *his* (Filmer's) *principles could not be made to agree with that Constitution and Order which God had settled in the World, and therefore must needs often clash with common Sense and Experience*(I,137, cf. 124, 153). Rational argument is decisive; the appeal to evidence serves only to confirm it. This is not only a consequence of the relative lack of evidence (cf. II, 112: *as far as we have any light from History*). Historical data, even if taken from Scripture, cannot speak for themselves, they have to be interpreted in the light of Reason (Medick 1973, 121, with interesting references to the *Essay*). Locke has no qualms about approving Filmer's historical speculations concerning the patriarchal origins of political power (§ 74–76, 105–107): he does not dispute the alleged data so much, as their interpretation. We indeed see people subjecting themselves as a matter of course to the authority of their fathers without making any explicit reservations, but we have to interpret them as giving their tacit consent on the conditions reason recommends. Nothing in the evidence conflicts with this interpretation, and some data confirm it. In the same way observation interpreted by reason shows that the right to obedience, created by procreation, is temporary only (II, 80–81, cf. Laslett in Locke 1970, 93).

This insight into Locke's intentions, does, I concede, not get us very far. Few commentators really want to deny that Locke believed his rational construction of "origins" to be at the same time a rational reconstruction of actual historical fact. Pitkin only concludes that "the hypothetical consent imputed to hypothetical, timeless, abstract, rational men", is the only relevant one (Pitkin 1972, 57). Parry accepts Locke's narrative as "conjectural history", but sees the conjecture as a reminder of what might be logically possible without government (Parry 1978, 57). Even Dunn, who rejects the idea of conjectural history and insists that the analytical function of the concept of the state of nature lies precisely in its a-historicity (Dunn 1969, 103, 111f), accepts that it can have instances and that this is important for Locke because it eliminates most of Filmer's argumentation (Dunn 1971, note 13). What these authors contend is:

1. That Locke's confidence in his reconstruction of history is as vulnerable as its theological foundations;
2. That the rational construction can do all the theoretical work Locke wants his historical reconstruction to do;
3. That as a matter of fact Locke himself lets the rational construction do most of the work. (One may of course accept 1 and 2, but reject 3, cf. Benn & Peters 1959, 319, 326ff; Plamenatz 1963, 209 ff.)

This then is the position to be scrutinized.

2. THE IDYLLIC AND THE GRIM INTERPRETATION

Locke has often been accused of commuting between two incompatible descriptions of the state of nature, an idyllic and a grim one. Tracing their relationship we can find one way in which history is relevant to his concerns.

Life in the state of nature has so many disadvantages that *Government is hardly to be avoided amongst Men that live together* (II, 105). Describing them Locke sometimes seems to echo Hobbes (II, 20–21, 123): festering feuds. But if natural men cannot help drifting into a state of enmity, misery and destruction when there is no coercive power to restrain them, what sense does it make to appeal to their moral and social sentiments, to trust and trustfulness, for requiring conformity to the law from citizens and from governors? If moral relations between people did not antedate the institution of government, civil society could not survive the dissolution of government without dissolving itself. Political obligation (or at least its having any motivating impact) would depend on the existence of a coercive power. (And in that case, as Locke sees very clearly, we could have no reason either to trust the coercive power, II, 13, 93, 137.) Therefore it is essential for Locke to emphasize the difference between the state of nature and the state of war (II, 19). He couldn't allow the Law of Nature to be a dead letter in the state of nature. But if natural man on the other hand really resides in a tranquil and law-abiding community in which everybody is equally free, *why will he part with his Freedom? Why will he give up This Empire, and subject himself to the Dominion and Controul of any other Power?* (II, 123) Why indeed? It seems that Locke has to rely on contradictory images of the state of nature in different stages of his argument.

The semblance of a contradiction however disappears as soon as we make the necessary distinction between the two logical roles of the concept of the state of nature. In the first place it denotes the normative context for choosing between political authority and its alternatives; as such it is the condition in which people have the law of nature to govern them and nothing more. In the second place it refers to the condition we, as a matter of sober empirical fact, may expect to obtain in the absence of political authority. The relevant question to ask about this condition is in how far the law of nature in it is not only valid but fulfilled.

In advance we can only sketch the possibilities. They form a continuum. At one extreme we find the ideal community, in which no disagreements exist concerning the interpretation of the law of nature, and everyone is always willing to conform to it. So it is easy to choose between this state of anarchy and political society: there is nothing to commend the latter. If everyone used his rational power optimally, in gaining insight as well as in governing his conduct, this ideal community could be realized. (Assuming the law of nature to be clear enough to decide all possible controversies.) This is therefore one of the conditions within reach of human beings living together without government.

And this, I submit, is what Locke is trying to say when he states, II, 19, that the state of nature and the state of war *are as far distant, as a State of Peace, Good Will, Mutual assistance, and Preservation, and a State of Enmity, Malice, Violence and mutual Destruction are one from another:* He cannot mean that the state of nature *necessarily* is a state of peace and not of war, for he denies this immediately afterwards (II, 21: *To avoid this State of War . . is one great reason of Mens . . quitting the State of Nature.*) So he must mean that the state of nature is *possibly* a state of peace. (Ashcraft 1968, 903-908, Colman 1983, 182f. It is misleading to identify the ideal realization as the meaning of the concept of the state of nature: Steinberg 1978, 59; or as one of two different meanings—*properly the state of nature*, II, 19; or *the perfect state of nature*, II, 87, vs. *the ordinary state of nature*, II, 97—, Aarsleff 1969, 101f; Medick 1973, 106f.)

On the other end of the continuum it is also possibly a state of war. And in between it might be a condition which is in danger of degenerating into such a state.

By letting people deliberate "in" a state of nature, whether to remain in it or to leave it for political society (e.g. II, 89), Locke combines the two logical roles of the concept. Political theory therewith becomes, as it should, a moral theory for a non-ideal world. Under ideal conditions the law of nature would be performed universally in a state of peaceful anarchy. *And were it not for the corruption, and vitiousness of degenerate Men, there would be . . . no necessity that Men should separate from this great and natural Community, and by positive agreements combine into smaller and divided associations* (II, 128).[1] Under the non-ideal conditions of less than perfect conformity and biased interpretation, civil society is the alternative to be preferred. It promises (but does not guarantee) a higher level of fulfilment of the law of nature.

Political authority is possible, because people have the faculty of reason; it is needed because they do not always exercise it. If they were unable to take the law of nature seriously, they would be unable to honour the moral reasons for the acceptance and, if necessary, for the rejecting of authority (cf. Laslett in Locke 1970, 108ff, on Locke's "doctrine of natural political virtue"). In that case authority could not exist, coercion only. If, on the other hand, people had no problems in living in accordance with the canons of the law of nature, they would have no need of authority (nor of coercion either). It is therefore essential to Locke's enterprise—and not unplausible— to assume them to be somewhere between those two extremes. *Our state here in this world is a state of mediocrity. We are not capable of living together exactly by a rule, nor altogether without it* (journal entry 20/3/1678, quoted by Ashcraft 1968, 907).

Men as men are able to know the Law of Nature, and to act in accordance with it (II, 6, 12, 58, 61, 63). These capacities however have to be exercized actively; true knowledge is not something which is given to man, it has to be achieved. He can know the theological ordering of nature from observation, he

can conclude that it must have been constructed by an omnipotent and wise Maker, he may surmise the ends of the Creator from his workmanship. Knowing himself to be a rational and free being, he may then conceive of himself as a servant required to serve the ends of his Master, while the rest of nature serves those ends of necessity. This doesn't mean his actions are without cause. Normally they are caused by present uneasiness to pursue some absent good, but the knowledge of some superior happiness may suffice to suspend the immediate prosecution of desire. This power of suspension is his liberty (*Essay* II, xxi). It allows reason to govern conduct by unbiased judgment.

But again: this is only a capacity. As a matter of fact people tend to be moved by passion, and to sacrifice their longterm advantage to the satisfaction of their strongest desires. They do not assent to the judgment with the greatest probability, but stick to the party that education or interest has engaged them in (I, 58, II, 13, 124–125, 136). And these shortcomings show themselves particularly in the execution of the law of nature. They tend to see other people's transgressions, but not their own; they may be expected to impose greater punishment on others than on themselves; they often attempt to fly from justice (II, 124–126.) From these tendencies quarrels may arise and develop into feuds, from whence, in the state of nature, a state of war may originate.

Whether it will, and on what scale, does however not so much depend on the nature of man, as on contingent historical circumstances. (Seliger 1968, 83f, 90f, 261, avoids introducing historical elements at this point by letting Locke consider the probable performance of the law of nature by the "normal man". Ashcraft 1968 first demonstrated clearly the relevance of presumed historical developments, cf. Medick 1973, 126ff, and cf. Batz 1974 for Locke's use of reports of America, esp. Acosta's.)

It is not impossible that people meet each other in a state of nature and enjoy some social intercourse. The absence of authority does not imply automatically that the law of nature is not honored at all. Locke's appeal to empirical data to prove this point (II, 14: the relation between sovereign states, cf. 145, 183–184; the Swiss and the Indian in the woods of America; the two seamen of Garcilasso de la Vega, who after shipwreck came ashore together, and lived for some years together reasonably well, though sometimes parting for a time in disagreement, cf. Ashcraft 1968, 907) is entirely legitimate.

The historical evidence, according to Locke, makes it possible to detect a universal developmental pattern in human history. The first stage is characterised by the following conditions: plenty of natural provisions, much land and few people, Men in danger of becoming lost in what was then the vast wilderness of the Earth, most of the land an uncultivated waste, no permanent settling, people wandering with their flocks and their herds, or dwelling in forests gathering and hunting, most of them living in extended families (with servants and perhaps with slaves), directing their economic activities almost exclusively to the fulfilment of their own needs, small properties, no fixed property on the

land at all, poverty (I, 85–86, 136, II, 30–32, 35–38, 44–45, 51, 74–76, 105–111, 162).

In this golden age of virtue, the equality of a simple poor way of living gave the needy and wretched inhabitants little matter for covetousness and ambition, and little room for quarrels and contentions. As there were few trespasses and few offenders, they were in no need of a multiplicity of laws or of officers. What little government was found necessary, was mainly provided by the patriarchal heads of families, accepted as leaders by their adult sons (and servants?) more or less spontaneously. Family and commonwealth coincided. The settling of internal disputes was a less important task of government than the provision of external defence. Hence it was also possible for the societies to have no kings but only captains: elected war-chiefs, chosen for their military prowess to "govern" for the duration of a campaign. In fact most early kingdoms show a mixture of the hereditary and the elective principle. (I, 118, 135, 158, II, 31, 36, 51, 74–76, 102,105–111, 162.)

In the second stage population and production multiply, technology develops (*Invention and Arts*, II, 44, cf. 101; cf. *Essay* IV, xii, 11–12), cities are built, literacy begins, making possible both records and historical knowledge. The development is not generated, but strongly accelerated by the invention of money. The scope of trade is thereby enlarged; people begin to use materials already processed by others for their productive activities, and this kind of cooperation greatly increases the productivity of labour. The subsistence-economy makes place for a market-economy. During this process there is an awakening of the desire to have more than one needs, evil concupiscence, and craving for imaginary values like money and treasures. All this creates an inequality of properties, which enlarges the temptations to break the law of nature, as well as the scope of controversy and dispute. As the original limitations on appropriation are no longer effective, land rapidly becomes scarce. Externally commonwealths define their boundaries by consent, internally they settle property disputes by laws. Stronger government is needed to accomplish these things, but this in its turn makes ample room for the vain ambition of rulers, tempted to follow personal instead of communal interests. (II, 36–38, 45–51, 101, 107, 111, 175, 184.)

It is not quite clear how Locke evaluates these developments. He makes free use of adverse judgments from the conventional stoic repertory; on the other hand he is certain that God commands man to use his mental and physical capacities to the utmost, not only for survival but also for convenience. When the knowledge of men had not yet found ways to shorten our labour, we had to spend all our waking hours in making a scanty provision for a poor and miserable life. (So much for the *golden age*.) The world is given to the rational and industrious, not to the poor and virtuous. The expanding outcome of productive labour is clearly appreciated (Ashcraft 1986, 266–280). But Locke does not oversee its by-products: avarice, ambition and luxury, inequality and conflict,

abuse of power. So Locke's view of history appears to be subtle and complex: progress takes its toll in loss of innocence (cf. I, 58). It is a blessing, but not an unmixed one. Locke's appreciation recalls *The Embarrassment of Riches* Simon Schama in his recent book finds in Dutch 17th century culture.

According to Ashcraft political society begins only with the second stage. (Ashcraft 1968, 912ff, cf, Medick 1973, 132; Batz 1974, 669; Anglim 1978, 86f; Pateman 1979, 65; Beitz 1980, 498; Tully 1980, 150f. According to Laslett in Locke 1970, 106, the patriarchal stage cannot be reckoned either to the state of nature or to civil society.) But already in the first stage government provides the required "appeal on earth", and this implies (almost by definition) that the state of nature is left. And Locke does not only talk freely of government in the first stage, but also of commonwealth and civil society (II, 162; 74 quotation Hooker; and cf. the quotation from the *Third Letter on Toleration*, Laslett in Locke 1970, 358). It is true that he describes the development of property relations up to the invention of money as being (logically) independent of political organization. (Some conclude that civil society is created to protect inequality of possession; others that it is meant to restore equality.) But the inference is not warranted that this development took place in a pre-political state of nature: it does certainly increase, but not necessarily create the need for government. Ashcraft argues that primitive patriarchal government is a form of absolute monarchy, and as such continues the state of nature. As Locke clearly states that patriarchal government is based on consent (II, 105-106, 112), Ashcraft has to contend that Locke founds even absolute government on consent (which does not legitimize it). But Locke's position on patriarchal power is that, precisely as a form of *political* authority, it is necessarily, if only implicitly, limited.

So civil society has been present, at least somewhere and intermittently in the first stage; but it becomes inevitable in the second. And the need is felt for more complex arrangements of legislation, execution, and control of legislative and executive powers. In so far government is the product of history.

3. THE ASSESSMENT OF LEGITIMACY

How should we decide whether or not government acts within its powers: by appealing to natural law, or to the conditions of consent, by consulting Reason, or History? In the *Second Treatise* we find three different kinds of constraints on the legitimate action of government.

(a) *Nobody can give more power than he has himself, and he that cannot take away his own life cannot give another power over it* (II, 23, cf. 24, 135, 149, 168,172). The fundamental duty of the Law of Nature is to preserve human life (II, 6, 159). Everyone has a right to life, and to the essential means of preserving it (II, 172, I, 42). But no one has a right to take away his own life

when he pleases (II, 6–7). Therefore he cannot transfer the right to take away his life to another. And of course, no one originally has a right to take away the life of another, so neither can anyone possibly transfer that right (II, 135, 179: *. . . the People having given to their Governours no Power to do an unjust thing, such as is to make an unjust War, (for they never had such a Power in themselves)* . . But cf. II, 139: a Serjeant may *command a Souldier to march up to the mouth of a Cannon, or stand in a Breach, where he is almost sure to perish*. How did he acquire that power?).

The right to life cannot be alienated: *they will always have a right to preserve what they have not a Power to part with* (II, 149). (According to Simmons 1983 Locke does not recognize any inalienable rights, but only says that some rights we cannot resign or transfer, because we don't have them. This is true of a person's right to dispose of his life, but not of his right to life.) Nor can the right to personal liberty be alienated, for the life of a slave is within the absolute, arbitrary power of his master. We have no such control over our own life, and therefore we cannot give it away. So the only way one can lose the right is by forfeiting it by some grave offence to the law of nature which makes one a *noxious beast* deserving to be destroyed (II, 23–24, 85, 172, 178ff).[2]

If we cannot give to others the right to dispose of our life, personal liberty or bodily integrity, we cannot give it to civil society either. Hence civil society cannot delegate such a right to the government it institutes. (So Ashcraft's suggestion that even absolute government is based on consent cannot be true.) Therefore any government which claims to have it is necessarily acting *ultra vires*.

It goes without saying that whether or not a government is legitimate according to this criterion, has nothing at all to do with consent. It is exclusively a matter of natural law.

(b) Some contracts are impossible, that is to say necessarily void. Others are possible, but irrational. Property rights, for instance, are alienable as a matter of course. Locke therefore could not say that as they incorporate themselves into civil society it is impossible that people should give up their property. Certainly they could. The only question is why should we suppose them to have done so? The terms of the original compact, of which we have little documentary evidence, we have to reconstruct from the reasons people had of entering into it. In doing so we should use as a principle of interpretation that *no rational Creature can be supposed to change his condition with an intention to be worse* (II, 131, cf. 163, 164, 168). In this way we find new limits of political authority; they follow from the reasons we ascribe to people for giving up their natural power to government (II, 90, 137, 149, 171, 179).

This is the "principle of interpretative charity" (Tuck 1979, 80f), which was already fundamental to Grotius. According to Tuck (172f) Locke discovered that he could dispense with the principle because he could rely on the first kind of constraints exclusively. The paragraphs quoted make clear that Locke retains it.

It is not an egoistic principle; it does not say: everybody can only be supposed to change his condition for the best. It implies that people want to be sure not to be exploited, not that they try, if possible, to exploit others. So it rules out unilateral sacrifice, but prescribes accepting a compromise in bargaining over the surplus of cooperation. "Worse" is appraised by the moral measure of Natural Law, prescribing the preservation of Self *and of Mankind.* Only on this foundation an agreement is possible which protects everybody's "property".

Sometimes Locke even appeals to this principle in discussing inalienable rights. Against absolutism, he regularly says in the same section: that people cannot give away a power of absolute control over their own lives, because they don't have it, *and* that it would be foolish to do so and therefore should not be supposed to have been done (II,137, 149, 168, 171–172). *As if when Men quitting the State of Nature entered into Society, they agreed that all of them but one, should be under the restraint of Laws, but that he should retain all the Liberty of the State of Nature, increased with Power, and made licentious by Impunity. This is to think that Men are so foolish that they take care to avoid what Mischiefs may be done them by Pole-Cats, or Foxes, but are content, nay think it Safety, to be devoured by Lions* (II, 93, cf. 13, 137; obviously against Hobbes and recalling the arguments used by Shaftesbury c.s. in the discussion about Danby's Test Bill in 1675, Ashcraft 1986, 116; Haley 1968, 377f).

But the most important use of the principle concerns the alienable right of property: *For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires the People should have Property, without which they must be suppos'd to lose that by entring into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own* (II, 138, cf. 222).

In the same way Locke argues in the *Epistola* that when the law concerns things, like the exercise of religious faith, which do not belong to the province of the magistrate, *those who disagree are not obliged by that law, because political society was instituted only to preserve for each private man his possession of the things of this life, and for no other purpose.* (Ed. Klibansky, p. 129, cf. 85. What if the magistrate sincerely believes his actions to be in the public good? Locke answers: The private judgment of the magistrate does not give him any new right.)

Locke's principle of interpretation does not only decide which rights people reserve, but also which ones they give up. *Whosoever therefore out of a state of Nature unite into a Community, must be understood to give up all the power, necessary to the ends for which they unite into Society* . (II, 99, cf. II, 83). But *(t)he great and chief end . . of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property. To which in the state of Nature there are many things wanting.* (II, 127, cf. I, 93 etc.) So Locke proceeds to describe the defects of the realization of the Law of

Nature in the state of nature. All of these derive from a single source: the fact that in the state of nature the power of the execution of the law of nature is given to every man. It is therefore this, and only this power, which we should suppose that people resign when they unite into one political community (II, 87-90, 127, 136, 171). In this way not only the maximum, but also the minimum role of lawful government is derived from the principle of interpretation.[3] The essential task and power of government is judiciary: to decide authoritatively any controversy about conflicting rights, and to see its decision enforced.

The transference of this power has, it is true, some consequences for the exercise of natural rights (II, 135: *the Obligations of the Law of Nature, cease not in Society, but only in many cases are drawn closer . .* cf. 129, 130). Natural liberty was always limited by natural duties, but government now has the power to delineate those limits authoritatively. That the rights are limited, however, does not mean that they no longer exist; that the limits are specified by law, does not mean that the rights themselves are legal rights only. Only government can tell us exactly what our rights are, but this does not mean that it creates them (cf. II, 83). When the Legislative acts as Umpire (II, 87, 212, 227), its judgment is final, but not therefore infallible (Hart 1963, 138ff). God is the only judge whose final judgment at the same time is a criterion of right.

On entering civil society people should accept *that the Majority have a Right to act and conclude the Rest* (II, 95, cf. 96–99). For forming a political community by compact means agreeing to a uniform decision-procedure: *For the Essence and Union of the Society consisting in having one Will, the Legislative, when once established by the Majority, has the declaring, and as it were keeping of that Will* (II, 212). As long as the community acts as a whole, which possibly it does only in the one act of giving in trust the legislative and executive powers of the community, it may act on a rule of procedure explicitly agreed upon. But if it does not make an explicit decision, it must be understood (by the principle of interpretation) to have opted for the majoritarian rule. Apparently Locke sees this rule, to use the language of game theory, as a salient coordination equilibrium. (But his arguments for the rule and against unanimity are highly defective.)

The protection of natural rights is not the only end of political society Locke recognizes; it is also the expression of shared political destiny, of national aspiration (I, § 144-146, II, 128, contrast 115; Seliger 1969). Therefore the delivery of the people into the subjection of a foreign power (the pope, for instance) is a forfeiture of trust which at once makes the government illegitimate. *For the end why People entered into Society, being to be preserved one intire, free, independent Society, to be governed by its own Laws; this is lost, whenever they are given up into the Power of another* (II, 217).

This form of argument represents the central core of Locke's political theory. *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 . . . (II, 147, cf. 161, 171, 199, 206, 222, 239, and the passage of 1667 quoted by Laslett in Locke 1970, 360, note). The whole enterprise of determining the extent of political authority in this way assumes that the actual compact will be the rational one. Reason requires us to retain as much of the positive aspects of the state of nature as possible, but to give up as much of them as is necessary to correct the negative aspects. Civil society exists because reason demands it; it also exists in the forms reason demands.

But reason alone is not enough. We are not bound to the terms Locke's principle of interpretation generates, because they are the pre-eminently reasonable ones, but because they have been actually agreed upon. The principle of interpretation only makes it possible to reconstruct this actual agreement from the reasons for entering into it. This at least is what Locke pretends to do. He wants to compare the performance of government not only with its ideal functioning, but rather with the task it has actually been given. It remains to be seen whether the difference between those two ways of putting it has any theoretical importance.

(c) *The great Question which in all Ages has disturbed Mankind, . . . has been, Not whether there be Power in the World, nor whence it came, but who should have it* (I, 106, cf. 81, 94, 122; II, 198). This question cannot be answered either by appealing to natural law, or by rational reconstruction of the original compact: it is a "pure coordination problem". The answer has to be given by a contingent historical decision to be made by the commonwealth as a whole. Once this decision is made, however arbitrarily, it cannot be altered as long as the government is in being (II, 141, 157, 176, 212, 220, 242). For it has the coordinating power of a precedent: to make expectations converge. And even the "decision" does not necessarily consist in more than the convergence of expectations on a salient coordination equilibrium: *'twas easie, and almost natural for Children by a tacit, and scarce avoidable consent to make way for the Father's Authority and Government* (II, 75).

This is not the only criterion of legitimacy derived from such historical decisions. In the primitive times of patriarchal and elective government (II, 74–76, 94, 105–112, 162–166) explicit limitations on the exercise of political authority were rarely made. *(T)he Government was almost all Prerogative* (162). *(S)ome one good and excellent Man, having got a Preheminency amongst the rest, had this Deference paid to his Goodness and Vertue, as to a kind of Natural Authority, that the chief Rule, with Arbitration of their differences, by a tacit Consent devolved into his hands, without any other caution, but the assurance they had of his Uprightness and Wisdom* (94). Yet, this did not mean that his authority was not limited at all (as Ashcraft 1968 suggests). Limits of the first type necessarily existed. Limits of the second type must have been implicitly understood to exist by all concerned. For *certain it is that no body*

was ever intrusted with authority *but for the publick Good and Safety* (110, cf. 163, 166, 168). Only the need was not felt to *that the People should . . . go about to set any Bounds to the Prerogative of those Kings or Rulers, who themselves transgressed not the Bounds of the publick good* (166).

This happy state would not persist. *The Reigns of good Princes have been always most dangerous to the Liberties of their People* (166). For *Successors of another Stamp* (94) would come, apt to use their discretionary power in their own interest, and not in the interest of the people. The people would then have to struggle in order to *recover their original Right, and get that to be declared not to be Prerogative, which truly never was so* (166). In such cases *Men found it necessary to examine more carefully the Original and Rights of Government; and to find out ways to restrain the Exorbitances, and prevent the Abuses of that Power which they having intrusted in another's hands only for their own good, they found was made use of to hurt them* (111). This could be done by making the bounds of lawful government explicit in the form of declared constitutional arrangements. These have to be interpreted by their function: to make sure that the exercise of authority will remain within the limits of its trust.

This process of learning by trial and error—fitting Locke's general conception of the exercise of reason (Medick 1973, 69–70)—will be impelled by developments in the second stage of political history. Growth of population, of production, of inequality, will tend to multiply conflicts of rights, and give much greater scope to governmental ambitions. So the need for explicit constitutional arrangements will be more urgently felt.

As constitutional arrangements are the results of a learning process, it is possible to predict the development of some of them. If you can identify the problem, the solution may be more or less obvious. Hence Locke also uses a certain amount of a priori reasoning at this level. This should not be taken to indicate a belief that the idiosyncracies of the English constitution are universal characteristics of all legitimate political systems. It indicates a method of interpreting actual constitutional rules: they have no authority from their ancient origins, but only in so far as they are rational solutions to problems people are actually confronted with. (Cf. e.g. II, 213ff or 143.)

The most obvious of the constitutional guarantees against arbitrary power is the Rule of Law. In some places Locke derives this principle from the universal end of government. The reason people unite into political society is that they find they disagree about the application of the law of nature. Hence the most important task of government is its legislative one. *And therefore whatever Form the Common-wealth is under, the Ruling Power ought to govern by declared and received laws, not extemporary Dictates and undetermined Resolutions* (II, 137). *(A) Government without Laws, is, I suppose, a Mystery in Politicks, unconceivable to humane Capacity, and inconsistent with humane Society* (II, 219, cf. 87, 91 etc.). But this cannot be timelessly true. Under the

original patriarchal government political society could perform its primary function, not by having settled declared laws, but only by having a common judge to decide controversies. The principle that all executive and judicial action should be authorized by law, does not really derive from the primacy of the arbitrating function, but rather from the experienced need to prevent abuse of arbitrating power. *Where-ever Law ends, Tyranny begins* (II, 202: *if the Law be transgressed to another's harm,* it is added significantly). This is not so much a necessary truth as a lesson from history.

So Locke's attitude to positive law is an ambivalent, or perhaps I should say a sophisticated one. On the one hand he strongly insists on the principle, *No Man in Civil Society can be exempted from the Laws of it* (II, 94, cf. 206: *against the Laws there can be no Authority*). But municipal law has its defects: it is too general to do justice to the intricate detail of unforeseen situations, and its requirements are not always as plain as they should be (II, 12). Therefore on many occasions insistence on the letter of the Law would be self-defeating. Hence his fundamental doctrine of prerogative (II, 147, 156-158, ch. xiv): the power of the executive to act where the law is silent, or even in deviation from the strict letter of the law. This power may only be exercised in the public interest, and when urgent needs prevent the consultation of the legislative. (In a report of 1672 Locke stated that the issuing of a Declaration of Indulgence on royal prerogative would not be unconstitutional, Ashcraft 1986, 111f.) Here it appears clearly that Locke's concept of trust, with all its legal overtones, is not actually a legal one. Whether or not the government acts within the terms of its trust, cannot be decided by appeal to the letter of the law (or even of a written constitution.) The decisive test is whether its actions conform to the legitimate expectations of its rational citizens. *For 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* (II, 158).

If legal, or even constitutional arrangements are counterproductive, they should be changed. (The 79th of the *Fundamental Constitutions of Carolina* which were drafted by Locke, provided that all statute laws should be null after a century, Laslett in Locke 1970, 293.) Locke, it is well known, had no particular reverence for the ancient constitution as such (*the following of Custom when Reason has left it*, II, 157, cf. 158; I, 58). Historical experience will show its strengths as well as its weaknesses, particularly in changing circumstances. This seems to have been the main point of Locke's publication of the *Two Treatises* under circumstances so vastly different from the ones obtaining at the time of their conception (Ashcraft 1986, 575–57, 591–593; den Hartogh [1]. *(U)pon the forfeiture of their Rulers . . . the People have a Right to act as Supreme, and continue the Legislative in themselves, or erect a new Form, or under the old form place it in new hands, as they think good* (II, 243, last sentence of the book). The Convention Parliament should feel free to decide all

the constitutional questions in dispute, not in order to return to an ancient form, but in order to eliminate future abuse. What happened in 1688 was not, as the moderate Whigs insisted, a change of personnel, the government remaining intact, but a dissolution of government, only political society remaining intact: the ideal conditions for constitutional clarification or, if needs be, change (which otherwise would only be possible with the cooperation of the government). *(N)ow they have an opportunity offerd to finde remedys and set up a constitution that may be lasting*. In the letter to Clarke from which this quotation comes (8/2/1689) Locke admittedly recommends *restoreing our ancient government* (as the Whigs thought it was, no doubt), but he only does so because it is *the best that ever was*.

Some other constitutional arrangements which Locke discusses, are meant to strengthen the preventive effects of the requirement of the rule of law: the separation of the legislative and the executive power, the investment of the legislative power in collective bodies of men, assembling temporarily and returning afterwards to the status of private men, to be handled by the executive in accordance with the laws they gave themselves (II, 138, 143, 153–156, 160). Such arrangements are the product of history, they do not necessarily characterize every lawful government. II, 134 seems to stipulate as a universal requirement that the Legislative should be an elected body (but perhaps the phrase *which the publick had chosen and appointed* refers to the original compact only, cf. the *native right* in 176); otherwise laws could not have the necessary consent of the society. Elsewhere however (II, 132, 142) Locke makes it clear that this is only the superior one of a number of alternative arrangements.

Such rules are contingent, but they are not accidental: they are the product of a process of learning by trial and error. In this sense they also have to be seen as demanded by reason, even if they are not necessarily the best reason could do. In order to use them as a test of legitimacy they should be interpreted for what they are: guarantees of natural rights against the encroachment of political power.

All such arrangements are the product of "consent", given actually in concrete historical circumstances. They are made by rational men responding to the demands of the situation.

4. THE MEANING OF CONSENT

So what does "consent" mean? It is traditionally assumed to be the answer to the question why the individual should obey the law of the state. This is the question apparently addressed in II, 119–122, and only there. The answer, whatever its correct interpretation, leaves no traces in Locke's account of legitimate authority. In that context we found only references to the terms of the *original compact* or *agreement* (II, 97, 243) underlying civil society, and of the act of delegation constituting government. These terms could partly be recon-

structed by the principle of interpretation, partly found in constitutional history, interpreted as a learning process. How are we to conceive of this first contract?

The main passages in which Locke discusses it, II, 87–89, 95–99, are not very helpful in determining the meaning of the concept. I therefore propose to take a more oblique approach, studying the connotations of the concepts of *consent, contract, compact,* and *agreement,* as they appear in other places in the *Treatises*. (Other locutions: to resign, to quit, to divest oneself of, to part with, to give/lay up, to make/give way, to assent, to submit, to subject oneself to the dominion of, to incorporate, to approve, to acquiesce in, to unite, to enter into; promise, covenant, engagement, institution.) Locke is rather fond of the figure of hendiadys: which are the expressions with which *consent* etc. are coupled? Which adjectives does he use in combination with them? Which concepts are given as their opposites? How does he describe the subject doing the consenting and contracting: by singular or plural expressions, referring to individuals or to collectives?

Let me start with one fairly typical passage. In I, 88, Locke discusses the question why property, upon the decease of the owner, does not return to the common stock of mankind, but rather devolves on the owner's offspring. *'twill perhaps be answered, that common consent hath disposed of it, to the Children. Common Practice, we see indeed does so dispose of it but we cannot say, that it is the common consent of Mankind; for that hath never been asked, nor actually given: and if common tacit Consent hath establish'd it, it would make but a positive and not Natural Right of Children: But where the Practice is Universal, 'tis reasonable to think the Cause is Natural.* The passage shows that the existence of a common practice is a necessary, but not a sufficient condition to infer to common consent. If we find a common practice, the cause can be either consensual or natural. That the cause is natural does not mean that no human action or choice is involved: the right of inheritance is obviously created by the act of begetting. That the cause is consent, on the other hand, does not necessarily mean, that the right is created intentionally; that consent has not been asked nor actually given, does settle the question of express, not that of tacit consent. The differentia specifica seems to be that the normative effect belongs to the action, not by *the ordinance of God*, but by *Human Institution* (I, 140).

In the *Essays on the Law of Nature* (ed. von Leyden 1954, 161–163) Locke refers to "tacit contracts, i.e. contracts prompted by the common interests and conveniences of men, such as the free passage of envoys, free trade and other things of that kind". *Thus the measure of what is everywhere called and esteemed virtue and vice is this approbation or dislike, praise or blame, which, by a secret [!] and tacit consent, establishes itself in the several societies, tribes, and clubs of men in the world, whereby several actions come to find credit or disgrace amongst them, according to the judgment, maxims, or fashions of that place. (Essay* II. xxviii.10, cf. I. iii. 22: *consent of neighbours* as

common source of principles, III. ii. 8: *common use, by a tacit consent, appropriates certain sounds to certain ideas in all languages*; this signification is *perfectly arbitrary*.)

So common consent is a common practice, evolving in a human community as a result of the contingent actions of rational men. It is what Hume would call a *convention*. Convention in this sense is wider than in the sense defined by Lewis 1969: it is, to use modern language, a pattern of mutual expectations assuring the possibility of cooperation by mutual adjustment, not only in games of pure coordination, but also in all kinds of mixed motive games (Assurance Game, Prisoner's Dilemma, Bargaining Game, and so on).

This interpretation is confirmed in several other places: I, 43 (from Adam's postulated right of ownership of the whole world, no authority over Persons follows directly, but only by *the consent of the poor Man, who preferr'd being his Subject to starving*—a consent Locke considers to be coerced and hence void), 47, 94 (if government is granted by *Agreement and consent of Men*, it must also determine the right of succession; this cannot follow directly from inheritance or primogeniture), 113 (Filmer pleads for the natural power of kings, against all compact), 126 (if political power derives from the *Ordinance of God and Divine Institution*, this has to be sufficient for the identification of the right-holder: *This Paternal Regal Power, being by Divine Right only his, it leaves no room for humane prudence, or consent to place it anywhere else . . .*), 140 (If Noah did divide between his sons, the right of the heir is not a divine right, but *only Human depending on the Will of Man . . . and Men may put Government into what hands, and under what form, they please*.) 11, 28 and 35 (common land common by compact, i.e. *by the Law of the Land)*, 36, 46 and 50 (gold and silver derive their value not from real use, but from the consent of Men), 50 (outside political society inequality of possessions results from men tacitly agreeing in the use of money, *without compact*, in government the possession of land is determined by positive constitutions, cf. rejected reading, Laslett in Locke 1970, 75, 134 (positive laws cannot be laws without the consent of the society).

In these cases the consenting subject tends to be referred to as "Men", "Mankind", "People", "the Society"; Locke even uses the expression *publick Will* (II, 151, 212). In sections discussing the institution of government political obligation is often contrasted with the *natural* freedom of the state of nature (e.g. II, 95, 97, 102–105, 112, 119, 173). The adjective *positive* is sometimes opposed to *tacit* (122), sometimes to *natural* (45, 128). Even *voluntary* may be opposed, not to *coerced*, but to *natural* (73, cf: 141: *positive voluntary Grant and Institution*). All this points to the conventional nature of political obligation. If Filmer's fabric falls, *Governments must be left again to the old way of being made by contrivance, and the consent of Men (Antroopine Ktisis) making use of their Reason to unite together into Society* (I, 6).

Whenever a conventional arrangement is made, there will have been alterna-

tives, which might have been as good from a rational point of view. What is "chosen", is a matter of contingent, perhaps even arbitrary fact. This connotation of contingent choice also comes into view at several points: I, 94 *(he comes by Right of Succession, to be a prince in one place, who would be a Subject in another)*, 140, 148 (*Election and Consent*), II, 81 and 83 (matrimonial arrangements may be differentially specified by contract), 97,99, 106 (individuals *might set up what form of Government they thought fit*), 192.

A right given by "consent" in this sense can never be an unlimited one; it is given with some end in view, and therefore conditional upon some degree of realization of the end. *As soon as Compact enters, Slavery ceases . . . For what Compact can be made with a Man that is not Master of his own Life? What Condition can he perform?* (II. 172, cf. 24) The aspect of "contract", made visible here, is the reciprocity of rights and duties (Dunn 1969, 130). The contractual relation cannot be a completely asymmetrical one: I may only claim the fulfilment of your obligations as long as I fulfil mine. On entering political society everyone is to part *with as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the Society shall require: which is not only necessary, but just; since the other Members of the Society do the like* (II, 130; *mutual consent, mutual agreement*: II, 14, 47, 102, 171, cf. 78). On account of this relation between consent and reciprocity, Locke is able to infer from the very fact that a right is given by consent that it is limited (I, 10, 43, 47, 67; II. 17, 23, 24, 82, 94).

Hume, as is well known, took Locke to task for founding political obligation on contract and not on convention directly. *You find yourself embarrassed when it is asked, Why we are bound to keep our word? Nor can you give any answer but what would immediately, without any circuit, have accounted for our obligation to allegiance.* ("Of the Original Contract", *Essays II.12; cf. A Treatise of Human Nature*, III. ii. 8–9.) But when he did so, he did not read Locke very sympathetically. For what Locke meant when he said that governments are made *by contrivance, and the Consent of Men* is really very close to Hume's idea of justice and allegiance as *artificial virtues*. On the other hand it is true that Locke did not realize that speaking about "contract" in this connection can at best be a metaphor, because its obligations derive from the development of mutual expectations, and not from voluntary intentional acts of identifiable individuals. (The connotation of voluntariness is present in I, 54 (children often born *against the Consent and Will of the Begetter*), 67, 131, 140, II, 50, 73, 78, 81, 102, 141, 173, ch. xvi passim. But in I, 67, 131, II, 73, 81, 141, 173, it may refer not so much to the absence of coercion as to the absence of a natural cause.) Hume certainly improved on Locke by analysing convention explicitly as a pattern of mutual expectations, explaining promise rather than being attributable to it.

This brings us back to the passage (II, 119–122) about political obligation and individual consent. Locke is considering here the objection that the original

compact cannot obligate present citizens, because parents cannot bind their offspring (II, 73, 116, 118, 189). It may seem that the answer to this question will give us the one contingent historical factor in Locke's political theory which has the power to deprive all others of their significance. For would not any act of submission by itself be sufficient to generate political obligation, whatever the antecedents of political society?

It is not my intention here to unravel the whole web of the relations between express consent, tacit consent, full membership, the inheritance of property, and the obligations of resident aliens.[4] I will concentrate on the most plausible position: political obligation, not only in patriarchal communities (II, 75) but everywhere, is usually a matter of tacit consent.

Consent is a particular kind of promise. By consenting to the act of another person I convey to him that I undertake an obligation, and hence he can rely on me, not to interfere in his action, not to attempt to undo its results, and sometimes to let him act on my authority or responsibility. My consent is tacit, if I do something which primarily has another meaning than promising, but from which it may be inferred that I now also intend to assume an obligation. By taking a glass of wine I may consent tacitly to sharing in the payment of the bottle. It is not an act of express consent, for nobody would want to deny that it is possible for me to take the wine because I like it.

Locke wants to extend the range of tacit consent very widely indeed. Whoever makes use of facilities created by the government as the agent of political society, by the very act gives his tacit consent to the acts of that agent, and becomes obliged to obey his commands. This he does already by *barely travelling freely on the Highway* The consequence is, as he notes, that merely staying within the territory of a government, is to be tacitly consenting to its exercise of authority (II, 119).

The objections to this view are obvious and well known (for a summary, see Simmons 1979, ch. 4). There is no reason at all to ascribe to a traveller on the highway the intention to indicate consent. *Can we freely say, that a poor peasant or artisan has a free choice to leave his country; when he knows no foreign languages or manners, and lives from day to day, by the small wages he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.* (Hume, "Of the Original Contract", *Essays* II.12.) If enjoying a windfall benefit creates obligations, it is not true that *any number of Men* may unite into a Community, *because it injures not the Freedom of the rest* (II, 95). And even if we concede that obligations go with the enjoyment of benefits, why should the obligations of a traveller go beyond the regulation of his enjoyment and, from the rules of traffic, the payment of tolls or the requirements of quarantine, extend to all the laws of the country?

Yet recent political philosophy tends to accept as a source of political obli-

gation the very act Locke fastens upon: the use of communal facilities. A principle of fairness is defended, stating that a group of people involved in a cooperative enterprise may require contributions from all those who accept the gains of the enterprise (Rawls 1964, 9–11; Simmons 1979, ch. 5; Arneson 1982; Klosko 1987). Nobody is allowed to reserve for himself a free-riding position. *For it would be a direct Contradiction, for any one, to enter into Society with others for the securing and regulating of Property; And yet to suppose his Land . . . should be exempt . . .* (II, 120).

It is controversial whether the acceptance of benefits has to be voluntary. If so, no contributions could be required for the production of so-called public goods (from the enjoyment of which nobody can be excluded). Yet it is exactly this kind of enterprise which calls for cooperative action. I would therefore defend these cases coming, in certain conditions, under the reach of the principle of fairness. One condition is that all exit-options which are not excluded by the nature of the public good should be left open, whether or not that is sufficient to make the acceptance of benefits really "voluntary". (E.g.: emigrating.) This condition I take to be an integral aspect of Locke's notion of tacit consent.

So *living quietly, and enjoying Priviledges and Protection* (II, 122) under the laws of a country requires obedience to those laws as a quid pro quo. According to a journal entry (15/7/1678) even illegitimate political authorities may provide real services, and then their subjects owe them some duties of obedience in return. You cannot excuse yourself from taking *the benefits of another's Pains* (II, 34) by saying that you did not consent to their production. Locke is making the same point in saying that after all you have "consented", tacitly, by accepting the benefits.

One could argue, reasonably, that this is a confusing way of putting it (cf. Simmons 1979, 89–95). For it suggests that the obligation you assume does derive from a principle, not of fairness but of promise-keeping. Let it be conceded that one can be bound to obedience to civil authority only by one's own acts (II, 95, 119), why should those acts be acts of consent? After all, people may act, and decide to act, in such ways as to create rights and obligations, in themselves and in others: obligations of parenthood (I, 88, 98!), of reparation (II, 10), of charity (I, 42), rights of property (II, v) etc. (cf. Snare 1975, 31–32). These acts are not acts of consent, nor does Locke say they are. So why does he insist on classifying the acceptance of the benefits of a cooperative venture as an act of consent?

The primary effects of those non-consenting acts are natural ones, and the normative consequences are joined to them by the law of nature, whether or not one intends those consequences to follow. But when I select some apples in the greengrocer's shop, I consent (tacitly) to pay for them. My primary intention, no doubt, is not to undertake an obligation. The reason why this is a consenting act nevertheless, and procreation is not, is that the normative effect does not follow "by the law of nature" directly (and universally), but only because of the

arrangements made by the greengrocer, acting within his rights. The apples are on offer, but only conditionally so, on terms. So the normative consequences of my act are joined to the non-normative ones by human institution. And this, I suggest, is the real point of Locke's use of the idiom of consent.

Tacit consent is given when a person does something with the primary intention of realizing a non-normative effect, but at the same time intends, or may be supposed to intend, to assume an obligation. To this definition we should add that the normative consequence should be the product of a conventional arrangement. The acceptance of the benefits of a cooperative venture will count as tacit consent under this definition, because it is dependent on the setting up of the cooperative venture, defining the terms of sharing in the profit. Implicit conventions govern the distribution of its benefits and burdens.

Government is legitimate if, on the whole, it acts within its powers. If so, the individual is left only with the choice to obey willingly or to emigrate. The obligation of obedience is based on the natural obligation to preserve mankind, which is the fundamental tie binding human beings into one natural community, in combination with the principle of fair reciprocity which governs their actual political associations. No resident individual is in a position to decide on the existence or extent of his obligation (though he is in a position to judge). His individual consent cannot legitimize an illegitimate government, nor can his withholding consent delegitimize a legitimate one either.

To be sure, Locke sometimes seems to recognize an individual right of resistance, II, 168, 208 (contrast however 149, 230, 242, 243; cf. von Leyden 1982, 157f., 185), but this does not rest on individual decision but on individual judgment (cf. also II, 241, 209–210, 21, and the other Jephtha places to which Laslett there refers), particularly with reference to inalienable rights, II, 168.

Yet when someone accepts the fruits of the labours of the government, which he can hardly avoid doing, Locke will say he gives his *tacit consent*, and is *therefore* obligated. What he conveys with this unfortunate way of speaking is not so much that the act is voluntary—though there must be an exit-option, it is a rather desperate one—as that it is a way of participating in the reciprocal arrangements of the political "contract".

CONCLUSION

Political obligation in the *Two Treatises* is not really based on the principle of promise-keeping, though it is based on moral principles of trust, trustworthiness and fairness. *(T)hose, who liked one another so well as to joyn into Society, cannot but be supposed to have some Acquaintance and Friendship together, and some Trust in one another . . .*(II, 107, cf. 14: *Truth and keeping of Faith*, 19, 77, 101: *the love and want of Society*, 110, 128; *Societas vin-*

culum fides, Essays on the Laws of Nature, ed. von Leyden 1954, 212. Cf. Dunn 1984, 286ff.) These are the moral motives needed to sustain the pattern of mutual expectations which is the foundation of political society. The natural social dispositions of men, and their capacity to know and follow the law of nature, are the attitudinal presuppositions of the "contract" (which is at least an apt metaphor). Political authority is consensual in nature; but this does not mean that everyone's obedience depends on his own consent. It means that the exercise of authority requires a context of general willing cooperation, made possible by a general attitude of trust. (It is the insight that legitimate political society is categorically distinct from a regime of coercion which has, mistakenly, led political theorists like Tussman, Walzer, Plamenatz, Pateman and Steinberg, to retain a consent theory of political obligation.)

We should exclude the notion of individual consent. But this does not imply that we should strike out historical fact and retain only abstract principle. On the contrary. If we take the contractual terminology to refer basically to conventions, it appears clearly that the historical interpretation is not a piece of mythology arising from a confusion between genetic explanation and normative justification, and really beside the point of Locke's enterprise. It is as essential to his intentions as to their continuing relevance. For a purely hypothetical contract theory of political obligation, (or of any other institutional arrangement with normative impact), suffers from one obvious defect. It is not enough for me to see clearly what reason dictates (either as a personal or as a collective strategy), it is not even enough to know that the others see it too. For what reason dictates is a pattern of mutually adjusted cooperative behaviour, and this can only produce the results desired when everybody, or almost everybody, plays his part. So what is necessary is that each of us may expect the others to do so, knows the others to expect, etc. And whether we have sufficient warrants for these mutual expectations can only be a matter of contingent historical fact. If the convention has not actually arisen, the enumeration of its incomparable merits gives nobody any reason to act. Abstract principle is not enough, it has to be embodied in real conventions. *For were I never so fully perswaded, that there ought to be Magistracy and rule in the World, yet I am nevertheless at Liberty still, till it appears who is the Person that Hath Right to my Obedience* (I, 81). But this can appear only from "consent".

And yet it makes sense to ask the hypothetical question, What would rational and moral men agree to under the actual circumstances? Or, alternatively and equivalently: What would rational men agree to under circumstances differing from the actual ones in ways designed to neutralize any immoral tendencies? The answer may be useful in order to criticize existing arrangements. Government rests on a continuing mutual understanding between citizens ("compact"), and between governors and citizens ("trust"). By comparing this actual understanding to an ideal one, we verify to what extent it has a firm foundation. Is the operating system of rules one which no one could reject

as a basis for informed, unforced general agreement? (Cf. Scanlon 1982, 110; Jacobs 1985, 242ff.)

So what, finally, is decisive: the existence of the foundation, or the (collective) judgment that it exists? What is the ultimate criterion of legitimacy: acting in the public good, or being trusted to do so? Locke seems to believe, rather sanguinely, that the two criteria will not easily give divergent outcomes. (Cf. II, 158: the satisfaction of the first seems to be a base to infer to the satisfaction of the second criterion. Perhaps the same is true of II, 192: a conqueror may be legitimized afterwards, either by the consent of the people, or by his introducing constitutional arrangements required by the ideal contract.)

But what if the two criteria do give divergent outcomes? The People shall be Judge (II, 242); the recognition of legitimacy is a necessary condition of legitimacy. This does not mean, however, that the judgment of the people cannot be mistaken; this is something of which God will be the Judge (ibid).

Even if we judge correctly that the existing arrangements would have been rejected out of hand as the terms of a hypothetical agreement, this judgment does not lead to action in any straightforward way. We may have reason to refuse to follow the convention whatever the consequences of refusing, or to try to mobilize an oppositional party to change it, or to attempt to modify it by starting to deviate, or to adhere to it in order to prevent unnecessary scandal and perturbation.

The answer to the hypothetical question may be useful in a second way: as a means of understanding the implications of existing arrangements. Not every convention exists in the form of an authoritative formulation, and even verbal formulations often have to be interpreted or specified in actual circumstances. In order to interpret or specify the convention, it may help to consider what cooperative end it is supposed to serve, what interaction problem it is meant to solve. Operating on such principles of interpretation is something which people routinely do in every cooperative venture they are involved in, from communicating in a language to giving judgment in court.

These are, as I hope to have shown, the two ways in which John Locke in fact makes use of the thought experiment of the rationally reconstructed contract. Some beliefs, even generally held, cannot be true, because they are in conflict with "natural law" (to which, perhaps, we may give the secular reinterpretation of the fundamental principles underlying the system of conventions as a whole): People cannot give up more power than they have themselves, and every requirement made of persons must be shown to serve some sensible end. Existing constitutional provisions, from time to time, have to be criticized and changed for the better, in the light of recent experience. On the other hand, if we want to know what we actually are committed to, we may usefully ask ourselves what we "may be supposed to have consented to", taking ourselves and others to be within the reach of appeals of rationality, trustworthiness, and fairness. Though political obligation is a contingent historical fact, it is some-

thing which can obtain only under (partially) rational and (partially) moral beings -in *a Society of Rational Creatures entred into a Community for their mutual good* (II,163, cf. 172). And this severely limits the possible forms it can take.

ENDNOTES

1. Ashcraft 1968, 903f; Batz 1974, 668; Colman 1983, 184, claim that these vicious and degenerate men are men who, exceptionally, declare themselves to live not by the law of nature, but to make force and violence their rule of right. These are the *noxious Creatures and Savage Beasts* of II, 1, 8, 10, 11, 16, 172, 181, 182, and only they have the *sedate, settled design*, II, 16 which defines a state of war. They are to be distinguished from the ordinary well-meaning men who are *no strict Observers of Equity and Justice*, II, 123, because ill nature, passion and revenge often carry them too far(II, 13). Their hasty use of force would in itself not be enough to destroy the peaceful character of the state of nature. I hesitate to accept this subdivision of sin: the mistaken judgments arising from passion and interest suffice to create the inconveniences of the state of nature, which are the reason for entering civil society (II, 124–126), and they may also suffice to create permanent and escalating conflict or the threat of it.

2. This theory creates the problem of Locke's attitude to African slavery. (He invested in the Royal African Company, was one of the Lords Proprietors of the slave-holding state of Carolina, and twice a member of the Board of Trade which regulated the slave trade and colonial exploitation.) The problem is not solved, of course, by recognizing that Locke's discussion of slavery really aims at the political slavery of absolute monarchy. The ridiculous theory that the African slaves (women, children, cf. II, 183!) were really captives in a just war, is stated explicitly in the instructions of the Board of Trade to Governor Nicholson of Virginia, drafted by Locke in 1698.

3. According to Tully 1980, 158ff, people give up to the government all their natural liberty in order to get back a liberty legally defined. In specifying the bounds of this legal liberty government should look at the law of nature as providing a guide, not a plan. I believe the textual evidence on the whole is against this interpretation, cf. Waldron 1984. But the decisive point is that it removes the essential difference between the supporters of divine right and Locke. For even Parker accepted the proposition that there were *obligations antecedent to those of human laws*, cf. Ashcraft 1986, 47. See den Hartogh (2).

4. The thesis that only express consent gives full membership should be seen in the light of Locke's opposition to the "weak" oath of allegiance of 1689: government *should* obtain the explicit recognition of its legitimacy from the whole of the people, for this would *create* the requisite moral bounds of trust. Den Hartogh (1); cf. Farr & Roberts 1985.

REFERENCES

Aarsleff, Hans. "The state of nature and the nature of man in Locke", in: Yolton ed., 1969.

Anglim, John. "On Locke's State of Nature", *Political Studies* 26, (1978), 78–90.

Arneson, Richard J. "The Principle of Fairness and Free-Rider problems", *Ethics* 92(1981/2), 616–633.

Ashcraft, Richard. "Locke's state of nature: historical fact or moral fiction?", *Amer. Political Science Review* 62,(1968), 898–915.

———. *Revolutionary Politics and Locke's Two Treatises of Government*, Princeton U.P., 1986.

Batz, William G. "The Historical Anthropology of John Locke", *Journal of the History of Ideas* 35(1974), 663–670.

Beitz, Charles R. "Tacit Consent and Property Rights", *Political Theory*8 (1980), 487–502.

Benn & Peters, S.I./R.S. *Social principles and the Democratic State*. Allen & Unwin, London, 1959.

Bookman, John T. "Locke's Contract: Would People Consent to It?", *Amer. Journal of Economics and Sociology* 43 (1984), 357–368.

Brandt, Richard B. *A Theory of the Good and the Right*. Oxford U.P., 1979.

Colman, John. *John Locke's Moral Philosophy*. Edinburgh U.P., 1983.

Den Hartogh, Govert. (1) "Express Consent and Full Membership", *Political Studies* 38 (1990), 105–115.

———. (2) "Tully's Locke", *Political Theory*, August 1990.

Dunn, John. *The Political Thought of John Locke*. Cambridge U.P., 1969.

———. "Consent in the political theory of John Locke", in: Gordon J. Schochet ed., *Life, Liberty, and Property, Essays on Locke's Political Ideas*. Wadsworth, Belmont Cal. (1971).

———. "The concept of "trust" in the politics of John Locke", in: Richard Rorty, J.B. Schneewind, Quentin Skinner eds., *Philosophy in History*. Cambridge U.P., 1984.

Farr & Roberts, James/Clayton. "John Locke on the Glorious Revolution: a Rediscovered Document", *The Historical Journal* 28 (1985), 385–98.

Gauthier, David. *Morals by Agreement*. Oxford U.P., 1986.

Grice, G. Russell. *The Grounds of Moral Judgment*. Cambridge U.P., 1967.

Habermas, Jurgen. "Diskursethik- Notizen zu einem Begrundungsprogramm", in: *Moralbewusstsein und Kommunikatives Handeln*, Suhrkamp, Frankfurt a.M., 1983.

Haley, K.H.D. *The First Earl of Shaftesbury*. Oxford U.P., 1968.

Harsanyi, John C. *Essays on Ethics, Social Behavior, and Scientific Explanation*. Reidel, Dordrecht, 1976.

Hart, H.L.A. *The Concept of Law*. Oxford U.P.. 1963.

Hume, David. *Essays Moral, Political and Literary*. Eds. T.H. Green & T.H. Grose, 2 vols., Longmans, Green, 1875.

Jacobs, Frans. *Ten Overstaan van Allen, Universalisering in de Ethiek*. Amsterdam, 1985.

Kavka, Gregory S. *Hobbesian Moral and Political Theory*. Princeton U.P., 1986.

Klosko, George. *"The Principle of Fairness and Political Obligation"*, *Ethics*97 (1986/-87), 353–362.

Lewis, David K. *Convention, a philosophical study*. Harvard U.P., Cambridge Mass., 1969.

Locke, John. *Epistola de Tolerantia, A Letter on Toleration*. Ed. Raymond Klibansky, transl. J.W. Gough. Oxford U.P., 1968.

———. *Essays on the Law of Nature*. Ed., transl., introd. W. von Leyden. Oxford U.P., 1954.

———. *Two Treatises of Government*. Critical ed., introd. Peter Laslett, Cambridge U.P. 1970.

Medick, Hans. *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft*. Gottingen, Van den Hoeck & Ruprecht, 1973.

Parry, Geraint. *John Locke*. (Political Thinkers.) Allen & Unwin, London, 1978.

Pateman, Carole. *The Problem of Political Obligation*. Wiley, Chichester, 1979.

Pitkin, Hanna. "Obligation and Consent", in: Peter Laslett, W.G. Runciman, Quentin Skinner eds. *Philosophy, Politics and Society*, 4th series. Blackwell, Oxford. (1972).

Plamenatz, John. *Man and Society, Vol. I.* Longman, London, 1963.

Rawls, John. "Legal Obligation and the Duty of Fair Play", in: S. Hook ed. *Law and Philosophy*. New York U.P., 1964.

Rawls, John. *A Theory of Justice*. Oxford U.P., 1971.

Richards, David A.J. *A Theory of Reasons for Action*. Oxford U.P., 1971.

Scanlon, T.M. "Contractualism and utilitarianism", in: Amartya Sen & Bernard Williams eds., *Utilitarianism and Beyond*. Cambridge U.P., 1982.

Seliger, Martin. *The Liberal Politics of John Locke*. Allen & Unwin. London, 1968.

_____. "Locke, liberalism and nationalism", in: Yolton ed. 1969.

Simmons, A. John. *Moral principles and Political Obligations*. Princeton U.P., 1979.

_____. "Inalienable Rights and Locke's Treatises", *Philosophy and Public Affairs* 12 (1983), 175–204.

Snare, Frank. "Consent and Conventional Acts in John Locke", *Journal of the History of Philosophy* 13 (1975), 27–36.

Steinberg, Jules. *Locke, Rousseau, and the Idea of Consent*. Greenwood Press, Westport Conn., 1978.

Tuck, Richard. *Natural Rights Theories*. Cambridge U.P., 1979.

Tully, James. *A Discourse on Property: John Locke and his Adversaries*. Cambridge U.P., 1980.

Tussman, Joseph. *Obligation and the Body Politic*. Oxford U.P., 1960.

Von Leyden, W. *Hobbes and Locke, The Politics of Freedom and Obligation*. Macmillan, London, 1982.

Waldron, Jeremy. "Locke, Tully, and the Regulation of Property", *Political Studies* 32 (1984), 98–106.

Yolton, John W. ed., *John Locke: Problems and Perspectives*. Cambridge U.P., 1969.