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## Cain as His Brother's Keeper: Property Rights and Christian Doctrine in Locke's *Two Treatises of Government*

Steven Menashi<sup>\*</sup>

### I. INTRODUCTION

In his *Theories of Surplus Value*, Karl Marx devotes a brief chapter to John Locke's disagreement with Sir Dudley North on the cause of high interest rates. In it, Marx summarizes Locke's labor theory of property, and he concludes with an arresting aside: "Locke's analysis is all the more important since he is the classical exponent of bourgeois society's ideas of right in opposition to the feudal, and his philosophy moreover served all subsequent English economists as the foundation for all their ideas."<sup>1</sup> According to Marx, Locke's theory of property created the political economy of modern liberalism. Thus, while "Cromwell and the English people dr[ew] from the Old Testament the language, passions and illusions for their own bourgeois revolution," Marx explains, "[w]hen the real goal was reached, when the remodeling of English society was accomplished, Locke supplanted Habakuk."<sup>2</sup>

Locke's labor theory of property sits at the root of modernity<sup>3</sup> and of the Anglo-American legal tradition.<sup>4</sup> A Lockean conception of

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<sup>1</sup> KARL MARX, *THEORIES OF SURPLUS VALUE* 29 (G.A. Bonner & Emile Burns trans., Int'l Publishers 1952) (1863); *see also id.* at 26 ("[T]he ownership of a greater quantity of means of production than one person can put to use with his own labor is, according to Locke, a *political* device which contradicts the law of nature on which property or the right to private property is founded."). Harvey C. Mansfield points to Marx's comment in *On the Political Character of Property in Locke*, in *POWERS, POSSESSIONS, AND FREEDOM* 23, 23 (Alkis Kontos ed., 1979).

<sup>2</sup> KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 11 (Daniel De Leon trans., C.H. Kerr 3d ed. 1914) (1852).

<sup>3</sup> *See* MATTHEW H. KRAMER, *JOHN LOCKE AND THE ORIGINS OF PRIVATE PROPERTY* 3 (1997) ("Locke's labor theory of ownership has helped to win a place for its formulator among the great thinkers in Western civilization."); C.B. MACPHERSON, *THE*

property animated the American Revolution and the U.S. Constitution.<sup>5</sup> Thomas Jefferson ranked Locke, along with Sir Isaac Newton and Francis Bacon, among “the three greatest men that have ever lived, without any exception,” men distinguished for having “laid the foundation of those superstructures which have been raised in the Physical & Moral sciences.”<sup>6</sup> Newton and Locke, wrote James Madison, “established immortal systems, the one in matter, the other in mind.”<sup>7</sup> Beyond law and politics, Locke’s ideas transformed Christian doctrine.<sup>8</sup>

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POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 220–21 (1962) (arguing that Locke’s “insistence that a man’s labour was his own . . . provides a moral foundation for bourgeois appropriation” and “a positive moral basis for capitalist society”); JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES, at x (1980) (noting that “Locke’s theory of property has played a major and contradictory role in western political thought,” alternately providing “the major philosophical foundation of modern socialism” and a justification of private property); see also PETER C. MYERS, OUR ONLY STAR AND COMPASS: LOCKE AND THE STRUGGLE FOR POLITICAL RATIONALITY I (1998) (locating “in Locke’s political philosophy the deepest, most philosophically self-conscious expression of modern liberal thought”).

<sup>4</sup> See Steven Chersensky, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 595, 633 (1993) (“The labor theory is the predominant property justification articulated in Anglo-American jurisprudence and philosophy . . . . The labor theory is generally attributed to John Locke and the influential chapter on property in his Second Treatise of Government.”); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296 (1988) (“Reference to Locke’s Two Treatises of Government is almost obligatory in essays on the constitutional aspects of property.”); see also G. E. Aylmer, *The Meaning and Definition of “Property” in Seventeenth-Century England*, 86 PAST & PRESENT 87, 95 (1980).

<sup>5</sup> See STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 70 (1990) (“Lockean theory . . . suppl[ied] the concepts and categories in which the Revolutionists articulated their deepest concerns about liberty and property.”); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 16 (1985) (“The Lockean system was dominant at the time when the Constitution was adopted. His theory of the state was adopted in Blackstone’s *Commentaries*, and the protection of private property was a central and recurrent feature of the political thought of the day.”); JEROME HUYLER, LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA 209 (1995) (“John Locke’s moral philosophy was reflected in the aspirations, controversies, and daily way of life of the American colonists.”); Michael W. McConnell, *Contract Rights and Property Rights*, in LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 141, 142–43 (Ellen Frankel Paul & Howard Dickman eds., 1989) (“It is fair to conclude that the protection of private property was as nearly unanimous an intention among the founding generation as any other element of a political creed.”).

<sup>6</sup> Letter from Thomas Jefferson to John Trumbull (Feb. 15, 1789), in THOMAS JEFFERSON: WRITINGS 939, 939–40 (1984).

<sup>7</sup> James Madison, *Spirit of Governments*, NAT. GAZETTE, Feb. 20, 1792, available at [http://www.constitution.org/jm/17920220\\_spirit.htm](http://www.constitution.org/jm/17920220_spirit.htm).

<sup>8</sup> See ALICE M. BALDWIN, THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION 68 (1965) (noting “clear evidence of the transmission through the cler-

The Supreme Court has recognized the importance of Locke's theory of property to American law.<sup>9</sup> Legal scholars continue to debate Locke's theory and apply it to new issues in the law of property, such as regulatory takings,<sup>10</sup> intellectual property,<sup>11</sup> cyberproperty,<sup>12</sup> the right of publicity,<sup>13</sup> environmental law,<sup>14</sup> and family law.<sup>15</sup> Americans are the "inheritors of the Lockean tradition" of property rights, Richard Epstein has written.<sup>16</sup> Yet despite the vast influence of

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gy of the theories of Locke"); DWORETZ, *supra* note 5, at 32 ("The clergy were demonstrably conversant with Locke's writings, and they had similar 'religious preoccupations.'"); MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* 148–201 (1996); *cf.* HENRY LONGUEVILLE MANSEL, *Freethinking—Its History and Tendencies*, in *LETTERS, LECTURES, AND REVIEWS* 291, 296 (Henry W. Chandler ed., 1873) ("In England, in the early part of the last century, both the assailants and the defenders of Christianity borrowed their weapons from the armoury of Locke.").

<sup>9</sup> See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 627–28 (2001) (rejecting the government's argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause because "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (citing Locke's Second Treatise and invoking the labor theory of property to establish that trade secret rights constitute "property" for the purpose of the Takings Clause of the Fifth Amendment).

<sup>10</sup> See, e.g., EPSTEIN, *supra* note 5, at 162 (arguing that the "public use" language of the Takings Clause "fits in with the Lockean conception of the state").

<sup>11</sup> See Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 804 (2001) ("Expressed in terms of Lockean labor theory, the ethical justification argues that when a creator deliberately combines her mental efforts with language, images, techniques, or other ideas in the public domain, the resulting product should be identified as her intellectual property."); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993) ("Locke's labor theory of property and allied approaches have been used so frequently as a justification for creators' ownership rights that Locke's *Two Treatises* have been erroneously credited with having developed an explicit defense of intellectual property.").

<sup>12</sup> See Michael A. Carrier & Greg Lastowka, *Against Cyberproperty*, 22 BERKELEY TECH. L.J. 1485, 1500 (2007) (noting that "[c]yberproperty proponents have invoked Locke's labor theory to justify the concept" but arguing that the labor theory does not support cyberproperty).

<sup>13</sup> See Sudakshina Sen, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 739 (1995) ("[T]he celebrity's right of publicity is justified in terms of John Locke's labor theory of property.").

<sup>14</sup> See, e.g., Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy*, 26 ENVTL. L. 1095, 1127 (1996) (arguing that "the traditional Lockean viewpoint" promotes "ecological abuse" and urging its reconsideration).

<sup>15</sup> See Shoshana L. Gillers, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 693 (2001) (proposing "a normative model of legal parenthood based on a Lockean labor theory of property that awards parenthood to the gestational mother, or those who commissioned her services").

<sup>16</sup> Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 750 (1990).

Locke's theory of property, many scholars question its coherence.<sup>17</sup> Some conclude that Locke's theory rests upon theological assumptions without which it makes no logical sense.<sup>18</sup>

Locke himself regarded his theory as a significant accomplishment.<sup>19</sup> Yet contemporary scholars do not agree. According to John Dunn, the political doctrine of Locke's *Two Treatises of Government* "was merely the dignifying of the legal order of the English polity."<sup>20</sup> Locke evinced "a considerable degree of acceptance of the conventional social pieties" and merely offered "principles of the most indubitable and parochial political orthodoxy."<sup>21</sup> Under this view, however, the dramatic intellectual influence of Locke's doctrine—not to mention the controversy it created in its own time—seems almost inexplicable.

That an apparently conventional theological work had such influence offers a clue about Locke's intention. Perhaps Locke meant furtively to accomplish what Marx claims he actually did: to undermine feudal society and to supplant traditional religious ethics. Against scholars who argue that Locke's *Two Treatises of Government* is logically incoherent or religiously dogmatic, this Article argues that Locke's theory of property aimed to supplant traditionalist Christian ethics with a modern ethic of human autonomy.<sup>22</sup> Through a close examination of the discussion of property in *Two Treatises*, the Article reveals that Locke's reliance on the authority of scripture is more ap-

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<sup>17</sup> See Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 155 (2002) ("Despite its omnipresence in the lawyer's understanding of property rights, his theory of property has fallen prey to modern academic critiques . . . . They declare, in short, that Locke's labor argument for property is a lousy justification for property rights."). For particular critiques, see, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174–78 (1974); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 184–91 (1988).

<sup>18</sup> See *infra* Part II.A.

<sup>19</sup> In a 1703 letter to Richard King, Locke assessed his contribution by writing, "[P]roperty, I have found nowhere more clearly explained than in a book intitled, *Two Treatises of Government*." TULLY, *supra* note 3, at x. Locke presented himself as a disinterested observer because *Two Treatises* had been published anonymously. See *infra* note 95 and accompanying text.

<sup>20</sup> JOHN DUNN, *The Politics of Locke in England and America in the Eighteenth Century*, in *POLITICAL OBLIGATION IN ITS HISTORICAL CONTEXT* 53, 60 (1980).

<sup>21</sup> *Id.* at 60, 63.

<sup>22</sup> Locke's theory of property is the heart of his political philosophy. See MACPHERSON, *supra* note 3, at 197 ("Everyone sees that Locke's assertion and justification of a natural individual right to property is central to his theory of civil society and government."); cf. WILLMOORE KENDALL, *JOHN LOCKE AND THE DOCTRINE OF MAJORITY RULE* 69 (1918) (evaluating Locke's theory in light of "the most crucial of the 'natural' individual rights which he is thought to have defended," the natural right to property).

parent than real. While Locke cites biblical teaching ostensibly to support his theory of property, his argument in fact undermines the biblical view.

After this Introduction, Part II introduces the “theological view” of Locke and argues that while scholars are right to identify apparent deficiencies in Locke’s prose, they fail to consider how those difficulties might proceed from a conscious rhetorical method. Locke avoids the appearance of heterodoxy in order to gain wider acceptance of his ideas. Part III explores Locke’s view of nature that forms the basis of this theory of property. Locke’s vision of nature effects a break from traditional notions of divine sovereignty in favor of human self-reliance. Part IV illustrates how Locke’s theory of property alters the biblical ethic. Locke’s challenge to traditional Christianity becomes clear when one compares Locke’s teaching with those of the Church fathers, especially the biblical teaching on property to which Locke alludes in *Two Treatises*. Locke’s theory supplants biblical morality by justifying material acquisition and celebrating human industry. Part V explains how Locke’s doctrine forms the moral core of a liberal society. What results is a redirection of social life from spiritual devotion to commercial development and a shift in allegiance from church to self. Together, these Parts lead to a fuller understanding of a theory that undergirds American constitutionalism, modern liberalism, and the law of property.

## II. LOCKE’S RHETORIC

Before examining Locke’s articulation of his theory, it is worth reviewing contemporary critiques of Locke and how his ostensible deficiencies might be explained by a conscious rhetorical method.

### A. “A Series of Theological Commitments”

Given the strength of Marx’s assessment—and of Locke’s political achievement—one wonders how contemporary scholars can regard Locke’s treatise as a conventional text, judging “practically every feature in Locke’s political system” to be “a commonplace of current English political theory.”<sup>23</sup> Or, worse, to regard *Two Treatises of Government* as an “incoherent and carelessly written work” that “appears

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<sup>23</sup> J.W. GOUGH, JOHN LOCKE’S POLITICAL PHILOSOPHY 98 (1950); see also JONATHAN I. ISRAEL, ENLIGHTENMENT CONTESTED: PHILOSOPHY, MODERNITY, AND THE EMANCIPATION OF MAN 1670–1752, at 58 (2006) (identifying Locke as an “essentially conservative thinker[.]”).

to be merely muddle.”<sup>24</sup> Observing the apparent banality and incoherence of Locke’s argument, some scholars resort to “the standard theological reading of Locke’s politics,” in which “[c]ommentators assume that Locke, as a child of his times, must have believed” in prevailing Christian doctrines, and these complete his otherwise inadequate system.<sup>25</sup> John Dunn, citing “the theoretical centrality of Locke’s religious preoccupations throughout the work,” concludes that Locke’s arguments depend “for their very intelligibility, let alone plausibility, on a series of theological commitments.”<sup>26</sup> As Matthew Kramer puts it, “Without explicit or tacit affirmations of God’s benevolent reign, the principles and arguments [of Locke’s theory of property] would crumble under the slightest challenge.”<sup>27</sup> Readers of Locke’s work must accept his religious commitment “unless we presume that Locke deliberately ventured arguments which he almost surely would have assessed as gravely flimsy.”<sup>28</sup>

According to this view, *Two Treatises* is “saturated with Christian assumptions” such that Dunn locates “the key to Locke’s moral vision” in the traditional Calvinist doctrine of the calling.<sup>29</sup> Steven Dworetz concludes that “Locke is a sincere theist whose political theory cannot be detached from his ‘religious preoccupations’ without unhistorically secularizing, and thus distorting, its character.”<sup>30</sup> Similarly, Jeremy Waldron contends that “[t]o treat Locke’s argument as though it were a secular argument, and thus on a par with our patterns of secular argumentation, is one sort of anachronism.”<sup>31</sup> According to Waldron, Locke founded his notions of human equality

<sup>24</sup> JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE TWO TREATISES OF GOVERNMENT* 164 (1969).

<sup>25</sup> JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT* 53 (2002); see also David Foster, *The Bible and Natural Freedom in John Locke’s Political Thought*, in *PIETY AND HUMANITY: ESSAYS ON RELIGION AND EARLY MODERN POLITICAL PHILOSOPHY* 181, 181 (Douglas Kries ed., 1997) (“According to the prevailing view, Locke’s politics rest, whether he was aware of it or not, on certain Christian or biblical premises . . .”). See generally Eldon Eisenach, *Religion and Locke’s Two Treatises of Government*, in *JOHN LOCKE’S TWO TREATISES OF GOVERNMENT: NEW INTERPRETATIONS* 50 (Edward J. Harpham ed., 1992) (discussing recent scholarship on the role of religion in *Two Treatises*).

<sup>26</sup> DUNN, *supra* note 24, at ix–xiii.

<sup>27</sup> KRAMER, *supra* note 3, at xi.

<sup>28</sup> *Id.*

<sup>29</sup> DUNN, *supra* note 24, at 99, 245.

<sup>30</sup> DWORETZ, *supra* note 5, at 30.

<sup>31</sup> WALDRON, *supra* note 25, at 15.

and rights “on theological grounds.”<sup>32</sup> Victor Nuovo calls Locke a “Christian philosopher” whose work falls squarely “within the conventions of biblical scholarship of his day.”<sup>33</sup> For these scholars, “[a]ll the roads of Lockean philosophy lead to the hallowed ground of Christianity.”<sup>34</sup> It turns out, contra Marx, that Locke was just another Habakuk all along.

Yet the theological view of Locke’s *Two Treatises* fails to account for certain realities. For one, scholars often consider Lockean political theory apart from Locke’s religious preoccupations, but his ideas, though secularized, remain distinctly and recognizably Lockean. Dworetz suggests that secular ideas cannot be authentically Lockean, though Waldron—while he insists upon the Christian foundations of Locke’s political thought—regards those religious foundations as insignificant, “at most a genealogical point.”<sup>35</sup> If the theological grounds of Locke’s political principles were so essential, it seems odd that those principles hold sway not in Locke’s own time but in modern liberal societies that lack the same, or even any, theological commitments. One faces the paradox of Lockean principles coming to predominate just as their foundation decays. Such principles, moreover, have been politically transformative. One naturally wonders how the author of an incoherent tract of familiar dogmas could manage to transform Anglo-American law, inspire American independence, and initiate liberal political economy.<sup>36</sup>

And why was *Two Treatises* so controversial? Locke published the book anonymously and would not allow his authorship to be acknowledged until his death.<sup>37</sup> In 1683—six years before *Two Treatises*

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<sup>32</sup> *Id.* at 151; see also HENNING GRAF REVENTLOW, *THE AUTHORITY OF THE BIBLE AND THE RISE OF THE MODERN WORLD* 244 (John Bowden trans., Fortress Press 1985) (“[T]he religious side in Locke’s thinking is in a particular way constitutive of his whole philosophical system.”). Jonathan Israel also argues that Locke “abjured notions of a purely secular morality.” ISRAEL, *supra* note 23, at 52. To Israel, Locke was a “Christian[] who believed passionately in Revelation, Christ’s miracles, and a providential God who sent His son.” JONATHAN I. ISRAEL, *RADICAL ENLIGHTENMENT: PHILOSOPHY AND THE MAKING OF MODERNITY 1650–1750*, at 469 (2001).

<sup>33</sup> Victor Nuovo, *Locke’s Christology as a Key to Understanding His Philosophy*, in *THE PHILOSOPHY OF JOHN LOCKE: NEW PERSPECTIVES* 129, 148 (Peter R. Anstey ed., 2003). Eldon Eisenach, summarizing recent scholarship, concludes that “Locke was a devout member of the Anglican confession” whose philosophy is “informed by a deep faith in the efficacy of biblical revelation as a source of moral and political duties.” Eisenach, *supra* note 25, at 61, 70.

<sup>34</sup> Richard Ashcraft, *Faith and Knowledge in Locke’s Philosophy*, in *JOHN LOCKE: PROBLEMS AND PERSPECTIVES* 194, 214 (John W. Yolton ed., 1969).

<sup>35</sup> WALDRON, *supra* note 25, at 242.

<sup>36</sup> See *supra* notes 3–16 and accompanying text.

<sup>37</sup> See *infra* note 95 and accompanying text.

was published but perhaps five years after Locke started writing it<sup>38</sup>—Algernon Sidney was convicted of treason and executed for endorsing similar ideas. The court examined manuscript pages of Sidney’s *Discourses Concerning Government*, a “most seditious and traitorous libel,” according to the Lord Chief Justice, that advocates “fixing the power in the people.”<sup>39</sup> Sidney’s *Discourses* argues against Sir Robert Filmer’s *Patriarcha*—precisely the work against which Locke’s *Treatises* is directed. Sidney’s and Locke’s arguments are similar in many respects.<sup>40</sup> In fact, Locke and Sidney had both been involved in the same conspiracy to overthrow the monarchy.<sup>41</sup> It made sense, then, for Locke to worry about the reaction to his *Two Treatises*.

In 1690, Locke published his *Essay Concerning Human Understanding*, which he had been writing since 1671.<sup>42</sup> His friends and collaborators, the physicist Sir Isaac Newton and the Whig writer James Tyrrell, denounced him for promoting Hobbism.<sup>43</sup> Newton thought Locke’s argument “struck at the root of morality,” as he explained to his friend, and “I took you for a Hobbist.”<sup>44</sup> The Bishop of Worcester, meanwhile, alleged that Locke’s “‘new way of ideas’ undermined the principles of Christianity.”<sup>45</sup> The charge of Hobbism was serious. Opposition to Hobbes’s work had prompted repeated attempts to make Christian heresy a criminal offense.<sup>46</sup> And apart from the legal

<sup>38</sup> J. Kemp, Book Review, 12 PHIL. Q. 356, 358 (1962) (reviewing JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1960) (1690)).

<sup>39</sup> *The Trial of Algernon Sidney*, in 1 ALGERNON SIDNEY, DISCOURSES ON GOVERNMENT 107, 157, 226 (Lawbook Exch. 2002).

<sup>40</sup> Thomas G. West, *Foreword* to ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT, at xv, xxiv (Thomas G. West ed., rev. ed. 1996); *see also id.* at xxii (“Sidney invokes the authority of divine revelation to vindicate conclusions reached by reason.”).

<sup>41</sup> *Id.* at xxxiv.

<sup>42</sup> 1 JOHN LOCKE, DRAFTS FOR THE *ESSAY CONCERNING HUMAN UNDERSTANDING* AND OTHER PHILOSOPHICAL WRITINGS (Peter H. Nidditch & G.A.J. Rogers eds., Oxford Univ. Press 1990) (1690).

<sup>43</sup> David Wootton, *John Locke: Socinian or Natural Law Theorist?*, in RELIGION, SECULARIZATION AND POLITICAL THOUGHT: THOMAS HOBBS TO J.S. MILL 39, 41 (James E. Crimmins ed., 1989).

<sup>44</sup> HENRY RICHARD FOX BOURNE, THE LIFE OF JOHN LOCKE 226 (1876).

<sup>45</sup> Ashcraft, *supra* note 34, at 198.

<sup>46</sup> In 1866, the committee of the House of Commons considering such a bill “was specifically empowered to gather information about the atheistical implications of *Leviathan*.” RICHARD TUCK, HOBBS 42 (1989). The bill failed in the Lords but was reintroduced in 1667, 1674, 1675, and 1680. *Id.* at 42–43; *see also* Noel Malcolm, *General Introduction*, in 1 THOMAS HOBBS, THE CORRESPONDENCE, at xxi, xxv (Noel Malcolm ed., 1994).

threat, any work tarred with the Hobbist label would be denied a full hearing in the public square.<sup>47</sup> Locke's work was susceptible to the charge. The *Two Treatises* purported to refute not only Filmer's *Patriarcha*, but Filmer's *Observations upon Mr. Hobbes's Leviathan* as well.<sup>48</sup> Thus, Locke's work refutes Filmer's refutation of Hobbes and thereby provides an indirect defense of Hobbes. When *Two Treatises* appeared, it was hailed "as a controversial work," and even Whig leaders "hesitated at first about accepting it."<sup>49</sup> Such a reaction would make little sense had Locke simply reflected the commonly accepted ideas of the time.

Contemporary observers must lack some awareness that was prevalent in 1690 if they do not believe that Locke offers anything novel. Instead of the theological interpretation, it may be worth taking seriously the suggested alternative that Locke deliberately ventured flimsy arguments—arguments that would be embraced by readers with preexisting theological commitments—in order to make other, more subversive arguments in the book more palatable.<sup>50</sup> As Locke

<sup>47</sup> See Jon Parkin, *Hobbiism in the Later 1660s: Daniel Scargill and Samuel Parker*, 42 HIST. J. 85, 86 (1999) (noting "the kind of backlash that unwisely expressed Hobbesian views might face").

<sup>48</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. I, ch. II, § 14 (Thomas Hollis ed., London, A. Millar et al., 1764) (1690) [hereinafter LOCKE, TWO TREATISES], available at <http://oll.libertyfund.org/title/222>. I use the Hollis edition of *Two Treatises* because it is the first to include the corrections and additions Locke made to the text during his lifetime. Each of the first three editions of *Two Treatises* contained printer's errors, and Locke made extensive corrections to a copy of the third edition, which is now housed at Christ's College, Cambridge. C.B. Macpherson reproduces the Hollis edition in JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett 1980) (1690), though the Macpherson edition does not include the First Treatise. See *A Note on the Text*, in SECOND TREATISE OF GOVERNMENT, *supra*, at 1; see also Peter Laslett, *Introduction* to JOHN LOCKE, TWO TREATISES OF GOVERNMENT 16, 22–23 (Peter Laslett ed., Mentor rev. ed. 1963) (1690) (noting that Locke "corrected a copy of the printed version in minute detail, scrutinizing word-order, the italics, the punctuation, even the spelling, as well as the general sense" and that Hollis acquired the master copy and published it as the 1764 edition). Contemporary editors have made some further alterations to Locke's corrected text, see, e.g., *Editorial Note*, in TWO TREATISES OF GOVERNMENT, *supra*, at 162, 163–64, so I rely directly on the Hollis edition. Further citations to *Two Treatises* will identify the book, chapter, and section number. Italics have been omitted in some cases.

<sup>49</sup> GOUGH, *supra* note 23, at 133.

<sup>50</sup> Kramer offers this suggestion sarcastically. See *supra* note 28 and accompanying text. But a similar view was prevalent in Locke's own time. Scholars and Anglican divines such as Edward Stillingfleet, George Hickes, and William Carroll accused Locke of furtively promoting deism, atheism, and "Spinozism" concealed behind "such shifts, tricks, stratagems and equivocations to conceal themselves and to set off his doctrine under . . . a variety of disguises and abuse of words." ISRAEL, *supra* note 32, at 606 (quoting WILLIAM CARROLL, SPINOZA REVIV'D 157–58 (1704)). See generally Stuart Brown, *Locke as Secret 'Spinozist': The Perspective of William Carroll*, in DISGUISED

explains at the beginning of *Two Treatises*, a writer may act “like a wary physician, when he would have his patient swallow some harsh or corrosive liquor, he mingles it with a large quantity of that which may dilute it; that the scattered parts may go down with less feeling, and cause less aversion.”<sup>51</sup>

This Article suggests that Locke crafted *Two Treatises* in the manner Locke himself identified. It argues that his sometimes opaque and seemingly contradictory language obscures a high ambition: Locke aims, in his First Treatise, to refute Filmer’s argument for the divine right of kings and, ultimately, biblical morality as a foundation for political life. In the Second Treatise, Locke aims to replace biblical morality with an ethic founded on reason. Reason, which Locke calls man’s “only star and compass,” should be what “he steers by.”<sup>52</sup> When reason is “laid aside,” men follow “the authority of example” which is based not upon reason but upon custom and folly: “[W]hen fashion hath once established what folly or craft began, custom makes it sacred, and it will be thought impudence, or madness, to contradict or question it.”<sup>53</sup> According to Locke, many of the world’s “religions, governments, and manners” persist in this way.<sup>54</sup> Locke aims to supplant “the authority of example” with reason. He states this challenge to the authority of revelation rather explicitly, but because it appears in a work suffused with deference to religious authority, it fails to impress itself upon all readers. Locke does not want his work dismissed as “impudence, or madness” because it questions regnant dogmas.

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AND OVERT SPINOZISM AROUND 1700, at 213 (Wiep van Bunge & Wim Klever eds., 1996); Rosalie L. Colie, *Spinoza and the Early English Deists*, 20 J. HIST. IDEAS 23, 31 n.32 (1959) (“Locke . . . was roundly attacked by Stillingfleet, Carroll, Witty and occasional minor critics for his ‘Spinozism.’”).

Carroll urged that the English, being a solid, decent Christian nation, would have nothing to do with Spinoza’s philosophy when expounded ‘in plain, precise and determined terms’ but that Locke, by divesting words of their usual connotations, had sought to smuggle in [Spinoza’s] ‘most absurd, impious and abominable hypothesis . . . covertly’, arguing that had Locke ‘defin’d his names as Spinoza did, I mean his chief terms . . . he would have quite ruin’d his design, especially in these nations . . .’

ISRAEL, *supra* note 32, at 607. This perspective “was broadly in line with the interpretation of Locke that held sway in the eighteenth century.” Brown, *supra*, at 216 n.11; see also Wim Klever, *Locke’s Disguised Spinozism 2* (2009), available at <http://bit.ly/q3fjhe> (defending “the correctness of Carroll’s judgment”).

<sup>51</sup> LOCKE, *TWO TREATISES*, *supra* note 48, bk. I, ch. II, § 7.

<sup>52</sup> *Id.* bk. I, ch. VI, § 58.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

*B. Locke's Carelessness*

Those scholars who adopt the theological view observe, with some justification, that "Locke is full of illogical flaws and inconsistencies."<sup>55</sup> Getting Locke's message is "complicated by Locke's failure to commit himself unequivocally on several of the most crucial questions to be discussed. He frequently used imprecise language, and . . . sometimes made plainly contradictory statements."<sup>56</sup> Locke employs "evasive and incoherent formulations," marked by "vacillations over strategies for convincing others."<sup>57</sup> "Locke's carelessness," concludes one scholar, "vexes every attentive reader of his works."<sup>58</sup>

The inconsistencies in Locke's teaching are many and easy to recount. He argues that nature furnishes the supports of life "richly" and in abundance, but elsewhere writes that nature provides "almost worthless materials" and a state of "penury."<sup>59</sup> Locke insists that people are the property of God, "sent into the world by his order and about his business,"<sup>60</sup> but also maintains that "every man has a property in his own person," which "nobody has any right to but himself."<sup>61</sup> He teaches that God gave all of nature to mankind in common,<sup>62</sup> but also argues that men may appropriate elements of the common stock at will, in varying amounts according to one's degree of industry.<sup>63</sup> He describes the state of nature as "a state of perfect freedom"<sup>64</sup> governed by a law of nature, but also "full of fears and continual dangers."<sup>65</sup>

Beside the apparent inconsistencies, Locke is also imprecise. He employs dissimilar terms synonymously, obscuring his meaning. For example, he sometimes seems to treat interchangeably such terms as "law of nature,"<sup>66</sup> "law of reason,"<sup>67</sup> "the law of nature, or the revealed

<sup>55</sup> GOUGH, *supra* note 23, at 123.

<sup>56</sup> Walter M. Simon, *John Locke: Philosophy and Political Theory*, 45 AM. POL. SCI. REV. 386, 386 (1951).

<sup>57</sup> DUNN, *supra* note 24, at 134, 197.

<sup>58</sup> C.B. Macpherson, *Progress of the Locke Industry*, 3 CAN. J. POL. SCI. 323, 324 (1970) (book review).

<sup>59</sup> *Compare* LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 31, *with id.* bk. II, ch. V, § 43.

<sup>60</sup> *Id.* bk. II, ch. II, § 6.

<sup>61</sup> *Id.* bk. II, ch. V, § 27.

<sup>62</sup> *Id.* bk. II, ch. V, § 25.

<sup>63</sup> *Id.* bk. II, ch. V, § 48.

<sup>64</sup> *Id.* bk. II, ch. II, § 4.

<sup>65</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. IX, § 123; *see infra* Part III.A.

<sup>66</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 4.

<sup>67</sup> *Id.* bk. II, ch. V, § 30.

law of God,”<sup>68</sup> “the positive law of God,”<sup>69</sup> “the law of God and nature,”<sup>70</sup> “the laws of God and nature,”<sup>71</sup> “the law of God, or nature,”<sup>72</sup> “reason, which was the voice of God” in man,<sup>73</sup> and others. One might either judge Locke a sloppy wordsmith or conclude he deliberately obscured the distinctions between the laws of reason, nature, and God—even though he elsewhere insists upon such distinctions.<sup>74</sup>

In a different sort of imprecision, Locke uses “property” to designate a range of phenomena, such as an attribute (“the *property* of labor should be able to over-balance the community of land”<sup>75</sup>), a right of ownership (“men might come to have a *property* in several parts of” the common world<sup>76</sup>), the item owned (man removes a thing from nature “and thereby makes it his *property*”<sup>77</sup>), ownership in general (“this original law of nature, for the beginning of *property*, in what was before common, still takes place”<sup>78</sup>), one’s estate (parents provide for “the descent of their *property* to their children”<sup>79</sup>), and the spectrum of individual rights (men join society “for the mutual preservation of their lives, liberties and estates, which I call by the general name, *property*”<sup>80</sup>). The term “estate,” moreover, variously refers to property (“his father’s *estate*”), political circumstances (“[m]en being [naturally free], no one can be put out of this *estate* and subjected to the political power of another”), wealth (“it would always be a sin, in any man of *estate*, to let his brother perish”), and social structures (“[s]lavery is so vile and miserable an *estate* of man”).<sup>81</sup> One could go on.

<sup>68</sup> *Id.* bk. I, ch. XI, § 124.

<sup>69</sup> *Id.* bk. II, ch. VI, § 52.

<sup>70</sup> *Id.* bk. II, ch. VI, § 66.

<sup>71</sup> *Id.* bk. II, ch. XVI, § 195.

<sup>72</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 116.

<sup>73</sup> *Id.* bk. I, ch. IX, § 86.

<sup>74</sup> *Cf.* Klever, *supra* note 50, at 13 (“Locke and Spinoza . . . accustom themselves mostly to the normal, popular or ‘theological’, way of speaking about God as if he would be a kind of superhuman person and spell his name with a capital. But they incidentally deviate from this usage and write consciously in *double language*, alternating the words ‘God’, ‘creator’, ‘maker’ etc. with words like ‘universe’, ‘world’, ‘nature’.”).

<sup>75</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 40.

<sup>76</sup> *Id.* bk. II, ch. V, § 25.

<sup>77</sup> *Id.* bk. II, ch. V, § 27.

<sup>78</sup> *Id.* bk. II, ch. V, § 30.

<sup>79</sup> *Id.* bk. II, ch. VII, § 89.

<sup>80</sup> *Id.* bk. II, ch. IX, § 123.

<sup>81</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XVIII, § 202; bk. II, ch. VIII, § 95; bk. I, ch. IV, § 42; bk. I, ch. I, § 1.

Locke also shifts and qualifies his arguments. In Chapter 2 of the Second Treatise, for example, Locke advances the “very strange doctrine” that every individual in the state of nature has the right to enforce the natural law on behalf of mankind.<sup>82</sup> In the absence of such a power, Locke argues, a state could not punish a foreign visitor who commits a crime. The civil laws of the country “speak not to him, nor, if they did, is he bound to hearken to them.”<sup>83</sup> Only the power to enforce the natural law would allow a magistrate to punish a foreigner.<sup>84</sup> In Chapter 8, however, Locke acknowledges that a foreigner tacitly consents, by living under a government “and enjoying the privileges and protection of it,” to be “obliged to comply with the laws, and submit to the government he found there.”<sup>85</sup> The foreigner is subject to the civil law after all.<sup>86</sup>

What makes Locke’s frustrating style especially notable is that he attacks Sir Robert Filmer, his interlocutor in *Two Treatises*, for precisely the same textual faults. “I imagine I shall have neither the time nor inclination to repeat my pains,” writes Locke, “by tracing Sir Robert again through all the windings and obscurities.” Locke hopes readers will lack the weakness

to be deceived with contradictions dressed up in a popular stile, and well-turned periods: for if any one will be at the pains, himself, in those parts, which are here untouched, to strip Sir Robert’s discourses of the flourish of doubtful expressions, and endeavour to reduce his words to direct, positive, intelligible propositions, and then compare them one with another, he will quickly be satisfied, there was never so much glib nonsense put together in well-sounding English. If he think it not worth while to examine his works all thro’, let him make an experiment in that part, where he treats of usurpation; and let him try, whether he can, with all his skill, make Sir Robert intelligible, and consistent with himself, or common sense.<sup>87</sup>

It is difficult to believe a writer who so brazenly denounces his subject for obscurities, contradictions, and inconsistencies would be unaware of the same features in his own work, especially when they are so blatant. In fact, Locke tells his readers not to ascribe such contradictions or obscurities to the author’s carelessness. In response to Fil-

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<sup>82</sup> See *infra* Part II.A.

<sup>83</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 9.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* bk. II, ch. VIII, § 122.

<sup>86</sup> On the significance of Locke’s treatment of aliens, see LEE WARD, JOHN LOCKE AND MODERN LIFE 81–83 (2010).

<sup>87</sup> LOCKE, TWO TREATISES, *supra* note 48, Preface.

mer, Locke writes, “I do not think our author so little skilled in the way of writing discourses of this nature, nor so careless of the point in hand, that he by oversight commits the fault that he himself, in his [other writings], objects to.”<sup>88</sup>

Locke’s objections to Filmer suggest that his readers should not attribute his own contradictions and obscurities to carelessness. “[O]bscurity cannot be imputed to want of language in so great a master of style,” Locke writes of Filmer. Instead, an author may “chose rather to content himself with doubtful and general terms, which might make no ill sound in men’s ears who were willing to be pleased with them” rather than specific terms that could cause disruption or outrage.<sup>89</sup> Locke also identifies

our author’s way of writing, who, huddling several suppositions together, and that in doubtful and general terms, makes such a medley and confusion, that it is impossible to show his mistakes, without examining the several senses wherein his words may be taken, and without seeing how, in any of these various meanings, they will consist together, and have any truth in them.<sup>90</sup>

Locke thus invites readers to strip his own work of doubtful expressions and obscurities, to reduce his words to intelligible propositions “and then compare them one with another” to see what argument emerges.<sup>91</sup>

### C. *Locke’s Caution*

Locke elsewhere provides another standard by which to judge an author. “I have always thought the actions of men the best interpreters of their thoughts,” Locke writes in *An Essay Concerning Human Understanding*.<sup>92</sup> A look into his background reveals the common opinion that “Locke was an inordinately cautious man.”<sup>93</sup> In fact, Locke “was able to preserve his life, liberty and estate, while completing his major works and extending his influence enormously only

<sup>88</sup> *Id.* bk. I, ch. II, § 7 (citation omitted).

<sup>89</sup> *Id.* bk. I, ch. XI, § 110.

<sup>90</sup> *Id.* bk. I, ch. III, § 20.

<sup>91</sup> *See id.* Preface.

<sup>92</sup> JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 27 (Prometheus Books 1995) (1693) [hereinafter LOCKE, HUMAN UNDERSTANDING]. For a discussion of Locke’s caution in light of this statement, see LEO STRAUSS, NATURAL RIGHT AND HISTORY 206 (1953).

<sup>93</sup> A.H. MacLean, *George Lawson and John Locke*, 9 CAMBRIDGE HIST. J. 69, 73 (1947); *see also* Brown, *supra* note 50, at 223 (“Locke’s reputation for secrecy was well-established.”).

through the exercise of a unique and all-encompassing caution.”<sup>94</sup> Locke not only published *Two Treatises* anonymously; he took every precaution to maintain secrecy. He “not only evaded his friends’ inquiries; the extant correspondence . . . suggests that he was at pains to conceal his authorship from the publisher, Awnsam Churchill . . . [who] was not to see a scrap of writing in Locke’s hand.”<sup>95</sup> This caution makes sense, given the controversial character of the ideas Locke propounded. There was not only the execution of Algernon Sidney.<sup>96</sup> As late as 1697, a university student named Thomas Aikenhead was executed at Edinburgh for blasphemy.<sup>97</sup>

As of 1703, Locke would not admit even to having read Sidney’s *Discourses Concerning Government*—even though historians now know he had purchased a copy for his library in 1698.<sup>98</sup> When Stillingfleet wrote to Locke accusing him of siding with Hobbes and Spinoza on the question of the immortality of the soul, Locke replied that he had not read the works of either. “I am not so well read in Hobbes or Spinoza, as to be able to say what were their opinions in this matter,” he wrote.<sup>99</sup> “But possibly there be those, who will think your lordship’s authority of more use to them in the case than those justly decried names.”<sup>100</sup> (For good measure, Locke included a vigorous defense of the immortality of the soul.) Historians now know that Locke had Hobbes’s *Leviathan* as well as Spinoza’s works in his library.<sup>101</sup> “As a writer, Locke was not in the habit of revealing his sources,” observes A.H. MacLean.<sup>102</sup> “He preferred to foster the impression of being guided by nothing save the dictates of individual

<sup>94</sup> Robert H. Horwitz, 74 AM. POL. SCI. REV. 160, 160 (1980) (reviewing THE CORRESPONDENCE OF JOHN LOCKE (E.S. de Beer ed., 1978–79)).

<sup>95</sup> Esmond S. De Beer, *Locke and English Liberalism: The Second Treatise of Government in Its Contemporary Setting*, in JOHN LOCKE: PROBLEMS AND PERSPECTIVES, *supra* note 34, at 34, 35.

<sup>96</sup> See discussion *supra* Part II.A.

<sup>97</sup> David M. Fahey, *The Prudent Ambiguity of John Locke*, 23 REV. POL. 410, 410 (1961) (reviewing RICHARD H. COX, LOCKE ON WAR AND PEACE (1960)).

<sup>98</sup> MacLean, *supra* note 93, at 73 & n.28.

<sup>99</sup> *Mr. Locke’s Reply to the Bishop of Worcester’s Answer to His Second Letter*, in 4 WORKS OF JOHN LOCKE 193, 477 (Elibron Classics 2005) (1801).

<sup>100</sup> *Id.*

<sup>101</sup> Klever, *supra* note 50, at 1; MacLean, *supra* note 93, at 73 & n.29 (“Locke had a first edition copy of Hobbes’ *Leviathan* in his own library.”); see also Wim Klever, *Sloke, Alias Locke in Spinozistic Profile*, in DISGUISED AND OVERT SPINOZISM AROUND 1700, *supra* note 50, at 235, 260 (“I think, that our conclusion may be that he was better informed about Spinoza’s work and intentions than is suggested in this utterance, which may be interpreted as slightly disingenuous on account of the ruling public opinion.”).

<sup>102</sup> MacLean, *supra* note 93, at 74.

reason.”<sup>103</sup> It made sense to remain guarded. Several of Locke’s contemporaries suspected Locke of Hobbism.<sup>104</sup> Upon the publication of Locke’s *An Essay Concerning Human Understanding*, the Third Earl of Shaftesbury, Locke’s student and a longtime interlocutor, denounced him as a menace to justice and virtue:

It was Mr. Locke that struck the home blow: for Mr. Hobbes’ character and base slavish principles in government took off the poison of his philosophy. ’Twas Mr. Locke that struck at all fundamentals, threw all order and virtue out of the world and made the very ideas of these . . . unnatural and without foundation in our minds.<sup>105</sup>

Locke answered his critics “with public silence and private scorn.”<sup>106</sup>

Given Locke’s cautious behavior, by his own standard one would expect him to be an especially careful writer. “To avoid persecution,” observes David Fahey, “the cautious Locke employed oblique literary techniques which obscured the extent of his break with tradition.”<sup>107</sup> Locke was candid about this method at times. In his correspondence, one finds William Molyneux writing to ask about an apparent contradiction in his *Essay*. In reply, Locke confirms that the contradiction was intentional: “[T]he seeming contradiction between what is said p. 147 and p. 341, is just as you take it, and I hope so clearly expressed, that it cannot be mistaken, but by a very unwary reader . . . .”<sup>108</sup> One might attribute such contradictions to carelessness, but Locke seems to have anticipated that charge. One must, at least, entertain the possibility that his style was as he described: its import deliberately obscured in order to avoid outright disclosure of unpopular ideas.

### III. LOCKE’S VIEW OF NATURE

Locke must have been concerned with the reception that his ideas would have among the public. In the first half of the seventeenth century, “[t]was held a Sin to make a Scrutinie into the Waies of Nature,” wrote Locke’s contemporary John Aubrey.<sup>109</sup> Pious citizens regarded the scientific attempt to understand and to master na-

<sup>103</sup> *Id.*

<sup>104</sup> Fahey, *supra* note 97, at 410.

<sup>105</sup> Jason Aronson, *Shaftesbury on Locke*, 53 AM. POL. SCI. REV. 1101, 1103 (1959).

<sup>106</sup> Jonathan Barnes, *Mr. Locke’s Darling Notion*, 22 PHIL. Q. 193, 194 (1972).

<sup>107</sup> Fahey, *supra* note 97, at 410.

<sup>108</sup> Horwitz, *supra* note 94, at 160 (internal quotation marks omitted).

<sup>109</sup> AUBREY’S BRIEF LIVES, at xxxiv (Oliver Lawson Dick ed., Univ. of Mich. Press 1962) (1813).

ture as ingratitude for God's benevolence—and a profane, hubristic confidence in the capacities of fallen man to surpass revealed wisdom.<sup>110</sup> Deriding the natural world could be blasphemous, and authors seen to promote Hobbism would attract public scorn.<sup>111</sup>

#### A. *The Rule of Men*

For this reason, perhaps, Locke begins the Second Treatise by insisting upon the distinction between his view of the state of nature and the Hobbesian view of nature as a state of war. But Locke's initial portrait of the state of nature is heavily qualified. At the beginning of his chapter on the state of nature, Locke describes it as "a state of perfect freedom" and "[a] state also of equality."<sup>112</sup> He writes that the state of nature is "not a state of license" because it "has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."<sup>113</sup> But having portrayed the state of nature as peaceful, Locke does not indicate that the law of nature is

<sup>110</sup> *Id.*

<sup>111</sup> At the end of the century, "[h]eterodox books could still be burned and indeed this misfortune befell a book by another of Locke's followers. The Blasphemy Act of 1698 also posed a threat to the outspoken." Brown, *supra* note 50, at 213.

<sup>112</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 4. Men's "perfect freedom" is only to "order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature." *Id.* The law of nature appears to have narrow bounds: while man has an "uncontroulable liberty to dispose of his person or possessions," he "has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it." *Id.* bk. II, ch. II, § 6. He must be sure to make practical use of the possessions he accumulates: "Nothing was made by God for man to spoil or destroy." *Id.* bk. II, ch. V, § 31. And as he accumulates, there must be "enough, and as good, left in common for others." *Id.* bk. II, ch. V, § 27.

Men's "equality," which in contrast to their freedom is conspicuously not "perfect," is a state

wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should . . . set one above another.

*Id.* bk. II, ch. II, § 4. Locke does not actually say that all men are born "to all the same advantages of nature"; in fact, he says people are born to such advantages "promiscuously" or by chance. *Id.* He says only that insofar as they are born to the same advantages, they should be equal. Thus, the "perfect freedom" and the "equality" of men in the state of nature seem to describe the realities of uncontrollable liberty and the lack of political authority, neither of which seem desirable.

<sup>113</sup> *Id.* bk. II, ch. II, § 6.

realized peacefully or that men actually follow it. Instead, he immediately shifts to the importance of restraining men from harming others. He devotes the rest of the chapter to “execution of the law of nature,” the “right to punish transgressors,” “reparation and restraint,” “punishment,” “offender[s] dangerous to mankind,” “injury and violence,” “mischief,” “trespass,” the “power to kill a murderer,” “unjust violence and slaughter,” “war against all mankind,” “wild savage beasts,” and the right of every man to “punish the offender and be executioner of the law of nature.”<sup>114</sup> Locke’s state of nature turns out not to be so peaceful after all. Rather, there must be enforcement of the natural law so “that all men may be restrained from invading others rights, and from doing hurt to one another,” which they would do absent such enforcement.<sup>115</sup> Because the enforcement falls to each individual, meaning each person in the state of nature must employ force to prevent harm to himself, Locke’s state of nature looks like Hobbes’s vision of man’s natural state as “war, as is of every man, against every man.”<sup>116</sup>

Following this discussion, Locke seems unjustified in insisting, in the next chapter, that there is a “plain difference between the state of nature and the state of war, which . . . are as far distant as a state of peace, goodwill, mutual assistance, and preservation; and a state of enmity, malice, violence and mutual destruction are one from another.”<sup>117</sup> It turns out, however, that the state of nature and the state of war are “far distant” only because of a semantic distinction Locke draws between them:

Men living together according to reason without a common superior on earth, with authority to judge between them, is *properly the state of Nature*. But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the *state of war*; and it is the want of such an appeal gives a man the right of war even against an aggressor, though he be in society and a fellow-subject.<sup>118</sup>

Thus, “state of nature” refers only to the lack of political authority while “state of war” refers to the violent conflict between individuals

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<sup>114</sup> *Id.* bk. II, ch. II, §§ 7–12.

<sup>115</sup> *Id.* bk. II, ch. II, § 7.

<sup>116</sup> THOMAS HOBBS, LEVIATHAN 100 (Michael Oakeshott ed., Collier Books 1962) (1651).

<sup>117</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. III, § 19.

<sup>118</sup> *Id.*

that typically results.<sup>119</sup> Rather than reject the substance of Hobbes's teaching, Locke has redefined the terms.

As Locke conceives it, the state of war can exist either in the state of nature or in civil society. According to Locke, "Want of a common judge with authority, puts all men in a state of nature: force without right, upon a man's person, makes a state of war, both *where there is, and is not, a common judge.*"<sup>120</sup> But Locke has just said that the state of war exists only "where there is no common superior on earth to appeal to for relief."<sup>121</sup> When does such a state exist in a civil society under a government? Locke explains that sometimes within civil society it becomes impossible to appeal to the legal authorities, as when one is directly attacked and needs to defend oneself immediately. When "the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable," one regains his natural right to execute the law of nature and kill the aggressor.<sup>122</sup> But this is just a way of saying that the state of nature can break out in civil society at times—that there are situations, even in civil society, where no common judge is available to settle disputes. In this way, Locke emphasizes that the state of nature is truly the "state all men are naturally in"; civil society is a man-made device for keeping our natural condition at bay, though nature (and the threat of war) is always lurking just below the surface.<sup>123</sup>

The state of nature is not coextensive with the state of war, but the state of war exists only in the state of nature. The state of war is possible only when there is no common earthly judge—which is the definition of the state of nature. Thus, the state of nature and the state of war may be distant in concept, but not in fact: the state of nature makes the state of war possible—even inevitable. The state of nature is unstable because of "those evils, which necessarily follow from men's being judges in their own cases" and because "every one has the executive power of the law of nature."<sup>124</sup> In the exercise of that authority, the law of nature constrains men very little. Although

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<sup>119</sup> Robert A. Goldwin points out Locke's semantic distinction in *John Locke, in HISTORY OF POLITICAL PHILOSOPHY* 476, 478–80 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

<sup>120</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. III, § 19 (emphasis added).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Goldwin, *supra* note 119, at 481 (quoting LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 13).

<sup>124</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 13.

that law “be plain and intelligible to all rational creatures; yet men, being biassed by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.”<sup>125</sup> What, then, is the law of nature that men do follow, the law that is “writ in the hearts of all mankind”?<sup>126</sup> Only the “fundamental, sacred, and unalterable law of self-preservation”<sup>127</sup>—“[t]he first and strongest desire God planted in men, and wrought into the very principles of their nature, being that of self-preservation.”<sup>128</sup> Locke concedes that in enforcing the law of nature, “self-love will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow.”<sup>129</sup> In Locke’s telling, then, the state of nature is ultimately marked by confusion, disorder, and easily sown seeds of violence—which is not much different from Hobbes’s account.<sup>130</sup>

With everyone holding the executive power of the law of nature, but moved only by the natural law of self-preservation, the state of nature “is full of fears and continual dangers.”<sup>131</sup> Locke’s account of natural equality shifts. Natural equality of persons no longer appears to guarantee each person’s rights, but rather is precisely the condition that puts them in jeopardy: each person is “constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure.”<sup>132</sup>

<sup>125</sup> *Id.* bk. II, ch. IX, § 124.

<sup>126</sup> *Id.* bk. II, ch. II, § 11.

<sup>127</sup> *Id.* bk. II, ch. XIII, § 149.

<sup>128</sup> *Id.* bk. II, ch. VII, § 88.

<sup>129</sup> *Id.* bk. II, ch. II, § 13.

<sup>130</sup> *Cf.* HOBBS, *supra* note 116, at 129 (“[T]he laws of nature, as *justice, equity, modesty, mercy*, and, in sum, *doing to others, as we would be done to*, of themselves, without the terror of some power, to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like.”).

<sup>131</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. IX, § 123. *Compare id.*, with HOBBS, *supra* note 116, at 100 (noting that the state of nature is characterized by “continual fear, and danger of violent death”).

<sup>132</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. IX, § 123. *Compare id.*, with HOBBS, *supra* note 116, at 98 (locating the cause of the state of war in “equality of ability”), and *id.* at 101 (“It is consequent also to the same condition, that there be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man’s, that he can get: and for so long, as he can keep it.”).

With this conclusion, it is possible to appreciate what Locke means when he twice calls the vesting of executive power in each individual a “strange doctrine.”<sup>133</sup> In arguing that each individual may execute the law of nature, Locke breaks with the Christian tradition. In the *Summa Theologica*, Thomas Aquinas writes:

[I]t is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, so that it belongs to him alone who has charge of the community's welfare. Thus it belongs to a physician to cut off a decayed limb, when he has been entrusted with the care of the health of the whole body. Now the care of the common good is entrusted to persons of rank having public authority: wherefore they alone, *and not private individuals*, can lawfully put evildoers to death.<sup>134</sup>

In his state-of-nature teaching, however, Locke assigns the authority of killing evildoers to private individuals, who have no public authority because they exist outside civil society.<sup>135</sup> The “state of nature” prior to civil society has no place in the biblical tradition.<sup>136</sup> The Bible takes for granted the existence of political societies immediately after

<sup>133</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, §§ 9, 13.

<sup>134</sup> THOMAS AQUINAS, SUMMA THEOLOGICA pt. II–II, q. 64, art. 3 (2d rev. ed. 1920) (1265–74) (emphasis added), *available at* <http://www.newadvent.org/summa>.

<sup>135</sup> Richard Hooker writes that even in “those times wherein there was as yet no manner of public regiment established,” while men had a right to act in self-defense, “they knew that no man might in reason take upon him to determine his own right, and according to his own determination proceed in maintenance thereof.” 1 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 50 (John W. Parker 1851) (1593), *available at* <http://books.google.com/books?id=pssCAAAAQAAJ>. Hooker thereby distinguishes the right of self-defense from the right to punish; the latter requires the authority to act on behalf of the community that only government possesses. In the Christian natural law tradition, “punishment is the sole purview of government inasmuch as the power of government inheres in the social nature of community and does not derive from any purported natural right of individuals.” WARD, *supra* note 86, at 73.

<sup>136</sup> See REVENTLOW, *supra* note 32, at 276 (“[T]he natural state which Locke postulates . . . in no way rests on a biblical basis.”); STRAUSS, *supra* note 92, at 215 (“From the biblical point of view, the important distinction is the distinction, not between the state of nature and the state of civil society, but between the state of innocence and the state after the Fall.”); *cf.* 1 GEORGE HICKES, TWO TREATISES, ON THE CHRISTIAN PRIESTHOOD, AND ON THE DIGNITY OF THE EPISCOPAL ORDER 182 (John Henry Parker 4th ed. 1847) (1707), *available at* <http://books.google.com/books?id=28PiIvISyIUC> (“[H]e supposes there was an antecedent ‘state of nature’ in which men lived before political government was erected, though this wild notion hath been so many times unanswerably confuted by the writers against Hobbes, and of late by the Rehearsal against Mr. Locke.”). David Foster observes that in Locke’s account the state of nature displaces the biblical teaching of the Fall because “if, as Locke suggests, the original human condition was very imperfect, our present distress cannot be explained as a falling away from perfection.” Foster, *supra* note 25, at 201–02.

the Fall and after the Flood.<sup>137</sup> The Christian tradition held that “God hath certainly appointed government to restrain the partiality and violence of men.”<sup>138</sup> Paul expresses this view in his epistle to the Romans: “Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God.”<sup>139</sup> While the Christian tradition recognized a natural law, its dictates were to be enforced by divine judgment through the individual conscience.<sup>140</sup> By contrast, Locke appoints private individuals to be the enforcers of the natural law and the source of public authority. Discounting the efficacy of divine judgment, he argues that “the law of nature would, as all other laws that concern men in this world, be in vain, if there were no body that in the state of nature had a power to execute that law.”<sup>141</sup> Establishing the law of nature as an actual law that governs worldly affairs and investing the natural executive power in individuals challenges the Pauline view of submission to governing authority. The natural law provides a standard of justice for individuals to demand of their government—because the “municipal laws of countries . . . are only so far right, as they are founded on the law of nature, by which they

<sup>137</sup> See *Genesis* 4:16–17 (King James) (“[Cain] dwelt in the land of Nod . . . and he builded a city.”); *id.* 10:32 (“ [By] the families of the sons of Noah . . . were the nations divided in the earth after the flood.”).

<sup>138</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 13.

<sup>139</sup> *Romans* 13:1 (New Revised Standard); *Romans* 13:1 (King James) (“Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.”); see also 1 HOOKER, *supra* note 135, at 96 (“The public power of all societies is above every soul contained in the same societies.”); cf. AQUINAS, *supra* note 134, pt. II–II, q. 42, art. 2 (“[S]edition is opposed to justice and the common good. Therefore by reason of its genus it is a mortal sin.”).

<sup>140</sup> See 1 HOOKER, *supra* note 134, at 46 (“He is the only rewarder and revenger of all such actions; although not of such actions only, but of all whereby the Law of Nature is broken, whereof Himself is Author.”); see also 1 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 96 (Richard Tuck ed., Liberty Fund 2005) (1625) (“Justice brings Peace to the Conscience; Injustice, Racks and Torments . . . . [T]o this God is an Enemy, to the other a Patron, who does not so wholly reserve his Judgments for a future Life, but that he often makes the Rigour of them to be perceived in this.”). Locke puts little stock in conscience. See LOCKE, HUMAN UNDERSTANDING, *supra* note 92, at 30 (noting that conscience is “nothing else but our own opinion or judgment of the moral rectitude or pravity of our own actions” and that men “with the same bent of conscience” reach inconsistent conclusions).

<sup>141</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 7. But see *James* 4:12 (King James) (“There is one lawgiver, who is able to save and to destroy: who art thou that judgest another?”).

are to be regulated and interpreted"<sup>142</sup>—and a limit to their duty of obedience.<sup>143</sup>

In addition to shifting the character of the natural law in this way, Locke also challenges its substance. According to Aquinas:

A beast is by nature distinct from man, wherefore in the case of a wild beast there is no need for an authority to kill it; whereas, in the case of domestic animals, such authority is required, not for their sake, but on account of the owner's loss. On the other hand a man who has sinned is not by nature distinct from good men; hence a public authority is requisite in order to condemn him to death for the common good.<sup>144</sup>

Locke rejects this line of argument. For Locke, a man who threatens others *is* by nature distinct from good men:

[A]nd thus it is, that every man, in the state of nature, has a power to kill a murderer . . . to secure men from the attempts of a criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security: and upon this is grounded that great law of nature, *Whoso sheddeth man's blood, by man shall his blood be shed.*<sup>145</sup>

Aquinas insists that a murderer is not, like a beast, distinct from other men, so only a public official may condemn him. Locke, meanwhile, explicitly compares the murderer to a savage beast and argues that any person may treat him accordingly, at least in the state of nature.

<sup>142</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 12. *Compare id.*, with AQUINAS, *supra* note 134, pt. II-II, q. 96, art. 6 (“[I]t is not competent for everyone to expound what is useful and what is not useful to the state: those alone can do this who are in authority, and who, on account of such like cases, have the power to dispense from the laws.”).

<sup>143</sup> *See, e.g.*, LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XIV, § 163 (noting that when the people limit government power “they have not pulled from the prince any thing that of right belonged to him, but only declared, that that power which they indefinitely left in his or his ancestors hands, to be exercised for their good, was not a thing which they intended him when he used it otherwise”). Even though Locke agrees on the importance of civil government, changing the character of natural law alters the sort of government that may justly rule. *See id.* bk. II, ch. II, § 13 (“[I]f government is to be the remedy of those evils, which necessarily follow from men's being judges in their own cases, and the state of nature is therefore not to be endured, I desire to know what kind of government that is, and how much better it is than the state of nature.”). For this reason, Hobbes does not recognize a natural right to punish. *See* WARD, *supra* note 86, at 74–75.

<sup>144</sup> AQUINAS, *supra* note 134, pt. II-II, q. 64, art. 3.

<sup>145</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 11.

In the course of this discussion, moreover, Locke misrepresents the biblical tradition. The “great law of nature” he cites is God’s statement of his moral law, spoken to Noah in Genesis 9:6: “Whoso sheddeth man’s blood, by man shall his blood be shed: *for in the image of God made He man.*”<sup>146</sup> Locke abridges the text, however, leaving out the rationale provided in Genesis. In disagreement with the biblical view, Locke rejects the notion that all men are made in the image of God. Rather, Locke replaces the divine image in man with the capacity of reason. To Locke, reason—not divine creation—is the mark of humanity. This has the consequence that a person may abandon his reason and thereby expel himself from mankind. As Locke maintains, a criminal who has “renounced reason” has the status of those “wild savage beasts, with whom men can have no society.”<sup>147</sup>

As an expression of divine will, Genesis 9:6 is a description of moral justice reserved to God’s judgment, but Locke implies that the passage authorizes a vigilante “right to destroy such a criminal.”<sup>148</sup> Moreover, Locke distorts the example he marshals in support of such a right: “And Cain was so fully convinced, that every one had a right to destroy such a criminal,” writes Locke, “that after the murder of his brother, he cries out, *Every one that findeth me, shall slay me*, so plain was it writ in the hearts of all mankind.”<sup>149</sup> Yet Cain states this as a complaint, not a license.<sup>150</sup> He was not “fully convinced” that others had a right to destroy him. Significantly, neither was God. God decreed that Cain should not be executed.<sup>151</sup> Locke’s discussion implies that to execute Cain for committing murder would be an act of natural justice; he fails to mention, however, that to slay Cain would violate a divine command. Killing Cain, whether “writ on people’s hearts” or not, would contravene the rule of heaven. The biblical message is that judgment is reserved to the Lord, that men should resist the impulse

<sup>146</sup> Genesis 9:6 (King James) (emphasis added).

<sup>147</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 11.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Genesis 4:13–14 (King James) (“And Cain said unto the Lord, my punishment is greater than I can bear. Behold, thou hast driven me out this day from the face of the earth; and from thy face shall I be hid; and I shall be a fugitive and a vagabond in the earth; and it shall come to pass, that every one that findeth me shall slay me.”). Indeed, Locke later writes that “he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it.” LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. II, § 13.

<sup>151</sup> Genesis 4:15 (King James) (“And the Lord said unto him, Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold. And the Lord set a mark upon Cain, lest any finding him should kill him.”).

to vengeance,<sup>152</sup> but Locke takes Cain's initial statement to be a law of nature and the Bible to endorse individual retribution. Faced with the conflict between biblical revelation and his view of reason, Locke supplants the divine command with "laws of nature" and the rule of heaven with the rule of men.

*B. The Appeal to Heaven*

Locke's theory of the state of nature, bound up as it is with the natural executive power vested in individuals, overturns the rule of heaven. In the same section of the *Summa Theologica* quoted above, Aquinas cites the opinion of Augustine that if one kills pursuant to someone else's legitimate authority, acting as an agent of that authority, then one is not culpable for the death.<sup>153</sup> Therefore, explains Aquinas, one could kill "at the Lord's command," in the same way that "a soldier slays the foe by the authority of his sovereign, and the executioner slays the robber by the authority of the judge."<sup>154</sup>

Locke, by contrast, claims the power of an individual to kill a thief—not by the authority of a judge but because the thief has initiated a state of war.<sup>155</sup> The state of war, by definition, lacks the earthly authority of a sovereign or judge: "for where there is an authority, a power on earth, from which relief can be had by appeal, there the continuance of the state of war is excluded, and the controversy is decided by that power."<sup>156</sup> To accord with the traditional teaching, Locke would need to ground the individual's power in divine authority. As Augustine elaborates in *The City of God*, "they who have waged war in obedience to the divine command, or in conformity with His laws, have represented in their persons the public justice or the wisdom of government" and cannot be held guilty.<sup>157</sup> If Locke can show that individuals enforce the law of nature in the state of war

<sup>152</sup> See *Romans* 12:14–19 (King James) ("Bless them which persecute you: bless, and curse not. . . . Recompense to no man evil for evil. . . . Dearly beloved, avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord.").

<sup>153</sup> AQUINAS, *supra* note 134, pt. II–II, q. 64, art. 3; see also SAINT AUGUSTINE, *THE CITY OF GOD* 27 (Marcus D.D. Dods trans., Modern Library 1950) (5th cent.) ("[H]e to whom authority is delegated, and who is but the sword in the hand of him who uses it, is not himself responsible for the death he deals.").

<sup>154</sup> AQUINAS, *supra* note 134, pt. II–II, q. 64, art. 3.

<sup>155</sup> LOCKE, *TWO TREATISES*, *supra* note 48, bk. II, ch. III, § 18 ("[I]t is lawful for me to treat him as one who has put himself into a state of war with me, i.e. kill him if I can; for to that hazard does he justly expose himself, whoever introduces a state of war, and is aggressor in it."). But see *Matthew* 5:39–41 (King James).

<sup>156</sup> LOCKE, *TWO TREATISES*, *supra* note 48, bk. II, ch. III, § 21.

<sup>157</sup> AUGUSTINE, *supra* note 153, at 27.

in conformity with God's laws, he could ground his system upon Christian teaching.

Locke appears to submit the state of war to divine authority. Where there is no earthly judge, he writes, "the only remedy" is "an appeal to heaven."<sup>158</sup> Locke says that when no earthly authority can settle disputes, God will act as judge. He explains this by reference to the biblical story of Jephtha, a judge of Israel who conquered the Ammonites. Locke writes:

Had there been any such court, any superior jurisdiction on earth, to determine the right between Jephtha and the Ammonites, they had never come to a state of war: but we see he was forced to appeal to heaven. *The Lord the Judge* (says he) *be judge this day between the children of Israel and the children of Ammon*, Judg. xi. 27. and then prosecuting, and relying on his appeal, he leads out his army to battle.<sup>159</sup>

The story of Jephtha, which concerns a right of conquest between two nations, seems out of place in Chapter 3 of the Second Treatise, which is Locke's discussion of the state of war that emerges between individuals who have no common judge to decide their disputes. But it is relevant because Jephtha is the paradigmatic example of an individual who kills with divine authority. In fact, Augustine's discussion in *The City of God* establishes the principle that one may kill "in obedience to the divine command" by reference to Jephtha.<sup>160</sup>

The *Book of Judges* recounts that Jephtha was a judge in Israel, called to fight the Ammonites.<sup>161</sup> In the midst of battle, Jephtha makes a vow to God: if God provides him a victory in the war, then "whatever comes out of the door of my house to meet me when I return in triumph from the Ammonites will be the Lord's, and I will sacrifice it as a burnt offering."<sup>162</sup> God does deliver victory over the Ammonites to Jephtha; Israel under his command devastates twenty towns and subdues Ammon.<sup>163</sup> Upon his return home, however, Jephtha's daughter comes to meet him at the door of his house.<sup>164</sup> His daughter is therefore subject to the vow and must be sacrificed.<sup>165</sup>

<sup>158</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. III, § 20.

<sup>159</sup> *Id.* bk. II, ch. III, § 21.

<sup>160</sup> AUGUSTINE, *supra* note 153, at 27.

<sup>161</sup> *Judges* 12:7 (King James); *see also id.* 12:2; LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 163.

<sup>162</sup> *Judges* 11:30–31 (New International).

<sup>163</sup> *Judges* 11:32–33 (King James).

<sup>164</sup> *Id.* 11:34.

<sup>165</sup> *Id.* 11:35–36.

Jephtha says he is “miserable and wretched, because I have made a vow to the Lord that I cannot break.”<sup>166</sup> His daughter submits willingly, only asking for a two-month mourning period—at the end of which Jephtha sacrifices his daughter.<sup>167</sup>

Augustine holds Jephtha blameless for killing his daughter because God is “the fountain of all justice.”<sup>168</sup> Jephtha’s vow indemnifies him against punishment.<sup>169</sup> In the First Treatise, however, Locke has already condemned parental killing of children as “the most shameful action, and most unnatural murder, human nature is capable of” and an “act more contrary to nature than the wild and most untamed part of the creation.”<sup>170</sup> In refuting Filmer’s argument that the divine right of kings rests upon fatherly dominion, Locke denies the authority of fathers to slay or to sell their children, and he writes that when parents do so in the name of religion they violate reason and exhibit “a brutality below the level of beasts.”<sup>171</sup>

Jephtha illustrates what Locke opposes in Filmer and in the biblical view: the equation of the good with the ancestral—that is, with the father and ultimately with God the creator. In refuting Filmer’s argument for the “monarchical power of the father,” Locke notes

<sup>166</sup> *Judges* 11:35 (New International).

<sup>167</sup> *Judges* 11:36–39 (King James).

<sup>168</sup> AUGUSTINE, *supra* note 153, at 27.

<sup>169</sup> Hobbes, in *Leviathan*, also holds Jephtha blameless, but for the distinct reason that Jephtha was the earthly sovereign power. Still, in the Hobbesian system, divine authority works to indemnify an authoritarian state:

[N]othing the sovereign representative can do to a subject . . . can properly be called injustice, or injury; because every subject is author of every act the sovereign doth; so that he never wanteth right to any thing, otherwise, than as he himself is the subject of God . . . . And therefore it may, and doth often happen in commonwealths, that a subject may be put to death, by the command of the sovereign power; and yet neither do the other wrong: as when Jephtha caused his daughter to be sacrificed: in which, and the like cases, he that so dieth, had liberty to do the action, for which he is nevertheless, without injury put to death. And the same holdeth also in a sovereign prince, that putteth to death an innocent subject. For though the action be against the law of nature, as being contrary to equity, as was the killing of Uriah, by David; yet it was not an injury to Uriah, but to God.

HOBBS, *supra* note 116, at 161. Of course, if the state threatens the life of a citizen, the citizen is entitled to resist even if the state acts legitimately. *Id.* at 164 (“Subjects have liberty to defend their own bodies, even against them that lawfully invade them.”) (italics omitted).

<sup>170</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VI, § 56.

<sup>171</sup> *Id.* bk. I, ch. VI, § 58. *But see* HOBBS, *supra* note 116, at 251 (noting that children should be taught “that originally the father of every man was also his sovereign lord, with power over him of life and death”).

that in the Bible the father shares authority with the mother.<sup>172</sup> It is “[h]onor thy father *and thy mother*,” Locke points out.<sup>173</sup> Locke then quotes the repeated biblical injunctions that those children who fail to honor their parents should be put to death, ostensibly to point out that in each case the mother appears alongside the father: “he that curseth his father, or his mother, shall surely be put to death,” for example.<sup>174</sup> Yet because this discussion immediately follows Locke’s condemnation of the killing of children by parents, it is difficult not to notice that in each case the Bible calls for the killing of children. Locke cites Deuteronomy 21:18–21, though he fails to quote it fully.<sup>175</sup> What Locke omits from his quotation reveals that the passage contains a biblical injunction for parents to kill their disobedient children:

If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them: Then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; And they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton, and a drunkard. And all the men of his city shall stone him with stones, that he die: so shalt thou put evil away from among you; and all Israel shall hear, and fear.<sup>176</sup>

Locke goes on to quote from Zechariah 13:3: “And it shall come to pass, that when any shall yet prophesy, then his father and his mother that begat him shall say unto him, Thou shalt not live; and his father and his mother that begat him shall thrust him through when he prophesieth.”<sup>177</sup> These passages reveal that Filmer’s argument for patriarchal monarchical authority has support in scripture.

Locke’s other biblical references in the same passage suggest that Filmer’s argument is consistent with the biblical teaching. Locke quotes the prophet Isaiah, for example, as saying, “Woe unto him,

<sup>172</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VI, § 61.

<sup>173</sup> *Id.* (quoting *Exodus* 20:12 (King James)) (emphasis added).

<sup>174</sup> *Exodus* 21:17 (King James).

<sup>175</sup> Locke’s abridged quotation reads: “If a man have a rebellious son, which will not obey the voice of his father, or the voice of his mother; then shall his father and his mother lay hold on him, and say, This our son is stubborn and rebellious, he will not obey our voice.” LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VI, § 61.

<sup>176</sup> *Deuteronomy* 21:18–21 (King James).

<sup>177</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VI, § 61. Locke omits the words “for thou speakest lies in the name of the Lord,” which follow “Thou shalt not live” in *Zechariah* 13:3 (King James).

that sayeth unto his father, What begetteth thou, or to the woman, What hast thou brought forth?”<sup>178</sup> Locke attributes the quotation to Isaiah 11:10, but it actually appears at 45:10, where it occurs as a statement in which God explicitly analogizes his authority over man—exercised through his “anointed” political leader Cyrus in order to subdue other nations—to the authority of parents over their children.<sup>179</sup> Given this scriptural evidence, which Locke manipulates, the accusation Locke directs to Filmer seems to apply to himself: had he set forth the biblical text “without garbling, as God gave it, and joined mother to father, every reader would have seen, that it had made directly against him.”<sup>180</sup> While Locke argues that the Bible does not establish monarchical authority in the father alone because the mother shares in his authority, had Locke “joined mother to father,” it would become clear that the Bible does indicate a monarchical authority in the father and mother *together* and that the biblical text Locke quotes actually supports Filmer’s ultimate position. Later, in the Second Treatise, Locke even writes that the paternal power would more properly be called the “parental power” because it belongs to both parents; scripture “every where joins them together.”<sup>181</sup> Thus, Filmer’s argument for parental dominion, modified to include the mother, has support in scripture. But Locke argues that the parental killing of children is contrary not to scripture but to *nature*, which suggests that the biblical teaching contradicts natural justice.

The figure of Jephtha, then, evokes the image of religious authority that acts contrary to natural justice. By placing the story of Jephtha in his chapter on the state of war, Locke signals his disagreement with Augustine’s position. In Section 20 of the Second Treatise—immediately prior to the paragraph in which he references Jephtha—Locke reveals the full importance of his distinction between the states of nature and of war; the state of war can emerge

<sup>178</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VI, § 61.

<sup>179</sup> See *Isaiah* 45:1–14 (King James). Chapter 11 of *Isaiah* contains an image of universal peace, so the citation to *Isaiah* 11:10 contrasts sharply with the quotation in Locke’s text.

<sup>180</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VI, § 61; *cf. id.* bk. I, ch. VI, § 60 (noting that “to warp the sacred rule of the word of God, to make it comply with [an author’s] present occasion” is “a way of proceeding not unusual to those, who embrace not truths because reason and revelation offer them, but espouse tenets and parties for ends different from truth, and then resolve at any rate to defend them”).

<sup>181</sup> *Id.* bk. II, ch. VI, § 52; see also *id.* bk. I, ch. VI, § 66 (“[F]ather and mother [are] joined all along in the Old and New Testament where-ever honour or obedience is enjoined children.”).

when the prevailing authority, the earthly judge of law or religion, violates the law of reason:

[W]here an appeal to the law, and constituted judges, lies open, but the remedy is denied by a manifest perverting of justice, and a barefaced wresting of the laws to protect or indemnify the violence or injuries of some men, or party of men, there it is hard to imagine any thing but a state of war: for wherever violence is used, and injury done, though by hands appointed to administer justice, it is still violence and injury, however coloured with the name, pretences, or forms of law, the end whereof being to protect and redress the innocent, by an unbiassed application of it, to all who are under it; wherever that is not *bona fide* done, war is made upon the sufferers, who having no appeal on earth to right them, they are left to the only remedy in such cases, an appeal to heaven.<sup>182</sup>

Locke's view that the purpose of law is "to protect and redress the innocent" clashes with the legitimacy of Jephtha's appeal to God, which clearly victimized an innocent, his daughter. In Locke's account, a sovereign authority who fails to protect the innocent is himself an outlaw.<sup>183</sup> Yet as soon as Locke introduces the notion of "an appeal to heaven," its inadequacies appear in the following paragraph, where he invokes Jephtha.<sup>184</sup> Jephtha was the earthly sovereign,<sup>185</sup> but an appeal to heaven would not save Jephtha's daughter. Jephtha's indemnity for killing his daughter *came from heaven*. The contradiction between the two paragraphs raises the question: To whom could Jephtha's daughter appeal? By scriptural reference, Locke highlights the problem of collusion between political and religious authorities.<sup>186</sup>

Locke answers the problem of political and religious collusion by recasting the notions of God as judge and the "appeal to heaven." After he introduces Jephtha, he writes:

[A]nd therefore in such controversies, where the question is put, *who shall be judge?* It cannot be meant, who shall decide the controversy; every one knows what Jephtha here tells us, that the Lord the Judge shall judge. Where there is no judge on earth, the appeal lies to God in heaven. That question then cannot mean who shall judge, whether another hath put himself in a state of war

<sup>182</sup> *Id.* bk. II, ch. III, § 20.

<sup>183</sup> *See infra* Part V.B.

<sup>184</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. III, § 21.

<sup>185</sup> Locke highlights elsewhere that Jephtha was made "head and captain" and "judged Israel." *Id.* bk. II, ch. VIII, § 109.

<sup>186</sup> Jephtha is referenced five times in *Two Treatises*. *See id.* bk. I, ch. XI, § 163; *id.* bk. II, ch. III, § 21; *id.* bk. II, ch. VIII, § 109; *id.* bk. II, ch. XVI, § 176; *id.* bk. II, ch. XIX, § 241.

with me, and whether I may, as Jephtha did, appeal to heaven in it? of that I myself can only judge in my own conscience, as I will answer it, at the great day, to the supreme judge of all men.<sup>187</sup>

In Locke's telling, Jephtha is "forced to appeal to heaven." He already faces war with the Ammonites and has no earthly authority to appeal to. When Jephtha says, "the Lord the Judge be judge this day between the children of Israel and the children of Ammon,"<sup>188</sup> he is not calling for God to settle their dispute; he is announcing his intention to engage in combat. The *outcome* of the battle will represent God's judgment. This is the meaning that "appeal to heaven" takes on in Locke's work: a call to arms.<sup>189</sup> "[W]hether another hath put himself in a state of war with me, and whether I may, as Jephtha did, appeal to heaven in it," he writes, is something "I myself can only be judge in my own conscience."<sup>190</sup> People must judge for themselves whether the earthly authority has violated its responsibilities, entering a state of war with its subjects such that they must "appeal to heaven"—that is, to engage in war or rebellion:

*Who shall be judge, whether the prince or legislative act contrary to their trust? . . . To this I reply, The people shall be judge, for who shall be judge whether his trustee or deputy acts well, and according to the trust reposed in him, but he who deposes him, and must, by having deposed him, have still a power to discard him, when he fails in his trust?*<sup>191</sup>

In this act of judgment, God does not decide whether the revolution is legitimate or just. It rests with the people, holding the executive power of the law of nature, to decide whether the government has abused its delegated authority and must be resisted.<sup>192</sup> God's "judgment" becomes manifest in whether they are successful.

<sup>187</sup> *Id.* bk. II, ch. III, § 21.

<sup>188</sup> *Judges* 11:27 (King James).

<sup>189</sup> See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1434 n.134 (1990) (noting that by "appeal to heaven" Locke "meant revolution—'state of war' between government and the people").

<sup>190</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. III, § 21.

<sup>191</sup> *Id.* bk. II, ch. XIX, § 240; cf. DAVID HUME, *Of the Original Contract*, in POLITICAL ESSAYS 186, 198 (Knud Haakonssen ed., Cambridge 1994) (1741) (noting that cases "which admit of no determination from the laws of justice and equity . . . could be decided only by an appeal to heaven, that is, by war and violence").

<sup>192</sup> *Id.* bk. II, ch. XIX, § 241 ("[W]here there is no judicature on earth, to decide controversies amongst men, God in heaven is judge. He alone, it is true, is judge of the right. But every man is judge for himself, as in all other cases, so in this, whether another hath put himself into a state of war with him, and whether he should appeal to the Supreme Judge, as Jephtha did.").

With this doctrine, Locke effects a profound alteration of the biblical view. In the Bible, it is significant that Jephtha was a sovereign fighting another sovereign power. Where the Bible employs the phrase “the Lord be judge” in reference to rulers and subjects, it counsels submission and restraint.<sup>193</sup> Consider, for example, the confrontation between David and King Saul:

David also arose afterward, and went out of the cave, and cried after Saul, saying, My lord the king. And when Saul looked behind him, David stooped with his face to the earth, and bowed himself. And David said to Saul . . . Behold, this day thine eyes have seen how that the Lord had delivered thee to day into mine hand in the cave: and some bade me kill thee: but mine eye spared thee; and I said, I will not put forth mine hand against my lord; for he is the Lord’s anointed. . . . The Lord therefore be judge, and judge between me and thee, and see, and plead my cause, and deliver me out of thine hand.<sup>194</sup>

In the biblical tradition, to have the Lord judge between ruler and subject is to have the subject submit to earthly authority and “wait upon God’s providence” to change the conditions of political rule.<sup>195</sup> The Apostle Paul, likewise, taught submission to rulers:

Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgment.<sup>196</sup>

“[T]here is no man who can judge the deeds of a king,” according to the tradition, and Aquinas explains that “none is competent to pass sentence on [the sovereign], if he acts against the law.”<sup>197</sup> Even in

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In *A Letter Concerning Toleration*, Locke raises the possibility of a magistrate assuming religious authority that his subjects think illegitimate. “Who shall be judge between them?,” he asks. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 61 (Prometheus Books 1990) (1689). “I answer, God alone; for there is no judge upon earth between the supreme magistrate and the people.” *Id.* Locke cautions, however, that violence “usually happens where controversies arise, without a judge to determine them.” *Id.*

<sup>193</sup> NATHAN TARCOV, *LOCKE’S EDUCATION FOR LIBERTY* 66 (1984).

<sup>194</sup> 1 *Samuel* 24:8–15 (King James).

<sup>195</sup> LOCKE, *TWO TREATISES*, *supra* note 48, bk. I, ch. XI, § 121 (quoting ROBERT FILMER, *OBSERVATIONS UPON MR. HOBBS’S LEVIATHAN* (1652)).

<sup>196</sup> *Romans* 13:1–2 (New Revised Standard); *see also* 1 *Peter* 2:13–14 (King James) (“Submit yourselves to every ordinance of man for the Lord’s sake: whether it be to the king, as supreme; Or unto governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well.”).

<sup>197</sup> AQUINAS, *supra* note 134, pt. II–II, q. 96, art. 5. “When a man is condemned,” writes Aquinas, “he may not resist those who lead him to death.” *Id.* q. 69, art. 4.

cases of tyranny, Aquinas notes that “Peter teaches us to be subject with all fear not only to good and gentle masters, but also to those who are ill disposed.”<sup>198</sup> The Christian answer to someone living under an oppressive regime was to pray—to appeal to heaven in a more literal way.<sup>199</sup> The tradition was more concerned with order and virtue than with freedom, duties than with rights, and one’s immortal soul rather than worldly joys.<sup>200</sup>

Locke changes this orientation by treating individuals as the Bible treats sovereigns.<sup>201</sup> Man is sovereign in the Lockean order, so it is not incongruous to compare the rights of individuals in the state of war with those of sovereign nations. Thus, individuals faced with unjust rulers may “appeal to heaven” as Jephtha did against the Ammonites and seek to triumph over them. Locke takes an appeal once reserved for sovereigns and instills it in each individual as a natural inheritance. Moreover, Jephtha’s association with the appeal reminds one that religious teaching may not be a reliable guide to natural justice. Rather than look to priestly authority, “every man is judge for himself.”<sup>202</sup> Jephtha serves also as a reminder of the perils of resistance—of appealing to heaven too rashly. Because the appeal

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<sup>198</sup> THOMAS AQUINAS, *De Regimine Principum (On the Government of Rulers)*, in POLITICAL WRITINGS 5, 19 (R.W. Dyson ed., 2002) (1267).

<sup>199</sup> Aquinas writes that steps are to be taken against the scourge of tyranny not by the private presumption of any persons, but through public authority. . . . If, however, there can be no human aid at all against a tyrant, recourse must be had to God, the King of all, who is ‘a refuge in time of trouble’ (Psalm 9:9). For it is within His power to turn the heart of the cruel tyrant towards gentleness . . . .

AQUINAS, *supra* note 198, at 19–21. *But see* AQUINAS, *supra* note 134, pt. II–II, q. 42, art. 2 (arguing “there is no sedition in disturbing a government” that is tyrannical). *See generally* Peter Josephson, *The Law of Nature in the Age of Consent*, 12 GOOD SOC. 58, 58 (2003) (noting that according to Augustine and Aquinas “subjects must give up the ‘right to disobey’”).

<sup>200</sup> *See infra* Part V.A.

<sup>201</sup> *See* M. SELIGER, THE LIBERAL POLITICS OF JOHN LOCKE 64 (1968) (“Through paralleling external and internal relations any contradiction is removed between the traditional Christian view which restricted the appeal to heaven of the governed to mere prayer, and the justification of active resistance derived from natural law.”).

<sup>202</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XIX, § 241; *see also id.* bk. II, ch. XIV, § 168 (“[Individuals] have, by a law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, *viz.* to judge, whether they have just cause to make their appeal to heaven. And this judgment they cannot part with, it being out of a man’s power so to submit himself to another, as to give him a liberty to destroy him; God and nature never allowing a man so to abandon himself, as to neglect his own preservation.”).

to heaven is the assertion of man's own efforts, there is no guarantee of success:

[H]e 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, as he will answer at a tribunal that cannot be deceived, and will be sure to retribute to every one according to the mischiefs he hath created to his fellow-subjects; that is, any part of mankind.<sup>203</sup>

Locke counsels caution in making an appeal to heaven; it involves harsh real-world consequences. Locke's story of the origins of civil society—the reality that a state of nature or of war is an ever-present possibility and that the ultimate power of enforcing the natural law rests with the people—effects a profound change in orientation. Divine judgment is enforced through individual conscience and human action rather than the dictates of priests and kings. Understanding self-preservation as a natural right emboldens the citizen to confront governors armed with a pretense to divine authority.

### C. *The Fatherly and the Divine*

Placing responsibility in the people for ensuring that rulers act justly, Locke suggests, overturns the biblical worldview. In making his case for monarchy, Filmer argues that a father may transfer his patriarchal authority over his family to an heir; such heirs thereby become “not only lords of their own children, but also of their brethren, and all others that were subject to their fathers.”<sup>204</sup> That a father “may have a natural right to some kind of power over his children, is easily granted,” Locke writes, but he disputes that such authority may be inherited.<sup>205</sup> Specifically, Locke argues that the Bible does not vest a right of dominion in first-born sons and that a son's “birthright” is a solely financial inheritance.<sup>206</sup> This is not a complete answer to Filmer, however. Filmer does not argue that the heir is necessarily the

<sup>203</sup> *Id.* bk. II, ch. XVI, § 176.

<sup>204</sup> ROBERT FILMER, *Patriarcha*, in *PATRIARCHA AND OTHER WRITINGS* 1, 10 (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680) [hereinafter FILMER, *Patriarcha*]; see also ROBERT FILMER, *Observations Upon Aristotles Politiques*, in *PATRIARCHA AND OTHER WRITINGS*, *supra*, at 235, 282 (1652) [hereinafter FILMER, *Observations*] (“God also hath given to the father a right or liberty to alien his power over his children to any other, whence we find the sale and gift of children to have been much in use in the beginning of the world.”).

<sup>205</sup> LOCKE, *TWO TREATISES*, *supra* note 48, bk. I, ch. XI, § 111.

<sup>206</sup> *Id.*

first-born son, as Locke acknowledges.<sup>207</sup> Still, Locke points to I Chronicles 5:1 to prove his points:

Reuben . . . was the firstborn; but forasmuch as he defiled his father's bed, his birthright was given unto the sons of Joseph the son of Israel: and the genealogy is not to be reckoned after the birthright. For Judah prevailed above his brethren, and of him came the chief ruler; but the birthright was Joseph's.<sup>208</sup>

Based on this text, Locke argues that rule is not due to the first-born son because Judah became the chief ruler instead of Reuben, the first-born. Moreover, Locke notes, because "Joseph had the birthright, but Judah the dominion," the birthright could not have included the right of dominion.<sup>209</sup> Yet what is most notable about the passage is not whether it was the first-born who received dominion over his brethren, but that one brother actually did inherit dominion. Filmer's argument does not depend upon the heir being the first-born son; he argues that a father may transfer his authority to anyone he chooses.<sup>210</sup>

Locke acknowledges that Judah received dominion through a blessing from his father Jacob: "Judah, thou art he whom thy brethren shall praise . . . thy father's children shall bow down before thee."<sup>211</sup> Thus, while the biblical text supports Locke's immediate argument that dominion does not automatically vest in the first-born, it also supports Filmer's ultimate position "that dominion belongs to the heir over his brethren."<sup>212</sup> Locke posits that reason cannot "find

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<sup>207</sup> *Id.* bk. I, ch. XI, § 119 ("[Filmer] leaves us to guess, that by heir, he means the eldest son; though I do not remember he any where mentions expressly the title of the first-born, but all along keeps himself under the shelter of the indefinite term *heir*."); *cf. id.* bk. I, ch. XI, § 111 ("[H]e seems to insinuate, that the eldest son is heir; but he no where, that I know, says it in direct words."). In fact, Filmer argues that the inheritance does not go automatically to the first-born, but that fathers choose their own heirs:

[T]he wisdom of all or most princes hath thought fit to adopt many times those for heads of families and princes of provinces whose merits, abilities, or fortunes have enabled them, or made them fit and capable of such royal favours. All such prime heads and fathers have power to consent in the uniting or conferring of their fatherly right of sovereign authority on whom they please.

FILMER, *Patriarcha*, *supra* note 204, at 11.

<sup>208</sup> 1 *Chronicles* 5:1–2 (King James). Locke quotes the passage in the First Treatise, Section 115, though he cites "1 *Chron.* v. 12." LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 115.

<sup>209</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 115.

<sup>210</sup> See *supra* notes 204 and 207 and accompanying text.

<sup>211</sup> *Genesis* 49:8 (King James). Locke cites the blessing in LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 118.

<sup>212</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 115.

any such natural superiority amongst brethren.”<sup>213</sup> But given the heritability of paternal authority in the Bible, it seems that scripture does not follow Locke’s view of reason on this point.

To bolster his argument, Locke cites the example of Esau. Esau could not have understood a connection between the birthright and his father’s blessing (which gave dominion), Locke argues, because Esau complains that his brother Jacob cheated him twice: first by taking his birthright and second by taking his blessing. “[H]ad the blessing, which was to be lord over his brethren, belonged to the birthright,” writes Locke, Esau could not have counted it as a second, separate theft.<sup>214</sup> Again, Locke supports his limited point (that the birthright does not entail a right of dominion) while lending even more support to Filmer’s ultimate position (that fathers did transfer a right to be lord over one’s brethren). Just as it does not depend upon a right of first-born sons, Filmer’s argument also does not depend upon the inclusion of fatherly authority in the biblical “birthright”; a father may distribute authority as he pleases, according to Filmer.

Locke further argues that that the blessings of dominion given by Isaac to Jacob and by Jacob to Judah were “only predictions of what should long after happen to their posterities, and not any declaration of the right of inheritance to dominion in either.”<sup>215</sup> According to Locke, Jacob’s blessing signified only the promise of God to Rebecca about her sons Jacob and Esau: “Two nations are in thy womb, and two manner of people shall be separated from thy bowels; and the one people shall be stronger than the other people; and the elder shall serve the younger.”<sup>216</sup> In the same way, writes Locke, “Jacob blessed Judah . . . and gave him the scepter and dominion.”<sup>217</sup> The “scepter” refers to the leadership of Judah’s descendants over the descendants of his brothers, the other tribes of Israel.<sup>218</sup> It could represent a prediction regarding Judah’s posterity. It seems that “dominion,” however, is a different concept; the express language of the blessing seems to confer on Judah a direct lordship over his

<sup>213</sup> *Id.* bk. I, ch. XI, § 111.

<sup>214</sup> *Id.* bk. I, ch. XI, § 113; *see also* *Genesis* 27:29 (King James) (“Let people serve thee, and nations bow down to thee: be lord over thy brethren, and let thy mother’s sons bow down to thee.”).

<sup>215</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 118.

<sup>216</sup> *Genesis* 25:23 (King James).

<sup>217</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 118.

<sup>218</sup> *See Genesis* 49:10 (King James) (“The sceptre shall not depart from Judah, nor a lawgiver from between his feet, until Shiloh come; and unto him shall the gathering of the people be.”).

brothers.<sup>219</sup> Even accepting Locke's interpretation, however, does not undermine the idea that the Bible places monarchical authority in the father. It would seem to be an even greater endorsement of fatherly authority to say that, based on the initial vesting of Jacob's paternal authority in Judah, Judah's posterity should enjoy political rule in Israel *throughout the generations*. Or, that "the elder shall serve the younger" denotes not simply the subservience of Esau to Jacob, but that, because Jacob was heir to Isaac's authority, for generations "the Israelites, the posterity of Jacob, should have dominion over the Edomites, the posterity of Esau," as Locke puts it.<sup>220</sup> Thus, Locke again supports his limited claim (that the blessing might not confer an individual right of dominion) while lending even more support to Filmer's ultimate position (that the Bible identifies political authority with ancestral paternal power).

In support of his related argument that the birthright was only a financial inheritance, Locke notes that "[w]hat this birth-right was" appears in Genesis 48:22, in which Jacob gives Joseph an extra portion of his spoils.<sup>221</sup> But, in the same paragraph, Locke quotes the Book of Chronicles to the effect that the birthright was given not to Joseph himself but to the "sons of Joseph."<sup>222</sup> Following Locke's reference to Genesis 48, one finds that the birthright was not only an extra portion. Rather, Jacob adopts Joseph's two sons, Ephraim and Manasseh, and passes onto them God's promise to Abraham, Isaac, and Jacob to "make of thee a multitude of people" and to "give this land to thy seed after thee for an everlasting possession."<sup>223</sup> Says Jacob: "[L]et my name be named on them, and the name of my fathers Abraham and Isaac; and let them grow into a multitude in the midst of the earth."<sup>224</sup> Jacob declares that Manasseh shall become a people and be great, but "his younger brother shall be greater than he, and his seed shall become a multitude of nations."<sup>225</sup> Locke cites the example of Joseph's birthright to show that the birthright "was nothing but a double portion."<sup>226</sup> But further inspection reveals that the

<sup>219</sup> See *supra* notes 211 and 214 and accompanying text.

<sup>220</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 118.

<sup>221</sup> *Id.* bk. I, ch. XI, § 115; Genesis 48:22 (King James) ("Moreover I have given to thee one portion above thy brethren, which I took out of the hand of the Amorite with my sword and with my bow.").

<sup>222</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 115.

<sup>223</sup> Genesis 48:4–5 (King James).

<sup>224</sup> *Id.* 48:16.

<sup>225</sup> *Id.* 48:19. Therefore Jacob "set Ephraim before Manasseh." *Id.* 48:20.

<sup>226</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 115.

birthright entailed the inheritance of God's promise to the biblical patriarchs to elevate their posterity and to deliver their land—and that Jacob, transferring this divine promise, could set the rank and destiny of each son and his posterity. Thus, monarchical authority passed from God through the patriarchs to generations of their posterity.

In discussing the birthright inheritance, Locke focuses on *who* receives the paternal authority, arguing that Filmer's examples provide no reliable guide to identify the proper heir.<sup>227</sup> Yet the real dispute between Locke and Filmer is not who holds the authority, but *how* that authority is established—whether political power is fatherly, extending from God through natural fathers to the rulers of nations, or popular, extending from people to the government through a social compact. According to Filmer, fathers may confer their authority “on whom they please,” by whatever criteria they prefer; the important point is that “he that is so elected claims not his power as a donative from the people, but as being substituted properly by God” acting through the earthly fathers.<sup>228</sup> Locke's argument from scripture, ostensibly directed against Filmer, not only fails to confront this argument but illustrates that the nature of power in the Bible is as Filmer describes it.<sup>229</sup>

<sup>227</sup> See, e.g., *id.* bk. I, ch. XI, § 129 (“[I]f our author's own proof be to be taken, a younger brother may, in the life of his father and elder brothers, by right of descent, enjoy Adam's monarchical power; and if one so qualified may be monarch by descent, why may not every man?”).

<sup>228</sup> FILMER, *Patriarcha*, *supra* note 204, at 11. Indeed, Filmer argues that *whatever* the form of government, political power rests upon the fatherly authority of God:

[W]hether the prince be the supreme father of the people or but the true heir of such a father, or whether he come to the crown by usurpation, or by election of the nobles or of the people, or by any other way whatsoever, or whether some few or a multitude govern the commonwealth, yet still the authority that is in any one, or in many, or in all these, is the only right and natural authority of a supreme father.

*Id.* (editorial mark omitted).

<sup>229</sup> See J.W. Allen, *Sir Robert Filmer*, in *THE SOCIAL AND POLITICAL IDEAS OF SOME ENGLISH THINKERS OF THE AUGUSTAN AGE* 27, 27 (F.J.C. Hearnshaw ed., 1928) (“Either Locke had failed to understand Filmer, or he misrepresented him deliberately.”); *id.* at 45 (“Locke's criticisms simply do not touch [Filmer's] contention.”).

In another revealing example, Locke disputes Filmer's argument that the patriarchs “numbered their sons or subjects amongst their possessions, and disposed of them with as absolute a dominion, as they did their other goods.” LOCKE, *TWO TREATISES*, *supra* note 48, bk. I, ch. XI, § 154. In the next paragraph, as evidence for his own argument, Locke cites the example of Reuben offering his two sons as pledges to Jacob for the safe return of Benjamin. *Id.* bk. I, ch. XI, § 155. Reuben in fact treats his sons as possessions in just the way Filmer describes. See *Genesis* 42:37 (King James) (“And Reuben spake unto his father, saying, Slay my two sons, if I bring him not to thee.”). Locke argues that the pledge would be superfluous if Jacob al-

Locke's argument nevertheless challenges the view of *both* Filmer and the Bible that right authority is paternal, ancestral, and ultimately divine. Because the rightful heir is never apparent, according to Locke, the biblical view fosters arbitrary and abusive government.<sup>230</sup> While revelation may endorse patriarchal government, reason counsels otherwise. To illustrate the folly of looking to the authority of Adam, Locke poses a rhetorical question:

In the state the world is now, it is irrecoverably ignorant, who is Adam's heir. This fatherhood, this monarchical power of Adam, descending to his heirs, would be of no more use to the government of mankind, than it would be to the quieting of mens consciences, or securing their healths, if our author had assured them, that Adam had a power to forgive sins, or cure diseases, which by divine institution descended to his heir, whilst this heir is impossible to be known. And should not he do as rationally, who upon this assurance of our author went and confessed his sins, and expected a good absolution; or took physic with expectation of health, from any one who had taken on himself the name of priest or physician, or thrust himself into those employments, saying, I acquiesce in the absolving power descending from Adam, or I shall be cured by the medicinal power descending from Adam; as he who says, I submit to and obey the paternal power descending from Adam, when it is confessed all these powers descend only to his single heir, and that heir is unknown?<sup>231</sup>

The answer to Locke's question cannot be yes. One might trust that a priest possesses "the absolving power of Adam" and assume one's sins to be absolved after confession, but one cannot similarly trust that a physician holds "the medicinal power descending from Adam" and assume one's disease to be cured. The illness will either respond to treatment or it will not. A pretender cannot assume the role of physician without being found out. But a pretender may assume the

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ready had dominion over Reuben's sons, "as if a man should take two lambs out of his lord's flock, and offer one as security, that he will safely restore the other." LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 155. But this argument assumes that Jacob values all his descendants equally, and Reuben still has an independent interest in the survival of his own line, making the pledge a strong commitment on his part. What is most striking about the example is what Locke glosses over: the readiness with which Reuben exercises dominion over the lives of his sons.

<sup>230</sup> See, e.g., LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 121 ("And hence not being able to make out any prince's title to government, as heir to Adam . . . he is fain to resolve all into present possession, and makes civil obedience as due to an usurper, as to a lawful king; and thereby the usurper's title as good."); *id.* bk. I, ch. XI, § 161 ("[W]hat a brave right of lineal succession, to his paternal or regal government, our author has re-established, for the securing the rights and inheritance of crowns, where every one may have it, let the world consider.").

<sup>231</sup> *Id.* bk. I, ch. XI, § 125.

role of priest, Locke suggests, without any confirmation of or check on his authority. One may “acquiesce” to priestly power, just as one may “submit” to kingly power, and thereby make it real. Priestly or kingly powers exist only to the extent that parishioners or subjects acquiesce, Locke implies, but one cannot similarly will oneself “cured.” Medicine shows whether it has power in the actual curing of disease; it does not depend upon the acquiescence of subjects.

Because Locke has argued that submission to rulers based on their claims of paternal power is irrational, his equation of that submission with acquiescence to priests’ claims of absolving power implies that churchly authority is similarly unfounded and the submission of believers is similarly irrational. Believers *do* confess their sins and expect absolution based on the “assurance” and authority of those who have “taken on . . . the name of priest.” In a similar way, the biblical doctrine of paternal power may encourage submission to government. But Locke aims for political rule to resemble medicine more than religion: to be governed by an appreciable rational standard rather than irrational faith. It is in this sense that Locke regards Filmer’s doctrine as of no use to the government of mankind.

Locke indicates that the biblical perspective provides no rational guide to political life, highlighting that even God in the Bible commits the same mistake as Filmer. He criticizes Filmer for using the vague term “heir” to describe the recipient of paternal power, but he also notes that when God gave the land of Canaan to Abraham, he specified that it was to go to “his seed” after him.<sup>232</sup> “Seed” does not seem more precise than “heir,” and indeed Locke later criticizes Filmer for using the term “issue” as well. “[I]f God give any thing to a man and his issue in general, the claim cannot be to any one of that issue in particular; every one that is of his race will have an equal right,” Locke writes.<sup>233</sup> “[F]or if the regal power be given by God to a man and his issue, as the land of Canaan was to Abraham and his seed, must they not all have a title to it, all share in it?”<sup>234</sup> If the an-

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<sup>232</sup> *Id.* bk. I, ch. XI, § 128 (“If God had given the land of Canaan to Abraham, and in general terms to some body after him, without naming his seed, whereby it might be known who that somebody was, it would have been as good and useful an assignment, to determine the right to the land of Canaan, as it would be the determining the right of crowns, to give empire to Adam and his successive heirs after him, without telling who his heir is: for the word heir, without a rule to know who it is, signifies no more than some body, I know not whom.”); *cf.* *Genesis* 15:18 (King James) (“Unto thy seed have I given this land.”); *id.* 13:15 (“For all the land which thou seest, to thee will I give it, and to thy seed for ever.”).

<sup>233</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 162.

<sup>234</sup> *Id.*

swer were yes, it would imply a fairly expansive title to Canaan.<sup>235</sup> But Locke knows that this is not consistent with the biblical text because he also observes that Isaac was Abraham's sole heir.<sup>236</sup> Locke recounts that Isaac became sole heir because his mother Sarah urged Abraham to cast out his first-born son Ishmael, and Abraham sent away Ishmael and his other sons and "gave all he had unto Isaac."<sup>237</sup> Locke leaves out God's role in the choice of Isaac as Abraham's heir.<sup>238</sup> In Locke's account, the inheritance is decided not by divine will but by human intrigue.<sup>239</sup>

Filmer may not offer clear rules of inheritance, but Locke reveals that this is because God does not offer such rules either. Locke offers examples from the Bible—of Jacob stealing his older brother's birthright, of Reuben's disqualification and the younger Judah's appointment as chief ruler, of the favoritism shown to Isaac and to Joseph, and of conspiracies and revolts in the Kingdoms of Israel and Judah—to show that Filmer cannot make out a clear rule of inheritance, but in the course of doing so he makes out a critique of the Bible itself. The examples do not undermine Filmer's insistence that, according to the Bible, God rather than the people decides who is to rule, but the examples do show that God's will proceeds through arbitrary and unjust human events.

Filmer acknowledges the same point, arguing that in the Bible unjust acts by individuals are part of God's larger design: "God doth but use and turn men's unrighteous acts to the performance of His righteous decrees."<sup>240</sup> Locke, not acknowledging Filmer's explana-

<sup>235</sup> Cf. *Genesis* 13:16 (King James) ("And I will make thy seed as the dust of the earth: so that if a man can number the dust of the earth, then shall thy seed also be numbered."); *id.* 25:2–4 (noting many sons of Abraham and their descendants).

<sup>236</sup> LOCKE, *TWO TREATISES*, *supra* note 48, bk. I, ch. XI, § 114.

<sup>237</sup> *Id.*; see also *Genesis* 21:10–14 (King James) (recounting the expulsion of Ishmael); *Genesis* 25:5–6 (King James) ("And Abraham gave all that he had unto Isaac. But unto the sons of the concubines, which Abraham had, Abraham gave gifts, and sent them away from Isaac his son, while he yet lived, eastward, unto the east country.").

<sup>238</sup> God tells Abraham to listen to Sarah "for in Isaac shall thy seed be called." *Genesis* 21:12 (King James).

<sup>239</sup> Compare, e.g., LOCKE, *TWO TREATISES*, *supra* note 48, bk. I, ch. XI, § 167 (noting that God gave the crown to David and "his seed"), with *id.* bk. I, ch. XI, § 162 ("Solomon, who succeeded David in the throne, [was] no more his heir than Jeroboham, who succeeded him in the government of the ten tribes, was his issue.").

<sup>240</sup> FILMER, *Patriarcha*, *supra* note 204, at 11. Filmer also acknowledges that the identity of the true heir is uncertain but obedience is nevertheless due to a ruler: "No child naturally and infallibly knows who are his true parents, yet he must obey those that are in common reputation are so, otherwise the commandment of 'honour thy

tion, condemns Filmer's doctrine on the basis of its arbitrariness. Anyone can claim the fatherly power of Adam, Locke argues, all with the same degree of legitimacy.<sup>241</sup> In Locke's account, the fatherly power as Jephtha wields it is tyrannical, and its descent through the patriarchs is arbitrary. Locke therefore replaces the descent of power from God through the patriarchs to sovereign kings with the ascent of power from individuals through compact to civil society.

At the same time, Locke indicates that there can be a rational check on that power. If government power resembled medicinal rather than priestly power, it would be judged and constrained by actual standards. In the First Treatise, Locke suggests that if a "power rising from property" were considered the foundation of government, it would supplant fatherly power.<sup>242</sup> Property, then, has the potential to replace fatherly power—the inherited authority emanating from the God of the Bible.

#### IV. PROPERTY

At first blush, Locke's state of nature appears distinct from the Hobbesian one, but further inspection reveals similarities to the Hobbesian system. First, while Locke makes a conceptual distinction between the state of nature and the state of war, the dynamics of the state of nature lead to a state of war inevitably and constantly. "[T]he nature of war," writes Hobbes, "consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary."<sup>243</sup> That sounds like the Lockean state of nature, in which coequal sovereigns—no greater part the observers of law and justice—wield coercive authority over each other. Second, the law of nature for Locke as well as for Hobbes consists in the dynamics of individual self-preservation. Third, the state of nature induces people to form civil society.

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father and thy mother' were in vain, and no child bound to the obedience of it." FILMER, *Observations*, *supra* note 204, at 192.

<sup>241</sup> Locke writes: "[I]f one so qualified may be monarch by descent, why may not every man? if Judah, his father and elder brother living, were one of Adam's heirs, I know not who can be excluded from this inheritance; all men by inheritance may be monarchs as well as Judah." LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 129. Judah actually did hold monarchical power, *see supra* notes 208–11 and accompanying text, so this passage reads as a criticism of the Bible as well as Filmer.

<sup>242</sup> Locke quotes a passage from Filmer explaining that the fatherly power cannot coexist with a power in the people, except he replaces "power of the people" with "power rising from property." *See* LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VII, § 77 (quoting FILMER, *supra* note 195, at 158).

<sup>243</sup> HOBBS, *supra* note 116, at 100.

But the civil societies that result from Hobbes's and Locke's accounts are not identical. Hobbes aims to suppress those human passions, especially pride, which he takes to be the root of human conflict: "The passion, whose violence, or continuance, maketh madness, is either great *vain-glory*; which is commonly called *pride*, and *self-conceit*; or great *dejection* of mind," Hobbes writes.<sup>244</sup> Hobbes and Locke aim to counter dejection of mind by replacing piety with human self-reliance. To control pride, Hobbes advocates an absolutist form of government as well as a state religion that will moderate its subjects.<sup>245</sup> According to Hobbes, "The passions that incline men to peace, are fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them."<sup>246</sup> Hobbes relies primarily upon the first mechanism for promoting peace, the fear of death: Hobbesian man submits to government to control his passions; Leviathan keeps him in check through force.<sup>247</sup>

Locke places greater emphasis upon men's desires for material things and commodious living, and the hope by their industry to obtain them, as a way to channel the passions toward social peace. Lockean man submits to government in order to preserve and acquire property.<sup>248</sup> By making property the foundation of civil society, Locke aims to channel the passions away from factional strife and toward human industry. Legitimizing the desire for material gain—against religious teachings that condemn it—redirects human energies and transforms social attitudes. In doing so, Locke's theory of property entails a significant challenge to the biblical tradition.

<sup>244</sup> *Id.* at 63; see also *id.* at 120 ("[F]or the ninth law of nature, I put this, *that every man acknowledge another for his equal by nature*. The breach of this precept is *pride*.").

<sup>245</sup> Hobbes calls his government "Leviathan" after the great sea monster that the Bible calls "a king over all the children of pride." See *id.* at 235–36 ("Hitherto I have set forth the nature of man, whose pride and other passions have compelled him to submit himself to government: together with the great power of his governor, whom I compared to *Leviathan*, taking that comparison out of the two last verses of the one-and-fortieth of *Job*; where God having set forth the great power of *Leviathan*, calleth him king of the proud."); see also *Job* 41:33–34 (King James) ("Upon earth there is not his like, who is made without fear. He beholdeth all high things: he is a king over all the children of pride.").

<sup>246</sup> HOBBS, *supra* note 116, at 102.

<sup>247</sup> *Id.*

<sup>248</sup> See LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. IX, § 124 ("The great and chief end, therefore, of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property.").

A. *The Status of Locke's Theory of Property*

Close attention to Locke's text reveals this purpose. The opening statement of Locke's chapter on property, for example, includes a revealing inaccuracy:

Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence, or revelation, which gives us an account of those grants God made of the world to Adam, and to Noah and his sons, it is very clear that God, as king David says, Psal. cxv. 16. *has given the earth to the children of men*, given it to mankind in common.<sup>249</sup>

Locke begins the chapter by insisting upon the agreement of reason and revelation. Whether we consult one or the other, he says, we have an account of men's right to "meat and drink" and everything that sustains life.<sup>250</sup> But this is demonstrably false; in this case, the account provided by reason and that provided by revelation diverge. In Genesis 3:18, God grants to Adam "the plants of the field" to eat.<sup>251</sup> It is not until after the Flood, in God's grant to Noah, that God permits mankind to eat meat: "Every moving thing that lives shall be food for you; and just as I gave you the green plants, I give you everything."<sup>252</sup> Locke is well aware of the discrepancy between the grants to Adam and to Noah. He discusses the discrepancy in the First Treatise, where he implicitly criticizes God's arbitrary rule:

Adam . . . could not make bold with a lark or rabbit to satisfy his hunger, and had the herbs but in common with the beasts . . . . Should any one, who is absolute lord of a country, have bidden our author subdue the earth, and given him dominion over the creatures in it, but not have permitted him to have taken a kid or a lamb out of the flock to satisfy his hunger, I guess he would scarce leave thought himself lord or proprietor of that land, or the cattle on it; but would have found the difference between "having dominion," which a shepherd may have, and having full property as an owner.<sup>253</sup>

By specifying "meat" as well as Adam *and* Noah in his opening sentence, Locke highlights the discrepancy between the law of reason and the law of God. According to Locke, the law of reason says that

<sup>249</sup> *Id.* bk. II, ch. V, § 25.

<sup>250</sup> *Id.*

<sup>251</sup> *Genesis* 3:18 (King James).

<sup>252</sup> *Genesis* 9:3 (New Revised Standard).

<sup>253</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 39; *see also id.* bk. I, ch. IV, § 27.

men, upon birth, have a right to preservation and therefore to those things “nature affords for their subsistence.”<sup>254</sup> If this right of property is founded upon the right of preservation, it cannot be a collective right of all men in common because the inability to appropriate food for oneself would make self-preservation impossible. Thus, contrary to what Locke says, when we consult natural reason, it is not “very clear” that God has given the earth to mankind in common. According to natural reason, all individuals have a right to meat and drink in accordance with self-preservation. If God has vested title to the earth in mankind in common, then God has acted contrary to natural reason.

Locke makes this argument explicit in the First Treatise when he discusses man’s dominion over the animals. Irrespective of any explicit grant by God, Locke explains, man had the right to use the creatures for his own preservation because reason dictated that by “pursuing that natural inclination he had to preserve his being, he followed the will of his maker, and therefore had a right to make use of those creatures, which by his reason or senses he could discover would be serviceable thereunto.”<sup>255</sup> That natural instinct for self-preservation made the animals his property: “And thus man’s property in the creatures was founded upon the right he had to make use of those things that were necessary or useful to his being.”<sup>256</sup> This dictate of reason makes God’s explicit instructions to man irrelevant.<sup>257</sup>

Strictly speaking, therefore, the task Locke sets for Chapter 5, his chapter on property in the Second Treatise—namely, to derive an individual right to property from God’s grant to mankind in common—is unnecessary. Having already established a natural right to self-preservation, Locke has established the right to individual appropriation from nature, and he announces it up front.

Considering the other side of Locke’s statement—that is, taking the perspective of revelation—it is similarly not “very clear” that God has given the earth to mankind in common. The revelation here, the biblical “account of those grants God made of the world to Adam and to Noah and his sons,” is the subject of Locke’s debate with Filmer in Chapter 4 of the First Treatise, in which Locke purports to refute Filmer’s argument that those grants entitled Adam’s and Noah’s des-

<sup>254</sup> *Id.* bk. II, ch. V, § 25.

<sup>255</sup> *Id.* bk. I, ch. IX, § 86.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* (“I doubt not, but before these words were pronounced, i. *Gen.* 28, 29. (if they must be understood literally to have been spoken) and without any such verbal donation, man had a right to an use of the creatures, by the will and grant of God.”).

cendants to monarchical rule. There, Locke considers whether the donation of God to Adam in Genesis 1:28 could have given him power over other men.<sup>258</sup> Because “all positive grants convey no more than the express words they are made in will carry,” Locke examines the precise words of God’s grant.<sup>259</sup> Specifically, Locke considers whether the words “every living thing that moveth” could include mankind, giving Adam dominion over other men.

Filmer, however, never argues that mankind is included in those words.<sup>260</sup> Locke quotes Filmer as arguing that Adam “having here dominion given him over all creatures, was thereby the monarch of the whole world.”<sup>261</sup> In context and without the modifications in Locke’s quotation, that passage from Filmer’s *Observations upon Aristotle’s Politics* distinguishes between people and creatures, and it treats Adam’s dominion over the creatures as a right of ownership or control. That exclusive control, Filmer argues, establishes Adam’s monarchical power because his posterity could not possess anything “but by his grant or permission, or by succession from him.”<sup>262</sup> Nevertheless, Locke insists that Filmer is best understood to mean that the grant of dominion *itself* made Adam the sovereign ruler of all men by giving him direct dominion over mankind.<sup>263</sup> Locke is aware that this is a misrepresentation of Filmer’s argument; in an earlier chapter, Locke quotes the same passage in full and without modifications, and he explains that Filmer intends “monarch of the whole world” to sig-

<sup>258</sup> See Genesis 1:28 (King James) (“And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.”).

<sup>259</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 25.

<sup>260</sup> The words do not even appear in *Patriarcha*. See FILMER, *Patriarcha*, *supra* note 204.

<sup>261</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 23.

<sup>262</sup> Filmer writes:

Adam, being commanded to multiply, and people the earth, and to subdue it, and having dominion given him over all creatures, was thereby the monarch of the whole world. None of his posterity had any right to possess anything but by his grant or permission, or by succession from him.

FILMER, *Observations*, *supra* note 204, at 236.

<sup>263</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 23 (“[O]ur author says, *Adam was hereby monarch of the world*, which, properly speaking, signifies sovereign ruler of all the men in the world; and so Adam, by this grant, must be constituted such a ruler. If our author means otherwise, he might with much clearness have said, that *Adam was hereby proprietor of the whole world*.”).

nify “proprietor of all the world exclusive of the rest of mankind.”<sup>264</sup> By shifting his understanding of the passage, Locke enters into a refutation of an opinion Filmer does not hold. Yet his textual study of the grants to Adam and to Noah allows Locke to criticize the Bible in the guise of defending it.

First, Locke examines what the Bible means by “every living thing that moveth.” He finds that God divides the animals into three kinds: the fishes of the sea, the fowls of the air, and the living creatures of the earth.<sup>265</sup> In Genesis 1:24, Locke explains, God further divides the living creatures of the earth into three ranks: cattle, wild beasts, and the “creeping animals” or reptiles.<sup>266</sup> Locke explains this subdivision as ranking the animals from most to least useful to man, but the biblical text actually lists the creatures in a different order than Locke does, without any hint of ranking.<sup>267</sup> Moreover, Genesis 1:25 lists them in a still different order.<sup>268</sup> Locke quotes both of these biblical verses in the same paragraph in which he explains the ranking. While it may be sensible to rank the creatures as he does, Locke’s own textual evidence shows that he has no biblical foundation for the ranking.<sup>269</sup> Instead, the Bible catalogues the creatures in an inconsistent manner.

Locke notes that in Genesis 1:26, where God announces his intention to give Adam dominion over the creatures, God identifies cattle and reptiles as terrestrial creatures but leaves out the second rank, wild beasts.<sup>270</sup> In the actual grant of dominion to Adam in Genesis

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<sup>264</sup> *Id.* bk. I, ch. III, § 16. (“*Monarch of the world* is also differently used by our author; for sometimes he means by it a proprietor of all the world exclusive of the rest of mankind, and thus he does in the same page of his preface before cited: *Adam*, says he, *being commanded to multiply and people the earth, and to subdue it, and having dominion given him over all creatures, was thereby the monarch of the whole world; none of his posterity had any right to possess any thing but by his grant or permission, or by succession from him.*”); *cf. id.* bk. I, ch. IV, § 38 (quoting FILMER, *supra* note 195) (noting Filmer’s view of “dominion” as a “title to a property of all things”).

<sup>265</sup> *Id.* bk. I, ch. IV, § 26.

<sup>266</sup> *Id.* bk. I, ch. IV, § 25.

<sup>267</sup> See Genesis 1:24 (King James) (“And God said, Let the earth bring forth the living creature after his kind, cattle, and creeping thing, and beast of the earth after his kind: and it was so.”).

<sup>268</sup> See *id.* 1:25 (“And God made the beast of the earth after his kind, and cattle after their kind, and every thing that creepeth upon the earth after his kind: and God saw that it was good.”).

<sup>269</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 25.

<sup>270</sup> *Id.* bk. I, ch. IV, § 26; see also Genesis 1:26 (King James) (“And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”).

1:28, Locke further explains, the Hebrew term for terrestrial creatures signifies only beasts and reptiles, leaving out cattle.<sup>271</sup> The same term appears in God's grant to Noah in Genesis 9:12, Locke observes—though Locke neglects to mention that the biblical verse includes not only that term, signifying beasts and reptiles, but also “every beast of the earth.”<sup>272</sup> If Locke is correct, therefore, God mentions beasts twice but excludes cattle from Noah's dominion. The express language of the grants to Adam and to Noah, then, do not include all the types of animals: “[A]ll the words, whereby they are expressed in the history of their creation, are no where used in any of the following grants, but some of them omitted in one, and some in another.”<sup>273</sup> Nevertheless, Locke concludes that the grants to Adam and to Noah must include all the species of irrational animals because “since God certainly executed in one place, what he declares he designed in the other, we cannot but understand the same in both places.”<sup>274</sup> But this conclusion violates the standard Locke set at the start—that positive grants convey no more than the express words will carry. Thus, if one does not abandon that standard in evaluating God's donation—that is, if one expects of God at least as much as would be expected of a man—it becomes clear that God's grants to Adam and to Noah are arbitrary: God's accounts of the living creatures are inconsistent, and the express terms of the grants do not include cattle, those creatures most useful to man, which Locke describes as “such creatures as were or might be tame, and so be the private possession of particular men.”<sup>275</sup> In other words, God has given man possession of only those creatures of which man cannot take possession.

Locke concludes that the grants do not include dominion over human beings: “[W]hether we understand the Hebrew words right or no, they cannot be supposed to comprehend man,” especially because the term for “every living thing that moveth” is used in contradistinction to man elsewhere in Genesis.<sup>276</sup> This conclusion reveals

<sup>271</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, §§ 25–26.

<sup>272</sup> *Id.* bk. I, ch. IV, § 27; *see also* Genesis 9:2 (King James) (“And the fear of you and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea; into your hand are they delivered.”).

<sup>273</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 27.

<sup>274</sup> *Id.* bk. I, ch. IV, § 26.

<sup>275</sup> *Id.* bk. I, ch. IV, § 25. In Locke's view, the express terms are binding even in the case of a divine grant. *See id.* bk. II, ch. XVI, § 195 (“Grants, promises, and oaths are bonds that hold the Almighty.”).

<sup>276</sup> *Id.* bk. I, ch. IV, § 27.

that the textual analysis regarding the subdivisions of irrational animals was not relevant to Locke's argument about Adam's dominion over men. Man was not included in God's grants to Adam and to Noah regardless of which particular animals were comprehended in the language. The only purpose of Locke's textual analysis is to show that God's grants do not withstand rational scrutiny.

In the end, Locke discounts the positive grants, arguing instead that it is man's "intellectual nature" that allows him to have dominion over the inferior creatures.<sup>277</sup> According to Locke, this is the meaning of God's declaration that he will make man "in our image, after our likeness."<sup>278</sup> Locke recasts Genesis 1:26 from a statement of God's intention to create the first man in the divine image to God's creation of a whole species of intellectual creatures.<sup>279</sup> In this way, Filmer's argument that a "natural freedom of mankind cannot be supposed without the denial of the creation of Adam," which Locke dismisses,<sup>280</sup> has some merit. To defend the natural freedom of mankind, Locke argues that the "man" created and blessed by God in Genesis 1:26–28 is not Adam but "the species of mankind."<sup>281</sup>

In a similar way, Locke recasts the grant to Noah. Though Noah's sons are mentioned in the biblical text, Filmer argues that the blessing is best understood as including the sons in subordination or succession to Noah.<sup>282</sup> Locke argues that this interpretation, while possible, is not the best understanding of the text. Yet in Genesis 6:18, God says individually to Noah, "with thee will I establish my covenant; and thou shalt come into the ark, thou, and thy sons, and thy wife, and thy sons' wives with thee."<sup>283</sup> Given this statement of God's

<sup>277</sup> *Id.* bk. I, ch. IV, § 30. Locke also argues that men had a right to eat animals despite God's admonition to the contrary. See *supra* notes 255–57 and accompanying text.

<sup>278</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 30 (quoting *Genesis* 1:26 (King James)).

<sup>279</sup> *Id.* ("In the 26th verse, where God declares his intention to give this dominion, it is plain he meant, that he would make a species of creatures, that should have dominion over the other species of this terrestrial globe."). Locke sees that *Genesis* refers to man as "them" and concludes that it cannot thereby signify Adam alone—even though God also refers to himself in the plural in the same verse.

<sup>280</sup> *Id.* bk. I, ch. III, § 15 (quoting FILMER, *supra* note 195).

<sup>281</sup> See *id.* bk. I, ch. IV, § 40 ("I think it is impossible for any sober reader, to find any other but the setting of mankind above the other kinds of creatures, in this habitable earth of ours. It is nothing but the giving to man, the whole species of man, as the chief inhabitant, who is the image of his Maker, the dominion over the other creatures.").

<sup>282</sup> See *id.* bk. I, ch. IV, § 32.

<sup>283</sup> *Genesis* 6:18 (King James).

intention, one need only recall Locke's own admonition that "since God certainly executed in one place, what he declares he designed in the other, we cannot but understand the same in both places."<sup>284</sup> To make God's design consistent with his execution, it would be necessary to read the grant as including Noah's sons in subordination or succession. Moreover, because God makes his covenant not only with Noah and his sons but also with "your seed after you"<sup>285</sup> and "every living creature that is with you, for perpetual generations,"<sup>286</sup> it is not possible for the covenant to be executed in any other fashion but successively. Yet Locke insists that one cannot depart from the express words of the grant to Noah, even though if he were to apply the same contextual method he applies to Adam's grant, the meaning would be more consistent with the biblical text as a whole.<sup>287</sup> That reading, however, would also be consistent with Filmer's argument for monarchical rule and the biblical association of the right with the ancestral.

In Locke's vision, man has a right to "meat and drink" and to the use of inferior creation not because of God's explicit grant, but because the strong desire for self-preservation was "planted in him as a principle of action by God himself" and reason, "which was the voice of God in him, could not but teach him and assure him, that pursuing that natural inclination he had to preserve his being, he followed the will of his maker."<sup>288</sup> In other words, God's will is not revealed in the biblical account of his word, but in the instinct and reason he placed in mankind.

While Locke's view of natural reason makes his labor theory logically unnecessary to establish individual rights to property, the view he addresses—that the world was given to mankind in common—was one conventionally held in his day.<sup>289</sup> As Locke writes, "this being *supposed*, it seems to *some* a very great difficulty how any one should

<sup>284</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 26.

<sup>285</sup> *Genesis* 9:9 (King James).

<sup>286</sup> *Id.* 9:12.

<sup>287</sup> Compare LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 32 (invoking "the express words of the scripture" and "the plain express words of scripture" and arguing that the "express words [of the grant to Noah and his sons] give a joint title in present"), with *supra* note 274 and accompanying text. In the same way, Locke writes that "we may well suppose" that Adam had "more sons" than those recounted in scripture, LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 112, but does not allow a similar assumption for Noah, *see id.* bk. I, ch. IV, § 33 ("[W]e read not of any children he had after the flood.").

<sup>288</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IX, § 86.

<sup>289</sup> See, e.g., HUGO GROTIUS, THE FREE SEA 15 (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004) (1609).

ever come to have a property in anything.”<sup>290</sup> Locke himself does not hold such a supposition, nor is he among those “some” to whom private property poses “a very great difficulty.” But Locke “will not content myself to answer” that if one concedes the supposition, private property is impossible.<sup>291</sup> In other words, Locke proceeds to make an argument based on the suppositions of others; he engages with the conventional, commonly held view rather than his own.

### B. *The Theory of Property*

As with his teaching on the state of nature, Locke at first appears to be situated within the conventional view—Hugo Grotius, for example, also argued that property could be removed from the common through labor<sup>292</sup>—but Locke’s argument pushes the idea toward novel implications. In Locke’s hands, the argument for private property becomes a refutation of religious authority and an emancipation of human industry.

Locke begins the argument by (once again) painting a rosy picture of man’s natural state: “*God has given us all things richly*, 1 Tim. vi. 12. is the voice of reason confirmed by inspiration,” he writes.<sup>293</sup> By employing the phrase “reason confirmed by inspiration,” Locke calls attention to the deep disagreement between reason and revelation that he has already noted. The phrase also sets a hierarchy between reason and inspiration: reason is the primary ground of knowledge, and it seeks only “confirmation” from inspiration.

Locke’s quotation of scripture is inexact. The King James Bible refers to “God, who giveth us richly all things to enjoy.”<sup>294</sup> Locke’s rendition entails a change of tense and emphasis.<sup>295</sup> Additionally, his

<sup>290</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 25 (emphases added).

<sup>291</sup> *Id.*

<sup>292</sup> GROTIUS, *supra* note 289, at 15 (“[O]f those things which nature had brought forth for the use of man she would that some of them should remain common and others through every one’s labor and industry to become proper.”).

<sup>293</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 31. The citation to the First Book of Timothy is in Locke’s text.

<sup>294</sup> 1 Timothy 6:17 (King James).

<sup>295</sup> Locke quotes the same verse in the First Treatise but there he uses the present tense. See LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. IV, § 40 (“God gives us all things richly to enjoy”). In his chapter on property, however, Locke treats God’s donation of “all things” as having occurred in the past. “God gave the world to men in common” after which men were required to labor “to draw from it” the conveniences of life. *Id.* bk. II, ch. V, § 34 (emphasis added); see also *id.* bk. II, ch. V, § 32 (“God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him.”). The biblical teaching, however, evokes God’s *ongoing* beneficence to man while emphasizing the relative unim-

citation to the Book of Timothy is incorrect. The verse appears at 1 Timothy 6:17, but Locke cites to 6:12, leaving the reader to search 1 Timothy 6.<sup>296</sup> As it happens, Chapter 6 of the First Book of Timothy contains the Christian teaching on property. When read in parallel, Locke's own chapter on property engages with the biblical text.

Locke's disagreement with the Pauline teaching can be seen most starkly in the fact that Paul begins 1 Timothy 6 with a defense of slavery:

Let as many servants as are under the yoke count their own masters worthy of all honour, that the name of God and his doctrine be not blasphemed. And they that have believing masters, let them not despise them, because they are brethren; but rather do them service, because they are faithful and beloved, partakers of the benefit. These things teach and exhort.<sup>297</sup>

It may fairly be said that Locke's goal in *Two Treatises* is to "teach and exhort" the opposite notion. He opens the work with a denunciation of slavery: "Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that it is hardly to be conceived that an Englishman, much less a gentleman, should plead for it."<sup>298</sup> Under this view, the apostle Paul is neither an Englishman nor a gentleman. Paul teaches Timothy that slavery should not be questioned in order to protect "the name of God and his doctrine." Like Locke, Paul suggests that human autonomy is a threat to divine sovereignty.

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portance of material comforts: "Charge them that are rich in this world, that they be not highminded, nor trust in uncertain riches, but in the living God, who giveth us richly all things to enjoy." 1 Timothy 6:17 (King James) (emphasis added). Paul encourages the rich to "be rich in good works," a kind of wealth that provides "a good foundation against the time to come, that they may lay hold on eternal life." *Id.* 6:18-19; *cf.* Romans 11:33 (King James) ("O the depth of the riches both of the wisdom and knowledge of God!").

The placement of "richly" in the verse may affect whether the verse implies that God provides material abundance for individuals or that God "hath made all things for his own sake: . . . for him to shew beneficence and grace in them." 1 HOOKER, *supra* note 135, at 7. (internal quotation mark omitted); *cf.* *On the Misquotation of Scripture*, in 7 THE CHRISTIAN EXAMINER AND CHURCH OF IRELAND MAGAZINE 402, 403 (1828), available at <http://books.google.com/books?id=khUEAAAAQAAJ> ("[In the King James Bible] we find the word *richly* connected with the Author and giver of every good and perfect gift . . . and not with the creature or his enjoyments.").

<sup>296</sup> Some contemporary editions of the Second Treatise change the citation to 6:17, but this may violate Locke's injunction "not [to] think our author so little skilled in the way of writing discourses of this nature . . . that he by over-sight commits the fault." LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. II, § 7.

<sup>297</sup> 1 Timothy 6:1-2 (King James).

<sup>298</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. I, § 1.

Significantly, Paul sees the threat to divine authority coming not only from a desire for liberty but also from a desire for material gain. After he tells Timothy to urge the willful submission of slaves to masters, he says:

If any man teach otherwise . . . [h]e is proud, knowing nothing, but doting about questions and strifes of words, whereof cometh envy, strife, railings, evil surmisings, Perverse disputings of men of corrupt minds, and destitute of the truth, supposing that gain is godliness: from such withdraw thyself. But godliness with contentment is great gain.<sup>299</sup>

Those who are godly and contented, Paul argues, will gain more than those who promote disputes and contention for the sake of gain. The contrast between these rival camps corresponds to a central teaching in Locke's chapter on property—that the earth belongs “to the use of the industrious and rational . . . not to the fancy or covetousness of *the quarrelsome and contentious*.”<sup>300</sup> Both Paul and Locke oppose promoters of quarrels and contention.<sup>301</sup> For Locke, however, the quarrelsome and contentious are not those who lack contentment but those who lack industry—those who do not labor for material gain.<sup>302</sup>

Against Paul's ideal of “godliness with contentment,” Locke praises the “industrious and rational.”<sup>303</sup> Locke exalts industry rather

<sup>299</sup> 1 *Timothy* 6:3–6 (King James).

<sup>300</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 34 (emphasis added).

<sup>301</sup> Locke condemns the “quarrelsome and contentious” while Paul condemns those with “an unhealthy interest in controversies and quarrels,” 1 *Timothy* 6:4 (New International), or “a morbid craving for controversy and for disputes,” 1 *Timothy* 6:4 (New Revised Standard).

<sup>302</sup> In his chapter on property, Locke writes that when labor entitled one to property, “there could be then little room for *quarrels or contentions* about property so established.” LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 31 (emphasis added). Where labor provided title to land, “there could be no doubt of right, no room for quarrel.” *Id.* bk. II, ch. V, § 39. Where labor began a title to property in the common things of nature, “there could then be no reason of quarrelling about title.” *Id.* bk. II, ch. V, § 51. Locke suggests that quarrelsomeness does not arise from the acquisition of property, at least where it is acquired through labor. In the Second Treatise, Locke uses the word “contend” exclusively in relation to those who seek power over others. *See id.* bk. II, ch. III, § 21 (“contenders” in a state of war); *id.* bk. II, ch. VI, § 53 (men “who contend so much for the absolute power and authority of the fatherhood” and “contend for” monarchy); *id.* bk. II, ch. VI, § 61 (“blinded contenders for monarchy”); *id.* bk. II, ch. VIII, § 103 (referring to “contenders for paternal empire” who will not find in history “such a power as they contend for”). Locke uses the word “quarrel” once outside Chapter 5, where he describes one who “joins with” a contender in the state of war “and espouses his quarrel.” *Id.* bk. II, ch. III, § 16. The quarrelsome justify the use of force by the contentious—as religious authority might justify the abuses of a king.

<sup>303</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 34.

than contentment, and reason rather than godliness. In Locke's vision, industry and reason represent "great gain"—one gains title to the earth. Locke's chapter on property attacks Paul's rationale for "godliness with contentment" and supplants it with an ethic of industry and reason. Paul teaches:

For we brought nothing into this world, and it is certain we can carry nothing out. And having *food and raiment* let us be therewith content. But they that will be rich fall into temptation and a snare, and into many foolish and hurtful lusts, which drown men in destruction and perdition.<sup>304</sup>

Locke also mentions "food and raiment" in his teaching on property, where he derides it as the relatively worthless product of unassisted nature:

[F]or whatever bread is more worth than acorns, wine than water, and cloth or silk, than leaves, skins or moss, that is wholly owing to labour and industry; the one of these being the *food and raiment* which unassisted nature furnishes us with; the other, provisions which our industry and pains prepare for us, which how much they exceed the other in value, when any one hath computed, he will then see how much labour makes the far greatest part of the value of things we enjoy in this world: and the ground which produces the materials, is scarce to be reckoned in, as any, or at most, but a very small part of it; so little, that even amongst us, land that is left wholly to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing.<sup>305</sup>

Locke is not content with "food and raiment," as according to Paul one ought to be. To Locke, "the far greatest part of the value of things we enjoy in this world" comes from "our industry and pains." So he urges the promotion of productive labor against the penury of "the food and raiment which unassisted nature furnishes us with."<sup>306</sup>

Locke disputes Paul's contention that "we brought nothing into this world."<sup>307</sup> Rather, he maintains that we own the labor we carry in ourselves and that this labor creates virtually all the value in the world. Before the introduction of human labor, the world was barren. "[T]he extent of ground is of so little value, without labour," according to Locke.<sup>308</sup> "It is labour then which puts the greatest part of value upon land, without which it would scarcely be worth any

<sup>304</sup> 1 *Timothy* 6:7–9 (King James) (emphasis added).

<sup>305</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 42 (emphasis added).

<sup>306</sup> *Id.*

<sup>307</sup> 1 *Timothy* 6:7 (King James).

<sup>308</sup> *Id.* bk. II, ch. V, § 36.

thing . . . [N]ature and the earth furnish[] only the almost worthless materials, as in themselves.”<sup>309</sup> The uncultivated earth is “to be looked on as waste.”<sup>310</sup> Locke teaches the opposite of what Paul tells Timothy: the world was empty when we got here; man brings practically everything into this world.

Locke also reverses Paul’s teaching that the temptation of riches leads to ruin. For Locke, it is idleness that “drown[s] men in destruction and perdition,”<sup>311</sup> while the desire to be rich (“the desire of having more than man needed,” as Locke puts it) is what increases the common stock of mankind and supports human life.<sup>312</sup> The desire to be rich thereby benefits one’s neighbors, who react with gratitude.<sup>313</sup> For Locke, it is the desire to be rich that spurs men to labor, and it is labor that creates virtually everything of value.<sup>314</sup>

Locke turns the Pauline teaching about money on its head. Paul preaches to Timothy that “the love of money is the root of all evil.”<sup>315</sup> Locke argues the opposite: love of money drives human industry beyond mere subsistence production. “Find out something that hath the use and value of money amongst his neighbours, you shall see the same man will begin presently to enlarge his possessions,” writes Locke.<sup>316</sup> “[F]or as a man had a right to all he could employ his labour upon, so he had *no temptation to labour* for more than he could make use of.”<sup>317</sup> As long as man had no temptation to labor for more than he could make use of, he refrained from laboring on the earth except to gather whatever provision would sustain him at the given moment, before it spoiled. Because man could not benefit from anything beyond what he could immediately consume, men “*contented* themselves with what unassisted nature offered to their necessities.”<sup>318</sup> Locke teaches that man’s contentment is not gainful but wasteful because the vast global common—all the resources beyond individual immediate need—went undeveloped. Money, however, liberated people from the penurious conditions of nature because it created a

<sup>309</sup> *Id.* bk. II, ch. V, § 43.

<sup>310</sup> *Id.* bk. II, ch. V, § 38.

<sup>311</sup> 1 *Timothy* 6:9 (King James).

<sup>312</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 37.

<sup>313</sup> *Id.* bk. II, ch. V, § 36.

<sup>314</sup> *Id.* bk. II, ch. V, § 42 (“[L]abour makes the far greatest part of the value of things we enjoy in this world.”).

<sup>315</sup> 1 *Timothy* 6:10 (King James).

<sup>316</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 49.

<sup>317</sup> *Id.* bk. II, ch. V, § 51 (emphasis added).

<sup>318</sup> *Id.* bk. II, ch. V, § 45 (emphasis added). The language contrasts with Paul’s invocation of contentment as a virtue.

storehouse of value that enabled individuals to labor for more than their immediate consumption. “[W]ant of people and money gave men no temptation to enlarge their possessions of land,”<sup>319</sup> but with the introduction of money people had an incentive to develop the global common that had been lying in waste:

Thus labour, in the beginning, gave a right of property, wherever any one was pleased to employ it upon what was common, which remained a long while the far greater part, and is yet more than mankind makes use of. Men, at first, for the most part, contented themselves with what unassisted nature offered to their necessities: and though afterwards, in some parts of the world, (where the increase of people and stock, *with the use of money*, had made land scarce, and so of some value) the several communities settled the bounds of their distinct territories, and by laws within themselves regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began.<sup>320</sup>

In Locke’s telling, the introduction of money was the crucial step in the transition from the penurious state of nature to the creation of human civilization. Before money, the benefit of one’s labor redounded only to oneself, so no one had any incentive to labor for more than his own needs. With money, which places a permanent and transferable value upon individual labor, people could work for something beyond their individual needs and still realize a benefit. Money enabled people, for the first time, to work *in common*. Thus, according to Locke, the founding of cities and countries comes only after money is introduced. Money is the essential precondition of common human action.<sup>321</sup> Locke’s earlier discussion established that the state of nature preceding civil society is full of various evils: strife and fear, violence and continual dangers. Only the coming together in civil society, formed “by compact and agreement,” allows mankind to escape those evils. Money enables man to form civil society, and therefore to end the evil state in which man first finds himself.

In the Lockean view, the desire for money generates human industry, which provides comfort above the meager provisions of nature and creates a common stock. The desire for money also generates civil society, which enables common human action and provides security from the strife of the state of nature. In sum, money produces

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<sup>319</sup> *Id.* bk. II, ch. VIII, § 108.

<sup>320</sup> *Id.* bk. II, ch. V, § 45 (emphasis added).

<sup>321</sup> *Cf.* HOBBS, *supra* note 116, at 189 (“[M]oney . . . passeth from man to man, within the commonwealth; and goes round about, nourishing, as it passeth, every part thereof.”).

comfort, community, and peace. Locke reverses the Pauline teaching: in Locke's account, the love of money is the root of all *good*. Without the love of money, neither human comfort nor a peaceful society would be possible. Locke challenges the Bible: the gospel, by preaching against the love of money, leads not only to poverty but to strife—to quarrels and contentions.

In Locke's vision, God left the world to the "use of the industrious and rational," not to the "fancy or covetousness of the quarrelsome and contentious."<sup>322</sup> The labor of individuals, rather than the doctrines of priests or the greed of kings, entitles one to it.<sup>323</sup> Returning to Locke's original, misnumbered citation to the Book of Timothy, one finds Paul's instruction to "[f]ight the good fight of faith."<sup>324</sup> Paul appropriates the phrase "good fight" from classical philosophy, but he alters its meaning in the service of Christian faith.<sup>325</sup> Citing the verse as the "voice of reason," Locke evokes the original meaning and thereby makes his own "good confession": Locke fights the "good fight of faith" against faith on behalf of reason.<sup>326</sup>

Locke's rejection of biblical morality emerges in a particularly remarkable fashion in the middle of his chapter on property. In Section 37, Locke explains:

[H]e who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind: for the provisions serving to the support of human life, produced by one acre

<sup>322</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 34.

<sup>323</sup> See *supra* note 302 and accompanying text.

<sup>324</sup> 1 *Timothy* 6:12 (King James) ("Fight the good fight of faith, lay hold on eternal life, whereunto thou art also called, and hast professed a good profession before many witnesses.").

<sup>325</sup> Victor Pfitzner explains that "in assimilating the metaphor to his purposes," Paul "fit this image which typifies the Greek spirit of self assertion, of human achievement and endeavor, into his own theological system of thought with its emphasis on human impotence and divine grace." VICTOR C. PFITZNER, PAUL AND THE AGON MOTIF 6–7 (1967). Paul's use of the phrase contains "little of the Greek spirit of moral idealism." *Id.* at 6. According to Pfitzner, "references to the typically hellenistic tone . . . (containing the idea of the good and the beautiful) are beside the mark." *Id.* at 185. For Paul, the fight is good and noble because it seeks God's glory. *Id.*; see also *id.* at 166 ("The original polemic contained in the adjective 'good' is completely lost in 1 Tim 6:12 . . ."); cf. HARPER COLLINS STUDY BIBLE 2232 n.1.18 (1993) (noting that "good fight" is "a traditional phrase in Hellenistic moral philosophy"); RAYMOND F. COLLINS, I & II TIMOTHY AND TITUS: A COMMENTARY 274 (2002) ("The moralists used the images to speak of the struggle for the truth and the struggle of the moral life.").

<sup>326</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 37 (citing 1 *Timothy* 6:12). The construction "professed a good confession," which also appears in 1 *Timothy* 6:12, is likewise "common in Hellenistic uses of the agon motif." COLLINS, *supra* note 325, at 163.

of inclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded by an acre of land of an equal richness lying waste in common.<sup>327</sup>

Locke previously noted that he who “subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.”<sup>328</sup> He proceeds, in Section 37, to contrast this individual with a second human type: “Before the appropriation of land, he who gathered as much of the wild fruit, killed, caught, or tamed, as many of the beasts, as he could” remained under the old “rule of propriety.”<sup>329</sup>

Locke explains:

[I]f [the goods] perished, in his possession, without their due use; if the fruits rotted, or the venison putrified, before he could spend it, he offended against the common law of nature, and was liable to be punished; he invaded his neighbour’s share, for he had no right, farther than his use called for any of them.<sup>330</sup>

Thus, “in the beginning” (Locke begins Section 37 with that phrase), there were two human types: a laborer on the land, who increases the common stock of mankind, and a gatherer of fruit or beasts, who merely collects “the spontaneous products of nature” and thereby lessens the common stock.<sup>331</sup>

The full implications of Locke’s theory of property come to light in the following paragraph (Section 38), where Locke introduces the biblical figures of Cain and Abel: “Thus, at the beginning, Cain might take as much ground as he could till, and make it his own land, and yet leave enough to Abel’s sheep to feed on; a few acres would serve for both their possessions.”<sup>332</sup> The phrase “at the beginning” links Cain and Abel to the two human types Locke introduced in the previous paragraph, the tiller of land and the gatherer of beasts. Note that Cain tills the land and makes it “his own” while Abel’s sheep simply feed. Abel has only propriety, not property, in them.<sup>333</sup> Thus, “in the beginning”—when the first appropriation of land created the right of property and saved mankind from the penury of nature—

<sup>327</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 37.

<sup>328</sup> *Id.* bk. II, ch. V, § 32.

<sup>329</sup> *Id.* bk. II, ch. V, § 37.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*; see also Genesis 1:1 (King James).

<sup>332</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 38. Thanks to Steven Lenzner for calling my attention to the significance of this passage.

<sup>333</sup> *Cf. id.* bk. I, ch. IV, § 39 (noting “the difference between having dominion, which a shepherd may have, and having full property as an owner”).

Cain emerged as the great benefactor of mankind. Abel was his beneficiary. Locke continues:

[A]s families increased, and industry enlarged their stocks, their possessions enlarged with the need of them; but yet it was commonly without any fixed property in the ground they made use of, till they incorporated, settled themselves together, *and built cities*; and then, by consent, they came in time, to set out the bounds of their distinct territories, and agree on limits between them and their neighbours; and by laws within themselves, settled the properties of those of the same society.<sup>334</sup>

This other advance, the building of cities, humanity owes to Cain. Cain, according to Genesis, was the founder of the first city.<sup>335</sup> Cain's descendants, moreover, initiated those advances in the arts and sciences that are for Locke the mark of human civilization, including the raising of cattle,<sup>336</sup> music,<sup>337</sup> and metallurgy.<sup>338</sup> The Bible treats the progress of the arts and sciences with moral skepticism by attributing these advances to Cain and his descendants.<sup>339</sup> The biblical tradition elevates piety over science, but Locke reverses this judgment. He creates an alternative biblical narrative in which God commands human industry.<sup>340</sup> Locke does not mention Cain's killing of Abel—which the Bible takes to be the crucial moral point of the story—in his chapter on property. In Locke's retelling of the story, Cain is the hero. While the Bible celebrates the line of Adam through Seth, Locke's theory provides a new foundation myth that celebrates Cain as the founder of civilization and his line as mankind's benefactors.<sup>341</sup>

<sup>334</sup> *Id.* bk. II, ch. V, § 38 (emphasis added).

<sup>335</sup> *Genesis* 4:17 (King James) (“And Cain knew his wife; and she conceived, and bare Enoch: and he builded a city, and called the name of the city, after the name of his son, Enoch.”).

<sup>336</sup> *Id.* 4:20.

<sup>337</sup> *Id.* 4:21.

<sup>338</sup> *Id.* 4:22.

<sup>339</sup> See Leo Strauss, *Progress or Return? The Contemporary Crisis in Western Civilization*, 1 *MOD. JUDAISM* 17, 38 (1981).

<sup>340</sup> Locke even recasts the biblical injunction to “[b]e fruitful, and multiply, and replenish the earth, and subdue it,” *Genesis* 1:28 (King James), as a mandate for scientific improvement. LOCKE, *TWO TREATISES*, *supra* note 48, bk. I, ch. IV, § 33 (identifying “this great and primary blessing of God Almighty, *Be fruitful, and multiply, and replenish the earth*, which contains in it the improvement too of arts and sciences, and the conveniences of life”); see THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 142 (1988).

<sup>341</sup> Locke writes that Cain had a right of property in his land “which another had no title to, nor could without injury take from him,” LOCKE, *TWO TREATISES*, *supra* note 48, bk. II, ch. V, § 32, while Abel had no rights of property, but was at risk of violating “the common law of nature, and was liable to be punished.” LOCKE, *TWO TREATISES*, *supra* note 48, bk. II, ch. V, § 37. One might suspect that the killing, when

The actual *theory* of property Locke provides has few direct implications for anyone now alive—that is, those who live in civil society under a government. “[I]n governments, the laws regulate the right of property, and the possession of land is determined by positive constitutions,” according to Locke.<sup>342</sup> One cannot, therefore, appropriate from nature in civil society.<sup>343</sup> Even outside of governments, if anyone were to find themselves in the state of nature today, the “rule of propriety” does not act as much of a constraint after land has been appropriated and money implemented. The rule cannot be enforced absent natural spoilage, and money does not spoil.

It is unclear whether anyone besides Adam, Eve, Cain, and Abel ever lived under the “rule of propriety,” as they were the only ones to live before the appropriation of land. Not only the enclosure of land but also the introduction of money appears to have occurred early in human history. The invention of money was a natural step following the first appropriation:

He that gathered a hundred bushels of acorns or apples, had thereby a property in them, they were his goods as soon as gathered. He was only to look, that he used them before they spoiled, else he took more than his share . . . . And if he also bartered away plums, that would have rotted in a week, for nuts that would last good for his eating a whole year, he did no injury; he wasted not the common stock; destroyed no part of the portion of goods that belonged to others, so long as nothing perished uselessly in his hands. Again, if he would give his nuts for a piece of metal, pleased with its colour; or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others, he might heap up as much of these durable things as he pleased; the exceeding of the

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the brothers “were in the field,” *Genesis* 4:8 (King James)—that is, Cain’s field—was an act of natural justice. Abel was a shepherd who offered of his flock in sacrifice to God. Since this was before mankind was allowed to eat meat, *see supra* notes 249–53 and accompanying text, the meat surely spoiled without being consumed, which was a violation of “the common law of nature” for which Abel “was liable to be punished.” In fact, the whole of Abel’s flock was liable to spoil before being consumed because the consumption of meat was not permitted until after the Flood. Abel made no “use” of any of his flock. Abel’s raising of sheep was an act of pure piety—the sheep were sacrificed to God but not consumed by man—whereas Cain’s efforts supported human life. *See* LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 112.

<sup>342</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 50.

<sup>343</sup> *Id.* bk. II, ch. V, § 35 (“[I]n land that is common in England or any other country, where there is plenty of people under government, who have money and commerce, no one can inclose or appropriate any part, without the consent of all his fellow-commoners; because this is left common by compact, *i.e.* by the law of the land, which is not to be violated.”).

bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it.<sup>344</sup>

It makes sense that people would seek to exchange their produce for more durable goods, but Locke cannot be serious that people would collect gold (“a little piece of yellow metal”<sup>345</sup>) only because of its pleasing color—or diamonds because they sparkle—and not soon realize that it could be used as a medium of exchange.<sup>346</sup>

In addition to Cain and Abel, Locke cites other biblical figures who lived “in that part of the world which was first inhabited.”<sup>347</sup> Following Locke’s citations to Genesis, a reader learns that Abraham was “rich” in cattle, gold, and silver.<sup>348</sup> His nephew Lot “had flocks, and herds, and tents”<sup>349</sup> and lived “in the cities of the plain.”<sup>350</sup> Esau “took his wives, and his sons, and his daughters, and all the persons of his house, and his cattle, and all his beasts, and all his substance, which he had got in the land of Canaan; and went into the country.”<sup>351</sup> There he founded a nation, Edom, and “kings . . . reigned in the land of Edom, before there reigned any king over the children of Israel.”<sup>352</sup> In other words, from the beginning of human habitation, people hoarded large stocks of durable goods. The early chapters of Genesis also recount the use of money, trade between communities, and the purchase of land.<sup>353</sup> It would seem that money and “the desire of having more than man needed” are more permanent fixtures of human life than Locke’s narrative initially suggests.

Yet Locke’s naturalistic account of the evolution of money provides a story whereby rights of ownership grow out of a natural law of equality and an equitable distribution of property. This allows Locke to ground his case for private property in Christian moral commitments to egalitarianism and charity, despite the inequality that re-

<sup>344</sup> *Id.* bk. II, ch. V, § 46.

<sup>345</sup> *Id.* bk. II, ch. V, § 37.

<sup>346</sup> Compare *id.* bk. II, ch. V, § 46 (“[G]old, silver and diamonds, are things that fancy or agreement hath put the value on, more than real use, and the necessary support of life.”), with HOBBS, *supra* note 116, at 189 (“[S]ilver and gold have their value from the matter itself.”).

<sup>347</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 38.

<sup>348</sup> *Genesis* 13:2 (King James).

<sup>349</sup> *Id.* 13:5.

<sup>350</sup> *Id.* 13:12.

<sup>351</sup> *Id.* 36:6.

<sup>352</sup> *Id.* 36:31.

<sup>353</sup> *E.g., id.* 23:15–16 (“[T]he land is worth four hundred shekels of silver . . . [A]nd Abraham weighed to Ephron the silver, which he had named in the audience of the sons of Heth, four hundred shekels of silver, current money with the merchant.”).

sults. “[I]t is plain that men have agreed to a disproportionate and unequal possession of the earth,” Locke concludes.<sup>354</sup> In this way, unequal material accumulation becomes a matter not simply of efficiency or necessity but of morals and justice.<sup>355</sup> A natural individual right to property thereby displaces the traditional Christian natural-law view that property was held in stewardship for the common good.<sup>356</sup>

In the Lockean story, few if any people lived under the original natural law of distribution, which in any event was less an ethical mandate to be followed than a harsh condition to be overcome.<sup>357</sup> Locke writes straightforwardly that his theory is about the *origin* of property, how “labour, *in the beginning*, gave a right of property” rather than anything relevant to property today.<sup>358</sup> This is on the order of a creation myth. Locke’s theory establishes that

man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great

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<sup>354</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 50 (“[They have] by a tacit and voluntary consent, found out a way how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus gold and silver, which may be hoarded up without injury to any one.”).

<sup>355</sup> WARD, *supra* note 86, at 11 (“Locke transforms the idea of property, traditionally one of the key grounds for natural and civil inequality, into a basis for an understanding of moral relations rooted in equality.”); *cf.* THE FEDERALIST No. 10 (James Madison) (arguing that “the first object of government” is “[t]he diversity in the faculties of men, from which the rights of property originate” and recognizing that “[f]rom the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results”).

<sup>356</sup> According to Aquinas, “whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor . . . . [E]ach one is entrusted with the stewardship of his own things, so that out of them he may come to the aid of those who are in need.” AQUINAS, *supra* note 134, pt. II–II, q. 66, art. 7; *see also* MARY ANN GLENDON, RIGHTS TALK 34 (1991) (“The ideas of stewardship, of property as inherently entailing obligations, and of subsistence needs as taking precedence over property rights, became major themes of Christian ethics.”).

<sup>357</sup> In the state of nature, a full share of property was available to all only because man was too primitive to develop property in large amounts. *See* LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 36 (“[N]o man’s labour could subdue, or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to intrench upon the right of another, or acquire to himself a property, to the prejudice of his neighbor.”). While Locke writes that “the desire of having more than man needed . . . altered the intrinsic value of things,” that value always “depend[ed] only on their usefulness to the life of man.” *Id.* bk. II, ch. V, § 37. The introduction of money did not affect men’s natural desires but simply made the accumulation of more things useful, and hence “desired.”

<sup>358</sup> *Id.*, bk. II, ch. V, § 45. This intention may help explain why “the moves by which Locke extends his justification of property past its supposed beginnings are, as many commentators have pointed out, less convincing than those beginnings themselves.” Kenneth R. Minogue, *The Concept of Property and Its Significance*, in NOMOS XXII: PROPERTY 3, 10 (J. Ronald Pennock & John W. Chapman eds., 1980).

foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others.<sup>359</sup>

Locke's theory of property, which is ostensibly grounded upon the Christian doctrine that God gave the earth to man in common, requires one to accept that man owns himself and the product of his labor, that everything of value we enjoy comes from human invention, and that human ingenuity established the right to property in the first place. Accepting Locke's theory helps a Christian explain private property without abandoning the belief that God gave the world to man in common. But it also leads him to abandon a posture of selfless devotion and to assert his individual self-interest in worldly pursuits. Instead of pious reverence for divine creation, the Lockean God commands industrious mastery over it. Instead of godliness and glory, and their attendant quarrels and contentions, society's mission becomes the progress of industry and the arts.

### C. *Property and Autonomy*

As noted above, Locke uses the word "property" imprecisely,<sup>360</sup> often employing the term to refer generally to a person's "life, liberty and estate."<sup>361</sup> He does so advisedly, however, because the right to property formalizes an individual's sovereignty over his own person and mind. By creating an inviolate sphere around each individual, the innate right to hold material goods creates a "fence" to freedom, just as freedom is a fence to life.<sup>362</sup> One cannot be enslaved before

<sup>359</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 44.

<sup>360</sup> See *supra* notes 75–80 and accompanying text.

<sup>361</sup> E.g., LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. VII, § 87 ("[Man] hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men; but to judge of, and punish the breaches of that law in others."); *id.* bk. II, ch. IX, § 123 (arguing that people form society "for the mutual preservation of their lives, liberties and estates, which I call by the general name, property"); *id.* bk. II, ch. XV, §173 ("By *property* I must be understood here, as in other places, to mean that property which men have in their persons as well as goods.").

<sup>362</sup> See *id.* bk. II, ch. III, § 17 (noting that freedom is "the only security of my preservation; and reason bids me look on him, as an enemy to my preservation, who would take away that freedom which is the fence to it"); *id.* bk. II, ch. VII, § 93 ("[W]hat security, what fence is there, in such a state, against the violence and oppression of this absolute ruler?"); cf. CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 94 (2007) ("[O]nly in a regime of secure entitlements can there be liberty."); Minogue, *supra* note 358, at 15–17 (arguing that the abolition of property "requires the abolition of the will").

being dispossessed.<sup>363</sup> Moreover, because property cannot be taken without consent, the right to property instantiates the requirement of popular consent.<sup>364</sup> An inviolate right of property ensures that no authority, religious or governmental, can have total sway over a person's life or liberty.

Moreover, the societal focus upon material gain will limit the inclination of governments to infringe those rights. In discussing his labor theory of value, Locke digresses:

This shews how much numbers of men are to be preferred to largeness of dominions; and that the increase of lands, and the right employing of them, is the great art of government: and that prince, who shall be so wise and godlike, as by established laws of liberty to secure protection and encouragement to the honest industry of mankind, against the oppression of power and narrowness of party, will quickly be too hard for his neighbors.<sup>365</sup>

<sup>363</sup> See LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XV, § 174 (noting the inconsistency of slavery with property and distinguishing between political power, under which “men have property in their own disposal” and “despotic, over such as have no property at all”); *cf.* RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 1 (2008) (“The right to exclude protects against both conscious aggression and accidental entry.”).

<sup>364</sup> See LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XI, § 138 (“The supreme power cannot take from any man any part of his property without his own consent.”); *id.* bk. II, ch. XI, § 139 (“[T]he prince, or senate, however it may have power to make laws, for the regulating of property between the subjects one amongst another, yet can never have a power to take to themselves the whole, or any part of the subjects['] property, without their own consent.”); *id.* bk. II, ch. XI, § 140 (“[G]overnments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, *i.e.* the consent of the majority, giving it either by themselves, or their representatives chosen by them.”); Harvey C. Mansfield, *The Forms of Liberty, in* DEMOCRATIC CAPITALISM? 1, 19 (Fred E. Baumann ed., 1986) (“[T]he right to property becomes the visible, formal protection of the right to consent.”).

<sup>365</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 42; *see also* HOBBS, *supra* note 116, at 185 (“[T]here have been commonwealths that having no more territory, than hath served them for habitation, have nevertheless . . . increased their power, partly by the labour of trading from one place to another, and partly by selling the manufactures whereof the materials were brought in from other places.”). The advice to a prince echoes Machiavelli. According to Carnes Lord:

Machiavelli's argument—the message that is intended to improve on and eventually supplant the Christian message—may be summarized as follows. Men's natural desire to acquire must be respected as the premise of all political action. This desire cannot and should not be repressed. But it must be regulated so as to promote the common good. . . . For Machiavelli, men freed from religious passions are bound to love a prince who respects the necessities their own nature imposes on them; yet they require an authority that is more immediate-

A society oriented toward producing wealth through industry will not be interested in warring against other peoples, nor will its government seek to oppress its people in the service of a religious doctrine or factional interest. Property, like Locke's theory of nature, limits passions rooted in pride, honor, or glory and replaces the passionate devotion to abstract ideals with the rational pursuit of material self-interest.<sup>366</sup>

Constraining political authority is also necessary because removing religious authority carries the risk of augmenting earthly power. A prepolitical, natural right to property serves a key political purpose: an "appeal to heaven" when neither earthly nor heavenly authority can be trusted. Moreover, a public ideology of respect for rights of private property orients political life to the interests of the citizenry and the facilitation of commerce. If the purpose of government is the protection of property, the state has no business risking blood and treasure for the glory of the nation or of the church. Just as the pursuit of material wealth channels public passions in a more benign (but assertive) direction, so too does the state focus upon the more mundane (but profitable) task of facilitating the industry of its citizens.

As Paul recognized, the desire for material gain undermines religious piety and loyalty to the higher powers. The pursuit of property promotes self-interest at the expense of passionate, selfless participation in public life. Locke makes it the central organizing principle of society. Paul instructs Timothy to counsel the wealthy not to "trust in uncertain riches, but in the living God,"<sup>367</sup> while Locke reverses this advice.

## V. THE PROPERTY RIGHTS REGIME

To appreciate the change that Locke's theory effected, one might consider the understanding of ownership and the model of social life it displaced. Locke treats as self-evident the principle that the individual and his capacity for ownership precedes civil society, but such an idea could not have been obvious to someone familiar with

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ly and visibly fearful than the Christian God to check their unruly natural passions.

Carnes Lord, *Machiavelli's Realism*, in NICCOLO MACHIAVELLI, *THE PRINCE* 114, 120 (Angelo M. Codevilla ed., 1997). Locke seems to advance that argument in *Two Treatises*.

<sup>366</sup> See *supra* notes 244–48 and accompanying text.

<sup>367</sup> 1 *Timothy* 6:17 (King James).

the views of classical philosophy and the religious tradition that built upon it.

A. *Locke's Departure from the Traditional View*

The Lockean state of nature resembles the Hobbesian one in that man, exposed to continual dangers, cannot enjoy property.<sup>368</sup> Yet from this premise Hobbes concludes, in contrast to the Lockean idea of natural rights, that property is a product of social convention; it does not exist without a government that creates property interests and protects those interests.<sup>369</sup> Aquinas similarly insists upon the conventional character of private property, holding that “the ownership of possessions is . . . an addition [to the natural law] devised by human reason.”<sup>370</sup> That is, man does not own possessions by nature; there is only a conventional rather than a natural right to property. Hobbes, moreover, invokes the authority of Greek antiquity for the idea that justice concerns the proper distribution of property by the sovereign authority.<sup>371</sup> Classical debates about justice addressed the arrangement of property interests.<sup>372</sup> In order to promote public peace, many ancient laws enforced a particular distribution of property and constrained the transfer of possessions.<sup>373</sup>

<sup>368</sup> See *supra* Part III.A.

<sup>369</sup> HOBBS, *supra* note 116, at 186 (“[W]here there is no commonwealth, there is . . . a perpetual war of every man against his neighbour; and therefore every thing is his that getteth it, and keepeth it by force; which is neither *propriety*, nor *community*; but *uncertainty*.”).

<sup>370</sup> AQUINAS, *supra* note 134, pt. II–II, q. 66, art. 2. Accordingly, “the division and appropriation of things which are based on human law” does not withstand the fact that “whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor.” *Id.* pt. II–II, q. 66, art. 7.

<sup>371</sup> HOBBS, *supra* note 116, at 186 (“[E]ven Cicero, a passionate defender of liberty, in a public pleading, attribueth all propriety to the law civil. . . . Seeing therefore the introduction of *propriety* is an effect of commonwealth, which can do nothing but by the person that represents it, it is the act only of the sovereign; and consisteth in the laws, which none can make that have not the sovereign power. And this they well knew of old, who called that [*Nomos*], that is to say, *distribution*, which we call law; and defined justice, by *distributing* to every man *his own*.”).

<sup>372</sup> “Some,” Aristotle observes, “hold that a fine arrangement concerning property is the greatest thing; it is about this, they assert, that all factional conflicts arise.” ARISTOTLE, THE POLITICS 1266a36–38, at 67 (Carnes Lord trans., Univ. of Chi. Press 1984) (350 B.C.E.).

<sup>373</sup> See *id.* 1266b14–21, at 67–68 (“[T]he leveling of property does indeed have a certain power to affect the political partnership. This was plainly recognized by some of former times, as in the legislation of Solon, and others have a law which forbids the acquisition of land in whatever amount one wishes. Similarly, some laws forbid the sale of property, for example among the Locrians, where there is a law against sale unless he has suffered manifest misfortune; and some attempt to preserve original allotments [of land in colonies].”).

In the classical view, property is conventional and the city controls its accumulation and distribution in order to promote social good or justice. Plato, for example, suggests that the ideal republic would have no private property.<sup>374</sup> In Plato's *Laws*, the Athenian Stranger says that to avoid civil war a city must place an upper and a lower bound on each citizen's property holdings.<sup>375</sup> For citizens to live happily, self-interest must be tempered by community ties. Accordingly, no private citizen should be allowed to hold gold or silver, but only the coin which depends for its value upon the society in which it is traded.<sup>376</sup> The city ought to discourage "big profits made through vulgar occupations, or usury, or other sorts of shameful breeding" and instead rely upon "just the things that farming gives and yields, and only as much of that as will not compel one because of money-making to neglect those things which money is by nature intended to serve—namely, the soul and the body."<sup>377</sup> Plato argues that property should be understood as held in common so that citizens will make use of it for the common good.<sup>378</sup> Aristotle suggests that property should be held privately but used in common in order to avoid resentment and to build community ties.<sup>379</sup>

<sup>374</sup> In *The Laws*, the Athenian Stranger advocates common ownership as part of the view that the best city would approach unity. See PLATO, *THE LAWS OF PLATO* 739c, at 126 (Thomas L. Pangle trans., 1988) (360 B.C.E.). But see ARISTOTLE, *supra* note 372, 1261a16–18, at 56 ("[Y]et it is evident that that as it becomes increasingly one it will no longer be a city. For the city is in its nature a sort of multitude.").

<sup>375</sup> See PLATO, *supra* note 374, 744d–e, at 132 ("We assert that if (as we presume) the city must avoid the greatest illness, which has been more correctly termed 'civil war' than 'faction,' then neither harsh poverty nor wealth should exist among any of the citizens. For both these conditions breed both civil war and faction. It follows, therefore, that the lawgiver must announce a limit for both conditions.").

<sup>376</sup> *Id.* 741e–742a, at 129.

<sup>377</sup> *Id.* 743d, at 131.

<sup>378</sup> *Id.* 740a, at 127 ("[T]he division of lands is to be understood in something like the following way: each shareholder must consider his share to be at the same time the common property of the whole city, and must cherish his land, as a part of the fatherland, more than children cherish their mother.").

<sup>379</sup> ARISTOTLE, *supra* note 372, 1263a32–39, at 61 ("[I]n finely administered cities . . . everyone has his own possessions, but he makes some of them useful to his friends, and some he uses as common things. . . . It is evident, then, that it is better for possessions to be private, but to make them common in use."). Aquinas concurs in this view:

Two things are competent to man in respect of exterior things. One is the power to procure and dispense them, and in this regard it is lawful for man to possess property. . . . The second thing that is competent to man with regard to external things is their use. On this respect man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate them to others in their need.

AQUINAS, *supra* note 134, pt. II–II, q. 66, art. 2.

Like the Athenian Stranger, Aristotle counsels that wealth should be based on agriculture rather than commercial exchange, so as to achieve sustenance but not luxury.<sup>380</sup> “[A]ll who engage in business increase their money without limit,” Aristotle warns, “and since that desire of theirs is without limit, they also desire what is productive of unlimited things.”<sup>381</sup> Such unchecked desire threatens political life because the other virtues—Aristotle mentions courage and military valor—are made “forms of expertise in business, as if this were the end and everything else had to march toward it.”<sup>382</sup> In this way, commerce may supplant the civic virtues and the life of the city.

Desires must be limited for the city to be stable and happy. “[O]ne ought to level desires sooner than property,” writes Aristotle, “but this is impossible for those not adequately educated by the laws.”<sup>383</sup> Accordingly, Aristotle’s system of property requires “the adornment of character and an arrangement of correct laws.”<sup>384</sup> Similarly, Plato’s Athenian Stranger argues that a healthy society would discourage the accumulation and exchange of property through a religious teaching that it is impious to “dishonor the well-measured height and magnitude of property that you were allotted at the beginning, by buying and selling it among yourselves.”<sup>385</sup> The teaching would be enforced through the prayers of priests and the penalties of law.<sup>386</sup>

Controlling material desire is necessary also to maintain the proper attitude toward nature, Aristotle suggests.<sup>387</sup> Excessive economic activity promotes the idea that men cannot rely upon nature for sustenance but must transform nature in order to produce wealth. Aristotle analogizes economic activity to political rule: “just as politi-

<sup>380</sup> Waller R. Newell, *Oligarchy and Oikonomia: Aristotle’s Ambivalent Assessment of Private Property 9* (paper delivered at the Western Political Science Association annual meeting, April 1–3, 2010) (on file with author).

<sup>381</sup> ARISTOTLE, *supra* note 372, 1257b34–1258a2, at 48.

<sup>382</sup> *Id.* 1258a13–14, at 49. If “expertise in business” does not supply the desired excess, Aristotle explains, men “attempt this in some other fashion, using each sort of capacity in a way not according to nature. For it belongs to courage to produce not goods but confidence; nor does this belong to military or medical expertise.” *Id.* 1258a9–12, at 48; *see* Newell, *supra* note 380, at 9 (describing Aristotle’s view that if “household management were synonymous with open-ended acquisition, then all the virtues . . . would have to be viewed as means to money-making and material pleasures”).

<sup>383</sup> ARISTOTLE, *supra* note 372, 1266b30–31, at 68.

<sup>384</sup> *Id.* 1263a22–23, at 60.

<sup>385</sup> PLATO, *supra* note 374, 741b, at 128.

<sup>386</sup> *Id.* 741c, at 128.

<sup>387</sup> *See* Newell, *supra* note 380, at 10–12.

cal expertise does not create human beings but makes use of them after receiving them from nature,” so too does proper economic activity make use of what nature provides without attempting to alter nature through human industry.<sup>388</sup> “[A]ccording to Aristotle,” explains Waller Newell, “we need to envision nature as providing for our basic needs without an excessive emphasis on transforming nature through human productive techniques.”<sup>389</sup>

If nature were seen as lacking sufficient wealth to maintain human life, then human industry would need to intervene in nature to bring it forth. This attitude, Aristotle suggests, has implications for the political regime. If nature is deficient with respect to our material needs, human nature may be deficient with respect to our capacity for political order. If men by nature lack sufficient virtue to achieve self-government, then perhaps political leaders need to apply coercive force to suppress human nature and achieve social peace.<sup>390</sup>

It is better, argues Aristotle, to respect nature as the standard for economic as well as political life. When nature provides sustenance, the city can stress “the good life over mere life and need not be preoccupied with scarcity and survival.”<sup>391</sup> When nature endows human beings with the capacity for virtue, the city can rely on institutions that foster citizenship instead of a sovereign power that employs political terror to impose order.<sup>392</sup>

In the Aristotlean view, excessive emphasis upon economic production promotes unchecked desire, crowding out civic life, and invites tyrannical government. Accordingly, the laws must set limits upon the acquisition of property and foster such virtues as temperance and liberality.<sup>393</sup> Property arrangements were part of a system of social conventions that aimed to harmonize the character of citizens

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<sup>388</sup> ARISTOTLE, *supra* note 372, 1258b22–25, at 49. “Expertise in business relative to crops and animals is thus natural for all” while “expertise in exchange is justly blamed since it is not according to nature but involves taking from others.” *Id.* 1258a37–1258b2, at 49. Moneylending is objectionable because “one’s possessions derive from money itself and not from that for which it was supplied.” *Id.* 1258b3–4, at 49.

<sup>389</sup> Newell, *supra* note 380, at 10.

<sup>390</sup> *Id.* at 11 (“If nature at large is too poor, we will have to stress economic productivity over purposeful use. If human nature is too vicious from the outset, if its material is too poor or intractable, statecraft will have to stress compulsion based on fear over relying on people to be capable of virtue if properly educated in an environment where the laws support virtue.”).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* at 11–12.

<sup>393</sup> See ARISTOTLE, *supra* note 372, 1263a39–40, at 61 (“That [the citizens] become such [as to use possessions in common]—this is a task peculiar to the legislator.”).

with the good of the community.<sup>394</sup> In this way, the classical city would exhibit a holistic way of life, what the Greeks called the *politeia*, the particular regime of the society.<sup>395</sup> “[L]aws should be enacted—and all are in fact enacted—with a view to the regimes” of each political community, according to Aristotle.<sup>396</sup> A democratic society, for example, will arrange its laws differently than an aristocratic or oligarchic society. The regime finds expression in formal institutions and procedures of government, which direct social activity toward its distinctive way of life.<sup>397</sup> The laws governing property are part of this system and therefore aim to maintain a community and to shape the character of the citizens who live according to that way of life.<sup>398</sup>

<sup>394</sup> See Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN’S L. REV. 421, 431–32 (1995).

[The ancient Greeks] perceived people as gaining an understanding of their lives from participation and interaction with others in a social world that they jointly created. Consequently, the assumption was that people were shaped by the institutions in which they functioned; the central theme was connection rather than autonomy. Society preceded the individual, for self-knowledge was possible only with reference to the social matrix within which individuals found themselves. Institutions of social life, therefore, were important because they forged the character of citizens. . . . A virtuous citizenry was one that had learned from its institutions that the public good differed from the aggregate of private preferences.

*Id.*

<sup>395</sup> “[T]he Greek *politeia* . . . is a term which comprises all the innumerable characteristics which determine [the] state’s peculiar nature, and these include its whole economic and social texture as well as matters governmental in our narrower modern sense.” CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM ANCIENT AND MODERN* 26 (rev. ed. 1947). “Each constitution embodied a scheme of life, and tended, consciously or not, to bring the lives of those living under it into harmony with its particular scheme.” *Id.* at 27 (quoting I W.L. NEWMAN, *THE POLITICS OF ARISTOTLE* 210 (1887)); cf. STRAUSS, *supra* note 92, at 193 (identifying “regimes” as *politeiai*).

<sup>396</sup> ARISTOTLE, *supra* note 372, 1289a14, at 119; *id.* 1289a9–14, at 119 (“[T]he varieties of the regimes—how many there are and in how many ways they are combined—should not be overlooked. And it is with this same prudence that one should try to see both what laws are best and what are fitting for each of the regimes.”); *id.* 1282b8–11, at 103 (“Laws are necessarily poor or excellent and just or unjust in a manner similar to the regimes [to which they belong].”).

<sup>397</sup> *Id.* 1289a14–19, at 119 (“For a regime is an arrangement in cities connected with the offices, [establishing] the manner in which they have been distributed, what the authoritative element of the regime is, and what the end of the partnership is in each case; and there are distinct laws among the things that are indicative of the regime—those in accordance with which the rulers must rule and guard against those transgressing them.”).

<sup>398</sup> Cf. Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 645 (1993) (describing the classical view that “because the polity, to which all are subordinate, is

“[V]irtue must be a care for every city,” according to Aristotle,<sup>399</sup> because the city exists “not only for the sake of living but rather primarily for the sake of living well”<sup>400</sup> and “for the sake of noble actions, not [only] for the sake of living together.”<sup>401</sup>

Aristotle rejects the idea that the city exists merely in order to protect property and to prevent each person from suffering injustice. “[I]f it were for the sake of possessions that they participated and joined together, they would share in the city just to the extent that they shared in possessions.”<sup>402</sup> If it were “for the sake of an alliance to prevent their suffering injustice from anyone” or “for purposes of exchange and of use of one another,” political life would be reduced to a defense pact and trade alliance.<sup>403</sup> In such a polity, “law becomes a compact and . . . a guarantor among one another of the just things, but not the sort of thing to make the citizens good and just.”<sup>404</sup> Each citizen would be indifferent to the character of his fellows, insisting only that fellow citizens “should not act unjustly toward one another.”<sup>405</sup> This may be a precondition for the city to flourish, but it is an impoverished view of political life. “It is evident,” Aristotle concludes, “that the city is not a partnership . . . for the sake of not committing injustice against each other and of transacting business.”<sup>406</sup> Yet this idea—that society is a compact for preventing harm and protecting property—closely resembles the social contractarian views of Hobbes and Locke.<sup>407</sup> And Aristotle’s view that nature provides for human needs contradicts the Hobbesian and Lockean views of man’s natural state.<sup>408</sup>

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governed by its citizens, the polity has a strong interest in the character of its citizens, which can be maintained only through moral education”).

<sup>399</sup> ARISTOTLE, *supra* note 372, 1280b7, at 98.

<sup>400</sup> *Id.* 1280a31–32, at 98.

<sup>401</sup> *Id.* 1281a3–4, at 99.

<sup>402</sup> *Id.* 1280a25–27, at 98.

<sup>403</sup> *Id.* 1281a34–35, at 98; *cf.* Newell, *supra* note 380, at 23 (“To foment, as do Madison and the other founders, the limitless expansion of commerce over a limitless geographical extent would, for Aristotle, reduce politics to economics, with the common good diluted and distended into something akin to a trade alliance.”).

<sup>404</sup> ARISTOTLE, *supra* note 372, 1280b11–13, at 98.

<sup>405</sup> *Id.* 1280b4, at 98.

<sup>406</sup> *Id.* 1280b30–32, at 99.

<sup>407</sup> *See supra* Part III.

<sup>408</sup> *See supra* Part IV.

B. *An Antecedent and Paramount Right*

What intervened between Plato and Aristotle, on the one hand, and Hobbes and Locke, on the other, was the development of biblical religion, culminating the Christian claim to universal religious truth.<sup>409</sup> A universal religion entailed the claim that there was “a right antecedent and paramount to all government.”<sup>410</sup> The classical regime, by contrast, defined justice by reference to its own needs and way of life without an antecedent standard of abstract right. Instead, the classics recognized “a kind of natural right in the noble, wise, and virtuous, to govern” in the interest of the polity.<sup>411</sup>

As Locke puts it, “[T]he first beginners of commonwealths generally put the rule into one man’s hand, without any other express limitation or restraint, but what the nature of the thing, and the end of government required.”<sup>412</sup> Locke describes a “golden age” that “had more virtue, and consequently better governors” before “vain ambition, and *amor sceleratus habendi*, evil concupiscence, had corrupted men’s minds into a mistake of true power and honour” and then “ambition and luxury in future ages . . . taught princes to have distinct and separate interests from their people.”<sup>413</sup> At that point, “men

<sup>409</sup> Cf. Lord, *supra* note 365, at 119 (noting Machiavelli’s understanding that “the political and military realities of the world had been decisively affected by the victory of Christianity over paganism”).

<sup>410</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 126.

<sup>411</sup> I HOOKER, *supra* note 135, at 51 (citing ARISTOTLE, *supra* note 372, bks. III–IV).

<sup>412</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. VIII, § 110.

<sup>413</sup> *Id.* bk. II, ch. VIII, § 111. The Latin phrase *amor sceleratus habendi* is from Ovid’s *Metamorphoses*. See OVID, METAMORPHOSES 20 (Charles Martin trans., W.W. Norton & Co. 2005) (8 C.E.) (“shameful lusting after acquisitions”). Paul condemns “evil concupiscence” in the Epistle to the Colossians. *Colossians* 3:5 (King James) (“Mortify therefore your members which are upon the earth; fornication, uncleanness, inordinate affection, evil concupiscence, and covetousness, which is idolatry.”). In Ovid’s account, *amor sceleratus habendi* is a corruption that emerges in the iron age, late in mankind’s development, when “modesty, fidelity, and truth departed.” OVID, *supra*, at 20. For Paul, evil concupiscence is a worldly trait that the faithful must discard in favor of “mercies, kindness, humbleness of mind, meekness, longsuffering.” *Colossians* 3:12 (King James); see also *id.* 3:2 (“Set your affection on things above, not on things on the earth.”). Locke’s “golden age” corresponds neither to that of Ovid nor to the biblical time before the Fall because Locke indicates that there was government. LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. VIII, § 111 (noting “better governors”). Indeed, Locke’s golden age contrasts sharply with that described by Ovid. Compare, e.g., OVID, *supra*, at 18–19 (noting that in the golden age men were “[c]ontent with food acquired without effort”), with LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. V, § 32 (arguing that God commanded mankind to labor). Locke does not condemn worldly cravings as such but argues that the “desire of having more than man needed,” when governed by reason and channeled toward industry, promotes peace and comfort. See *supra* Part IV.B.

found it necessary to examine more carefully the original and rights of government" in order to "prevent the abuses of that power."<sup>414</sup>

In support of this chronology, Locke quotes a passage from Richard Hooker's *Of the Laws of Ecclesiastical Polity* in which Hooker invokes Cicero to describe the older regime under which rulers were "permitted unto their wisdom and discretion."<sup>415</sup> Classical polities, according to Cicero, selected as their rulers those men who were "conspicuous for [their] virtue" and "whose reputation for justice was high in the eyes of the people."<sup>416</sup> By Locke's time, such natural leaders had been taught "to have distinct and separate interests from their people" because they identified justice not with the needs of their particular polity but with a universal religious teaching.<sup>417</sup> From the Christian perspective, justice cannot vary with the needs of the regime but takes on the character of a fixed, eternal law.<sup>418</sup>

Outside of public view, Locke was candid about his disapproval of prevailing Christian beliefs and his distrust of religious authority. He thought universal religion distorted and disrupted political life. "[H]ad man kinde noe concernments but in this world [and] noe apprehension of any being after this life," Locke wrote in his journal, people would "trouble their heads" with only "an enquiry into the qualitys of the things in this mansion of the universe which hath fallen to their lott" and "direct[] their thoughts to the improvement of such arts and inventions . . . as might best contribute to their continuation in it with conveniency and delight."<sup>419</sup> In an early, unpublished work, Locke observed that "those flames that have made such havoc and desolation in Europe, and have not been quenched but with the blood of so many millions, have been at first kindled with

<sup>414</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. VIII, § 111.

<sup>415</sup> 1 HOOKER, *supra* note 135, at 52 n.3.

<sup>416</sup> CICERO, DE OFFICIIS 211 (Walter Miller trans., McMillan Co. 1913) (44 B.C.E.), available at <http://books.google.com/books?id=H4u1pu9GpUUC> ("If the people secured their end at the hands of one just and good man, they were satisfied with that; but when such was not their good fortune, laws were invented, to speak to all men at all times in one and the same voice.").

<sup>417</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. VIII, § 111.

<sup>418</sup> "[O]n account of the uncertainty of human judgment . . . different people form different judgments on human acts; whence also different and contrary laws result," writes Aquinas. AQUINAS, *supra* note 134, pt. II-I, q. 91, art. 4. "In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err." *Id.*

<sup>419</sup> JOHN LOCKE, *Understanding, in AN EARLY DRAFT OF LOCKE'S ESSAY TOGETHER WITH EXCERPTS FROM HIS JOURNALS* 84, 85–86 (R.I. Aaron & Jocelyn Gibb eds., Clarendon Press 1936) (1677).

coals from the altar”; he speculated “how much it might conduce to the peace and security of mankind if religion were banished the camp and forbid to take arms . . . [and] if men would suffer one another to go to heaven every one his own way.”<sup>420</sup> He left the reader to judge “how much I say if such a temper and tenderness were wrought in the hearts of men our author’s doctrine of toleration might promote a quiet in the world.”<sup>421</sup>

When claims to moral truth transcend the needs of the polity, religious loyalties may undermine the social order. Against Aristotle’s advice, justice will be measured according to supernatural standards rather than according to nature.<sup>422</sup> Citizens will follow and become dependent upon those authorities with privileged access to religious teaching.<sup>423</sup> Before universal religion, writes Hobbes:

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<sup>420</sup> JOHN LOCKE, *From: ‘Question: Whether the Civil Magistrate May Lawfully Impose and Determine the Use of Indifferent Things in Reference to Religious Worship. Answer: Yes’ (First Tract on Government, 1660), in POLITICAL WRITINGS 141, 144–45 (David Wootton ed., 2003).*

<sup>421</sup> *Id.* at 145. The full passage reads:

All those flames that have made such havoc and desolation in Europe, and have not been quenched but with the blood of so many millions, have been at first kindled with coals from the altar, and too much blown with the breath of those that attend the altar, who, forgetting their calling, which is to promote peace and meekness, have proved the trumpeters of strife and sounded a charge with a ‘curse ye Meros’. I know not therefore how much it might conduce to the peace and security of mankind if religion were banished the camp and forbid to take arms, at least to use no other sword but that of the word and spirit, if ambition and revenge were disrobed of that so specious outside of reformation and the cause of God, were forced to appear in their own native ugliness and lie open to the eyes and contempt of all the world, if the believer and unbeliever could be content as Paul advises to live together, and use no other weapons to conquer each other’s opinions but pity and persuasion (i Cor. 7), if men would suffer one another to go to heaven every one his own way, and not out of a fond conceit of themselves pretend to a greater knowledge and care of another’s soul and eternal concerns than he himself, how much I say if such a temper and tenderness were wrought in the hearts of men our author’s doctrine of toleration might promote a quiet in the world, and at last bring those glorious days that men have a great while sought after the wrong way, I shall leave everyone to judge.

*Id.* at 144–45.

<sup>422</sup> See *supra* notes 389–92 and accompanying text.

<sup>423</sup> Carnes Lord describes the Machiavellian critique of Christianity:

For Machiavelli, Christianity is the extreme and therefore paradigmatic case of successful fraud in politics. The Christian religion attempts to hold men to impossible standards of behavior through the promise of rewards and punishments that are (he assumes) impossible of delivery. Yet the promise is highly effective—up to a point—in attaching men’s loyalties to the princes of the Church and the secular rulers who de-

[S]ubjects did not measure what was just by the sayings and judgments of private men, but by the laws of the realm; nor were they kept in peace by disputations, but by power and authority. Yea, they revered the supreme power . . . . Therefore they little used, as in our days, to join themselves with ambitious and hellish spirits, to the utter ruin of their state. For they could not entertain so strange a fancy, as not to desire the preservation of that by which they were preserved.<sup>424</sup>

According to Hobbes, the classical regime is no longer possible.<sup>425</sup> Instead, Hobbes advocates the sort of government from which Aristotle recoils. He installs an absolute sovereign to coerce citizens and suppress human nature. He conceives of society as a compact, the sort of polity that Aristotle describes as an alliance rather than a city: where people do not “take thought that the others should be of a certain quality, or that none of those coming under the compacts should be unjust or depraved in any way, but only that they should not act unjustly toward one another.”<sup>426</sup> Hobbes does not want to encourage laws that “make the citizens good and just”<sup>427</sup> because he wants to liberate both the government and its citizens from the prevailing religious standards of goodness and of justice. Accordingly, the Hobbesian sovereign enjoys absolute power unconstrained by Christian ethics; the citizen pursues his individual self-interest freed from the “dejection of mind” that Hobbes believes Christian teaching fosters.<sup>428</sup> What results are more assertive citizens and a more commanding government, with correspondingly less influence for religious author-

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pend on them. But the inevitable failure—or, better, the lack of evident success—in delivering heavenly goods and sanctions is in the end doubly corrupting, and hence destructive, of sensible politics.

Lord, *supra* note 365, at 119.

<sup>424</sup> THOMAS HOBBS, *The Citizen: Philosophical Rudiments Concerning Government and Society*, in *MAN AND CITIZEN (DE HOMINE AND DE CIVE)* 87, 97 (Bernard Gert ed., Hackett 1991) (1651).

<sup>425</sup> Indeed, Hobbes almost ridicules it. He writes of Cato, for example, that “animosity should so prevail instead of judgement, and partiality instead of reason, that the very same thing which he thought equal in his popular state, he should censure as unjust in a monarchical; other men perhaps may have leisure to admire.” *Id.* at 90.

<sup>426</sup> ARISTOTLE, *supra* note 372, 1280b1–4, at 98; *see supra* notes 402–06 and accompanying text. According to Hobbes, men join society for the purpose of “getting themselves out from [the] miserable condition of war.” HOBBS, *supra* note 116, at 129.

<sup>427</sup> ARISTOTLE, *supra* note 372, 1280b11–13, at 98; *see supra* note 404 and accompanying text.

<sup>428</sup> HOBBS, *supra* note 116, at 63; *see supra* note 244 and accompanying text.

ity.<sup>429</sup> Hobbes approximates the particularity of the classical polity, in a way, because the sovereign enjoys supreme authority over his own particular society and does not serve a larger religious mission. As “a right antecedent and paramount to all government,”<sup>430</sup> Hobbes replaces religious truth with a social contract that constitutes society and the enforcement of which is the government’s paramount aim. Yet to those who believe in universal moral truth, the Hobbesian system appears unacceptably relativistic.

Locke retains the eternal law as “a right antecedent and paramount to all government,” though he conflates the law of God with the law of nature, the law of reason, and ultimately a scheme of natural rights to property.<sup>431</sup> Antecedent to government is a contract that aims not simply at self-preservation but at the vindication of property rights that are given to man by nature and that all men are bound by natural law to respect. Those rights remain paramount to all government: “[T]he law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men’s actions, must, as well as their own and other men’s actions, be conformable to the law of nature . . . .”<sup>432</sup> The sovereign, therefore, still defines justice by reference to an eternal law beyond his particular society, but that law now commands attention to the well-being of his people and prohibits their expropriation or abuse.

Locke provides some discretion to the legislator,<sup>433</sup> but because his system responds to the Christian demand for an antecedent and paramount right, the laws correspond to a prepolitical moral code rather than the particular, present needs of the polity. Locke indicates this shift when he distinguishes the “form of government” from the

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<sup>429</sup> Hobbes explains the derivation of his system from the connection between justice and ownership:

[W]hen I applied my thoughts to the investigation of natural justice, I was presently advertised from the very word *justice* (which signifies a steady will of giving every one his *own*), that my first enquiry was to be, from whence it proceeded that any man should call anything rather his *own*, than *another man's*. . . . I found that this proceeded not from nature, but consent (for what nature at first laid forth in common, men did afterwards distribute into several *impropriations*).

HOBBS, *supra* note 424, at 92–93.

<sup>430</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. XI, § 126.

<sup>431</sup> See *supra* notes 66–73 and accompanying text.

<sup>432</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XI, § 135.

<sup>433</sup> See, e.g., *id.* bk. II, ch. V, § 50 (noting that “in governments, the laws regulate the right of property, and the possession of land is determined by positive constitutions”).

larger “commonwealth”—a distinction alien to the classical city.<sup>434</sup> For Locke, the term “commonwealth” signifies “not a democracy, or any form of government; but any independent community, which the Latines signified by the word *civitas*.”<sup>435</sup> To “avoid ambiguity,” Locke writes, “I crave leave to use the word common-wealth in that sense, in which I find it used by king James the first; and I take it to be its genuine signification.”<sup>436</sup> Locke’s reference to the usage of King James I points toward the King James Bible, in which the word “common-wealth” is a translation from the original Greek *politeia*.<sup>437</sup> Moreover, the Latin *civitas*, to which Locke also refers, expresses the meaning of *politeia*.<sup>438</sup>

When Locke uses “commonwealth,” therefore, he means to indicate the regime and to distinguish it from the government. The commonwealth is the political community that is prior to and above any established government.<sup>439</sup> The commonwealth, by the decision of a majority of its members, may proceed to establish whatever “form of government” it prefers. As examples of possible forms, Locke mentions democracy, oligarchy, and monarchy.<sup>440</sup> According to

<sup>434</sup> See *supra* notes 394–401 and accompanying text.

<sup>435</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. X, § 133.

<sup>436</sup> *Id.*

<sup>437</sup> The word appears twice: in the Epistle to the Ephesians and in the apocryphal Second Book of Maccabees. See *Ephesians* 2:12 (King James), available at <http://bit.ly/scq7cS> (“That at that time ye were without Christ, being aliens from the commonwealth of Israel, and strangers from the covenants of promise, having no hope, and without God in the world.”); 2 *Maccabees* 13:14 (King James), available at <http://bit.ly/ucsWpB> (“So when he had committed all to the Creator of the world, and exhorted his soldiers to fight manfully, even unto death, for the laws, the temple, the city, the country, and the commonwealth, he camped by Modin.”).

<sup>438</sup> H.G. LIDDELL & R. SCOTT, GREEK-ENGLISH LEXICON 1240 (9th ed. 1996).

<sup>439</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XIX, § 211 (“That which makes the community, and brings men out of the loose state of nature, into one politic society, is the agreement which every one has with the rest to incorporate, and act as one body, and so be one distinct common-wealth.”). Locke distinguishes between “the dissolution of the society and the dissolution of the government” in a recognizably modern way. *Id.* But that distinction is an innovation on the ancient regime in which

there is no remedy for an unconstitutional act short of actual revolution. . . . [S]uch revolution, when it occurs, is . . . a complete overturn of the state’s institutions, a change in its whole way of life. . . . Aristotle refers to such revolutions as a dissolution of the polities in which they occur.

McILWAIN, *supra* note 395, at 38.

<sup>440</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. X, § 132. Locke identifies the three basic regime types described by Aristotle—democracy, oligarchy, and monarchy—as “form[s] of government.” *Id.* In contrast to the Aristotelean view, Locke

Locke, a society precedes the formation of a government and wields political authority over whatever form of government it chooses to establish.<sup>441</sup> This society delegates its legislative power to a government, but if that power is ever forfeited “by the miscarriages of those in authority . . . it reverts to the society, and 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.”<sup>442</sup> The commonwealth does not forfeit its authority; its purpose is to provide a common life for persons united by agreement and affection.<sup>443</sup> It is separate from the particular forms of rule.

The distinction between “form of government” and “commonwealth” is recognizable as the modern liberal division between state and society, and it is characteristic of liberal constitutionalism in which the fundamental constitution of society constrains the authority of the government. This feature distinguishes the Lockean commonwealth from the classical regime, which viewed the city as a whole.<sup>444</sup>

But the commonwealth is not indifferent to the character of the citizen. That character is shaped not by positive laws but by the natural law, the prepolitical social ethos that defines the distinctive virtues

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maintains that the forms of government are subject to a superior authority: “the whole power of the community,” which reposes in the majority. *Id.*

<sup>441</sup> *Id.*; see also Jeremy Rabkin, *Grotius, Vattel, and Locke: An Older View of Liberalism and Nationality*, 59 REV. POL. 293, 317 (1997) (“It is not a political constitution that makes a nation, in Locke’s account, but the prior existence of a nation that makes it possible to have a liberal constitution.”).

<sup>442</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XIX, § 243.

<sup>443</sup> *Id.* (“The power that every individual gave the society, when he entered into it, can never revert to the individuals again, as long as the society lasts, but will always remain in the community; because without this there can be no community, no commonwealth, which is contrary to the original agreement.”). The commonwealth is formed not simply by political compact but by underlying social bonds. See *id.* bk. II, ch. VIII, § 107 (“[T]hose, who liked one another so well as to join into society, cannot but be supposed to have some acquaintance and friendship together, and some trust one in another.”); see also Rabkin, *supra* note 441, at 306 (“Locke takes for granted that a political society does rest on social affinities, which are prior to, and deeper in some ways, than political consent to a particular government.”). The aim of a commonwealth is “to be preserved one intire, free, independent society, to be governed by its own laws.” LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. XIX, § 217. It dissolves only when it can no longer exist as an independent body, as when a society is conquered and dispersed by a foreign power. *Id.* bk. II, ch. XIX, § 211.

<sup>444</sup> See Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2009 SUP. CT. REV. 293, 340 (noting that the “social compact theory of John Locke . . . posits a strict separation between the state and its citizens” and therefore “projects a mirror image of the ancient Greek relationship between the individual and the state”).

of the liberal regime.<sup>445</sup> Commerce and property rights play a central role in acculturating citizens toward the liberal virtues.<sup>446</sup> In a Lockean society, citizens embrace norms of equality and consent, and they celebrate industriousness, innovation, and material production.<sup>447</sup> These norms, based on a prepolitical natural law, provide a new standard of justice to govern social and political life.<sup>448</sup>

### C. *Liberalism and the Social Virtues*

The liberal regime is not indifferent to the character of its citizens, as some have suggested,<sup>449</sup> though its government may be. In

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<sup>445</sup> See generally PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (2000); Ronald Beiner, *The Liberal Regime*, 66 CHI.-KENT L. REV. 73 (1990).

Liberalism, no less than socialism, feudalism, or any other social order, is a global dispensation, that is, a way of life that excludes other ways of life. It does no good for the liberal to say that the liberal state is neutral between the diverse life-choices of individuals. Is it neutral about continual growth and higher productivity? Is it neutral about scientific progress? Is it neutral about the market as a means of maximizing consumer choices? The fact that all of this supposedly enhances the prerogatives of individuals in the design of their life-options is what actually defines this dispensation rather than showing that there is none.

*Id.* at 84–85.

<sup>446</sup> See Suzanna Sherry, *Without Virtue There Can Be No Liberty*, 78 MINN. L. REV. 61, 71 (1993) (“[T]he right to property, which we would consider a paradigmatic individual right against the community, was viewed differently by the founding generation. . . . Land ownership both allowed citizens to cultivate virtue and independence, and tied them to their communities.”); David Lewis Schaefer, *Locke’s Troubling Legacy*, 51 REV. POL. 125, 126 (1989) (book review).

[T]he Founders’ thought embodies a radically new conception of the *sort* of virtue that good government requires, as compared with the classical, and traditional Christian, views. While deemphasizing aristocratic pride, military courage, and Christian meditation or asceticism, [the American Founders] . . . sought to encourage “moderation,” . . . Central to this goal was the promotion of commerce and of practically oriented scientific innovation, not only for their effect in raising the general standard of living, but, more importantly, as a means of encouraging a sober and rational patriotism, based on what Tocqueville was later to term “the principle of self-interest rightly understood.”

*Id.*

<sup>447</sup> See *supra* Part IV.

<sup>448</sup> Locke’s “constitutionalism is not merely materialistic, for it does respect the form of man in the state of nature. It is based on an original, perfect democracy of men equal in the state of nature.” Mansfield, *supra* note 364, at 17; cf. LOCKE, *TWO TREATISES*, *supra* note 48, bk. II, ch. II, § 12 (“[T]he municipal laws of countries . . . are only so far right, as they are founded on the law of nature.”).

<sup>449</sup> See, e.g., JOHN DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* 16 (1984) (“Between Machiavelli and Locke lies the dilemma of American politics. Classical political philosophy aims to discipline man’s desires and raise him far above his vulgar wants; liberalism promises

Locke's view, norms and social attitudes are a greater constraint on human behavior than positive laws or even religious teaching. In *An Essay Concerning Human Understanding*, Locke contrasts three alternative "moral rules" that may lead men to keep their compacts: the Christian, based upon divine command; the Hobbist, based upon the civil law; and that of "the old heathen philosophers," based upon virtue.<sup>450</sup> Locke argues that the Christian and Hobbist alternatives are unreliable. Men outwardly profess allegiance to rules that are "sacred," Locke writes, but their actions demonstrate that such rules do little to govern them.<sup>451</sup> Civil law is also unreliable: "Ignorance or doubt of the law, hopes to escape the knowledge or power of the lawmaker, or the like, may make men give way to a present appetite."<sup>452</sup>

Locke's discussion supports the classical alternative: the view that each society must cultivate its own necessary virtues and shape individual conscience. Men may "come to assent to several moral rules, and be convinced of their obligation," Locke writes, "from their education, company, and customs of their country; which persuasion, however got, will serve to set conscience on work, which is nothing else but our own opinion or judgment of the moral rectitude or pravity of our own actions."<sup>453</sup> Even those who are not so persuaded remain subject to social pressure: "men may sometimes own rules of morality which, in their private thoughts, they do not believe to be true, only to keep themselves in reputation and esteem amongst

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to realize desires and satisfy wants. The first is more noble, the second more attainable."); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 262 (1996) ("[B]y abandoning the ambition of inculcating certain habits and dispositions, [liberalism] denied government a stake in the moral character of its citizens and affirmed the notion of persons as free and independent selves."); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 1002 (1990) (noting that Locke "is considered the most influential thinker to have separated issues of personal virtue from political philosophy" such that for Locke the character of the citizen "loses its status as an integrated part of a whole concept of justice" in contrast to the classical view that "the virtues are all encompassed in the broad justice of obedience to the laws of a good state"). *But see* LOCKE, *HUMAN UNDERSTANDING*, *supra* note 92, at 29 ("God ha[s], by an inseparable connexion, joined virtue and public happiness together, and made the practice thereof necessary to the preservation of society . . .").

<sup>450</sup> LOCKE, *HUMAN UNDERSTANDING*, *supra* note 92, at 29.

<sup>451</sup> *Id.* (noting that "self-interest and the conveniences of this life make many men own an outward profession" of sacred rules, but their "actions sufficiently prove that they very little consider the Law-giver that prescribed these rules").

<sup>452</sup> *Id.* at 33.

<sup>453</sup> *Id.* at 30.

those who are persuaded of their obligation.”<sup>454</sup> Men will not disown a law “where fear of shame, censure, or punishment carries the mark of some awe it has upon them.”<sup>455</sup> Different societies exert different pressures and encourage different moral rules and virtues.<sup>456</sup>

Locke later makes his view of morality more explicit when he contrasts three types of law: the divine law, the civil law, and the “law of reputation or opinion,” which Locke also calls “[p]hilosophical law, the measure of virtue and vice.”<sup>457</sup> In explaining the philosophical law, Locke discounts the religious conception of virtue and vice; he argues that virtue varies with the needs and mores of each society:

“Virtue” and “vice” are names pretended and supposed everywhere to stand for actions in their own nature right and wrong . . . . But yet, whatever is pretended, this is visible, that these names, “virtue” and “vice,” in the particular instances of their application, through the several nations and societies of men in the world, are constantly attributed only to such actions as in each country and society are in reputation or discredit. . . . 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.<sup>458</sup>

Locke addresses the criticism that private censure cannot properly be termed a “law.” According to Locke, man’s sociality, his desire for social acceptance and esteem, is stronger than the dictates of other-worldly religion or positive law:

[H]e who imagines commendation and disgrace not to be strong motives to men to accommodate themselves to the opinions and rules of those with whom they converse, seems little skilled in the nature or history of mankind: the greatest part whereof he shall

<sup>454</sup> *Id.* at 32.

<sup>455</sup> *Id.*

<sup>456</sup> LOCKE, HUMAN UNDERSTANDING, *supra* note 92, at 29 (“[T]he great variety of opinions concerning the moral rules . . . are to be found among men according to the different sorts of happiness they have a prospect of, or propose to themselves.”). Locke writes that “there is scarce that principle of morality to be named, or rule of virtue to be thought on . . . which is not, somewhere or other, slighted and condemned by the general fashion of whole societies of men, governed by practical opinions and rules of living quite opposite to others.” *Id.* at 32.

<sup>457</sup> *Id.* at 280.

<sup>458</sup> *Id.* at 280–81; *see also id.* at 281 (“Virtue is everywhere that which is thought praiseworthy; and nothing else but that which has the allowance of public esteem is called ‘virtue.’ . . . This is the language of the heathen philosophers, who well understood wherein their notions of virtue and vice consisted.”).

find to govern themselves chiefly, if not solely, by this law of fashion; and, so they do that which keeps them in reputation with their company, little regard the laws of God or the magistrate. . . . He must be of a strange and unusual constitution, who can content himself to live in constant disgrace and disrepute with his own particular society. Solitude many men have sought, and been reconciled to: but nobody that has the least thought or sense of a man about him, can live in society under the constant dislike and ill opinion of his familiars, and those he converses with. This is a burden too heavy for human sufferance: and he must be made up of irreconcilable contradictions, who can take pleasure in company, and yet be insensible of contempt and disgrace from his companions.<sup>459</sup>

To Locke, credit and reputation represent no less than “[t]he principal spring from which the actions of men take their rise, the rule they conduct them by, and the end to which they direct them.”<sup>460</sup>

For Locke, it is the law of reputation or opinion that determines the character of society: “this makes merchants in one country and soldiers in another; this puts men upon school divinity in one country, and physic or mathematics in another; this cuts out the dresses for the women, and makes the fashions for the men; and makes them endure the inconveniences of all.”<sup>461</sup> Thus, despite his insistence in *Two Treatises* that government must be by “established standing laws,”<sup>462</sup> Locke recognizes that he who “would govern the world well, had need consider rather what fashions he makes than what laws; and to bring anything into use he need only give it reputation.”<sup>463</sup>

In *Two Treatises*, Locke follows his own advice. By bringing industry into social repute, and sanctifying property with natural law, Locke establishes a new commercial regime in place of traditional society. Through his theory of property, he obliges cities and palaces to

<sup>459</sup> *Id.* at 282–83. Locke’s argument recalls Aristotle’s observation that “man is by nature a political animal.” ARISTOTLE, *supra* note 372, 1253a2–3, at 37; *see also* LOCKE, HUMAN UNDERSTANDING, *supra* note 92, at 282–83 (“[N]o man escapes the punishment of their censure and dislike who offends against the fashion and opinion of the company he keeps, and would recommend himself to.”).

<sup>460</sup> JOHN LOCKE, *Credit, Disgrace*, in POLITICAL WRITINGS, *supra* note 420, at 236, 236 (1678) [hereinafter LOCKE, *Disgrace*].

<sup>461</sup> *Id.*; *see also id.* at 237 (“Where power, and not the good exercise of it, gives reputation, all the injustice, falsehood, violence and oppression that attains that [i.e. power] goes for wisdom and ability. Where love of one’s country is the thing in credit, there we shall see a race of brave Romans; and when being a favourite at court was the only thing in fashion, one may observe the same race of Romans all turned flatterers and informers.”).

<sup>462</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. II, ch. IX, § 131; *id.* ch. XI, § 137.

<sup>463</sup> LOCKE, *Disgrace*, *supra* note 460, at 237.

“keep right by following nature.”<sup>464</sup> He establishes a civil religion, based upon his own creation myth and couched in the language of Christian natural law, that will unite the interests of governors and citizens and that will liberate minds from subservience to priests.<sup>465</sup> Locke’s new law of reputation or opinion, however, is antecedent to government and therefore governs the lawgivers as well as citizens. In this way, Locke applies a classical understanding of politics modified to meet the challenge posed by Christianity.

#### VI. CONCLUSION: LOCKE AND LIBERAL CONSTITUTIONALISM

The Greek *politeia* is often called the “constitution” of the classical city because it constitutes the polity.<sup>466</sup> “For Aristotle, the constitution is more fundamental than the laws, not as a higher law that can be appealed to against the laws but as the fundamental political fact that shapes the laws.”<sup>467</sup> The ancient constitution encompassed the whole social regime, including social bonds and mores as well as the form of government.<sup>468</sup> By separating the regime from the form of government—making the regime prior to the government—Locke introduces the recognizably modern idea of “constitutionalism” as a constraint on government.<sup>469</sup> Locke’s constitutionalism identifies a fundamental law, a scheme of prepolitical natural rights, that constrains government action and ordinary legislation. But Locke also appreciates the emphasis upon social mores and character formation that characterized the classical regime.<sup>470</sup> The Lockean idea of prop-

<sup>464</sup> LOCKE, TWO TREATISES, *supra* note 48, bk. I, ch. VI, § 58.

<sup>465</sup> Cf. Lord, *supra* note 365, at 119–20 (arguing that Machiavelli offered a “countertheology” that “is intended to improve on and eventually supplant the Christian message”). Lord argues that Machiavelli’s rhetoric “served the serious purpose of preparing the ground for the emergence of a public philosophy or ideology that could contend with Christianity as the basis of modern politics,” but he suggests that more “direct historical impact” was achieved by “John Locke, who couched an arguably Machiavellian teaching in the language of Christian natural law.” *Id.* at 120–22.

<sup>466</sup> See MCILWAIN, *supra* note 395, at 26 (“Of all the varied meanings of which our word ‘constitution’ is susceptible, the Greek *politeia* conforms to one of the most ancient. . . . It is a purely descriptive term, and as inclusive in its meaning as our own use when we speak generally of a man’s constitution or of the constitution of matter.”).

<sup>467</sup> Nathan Tarcov, *Ideas of Constitutionalism Ancient and Modern*, in THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM 11, 17 (Steven Kautz et al. eds., 2009).

<sup>468</sup> See *supra* notes 394–401 and accompanying text.

<sup>469</sup> See WARD, *supra* note 86, at 115 (“Locke appears to have envisioned something like the liberal principle of constitutional supremacy over ordinary legislative power.”).

<sup>470</sup> See *supra* Part V.C.; cf. Tarcov, *supra* note 467, at 14 (“Insofar as Platonic constitutionalism depends on character and education as well as on countervailing institu-

erty rights undergirds not only a legal regime but also a sort of social ethos.<sup>471</sup>

The connection between property and political liberty is a significant aspect of the American legal tradition.<sup>472</sup> Property rights protect not only the person of the individual against the state, but also his conscience against established orthodoxy. “Can it be reasonable that he that cannot compel me to buy a house should force me his way to venture the purchase of heaven?” asks Locke.<sup>473</sup> “That he that cannot in justice prescribe me rules of preserving my health should enjoin me methods of saving my soul?”<sup>474</sup> The right to control objects in the external world is the formal embodiment of the individual’s sovereignty over his own person and mind. By creating a fence around each individual, property “serves as a metaphor for liberalism—a political regime organized around rights, to keep off-limits from the government the power to compel citizens to follow any one contestable theory of virtue.”<sup>475</sup> Madison illustrates the connection in Federalist 10 when he argues that “the first object of government” is the protection of the “diversity in the faculties of men, from which the rights of property originate.”<sup>476</sup> Protecting property is ultimately about pro-

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tions to preserve rule of law and prevent tyranny, it thereby depends on cultural character-formation.”).

<sup>471</sup> As legal scholars have recognized, “[T]he recognition of legal rights in property structures social relations.” JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 14 (2000). See generally Jane B. Baron, *The Contested Commitments of Property*, 61 *HASTINGS L.J.* 917 (2010).

<sup>472</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing “one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others”); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (“[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.”); *United States v. Perkins*, 163 U.S. 625, 627 (1896) (“[T]he laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses.”). See generally JAMES W. ELY, *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (1998) (“[T]he protection of property ownership was an integral part of the American effort to fashion constitutional limits on governmental authority.”).

<sup>473</sup> JOHN LOCKE, *An Essay Concerning Toleration* (1667), in *POLITICAL WRITINGS*, *supra* note 420, at 186, 188–89 [hereinafter LOCKE, *Toleration*].

<sup>474</sup> *Id.*

<sup>475</sup> Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 *CORNELL L. REV.* 889, 892 (2009).

<sup>476</sup> *THE FEDERALIST* No. 10 (James Madison).

protecting the faculties of mind that allow one to acquire it.<sup>477</sup> As Margaret Jane Radin has observed, “[T]o achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.”<sup>478</sup>

While certain “object relations,” as Radin puts it, are necessary to “self-constitution,”<sup>479</sup> the institution of property itself and the cultural norms it fosters shape the character of citizens on a social scale.<sup>480</sup> When Tocqueville visited America, he concluded that “[t]here is no country in the world where the sentiment for property shows itself more active and more restive than in the United States,” and the jealousy with which Americans held their property made them resist political upheaval that would “threaten to alter the constitution of goods.”<sup>481</sup> In this way, Lockean rights of property conduce to social

<sup>477</sup> Kenneth Minogue notes “a significant continuity between property understood as ownership of productive capital and property understood as personal characteristics, a point that haunts the literature and is recognized in Locke’s famous remark that ‘Every man has a property in his own person.’” Minogue, *supra* note 358, at 12; see also E.J. Hundert, *The Making of Homo Faber: John Locke Between Ideology and History*, 33 J. HIST. IDEAS 3, 9 (1972) (describing Locke’s view that “[o]ne’s property was the extension of self by virtue of the injection of personality into nature through work”).

<sup>478</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

<sup>479</sup> *Id.* at 967.

<sup>480</sup> See William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES 170, 173–74 (Amitai Etzioni ed., 1995).

As Tocqueville saw it, it was the institutional order, the patterns of normative, sanctioned interaction themselves, which worked through daily life to shape the imagination and character of the citizens. That is, institutionalized mores linked market, state, and civil society into the mutually reinforcing whole Tocqueville identified as American democracy. Besides individual consciousness and social interaction, human life also entails shared, socially sanctioned patterns of purpose. These are the institutional forms of family, school, religious congregation, business firm, and club, which structure the patterns of everyday life.

*Id.* Like Locke, Tocqueville emphasized social attitudes. In a democratic society, “public favor seems as necessary as the air that one breathes, and to be in disagreement with the mass is, so to speak, not to live,” he writes. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 615 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1835). “[The mass] does not need to use the laws to bend those who do not think like it. It is enough for it to disapprove of them.” *Id.*; see *supra* Part V.C.

<sup>481</sup> TOCQUEVILLE, *supra* note 480, at 610. “[T]heories that are revolutionary by their nature, in that they cannot be realized except by a complete and sometimes sudden change in the state of property and of persons, are infinitely less in favor in the United States than in the great monarchies of Europe,” Tocqueville observes. *Id.* “If a few men profess them, the mass repels them with a sort of instinctive horror.” *Id.*

peace because people view politics in terms of their material well-being. This political culture developed from the Lockean story about the origins of property and the pre-political nature of property rights. The idea of property in American life began “not with Locke the philosopher or Locke the political theorist, but with Locke the storyteller,” as Mary Ann Glendon has written.<sup>482</sup> “Property acquired its near-mythic status in our legal tradition, in part, because the language and images of John Locke played such a key role in American thinking about government.”<sup>483</sup>

While a Lockean conception of property helps to entrench political liberalism and to prevent authoritarianism or theocracy, it may also undermine the spirit of community that was central to the classical regime.<sup>484</sup> The idea of the Lockean social contract “underplays the significance of belonging to a community,” writes Hanoch Dagan.<sup>485</sup> The social vision it inspires “perceives our membership [in a political community] in purely instrumental terms, and insists that our mutual obligations as members of such a community should be derived either from our consent or from their being to our advantage.”<sup>486</sup>

This is not quite Locke’s position; Locke recognizes and relies upon human sociability.<sup>487</sup> He places the inculcation of “moral virtues and vices” beyond the state because the property-rights regime fosters the necessary virtues through acculturation and by linking social arrangements to self-interest. Lawmakers may safely “leave the practice of them entirely to the discretion and consciences of his people” because the moral virtues and vices are “a means to settle or disturb men’s peace and properties” and, through the formal institutions of property, to promote “the weal of the public.”<sup>488</sup> But the property-rights regime promotes certain social norms at the expense of others, such as an orientation toward commerce and individualism rather than religious piety and community.<sup>489</sup> As Glendon argues,

<sup>482</sup> GLENDON, *supra* note 356, at 20–21.

<sup>483</sup> *Id.*

<sup>484</sup> *See supra* Part V.A.

<sup>485</sup> Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 771 (1999).

<sup>486</sup> *Id.* at 771–72.

<sup>487</sup> *See supra* Part V.C.

<sup>488</sup> LOCKE, *Toleration*, *supra* note 473, at 195; *cf.* TOCQUEVILLE, *supra* note 480, at 509 (“The particular taste that men of democratic centuries conceive for material enjoyments is not . . . the enemy of regular mores; for good mores are useful to public tranquility and favor industry.”).

<sup>489</sup> *See supra* Part IV.B. Social scientists have long explained the emergence of capitalist society in the West in terms of acculturation. Max Weber, for example, ar-

American society conceives of its principles and interests in terms of individual rights.<sup>490</sup> In her account, the dominance of “rights talk” undermines community, responsibility, and public deliberation.<sup>491</sup>

The moral virtues associated with liberal capitalist society, Daniel Bell has argued, have been eroded by the working of capitalism itself.<sup>492</sup> The “acquisitive impulses” unleashed by consumer culture undermined the moral character marked by “the sober, prudential, delayed gratification of the Protestant ethic.”<sup>493</sup> The “prudential bourgeois culture” surrendered to “cultural modernism.”<sup>494</sup> Whereas religious tradition emphasized the need to restrain human desires and provided continuity with the past,<sup>495</sup> capitalist culture unleashed a ceaseless quest for new satisfactions.<sup>496</sup>

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gued that Protestantism promoted capitalism indirectly: “[not] by encouraging, let alone inventing, the pursuit of wealth, but by defining and sanctioning an ethic of everyday behavior that conduced to economic success.” David Landes, *Culture Makes Almost All the Difference*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* 2, 11 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); see also DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 287–88 (rev. ed. 1996) (1976) (“The impulse to profit and gain is found in all societies, but only in the West did capitalism, as a rational organization of production and the calculable balance sheet of costs, take hold and develop in the extraordinary way that it did.”).

<sup>490</sup> GLENDON, *supra* note 356, at 31 (“In America, when we want to protect something, we try to get it characterized as a right. . . . [W]hen we *especially* want to hold on to something (welfare benefits, a job), we try to get the object of our concern characterized as a property right.”); *id.* at 40 (“Remarkably, the property paradigm, including the old language of absoluteness, broods over this developing jurisprudence of personal rights.”).

<sup>491</sup> See *id.* at 76–171. According to Tocqueville, modern democracy “suggests to men very dangerous instincts . . . it tends to isolate them from one another and to bring each of them to be occupied with himself alone.” TOCQUEVILLE, *supra* note 480, at 419; *id.* at 484 (“Thus not only does democracy make each man forget his ancestors, but it hides his descendants from him and separates him from his contemporaries; it constantly leads him back toward himself alone and threatens finally to confine him wholly in the solitude of his own heart.”).

<sup>492</sup> BELL, *supra* note 489, at 21 (“[T]he Protestant ethic was undermined . . . by capitalism itself.”).

<sup>493</sup> *Id.* at 295. Capitalism as it developed “continued to demand a Protestant ethic in the area of production—that is, in the realm of work—but to stimulate a demand for pleasure and play in the area of consumption. The disjunction was bound to widen.” *Id.* at 75.

<sup>494</sup> *Id.* at 295.

<sup>495</sup> *Id.* at 157.

<sup>496</sup> *Id.* at 34 (“[S]ociety . . . has provided a market which eagerly gobbles up the new, because it believes it to be superior in value to all older forms. Thus, our culture has an unprecedented mission: it is an official, ceaseless quest for new sensibility.”). According to Bell, “The cultural, if not moral, justification of capitalism has become hedonism, the idea of pleasure as a way of life.” *Id.* at 21–22.

Given Locke's presentation of property as an alternative to religious devotion and social control, it should not be surprising that a Lockean regime would erode religious commitments and undermine social ties. Yet Bell points to a possible flaw in the Lockean design. The formal institutions of property and economic exchange call forth particular norms and character traits, but individuals participate in the system because of the rewards they expect to receive, namely, "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."<sup>497</sup> Because society is a means to achieving these individual ends, the end of society is separate from the social good or respect for social institutions and forms. "The trouble with modern constitutionalism," explains Harvey Mansfield, "is that civil liberties and manmade constitutional forms are made subordinate to the natural end that comprises life, liberty, and the pursuit of happiness. They are *means* to that end, not united with it; the form is not united with the end, as in Aristotle's constitutionalism."<sup>498</sup> As Tocqueville noted, people in modern democracies tend to mistrust institutional formalities and "throw themselves impetuously toward the object of each of their desires."<sup>499</sup> If the citizen of the Lockean regime promotes social peace, he does so in pursuit of the rights of man, not in performing the duties of a citizen. His society is organized above all for industry rather than political life.<sup>500</sup>

These effects were not unforeseen. Locke displaced religious orthodoxy with human industry, and the paramount law with fundamental rights. The erosion of community ties that this change effected was also a liberation from established authority. Locke did not

<sup>497</sup> Virginia Declaration of Rights (1776).

<sup>498</sup> Mansfield, *supra* note 364, at 18.

<sup>499</sup> TOCQUEVILLE, *supra* note 480, at 669 ("Men who live in democratic centuries do not readily comprehend the utility of forms; they feel an instinctive disdain for them."). By way of illustration, Edward Banfield observes that Americans pay homage to doctrines of limited government, but "they are also accustomed to thinking that government ought to serve the people in whatever ways they want." EDWARD C. BANFIELD, *Federalism and the Dilemma of Popular Government*, in *HERE THE PEOPLE RULE* 23, 24 (2d ed. 1991). See generally Irving Kristol, *The Disaffection from Capitalism*, in *CAPITALISM AND SOCIALISM: A THEOLOGICAL INQUIRY* 15, 16 (Michael Novak ed., 1979) ("No previous society or civilization—and certainly no church . . . had ever said that commercial transactions should shape the society. They believed rather that society should regulate and shape commercial transactions.").

<sup>500</sup> See 1 KARL MARX, *CAPITAL* 358 n.3 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Charles H. Kerr 1921) (1867) ("Strictly, Aristotle's definition is that man is by nature a town-citizen. This is quite as characteristic of ancient classical society as Franklin's definition of man, as a tool-making animal, is characteristic of Yankeedom.").

explicitly reject Christian teaching, to be sure. He wanted his readers to accept his arguments as an interpretation of authoritative religious teaching in order to achieve social change without sparking a religious backlash. Some readers might note his carefully expressed objections, but others, disposed to accept what appear to be conventional religious views, would adopt Locke's argument and it would become, as it eventually did, the mainstream view. This is how a civic religion develops, Locke recognized. "The greatest part cannot know, and therefore they must believe," he writes.<sup>501</sup> Accordingly, Locke aimed not to overthrow the prevailing faith, but to change it in the direction of a more humane ethics. "[C]ertainly propriety of speech is necessary in a discourse of this nature," Locke writes in *Two Treatises*.<sup>502</sup> The author seeks to appear as consistent with accepted views as possible. If contemporary readers find in Locke a bland reflection of conventional religious doctrine, he would appear to have succeeded. He succeeded so much, in fact, that the once-controversial and revolutionary foundation of modern constitutionalism now appears to be an unremarkable presupposition of the Western tradition.

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<sup>501</sup> JOHN LOCKE, *THE REASONABLENESS OF CHRISTIANITY* 157–58 (John C. Higgins-Biddle ed., Oxford Univ. Press 1999) (1695).

<sup>502</sup> LOCKE, *TWO TREATISES*, *supra* note 48, bk. II, ch. VIII, § 109.