

## Disobedient Locke

First, natural law, state of nature, the objective, correct, moral law governing all things and all peoples. Then, government, political societies, particular authorities that can create positive law. Starting with one, we are meant to reach the other. Whether we do, and how we do, depends, of course, on our understanding of both natural law and government. We have seen the somewhat uncertain basis Locke gives himself in natural law. Now we have to see what he can erect on this by way of government. We have to examine how or whether he can use the law that he has propounded in order to provide a legitimate basis for states, governments, political authorities.

This is one problem, the problem of political obligation. In fact, Locke has a double problem. As well as the problem of obedience, he also has the problem of disobedience. Both have to be justified. Yet the two problems are not only contrasting but also potentially conflicting. The general structure of the answer to the first problem – the problem of why we should obey – is to make use of the idea of a social contract or agreement. As with the earlier users of this device we have examined, the answer to why we are subject to government is that we subject ourselves. By consent or agreement, we construct a political society and bind ourselves to obey its government.

However, this is only the first of Locke's problems. This much is roughly similar to Hobbes (and Grotius and Pufendorf). For them, as we have seen, the result of subjecting ourselves is liable to be absolute government. We create a terrifying Leviathan we cannot subsequently

avoid. However, as we also noted, Locke's overall project is in fact the converse of Hobbes's project. Hobbes wants to show why we have to obey. Locke also wants this, but he wants as well to show why and when we have to disobey. Leviathan is to be controlled; these natural law and social contract materials have also to provide an argument for the limits of government. Yet an argument that successfully grounds obedience may find disobedience difficult, while one that secures disobedience may find obedience a problem.

Locke therefore has to produce an account of political obligation that also displays its limits. In doing so, he has to show why people would ever want to subject themselves to political authority, what counts as such subjection, and what the limits of such subjection are. Obviously, in terms of what counts as subjection, he wishes to use the idea of contract – that is of an act of subjection. However, we have to look at what counts as such an act, and whether or how it exists in the modern state. As we saw in the last chapter, justification by contract is justification by particular historical facts, and so precisely what is justified by such facts or acts depends upon the precise nature of the facts or acts themselves. This is difficult enough, but it is still not the whole of the problem. An act of subjection cannot be the end as well as the beginning of the matter. Somewhere, Locke also has to find a way out – that is, an explanation of where subjection ends. For this, we need to understand what is implied by subjection, what sorts of subjection are possible. There are not only acts but also meanings. There is not only what people have done but also whether they were entitled to try. Again, this involves examining the point, nature, and conditions of the original subjection.

### Consent

Consent is obviously central, and so it is with consent we start. 'When any number of men have so consented to make one community or government', says Locke, 'they are thereby presently incorporated and make one body politic' [*Second Treatise*, Sec. 95]. 'Presently' here means immediately. The act of consent in itself constructs a single corporation or political body. 'For', as Locke goes on, 'when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body with a power to act

as one body'. So, just as with Hobbes, we get here a unified, artificial, entity created by agreement. Notice that it has to be the agreement of every single person. So for each particular person, unless he or she individually agrees they are not bound to this body. 'And thus', Locke concludes, 'every man by consenting with others to make one body politic under one government puts himself under an obligation' [Sec. 97]. So here is the obligation, which, as before, is constructed by consent.

When making these remarks, Locke also says that each person has also consented to the idea that the decisions of this political society should be made by majority of its members. For him, what the majority decides has to be taken as the decision of the whole body. Otherwise the body would not be able to make any decisions unless all were unanimous, which, as Locke says, 'is next impossible ever to be had' [Sec. 98]. So there are actually two stages in the account, one in which unanimous consent is required and one not. To construct the political society in the first place, we need unanimous consent. No one can be bound to a society to which they did not individually consent. However, once we have the society to which the individual has consented, its decisions can then be decided by the majority. At the second stage, you can be bound by decisions to which you did not yourself agree, but this is only because you did agree to be bound to a society in which that was the inevitable decision procedure. Or, to put it another way, there is unanimous consent to be bound by majority decision.

This, if Locke is right, is only one of the hidden meanings or implications of consent. Others will follow. However, let us start with the consent itself, which Locke proposes as a necessary condition of legitimate government. 'The consent of any number of freemen', he says, 'is that, and that only, which did, or could give beginning to any lawful government in the world' [Sec. 99]. So it is clear that for Locke, no one can be 'subjected to the political power of another without his own consent' [Sec. 95]. However, the first problem is where this leaves us with respect to the natural law. We saw in the last chapter that for Locke, this is a law, but also that for him there is only a law if there is a law-maker. So far, so good. The maker of the natural law is God. Now, we are subject to the natural law (or to God, its law-maker). We have to do what it (or he) says, and we are rightfully subject to punishment if we don't. So we are subject. But did we subject ourselves? Or is God's

government not legitimate? It existed before we were born, and is true whether we like it or not. We seem to have here in Locke a case of legitimate subjection, by birth and independent of our consent.

One way to meet this problem would be to understand Locke as limiting his remarks to government on earth. Different rules apply for God and heaven. However, if God's creation of us is taken to give him legitimate authority over us, from birth and independently of our consent, then Locke needs to be careful how he resists Filmer's claim that parents have political authority over their children. As we saw, he does this by denying that parents create children. However, he would be more secure in resisting this and other arguments aligning political and filial obligation (such as that in both cases we have benefited from care and support) if he could maintain his claim that legitimate government always depends upon mature consent. Yet, since this is a universal claim, it should work for divine as well as merely terrestrial government.

The alternative way to resist the problem would be to claim that God does not have political authority, and so although the law of nature comes from a divine law-maker, this should not be thought of as divine government. In fact, at least in the *Reasonableness of Christianity*, Locke may just have enough wriggle room for this. Here he talks both about God's natural law, true at all times and places, and also the kingdom of Christ. This kingdom, admittedly a kingdom more prominent for Locke than it is for us, is also one in which we become subjects by subjecting ourselves. Faith for Locke is the acceptance of the kingdom of Christ. Locke says here that the point of Christ's coming 'was to be a king, and, as such, to be received by those who would be his subjects' [p. 113].

The old problem of God and the natural law is whether it is true because of its content or because of its source. Does God will it because it is good, or is it good because God wills it? Locke, like Pufendorf, takes a middle position. It is true because its content follows from the eternal nature of God, but God's will gives it its power. What does revelation add to this? Well, if by faith we accept Christ, then we accept him as a law-maker. He reveals to us a law, which we are then commanded to follow. We believe this is the right thing to do, not because it seems right to us in its content (we have failed to find the right content by our unaided reason) but rather because we accept him as a God and



ruler of a divine kingdom. In fact, for Locke, what Christ commands is the same as the natural law, which we could reach by our unaided reason. But this is not why we accept it. So here is the difference between the Christians and the heathen: same law, different grounds for acceptance.

This makes the rule of Christ political. As we have seen, the characteristic of political authority is that things are accepted because of their source rather than their content. If we are politically obliged, then we are obliged to do whatever the authority says, independently of its content. The source is sufficient. So Locke's claim could be put in general terms as that whenever I have a reason for action that derives from a source, this is because I have already chosen or consented to subject myself to this source. I have many reasons for action. Sometimes actions are good for me; sometimes actions are the right thing to do (the eternal, immutable, natural law). However, as well as these, I sometimes have the reason that I am commanded by political authority. This command will only provide a reason if the authority is legitimate, and for Locke it is only legitimate if I have consented to it. This is true for him for all kingdoms on earth, but may also be true of the kingdom of Christ. It legitimately provides me with reasons only if I accept, by faith, Christ as a law-maker.

### The Need for Government

So that is how we get ourselves obliged (or, at least, how we get obliged to earthly authorities). The next question is why anyone would wish to do this. And here also Locke has a clear and repeated answer. It is to protect our property. As he puts it, someone 'seeks out, and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name *property*' [Sec. 123]. Or, more succinctly, 'the chief and great end therefore of men's uniting into commonwealths and putting themselves under government is the preservation of their property' [Sec. 124]. It is clear from the first of these remarks that Locke, at least sometimes, uses 'property' in a rather wider sense than the standard one. However, the point for him, unlike some other political philosophers, cannot be that we need government in order to have property at all (in either the wider or

the more standard sense). This is a reason for Hobbes, who thinks that since there are no real rights without government, there are no property rights and hence no property. The same is true later for Bentham, on the same basis. However, Locke thinks that there are natural rights, independent and antecedent to government. Among these are property rights. So Locke, having a natural right to property, does not need government in order to give us property. The claim is not that without government we would have no property but rather that we need government to 'preserve' it.

In fact, if we remember Locke's state of nature, as briefly described in the last chapter, it becomes a serious question (which Locke asks himself) why people should wish to leave it and subject themselves to government. It is not to get rights or property. Also, as we have seen, among the rights we have without a state is the right to punish. So we don't need government to enforce our rights or render them secure. Furthermore, Locke distinguishes the state of nature from the state of war. So his state of nature is not necessarily one of continually unpleasant, Hobbesian, warfare.

So when Locke starts Chapter II of the *Second Treatise* with the question, 'if man in the state of nature be so free as has been said . . . why will he part with his freedom?' (Sec. 123), this is a real and important question for him. Even if, unlike Hobbes, it is not to get his rights, Locke might nevertheless suggest that life without government has a nasty tendency to be both brutish and short. It is true that Locke does here talk of 'inconveniences' in the state of nature whereby people 'are quickly driven' into political society (Sec. 127). But this is not just general inconvenience, or Hobbesian discomfort. Rather, Locke has here a quite specific and interesting account of the inconvenience of even his un-Hobbesian state of nature. In this account, Locke makes three claims as to why government is to be preferred to the state of nature – that is, three reasons for consenting to government. The first is that the state of nature lacks 'an established, settled, known, law' (Sec. 124). This takes us back to the problem, much discussed in the last chapter, of the knowability of the law of nature. If it can be known, then the state of nature is not defective in this way. However, perhaps it cannot. Locke wavers on knowability. In Chapter 2 of the *Second Treatise*, the state of nature chapter, he bravely declares of the law of nature 'that it is certain there is such a law, and that too as intelligible and plain to a

rational creature and a studier of that law as the positive laws of commonwealths, nay possibly plainer' [Sec. 12]. There are conditions: a creature has to be rational and also has to study it. Nevertheless, Locke does here explicitly claim that (under these conditions) the law of nature is at least as clear and intelligible as the positive laws of particular countries. If this is so, we will not improve the problem of knowledge by getting into government and so gaining such positive laws.

Yet, in the chapter we are presently considering (Chapter 9), Locke seems to make the converse claim, saying that in the state of nature, we 'lack a common measure to decide all controversies'. This latter claim also seems to be the more plausible one. With a particular commonwealth (state), we get an agreed source of law, (normally) an agreed written code that can be consulted, and an agreed adjudication procedure for handling problematic cases. However, the question is not just whether positive, state, law is more obvious than natural law. For Locke thinks that 'the obligations of the law of nature cease not in society' [Sec. 135]. He talks of the 'municipal laws of countries, which are only so far right as they are founded on the law of nature, by which they are to be regulated and interpreted' [Sec. 12]. In other words, natural law binds positive law. So, however clear a particular positive law seems to be, our duty will not be 'plain' unless we can also clearly see that it is not in conflict with natural law, and for this natural law also has to be clear. So if the right thing to do is more 'plain' with government, this cannot be for Locke because government clarifies natural law for us. Locke thinks that there is a natural law that we can know. So the point for him about government and knowledge of the law cannot be, as it is in Hobbes, that there is no way in which we can know God's law, and that we only reach knowledge with human commands. It therefore remains an open question as to whether more knowledge is available with states and governments. There is more clarity about what the law is, but there may be equal uncertainty about whether this law properly promulgates the law of nature, and if it does not, its greater clarity is pointless.

Locke, however, adds a specific reason why people are not good at knowing the law of nature. He first mentions this in the second, state of nature, chapter, and it also occurs in one of the passages of Hooker that he quotes. He repeats it here. It is that people have interests that bias their thoughts. He says that 'though the law of nature be plain

and intelligible to all rational creatures, yet men being biased 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' [Sec. 124]. Here again, he mentions lack of study, but it is interest that is the real killer to the possibility of knowledge. It is another scene in the continuing Lockean tragedy: another example of the constant affirmation of how the law can be known by reason alone to everyone, balanced with an explanation why, as a matter of fact, this possibility is not realised. People could know, but in fact they do not know. Being interested, biased, creatures they are not competent judges in cases that particularly affect them. Whenever they think that they have dealt with unjustly by others, they will not judge correctly.

This runs into the second problem about the state of nature that Locke puts in this chapter. He says that it lacks 'a known and indifferent judge' – that is, one who is impartial between parties. In the state of nature, everyone is, as he puts it, 'both judge and executioner' of the law, so people act as judges in their own cases. Yet to judge in your own case is something standardly taken to be against natural justice. We might put the point as that although there are right answers in the state of nature, it lacks a proper procedure for reaching them. It lacks due process, or procedural natural justice. This is another version of the point that interest biases outcome. People with an interest should not be the judges of the outcome.

According to Locke, 'known and indifferent' judges only come with states. However, again, there seems to be a bit of a shuffle here about the importance of God. After all, the law of nature is supposed by Locke to come from God, and so God sits as a judge over the state of nature. Yet God is a known and indifferent judge. So it would seem that Locke does not need the state in order to acquire a known and indifferent judge. He has God. Presumably the reason that this is not good enough for him is the same as the reason that God's execution of the law of nature is not good enough for him. As we saw, Locke thinks that terrestrial punishment has to be added to divine punishment if the law of nature is to be effective. So here the claim presumably is that without the state, this terrestrial punishment will not be administered by a known and indifferent judge.

States can certainly provide such impartial judges. However, having a state is neither necessary nor sufficient for their terrestrial provision.

Independent arbitrators may be employed by disagreeing parties without having or resorting to states. This can be seen from the relations between independent, sovereign states themselves. These were standardly taken at the time (for example, by both Hobbes and Locke) to be an example of relations between parties in a state of nature. Yet states do not necessarily lack impartial arbitration of their disputes. Even though in the state of nature (or, at least, in a condition analogous to it), they can appeal to third parties or to mutually agreed arbitrators. If states can do this, so may private persons.

Even ignoring God, therefore, it is not necessary to have political society in order to gain what Locke calls a 'known and indifferent' judge. Nor is it sufficient. We may have people incorporated in a political society and yet have a judicial or punishing system that is anything but impartial. It may, for example, favour the groups that happen to have political power, such as members of particular classes or races. So, even if we have government, the argument has to go on. The impartial administration of justice is an obvious advantage. It may be a reason for having states. However, insofar as it is a reason, it is also a reason for having particular kinds of states. Again, in effect, this is part of Locke's hidden message of consent. We will be deemed only to have consented to states that provide this. We wish to be impartially ruled according to known law; for Locke, this rules out rule by an absolute king on the basis that we have not consented to arbitrary rule.

Locke puts his points about impartiality more precisely in terms of achieving the just quantity of punishment for offences. He claims that everyone in the state of nature, 'being both judge and executioner of the law of nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat, in their own cases; as well as negligence and unconcernedness to make them too remiss in other men's' [Sec. 125]. So, again, passion and self-interest leads us astray. We are too hot in our own causes. When our interests are attacked, we over-punish in reply. Alternatively, when we are not involved ourselves, we are liable to be negligent. It might have seemed a good idea to back up the sanctions of God by placing the 'executive power' of the law of nature in everyone. However, the trouble with this is that it is liable to lead to either over-supply or else under-supply of punishment. When we are personally involved, we are liable to be partial, and we get over-supply. Alternatively, if

we are not involved, we are liable to be negligent, and we get under supply.

This possibility of under-supply is an application of public goods problems to the case of punishment. We all benefit, we may suppose, from the proper provision of punishment. Yet in cases where we are not personally involved, it can be seen that we are putting more effort into the provision of this good than we are getting out of it. So the cases in which we would achieve impartial justice in the state of nature – that is, the cases where people disinterestedly take it upon themselves to punish on behalf of third parties – are precisely the cases in which this impartial justice may well not be provided. For disinterested punishers are liable also to be uninterested ones. It is in no one's particular interest to provide the public good of the right levels of punishment, and hence it is not provided. In the state of nature, relying on the uncoordinated actions of independent people, we get under-supply. The answer, as with similar public goods problems, is to have a state that not only co-ordinates actions but also provides officials – that is, provides people who, being paid to do the job, have an interest in the disinterested provision of justice.

Locke's third and last reason for having a state in Chapter II is that 'in the state of nature there often wants power to back and support the sentence when right and to give it due execution' [Sec. 126]. But this again depends upon how serious we take the public goods problem to be. As long as the individual punishing power of people can be co-ordinated and applied, there is certainly power enough. A mob engaged in lynch law may fall foul of Locke's second supposed problem, about whether they are sufficiently impartial to be just. They do not, however, fall foul of Locke's third supposed problem, about lack of power. Individuals in a state of nature, acting together but not under common authority, have sufficient power to retribute or deter. A mob bent on vengeance is quite terrifying enough without its powers being monopolised in, or organised by, a state. Conversely, a state that has not solved the knack of getting people to do what it wants may lack adequate punishing power.

Sometimes there is a lack of power. In particular, weak people who lack the power to punish their injuries by themselves are not likely to be helped by others. However, the general problem is not lack of power but its correct direction and application. Here we do get reasons, based

on justice, for having states. People and property are to be preserved. Such is the requirement of the natural law. So we want a situation in which this law is properly respected and enforced – that is we want a just situation. Locke's argument is that we are more likely to be in this situation if we are in a state (because of better knowledge, greater impartiality, and more power). Notice that the argument in Locke for the state is not a straightforward prudential one, as in Hobbes. It is not that life is too painful in the state of nature. It is, instead, an argument in terms of justice. With states we get more justice; we get better justice. It is a moral argument, an argument based on natural law. Even if it has a consequentialist flavour, the good being maximised is not pleasure and pain, but justice.

### Social Contract

We now have a reason for having states. So we can return to the question of how, or when, these states oblige us. It might seem that we have also solved this – that reasons for having states are also automatically reasons why we are obliged. States are good for us; they give us more justice. Also, once these states exist, they assume that we are obliged. However, for Locke, neither of these is sufficient. For Locke, good reasons for having states do not give us the grounds of our obligation to them. For Locke, as we have seen, we are only obliged if we choose to make ourselves so. So we return to consent and the social contract – that is, to the only legitimate way for Locke in which states can be constructed or in which we can become a member of an already existent state. States are good for us, but this only obliges us if we choose to submit to them. That they are good gives us a reason for such submission, but unless we follow this reason and actually submit, we are not obliged. The advantages in justice that states provide flow from the monopoly of their punishing power. For Locke, this monopoly can only arise if each person alienates their natural right to punish, transferring it to society. This is what is signified by the social contract; it is to this that we consent.

Now, as we have seen, any such consent only obliges insofar as it is an actual historical event. Yet, surveying the current scene, we seem to see political obligation without any such events. We see people and governments and we see the people obeying the governments. But

what we don't see are contracts being signed, or any other actions in which people are explicitly transferring their natural rights to punish to the state. Indeed, in the next century after Locke, David Hume wrote a brilliant essay called 'Of the original contract', in which he says that 'it is strange that an act of mind, which every individual is supposed to have formed, and after he came to the use of reason . . . should be so much unknown to all of them, that, over the face, of the whole earth, there scarcely remain any traces or memory of it' [*Essays* p. 470].

The central question, both when Locke wrote and also today, is the obligation of people, born into settled states, to the governments of these states. There may have been occasional situations or historically distant happenings in which states were created by agreement between independent adults. Locke provides empirical evidence for this, as also for the contemporary existence for collections of individuals still in the state of nature. However, all of this, true or false, is irrelevant to the actual obligation of nearly all current people to current governments. These people have been born into settled states. Whatever happened in the past, the contracts of the parents cannot bind their descendants. So if consent is the source of obligation, people must consent for themselves as adults, at an age of full rationality. These consents have to be actual, particular, historical facts, something that happens in the adult lifetime of each consenting person. In which case, as Hume says, it is surprising that so much consent has been forgotten.

Locke realises that he has to explain what 'shall be understood to be a sufficient declaration of a man's consent, to make him subject to the laws of any government', and here he distinguishes between 'an express and a tacit consent' [Sec. 119]. Perhaps we are on the wrong track by looking for explicit declarations of transfer of rights, all of which seem somehow mysteriously to have been forgotten. Such explicit declarations, if we could find them, would be 'express' declarations of consent. However, perhaps instead we should have been looking for 'tacit' consent. Tacit consent also has to be a particular historical act (or situation, or series of acts). Something has actually to have happened that is understood to imply tacit consent. However, what this is may be much more subtle than what is involved in explicit consent. We may all have been engaged in these tacitly consenting acts and yet have not been aware of them. Sometimes, for example, we may be deemed to have tacitly consented by what we did not do, rather than



what we did. We saw earlier how Locke reads an agreement to majority decision-making into consent to political society. It is not explicit but it is implied; I am deemed to have tacitly consented to it. Similarly, other acts may be deemed to imply tacit consent to government. If this is so, I may not have mysteriously forgotten consenting, as Hume ironically suggests. Rather, it may be that at no time have I been aware that consenting was what I was doing. I thought that I was just minding my own business, or just doing something else, but it turns out that as well I was tacitly consenting to government.

The problem now therefore becomes which other such acts may be properly deemed to be such signs of tacit consent. The weakest sign would be that we don't actively protest. But if this were sufficient for tacit consent, political obligation would come rather easily. At any point I am not actively protesting, I would be deemed to have consented, and so held to be obliged. If this were enough, any would-be political authority would become legitimate whenever we do not have the energy or nerve to oppose it. Several different political authorities might all simultaneously lay claim to me. On this argument, if I don't object explicitly to any of them, then I am obliged to all of them. Obligation comes easily, but so also does disobedience. For, presumably, on the same basis, if I do object, then I am not obliged. So if I want to stop being obliged to a supposed political authority, I merely have to start objecting. Obligation here puffs round like a feather and has no greater value. The central problem of political obligation arises from the fact that if I really am obliged, then I am also obliged at the times when I wish to object and at the times when I am being asked to do things with which I do not agree. We therefore need a more substantial obligation than passive acceptance can provide. In any case, Locke himself distinguishes clearly between 'common practice' and 'common consent' in the *First Treatise* [Sec. 88]; merely going along with things is not sufficient sign of consent.

In the *Second Treatise*, Locke also uses and gives much more explicit signs of tacit consent than merely going along with things, or not objecting to them. In these examples, I am taken to consent tacitly to a political authority if I derive benefit from it. 'Every man that hath any possession of enjoyment or any part of the dominions of any government', he says, 'doth thereby give his tacit consent and is so far forth obliged to obedience to the laws of that government'. The

chief example here is ownership of land in the area controlled by the government, but he also includes ‘lodging only for a week’ and ‘travelling freely on the highway’ [Sec. 119]. Receipt of benefits are often thought to put people under obligations. So, at least at first sight, it would seem to be the receipt of the benefit here that has created the obligation. I benefit from being able to travel freely on the highway. This highway has been constructed and maintained, otherwise I would not be able to use it at all. It is guarded so that I can travel on it in (relative) safety without fear of being stopped or robbed. This benefit has been derived by me from the work or expenditure of others, and so it is plausible to suppose that my taking the benefit puts me under obligations. Similarly I benefit from the government’s protection of my land. So it might seem that the core argument here is one in which my receipt of benefits from a government puts me under an obligation. However, if this is the core argument, then the obligation is not created by consent.

In fact, Locke does not say enough here to place his account among more specific attempts to relate obligation to benefits, in particular the benefits derived from the existence of regular, rule governed, practices. However, he is right to think that the examples he does discuss relate to consent as well as to benefit. For in Locke’s supposed tacit consent cases of enjoying land or the highway, we choose (or consent to) the enjoyment, and Locke thinks that the obligation only lasts as long as this chosen enjoyment. If, for example, I give up land in a country or cease to travel on its highways, then for Locke I am no longer obliged to that country. This means that I am only under the obligation if I choose to have land in that country or travel on its highways. Yet if choice is involved, so also is consent. In choosing to enter a country and travel on its highways, I may be deemed to have tacitly consented to obey the laws of that country until I choose to leave it. So it is not just the benefit that puts me under the obligation; it is that I have freely chosen to enjoy it.

This may work for visiting what we think of as other countries – that is, for example, travelling along the roads of a foreign country on holiday, or buying a holiday property abroad. Here it is plausible to suppose that if I do such things, I have thereby agreed to abide by at least as much of the laws of those countries that relate to roads and property. I may think that the laws are silly, but if France, say, has a

national speed limit, I cannot reasonably object if I get fined by French political authorities for exceeding it. I did not have to go to, or drive in, France; if I choose to do so, I am then reasonably deemed to be subject to its speed limits, however silly I might find them.

However, even if we can make something of tacit consent with respect to such passing obligations, this is very different from the prime example of political obligation in which people are committed in a particular way to one country of which they are a subject or citizen. With this government, I am committed in a special way to obey, and this government may well be thought entitled to impose special burdens on me, such as requiring military or jury service, taxing me in special ways, and otherwise organising my life. Furthermore, Locke himself clearly wants this kind of particular obligation. For the question at which he is aiming in the *Second Treatise* is the point at which such special allegiance ends, and he therefore needs an account of when, if ever, rebellion is permitted with your own country, government, or political society. For this, an account of your obligation to obey the laws of foreign countries while travelling in their lands will not be sufficient.

Locke, that is, needs to discuss more than one kind of obligation. There is obligation to the laws of places we are passing through and there is obligation to our own government. These are different commitments, and hence need different bases. And, at least at first sight, this is just what Locke seems to have. For he has a clear distinction between two kinds of consent, and also holds that they lead to very different commitments. For tacit consent, we have seen that the obligation only lasts as long as the enjoyment. This fits foreign countries, and is very different for Locke from what I am committed to by express consent. Express consent binds someone for ever to a particular political community. It cannot be revoked. As Locke puts it, 'he that has once by actual agreement and any express declaration given his consent to be of any commonweal is perpetually and indispensably obliged to be and remain unalterably a subject to it' [Sec. 121]. As we saw, for Locke I am not a citizen of any particular country by birth. However, if when I come of age, I declare myself, say, to be English, then I cannot subsequently decide that I'd prefer to be American or French. I have done it as irrevocably as if I'd sold myself into slavery.

So we have two kinds of consent with two quite different kinds of consequences. If I am just enjoying or travelling, any transfer of a right to punish that this implies is strictly temporary. I can elude any obligation by selling up and leaving. Compared with this is the once-and-for-all transfer of rights achieved by explicit declaration, after which I can never regain the state of nature. We have two sorts of consent and two sorts of consequences. So far, so good. However, the trouble is that the combination will not do the work that Locke wants. We can get evidence of tacit consent, but it does not create the strong sort of obligation in which Locke is particularly interested. Express consent would create this strong sort of obligation, but it is something for which we do not seem to be able to find evidence. As Hume suggests, it is something that does not (normally) happen. All that is left therefore is countries that we are merely passing through, which would make the problems of rebellion rather too easy (as easy as coming home from holiday).

### Oaths of Allegiance

This objection depends upon following Hume's claim that explicit consent is something that rarely seems to happen, and discovering that the attempt to elude the claim by switching to tacit consent will not produce enough. However, perhaps this is too fast. Perhaps we should not have accepted the force of Hume's objection. We may not swear an explicit once-and-for-all oath of allegiance to particular governments when we come of age (repeated performances with a national flag by school children are something different). However, if we go back to Locke's world, we find that in fact it was a world of oaths. Among these were oaths of allegiance – that is, explicit agreements to obey the government. Both Grotius and Pufendorf discuss oaths. Contract, agreement, is important to all of these thinkers, but oaths are special. They are agreements before God. With oaths, people pledge their faith in a way that explicitly invokes the possibility of divine sanctions if they defect. This is why atheists do not get the benefit of toleration on Locke's proposals. Anyone who does not believe in God cannot usefully be put to an oath, and hence for Locke cannot be a reliable member of civil society. Of course, the validity of this, just like other parts of

Locke's God-backed natural law, depends upon people's apprehension of the consequences. If no one believes in God then oaths are no more special than any other kind of agreement.

This is one problem with oaths. Another can be seen if we look at the oaths actually used in Locke's day. At the beginning of the century, after the Roman Catholic attempt to blow up king and parliament known as the Gunpowder Plot, the government came up with an oath. This could be administered to anyone in the country over eighteen who missed a certain number of church services – that is, it was designed to test the loyalty of Catholics (and led to an exchange of arguments about political authority between King James I and Catholic writers). The person taking the oath declared in his 'conscience before God and the world, that our sovereign Lord King James is lawful and rightful king of this realm'; that he will 'bear faith and true allegiance'; that he will make known any conspiracies; and so on.

This, no doubt, is all to be expected. But then, even on the face of the document, the problems start. This long oath ends with the declaration that it is sworn 'without any equivocation or mental evasion or secret reservation whatsoever'. But this threatens an infinite regress. If, when I am swearing, I can make a mental reservation about what I am saying, then I can make a mental reservation when I say that I am making no mental reservations. In other words, just as in other contractual situations, the obligation has to come from the supposed meaning of the performance, from these words in this context. The oath does not work like a magic potion: if it commits, it depends upon the assumption that oath-takers are rightly committed to what they are commonly supposed to be committed to by such performances.

More, then, than the oath is needed. This, however, is only the start. There is a worse problem with the position of the head of the Roman Catholic Church on earth, the Pope. Obviously, given the oath's aim, it has to deny that the Pope has any power, either directly or indirectly, to depose the king. So the luckless oath-taker was required to swear 'that I do from my heart abhor, detest, and abjure, as impious and heretical, this damnable doctrine and position, that princes which be excommunicated or deprived by the Pope may be disposed or murdered by their subjects'. So far, again, only to be expected. The problem is that if the Pope really does have greater authority than the king, there is not much that the oath itself (or the king) can do about it. The oath tries,

making the person taking it swear that 'I do believe and in my conscience am resolved that neither the Pope nor any person whatsoever hath power to absolve me of this oath or any part thereof'. However, if the Pope really has power to absolve, he will not lose it because the person so swears, and if he has power to absolve, he will absolve the oath-taker from this bit as well.

In other words, these oaths have to depend upon already existing authority, and so do not create it. If kings really are superior, absolute monarchs who have to be obeyed, then they have the authority to administer such oaths, but this authority does not come from the oaths. Alternatively, if they have no authority to administer the oath, the oath itself is not going to give it to them. We can see an example of this in oaths administered later in the century. During the period of the Commonwealth, after the king was executed, people were required to take oaths of loyalty to the new government that had replaced the king. However, later still, as we saw, the kings were restored again. So what happens when the restored king, Charles II, comes back from his 'travels'? Again we have an oath, here as part of the 1662 Act of Uniformity (and to be taken by anyone, as Locke was at that time, teaching in an Oxford college). Apart from the declaration that 'it is not lawful upon any pretence whatsoever to take arms against the king', the swearer was also obliged to 'declare that I do hold there lies no obligation upon me or any other person from the oath commonly called the Solemn League and Covenant'. In other words, the oaths taken during the period without the king are held to be void. By my mere declaration (or oath), I can will these former oaths away. But how may I will them away if oaths are binding? This is explained in the oath itself, for in it I explicitly declare that the former oath I took 'was in itself an unlawful oath'. In other words, just as before, if the authority already exists, the oath is lawful, but then the lawfulness of the authority does not come from the oath. Alternatively, if the authority is unlawful, then so is the oath, and so, again, the oath does not make the authority lawful. This time it is not the English government that is possibly trumped by the Pope; the English government trumps itself.

However, it might reasonably be objected, all this misses the point. The point is that persons making oaths in good faith are bound by them. Both a punishing God and disapproving people will hold them to their express declarations. Once declared, they are bound, and no

one can absolve them. If they swore in good faith to the Commonwealth, they cannot then subsequently swear to the King. However, whether or not this works with kings, it does not work with the Pope. For this is where the Pope's power of absolution comes in. Roman Catholicism is a religion in which a specific institution or person is given the keys of heaven as God's minister on earth. This person has God's dispensing power. I am of course normally to be held to my oaths; I am normally bound in conscience before God. However, this does not apply if God himself, or his minister on earth, dispenses me. So James I and his government can make Catholics take the oath. Then the Pope can nullify its effect, even in conscience before God. So we are back where we are. (In this particular case, what actually happened was that the Pope declared that it was unlawful for Catholics to take the oath.) This is why Locke does not extend toleration to Catholics. Just like atheists (as he sees it), there is nothing to require them to keep their word. The atheists think that God is not there to do the work; the Catholics think that his representative can let them off.

Locke's defence of political obligation in consent does not therefore seem to fare too well. Tacit consent is too unspecific and too weak to be the foundation for the consent he wants and needs; express (or explicit) consent is neither sufficiently available nor, even if it were, would it work straightforwardly. The limitations to what can be achieved even by explicit consent are the inevitable result of there being an independent source of validation or authority. This source might be particular, as when a political authority stops its citizens consenting to other authorities or swearing oaths to them. The independent authority prohibits consent. However, the same consequences ensue if the independent source is more abstract. If the law of nature has independent authority, then it also may well declare that there are certain things or governments to which we are not allowed to consent. However, if the law of nature prohibits us consenting to certain kinds of governments, then we have an argument against the validity of these kinds of governments quite independently of the fact of whether anyone consented to them, or indeed of anything to do with consent.

Locke himself at one point in the *Second Treatise* mentions the kinds of oaths of allegiance we have just been discussing. He is considering an 'oath of allegiance' to a single, supreme, person, and claims that this

allegiance is to the person 'not as supreme legislator but as supreme executor of the law'. For, he says, 'allegiance being nothing but obedience according to law' it cannot be owed to a person acting by 'his own private will' but only when he represents the 'public will' [Sec. 151]. This comes as a consequence of Locke's argument against the legitimacy of an absolute, arbitrary, authority. The point to notice, however, is that the question is not, and cannot for Locke, be settled by the explicit terms of the oath. If someone, in explicit terms, declares allegiance to a dictator or absolute king as legislator, then Locke simply says that this is an oath that he may not legitimately make. But if oaths may be set aside in this way, it shows again that we need not get too excited trying to trace the historical record of exactly what was agreed, or how particular actions may be construed as exhibiting tacit consent. We may instead move directly from natural law and these purposes to the legitimacy or illegitimacy of certain kinds of government.

### Limits to Consent

Locke's own understanding of the law of nature, as we saw in the last chapter, takes it to have a purposive character. Our rights are not areas of protected decision-making but powers granted to us to enable us to fulfil God's purposes. Hence we may not contract ourselves into slavery or commit suicide. So this places limits on our legitimate consent. I may not, for example, consent to someone's killing or maiming me. The same applies, both in general theory and also in the details of Locke's own account, to consent to the state. There are certain kinds of government to which I may not legitimately consent since they are against God's purposes. In fact, there are not just analogies in Locke between the prohibition of consenting to slavery and consenting to absolute, arbitrary, government; they are part of the same argument. For Locke's central claim, working with the consent idea, is that such consent involves a transfer of our rights, yet we can not transfer what we do not have. Hence, since we do not have an arbitrary power over our own persons, we cannot transfer such a power to another. This is why we cannot by consent (contract, agreement) make ourselves the slave of another individual. We don't own ourselves in this way, and so cannot transfer such ownership to another person. However, exactly the same argument shows that we cannot make ourselves slaves



to government either. So we may give no one arbitrary power over us. As Locke puts it, 'nobody can transfer to another more power than he has in himself and nobody has an absolute arbitrary power over himself' [Sec. 135].

We saw that Locke defines political power as a power of life and death. Yet if we have not such power over ourselves, and hence cannot transfer it, it might seem that political power could not exist. However, this is to forget what is transferred, which is the state of nature right to punish. Such punishment, at least for Locke, involves power of life and death. If someone declares that they live by a law other than the law of reason, then they drop out of normal human respect. I am exempted from my duty to preserve God's creatures, and they may be destroyed as noxious beasts. So I do have power over other people's lives in the state of nature. The point is that it has to be exercised according to the law of nature. I cannot decide arbitrarily whom to punish, what for, and how much. I may only do it in accordance with fixed, standing, law. This is the power that is transferred. Hence states also have a life and death power over their citizens only according to fixed, standing, law.

Locke puts this argument in terms of the possibility of legitimate consent, but it can be seen that its force comes from the principles of legitimacy rather than from the consent. It is the law of nature that says that I may not treat people arbitrarily in the state of nature (when I have the power to punish) and it is the same law that says that the state may not treat people arbitrarily (when it has the power to punish). We do not need consent for this result. This becomes even clearer when we look at the occasions on which Locke gives a more substantive role to consent. For sometimes, instead of the argument that I cannot (legitimately) consent to absolute, arbitrary, government, he uses the argument that this is something that I would not consent to. He says that this is something that people 'would not quit the freedom of the state of nature for' [Sec. 137], or that 'a rational creature cannot be supposed, when free, to put himself into subjection to another for his own harm' [Sec. 164]. There is clearly a valid point here in terms of the relative goodness of states of affairs. If an arbitrary government is something that no rational person would choose in preference to the state of nature, then this shows that it has less goodness or utility. This is an argument against it; indeed, a conclusive argument if the facts are correct and if maximising utility is the proper end of action.

However, this conclusion follows directly from the utilities, and any claims about what people would have chosen is merely an indirect way of establishing the utilities.

Alternatively, this might be taken as a claim about what actually happened. Since this is what no rational person would have done, we may infer that this is not what actually happened. However, this is at best a probabilistic argument. Just because it seems irrational does not mean that it did not happen. For people are irrational. People do explicitly subject themselves to absolute authority. So if Locke's argument is meant to be a retrodictive argument about what actually happened, it is very weak. However, neither we nor Locke need worry too much about this. For any arguments about what might have happened are in fact trumped by the arguments about what could not have happened. If it is not possible for people to consent properly to absolute government, then it does not matter what actually happened, and we can stop trying to make guesses about what people may or may not have been trying to do.

So much for absolute government (although the weight of the argument now rests completely on the arbitrary use of punishing power's being forbidden by the law of nature). The next question is how and when exactly Locke permits resistance to such government, and here we do have to enter a bit further into the details of the supposed consensual structure. I noted earlier that consent is supposed to have two stages in Locke: a first stage in which everyone consents, and then a second stage in which the majority decides. This does not mean, however, that Locke thinks that only democratic governments are legitimate. There is in fact a third stage. The people consenting together form 'society' – that is, political society – a single body that moves with a single will. This will is inevitably (or so Locke thinks) that of the majority. However, what this society then does is to use this majority decision to establish a government. And this government might be of any form – a constitutional monarchy, an oligarchy, a representative or direct democracy, or something else. All we know (from the argument just given) is that it cannot be mere wilful, arbitrary rule. In Locke's frequently used quasi-historical terms, this is because that is not what the majority in fact did decide. In Locke's better argument, this is because it is something that no majority could legitimately decide.

Either way, we can see that Locke has more pieces in play, as in Pufendorf but not as in Hobbes. As well as individuals and government, there is an intervening entity, society (or 'political society'). Individuals do not submit themselves directly to government. They incorporate, and then the corporation (the people as a whole) gets government. This (more traditional) account gives Locke room for a double contractual operation, unlike Hobbes. People contract with each other in order to have 'society', and then this 'society' (the people as a whole) decides to have a government, a government it constructs on conditions. Leviathan in Hobbes is not contractually bound; it is the result of contracts (or something like contracts) between individual people. However, government in Locke is bound by its method of creation, and so there are reasons (unlike with Leviathan) for calling it to account. As well as arguments for obedience, based on the contracting structure and transfer of rights, there are also arguments for disobedience, based on the fact that government also has obligations, obligations that it may not meet.

### Trust and Discretion

With Locke, we get this double account, except that the second stage is more accurately thought of as a trust rather than a contract. The term 'trust' appears all over the end of the *Second Treatise*. Governments are entrusted bodies; they have fiduciary powers. Trust is of the same family as contract in that they are both creations by will of obligations between separate parties. However, the difference with trust is that the trustee is given a goal rather than making a more specific promise, and has discretion on how this goal is to be reached. For example, a trustee holding the goods of a child has discretion with respect to how these goods are used, but has the task, or goal, of preserving the child's interests. Similarly, for Locke, governments have discretion but are entrusted with using their power for the public good. (It is the public good either because, weakly and hypothetically, that is what the people can be understood to have chosen, or, strongly and straightforwardly, because the preservation of its people is the natural purpose of government.)

The considerable discretion that Locke allows governments can be seen in his treatment of prerogative power, on which he has a chapter

in the *Second Treatise*. Here he claims that ‘tis fit that the laws themselves should in some cases give way to the executive power’ [Sec. 159] – that is, when the executive is using this power in order to promote the ‘fundamental law of nature and government, that as much as may be, all the members of the society are to be preserved’. In other words, government in its executive branch has the goal of the preservation or good of society, but discretion about how to achieve this goal, and, as Locke puts it, ‘this power to act according to discretion for the public good . . . is that which is called *prerogative*’ [Sec. 160].

Some of the things Locke mentions here as uses of prerogative power are things that most people might allow to government: mercy (the prerogative of mercy) and equity (where laws are not interpreted according to the letter in order to serve the wider purposes of justice). Yet any such discretionary power is liable to be dangerous, and Locke himself is bound to have a problem distinguishing such discretion from the arbitrary government of which he disapproves. The problem is how he supports this prerogative power at the same time as he attacks arbitrary power. If governmental discretion is a good, then perhaps we should just contract ourselves into absolute power, allowing it to get on with it. But it is just such a contract that Locke thinks the law of nature forbids. So, instead, it would seem that we should tie power down by rules, preventing it from being arbitrary. Then we have Locke’s desired government by ‘settled, standing, laws’ [Sec. 137]. However, in this case, it is a problem how he can grant government prerogative powers that, as he says here, is a power to act ‘without the prescription of the law and sometimes even against it’.

Here is a particular example of this problem, as it arises in the text of the *Second Treatise* itself. It concerns the question as to whether the executive can change the terms of election to the legislature. At separate points in the *Second Treatise*, Locke gives two, potentially conflicting, answers. On the first occasion, just before the prerogative chapter, his attention is on the inequity of the representation system of his day when, because of the variable growth and decline of populations, widely different sizes of constituency were all equally represented in parliament. Here he thinks that it would be appropriate for the executive, by use of prerogative power, to change the electoral system. The government is to aim at public good, and this is public good, ‘it being the interest, as well as intention of the people, to have a fair and equal representative’ [Sec. 158].

On the other occasion, when at the end of the work Locke is justifying resistance to tyranny, he lays out a series of hypothetical actions by an executive that would, in his opinion, so alter the legislature that 'dissolution of government' might be 'imputed to the prince' [Sec. 218]. Although these are presented as hypothetical cases in a possible country, they are in fact, at least as Locke sees it, the actual actions taken by King Charles II of England, which therefore, in his opinion, justify armed resistance against him. Among these (hypothetical or actual) actions he lists are that 'the electors or ways of election are altered without the consent and contrary to the common interest of the people' [Sec. 216]. So Charles II has been using his prerogative power to alter the franchise, and this time, Locke criticises such use of prerogative power.

These two positions are not necessarily opposed to each other. For Locke, 'prerogative is nothing but the power of doing public good without a rule' [Sec. 166]. So Locke could say that the common theme is that discretion has to be used for the public good. The two cases of alteration of the franchise by prerogative are therefore different. The first case is aimed at the public good, whereas the second is not. However, this just takes us to the heart of the problem, which these particular examples illustrate. For the fundamental question is who is to be the judge of the public good. No doubt, any executive making a change in the franchise – for example, Charles II if asked the question – would say that he was acting for the public good. If discretionary power is granted, this is a power to act, but it is also a power to judge.

The question of the independence or merging of judgement is at the heart of the question of government, particularly in the social-contract tradition. In Hobbes, we make government by merging our wills. So when there is government, 'private' judgement is excluded; instead, judgement is to be governmental, public. So also in Locke. What we are doing in creating political society by transferring our right to punish is transferring also our right to judge when punishment is appropriate. We have seen how, even at the initial stage, our individual judgements are meant to be subservient to majority judgement. When this majority creates a government, then, in recognising obedience to it, we are suppressing our private judgements. We only get the 'known, indifferent' judge and all the other benefits that Locke outlines for states if we relinquish any attempt to second guess this common judge. So Hobbes; so Locke; so government.

The central problem with respect to discretionary power is not with respect to its object. This, the public good, is relatively uncontentious. It is with respect to who is to be entitled to judge the public good. In the *Second Treatise*, Locke quotes King James I, a king from the beginning of the century, when there was considerable public discussion about the extent of the king's prerogative. In the speech Locke quotes, King James claims that he aims at the public good and that he had promised in his coronation oath to devote his power to that end. Hence he is not a tyrant. 'Thus the learned king who well understood the notions of things' comments Locke sagely, 'makes the difference betwixt a king and a tyrant consist only' in that the king 'makes the laws the bounds of his power and the good of his public the end of his government', whereas the tyrant just follows 'his own will and appetite' [Sec. 200]. Hence Locke quotes the learned king, as if James were on Locke's side. They are both against arbitrary power. However, being against arbitrary power, or even having made a kind of contract with the people in a coronation oath, is neither the centre nor the end of the question. It is who is entitled to decide what is the public good. The King of England, unlike some Eastern potentate, thinks that he has to govern for the public good, but the king of England also thinks that it is he who is entitled to decide what is for the public good.

It is not that there are not sanctions or controls on what the king does. The king has promised in a coronation oath, promised before God. Hence he has to answer before God. As James puts it in part of the speech not quoted by Locke, 'yet doth God never leave kings unpunished when they transgress these limits' [p. 183]. It is a severe test, as James thinks of it; 'the higher we are placed, the greater shall our fall be', he says. But the point is that it is God who will be judge. The king answers to heaven; he has no judge on earth. As James puts it here, it is 'sedition in subjects to dispute what a king may do in the height of his power'.

For Locke also, 'princes... owe subjection to the laws of God and nature' [Sec. 195]. For Locke also, princes have to aim at the public good. The difference is with respect to who is entitled to judge whether this is what they are doing. The aim is the same, but the means are different. For both Locke and the kings he opposed, princely prerogative power rightly permits the king to act for the public good in an emergency – for example, seizing and demolishing houses to stop the spread of fire, or putting soldiers in private houses to stop an invasion.

For both Locke and James, this is subject to natural law. It is supposed that there is a right answer with respect to the question of the public good, and the king does wrong if he acts arbitrarily not for this good. So much is common. The difference is with respect to the question as to who shall be judge of whether the king has acted wrongly. For James I (and the other kings of the time), the answer is God. This is where Locke differs. His answer is that 'the people shall be judge' [Sec. 240].

### Rebellion

So it is the people who are supposed to judge. And if they judge that the government (executive, king) has not acted in the public good, then they judge that it has exceeded its trust. Hence, as in other cases of trust, the trustee can be dismissed for exceeding its powers. This is another example in which the relationship is better thought of as trust than contract in Locke. In a contract, if one party performs, the other is bound, and the judgement as to whether this has happened must depend upon independent arbitration. However, with trust, the body entrusting retains the power of deciding whether the trust is properly being performed. The people trusted – the trustees – are in this sense agents of whoever is trusting them – the trustors. As such, they can be recalled or dismissed. So if we think of it like Locke, rather than the king's having a kind of contract with the people of which only God can be judge (as in James I), we have the people entrusting power to government and retaining the judgement whether this trust is being properly used. 'The people shall be judge', says Locke, '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 ...?' [Sec. 240].

Hence we get a justification of rebellion. Strictly speaking, it is not a justification of rebellion against an existing government. Rather, if the government acts beyond its powers (as judged by the people), then this government is held to be 'dissolved'. That is, it attempted to do what no government was entitled to do, and hence ceases to be government. If dissolved, then power reverts to whatever gave it power in the first place. Here, the details of Locke's apparently unnecessarily complex story about origin come into place. For in this many-staged story, as we saw, power does not flow immediately from individuals to government, as in Hobbes. Instead, first we get an incorporated

‘people’, and this people sets up a government. Hence, if government is dissolved, power returns to the preceding stage – that is, to the people, but the people incorporated and as a whole. We do not get back to a state of nature with only separate individuals. Individual people are still bound inexorably to this ‘society’ by their supposed express consents. However, this intervening body – that is, the people as a whole – now has the chance to create a new government. It also has the chance to create a new form of government – for example, changing from kings to a more democratically controlled executive.

We saw before how Locke’s supposed historical stories can be recast as more abstract argument. Here again, for much of its scope, this argument does not need the specific historical story about entrustment that Locke gives it. It could work directly from natural law. In natural law, at least for Locke, the point of government is to preserve God’s creatures and enforce the law of nature. Therefore, anything arbitrary, particularly anything arbitrary that risks the lives of people, is wrong, and to be condemned. The problematic step, however, is whether we are entitled to move from this to either active or passive resistance. Here, natural law by itself (God’s commands) are less clear in their consequence, and the additional mechanisms of trust and supposed historical events may be needed.

Several times in the *Second Treatise*, Locke talks of an ‘appeal to heaven’. This is a rather coded expression that needs disentangling. For King James I can also say that the appeal is to heaven. He has God as the judge. For someone like King James, this means that subjects should leave kings alone. God will be judge, and if you, a subject, happen to be unlucky enough to fall in with a bad or incompetent king, you have to leave the amendment of this to God. You appeal to heaven, and then you wait. That would seem to be the most natural understanding of the expression ‘appeal to heaven’. However it is not, it would seem, what Locke means by it. He starts his story of appeals to heaven (in the ‘state of war’ chapter) by invoking a Biblical hero prior to a battle. The actual Biblical story is a bit less obvious than Locke allows (as far as the given story goes, this hero could have first appealed to God and then subsequently set out on battle as a separate act). However, as Locke understands it, this hero, Jephtha, appeals to heaven by seeking battle. It is in trial by battle by which the judgement of God is sought; to appeal to heaven is to take to war. So when, towards



the end of the work, Locke wants to invoke a similar trial by battle with a recalcitrant king, he talks of this as appealing 'to the supreme judge, as Jephtha did' [Sec. 241].

However, we do not particularly need battle in this story. The point is that government is dissolved (in the judgement of the people). So, although the people are not in a state of nature with respect to each other, they are in a state of nature with the old government or king. This king is now just like a highwayman. He is someone who has declared himself to live by another law, can be punished, is a noxious beast, may be destroyed, loses his normal natural right not to be attacked, and so on. He is 'justly to be esteemed the common enemy and pest of mankind; and is to be treated accordingly' [Sec. 230]. Just another pest to be destroyed. Just another legitimate object of punishment by war. In other words, just as with Grotius's different examples, war works as a justified punishment in the state of nature. Again, we may appeal to whomever we like, but we do the hard work ourselves.