

ON LOCKE'S ARGUMENT FOR GOVERNMENT

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What requires explanation or justification depends on what is taken as being given: what comes into question depends on what one already believes. The inertia of one's present outlook — sometimes too hastily labelled by others as a bias — gives one a sense of commitment without which possible justifications for one's position might be overlooked. Nor does an ability to empathize usually carry such a sense of commitment. Locke wrote and argued from a point of view well within the framework of civil government. The problem, as he saw it (and as many others in the social contract tradition had seen it before) was how to justify civil government on the basis of certain considerations about the nature of man. When he asks (in effect), "How can political societies be justified?", we ought to understand that he was not at the same time attempting to answer anarchistic arguments against government. He was not much interested in anarchism — a version of which he called the State of Nature — except as it provided a context in which to describe the Law of Nature and its consequences, which he then applied to matters of political organization.

Let me declare at the outset that in this paper I take it for granted that governmentlessness is an innocent state of affairs and requires no justification, but that the formation and continuance of political societies do. But I shall not attempt to demonstrate that political societies are unjustified: It is the purpose of this essay to imagine in what ways Locke's conclusions would have been altered had he been more fully committed to the investigation of the State of Nature as a condition which people are "naturally in" rather than as a condition which people naturally *start from* in their move to a governed society. That is to say, from the point of view of the State of Nature Locke's arguments are not persuasive — not persuasive especially on account of his failure to

recognize the possibilities for social organization without government.

I. THE STATE OF NATURE

What is the State of Nature? It is, according to Locke, a condition all men are "naturally" in, which is

a *State of perfect Freedom* to order their actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the will of any other Man (II, 4).¹¹

The Law of Nature referred to here is Reason. It

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. ... [A person] may not unless it be to do Justice on an Offender, take away, or impair the Life, or what tends to the Preservation of the Life, Liberty, Health or Goods of another (II, 6).

Given the State of Nature and this Law of Nature which governs it, people in such circumstances would seem to have a straightforwardly peaceful existence. But Locke claims that men, in such a State of Nature, would forsake this "perfect freedom" and institute a Commonwealth, i.e. a governed society. Why? Because there are certain "inconveniences" in the State of Nature, the remedy for which is civil government (II, 13). What are these inconveniences? They may be described, generally, as the inconveniences attendant to a state of war. But this is not to say (as Hobbes, for one, would have it) that a condition of governmentlessness is necessarily a condition of war of "all against all". Locke, that is, recognizes the possibility of peaceful coexistence among anarchists. But such an existence is precarious: If once there should occur the use of force without a justifying right to that force, a state of war arises (II, 19). Moreover, since, in a State of Nature, there is no

common authority to which appeals for the resolution of disputes may be made, war, once begun, continues (II, 20). It is to avoid such wars that men put themselves into a society and under an authority and power which may decide controversies (I, 21).

It is not unreasonable, Locke argues, to expect that in a State of Nature men may use force without right. There are, first of all, certain uses of coercion which *are* justified: A person may "take away, or impair the Life, or what tends to the Preservation of the Life, Liberty, Health, Limb or Goods of another" only if it is "to do Justice on an Offender" (II, 6). This law, which I shall be so bold as to restate as "People ought not to be coerced except in response to the initiation of coercion", and which I shall name the Rule of Political Justice, is part of the Law of Nature (see above). But although certain (retaliatory) acts of coercion may be justified (and, hence, each person is given the right to so act in execution of the Law of Nature [II, 7; 125; and *passim*]), some people may overstep the bounds of justified coercion: if a person is negligent in his obedience to the Rule of Political Justice, or is ignorant of the application of the Rule to some particular case (II, 124), or if a person is simply corrupt, vicious and degenerate (II, 128), then the initiation of coercion may take place. Once having occurred, coercion may then be used as a proper response in order to punish the initial transgressions and to prevent their recurrence. But the right to punish may be misused, says Locke: people may become too passionate in dealing with their own cases and negligent or unconcerned when dealing with others (II, 125). In addition,

They who by any Injustice offended, will seldom fail, where they are able, by force to make good their Injustice: such resistance many times makes the punishment dangerous, and frequently destructive, to those who attempt it (II, 126).

There is then the possibility of the occurrence, the recurrence, and the continuation of the improper use of force in the State of Nature, which makes for inconveniences in such a State. What are the remedies for such inconveniences? There are three things which the State of Nature lacks, but which, when present, Locke argues, can either prevent the initiation of force, or else ameliorate its harm when it does occur.

(1) In the State of Nature,

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 anticipation of it to their particular cases (II, 124),

the remedy for which is

an *established*, settled, known *Law*, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them (II, 124).

(2) In the State of Nature, everyone

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 remiss in other Mens (II, 125),

the remedy for which is

a *known and indifferent Judge*, with Authority to determine all differences according to the established Law (II, 125).

(3) In the State of Nature, the response to transgressions of the Law of Nature may be both inconsistent and dangerous, wherefore a competent power to execute sentences against offenders is desired (II, 126ff).

Let this suffice as a brief indication of Locke's reasons for the claim that persons in a State of Nature will find it reasonable to seek the apparent security of a governed society. One may question whether such a remedy for the inconveniences of a State of Nature might not give rise to conditions even more inconvenient than those in the original State of Nature, and so it becomes an important task to describe in some detail both the kind of governed society calculated to relieve the insecurities of a State of Nature and the precautions which must be taken to insure that any such government does not itself become a traitor to the purposes for which it was formed. Such matters occupy Locke's attention in the second half of the *Second Treatise*.

Although I believe that the history of the transgressions of the Law of Nature (or the Rule of Political Justice specifically) by government is sufficiently horrible to occasion a serious reevaluation of the comparative disadvantages of a governed society versus a State of Nature, I do not wish to argue that point here. Rather, the balance of this essay shall be devoted to an analysis of the reasons Locke offers for the claim that certain inconveniences

in a State of Nature find their proper remedy only in a governed society. To that end, I shall examine those three putative failings of the State of Nature: lack of an established and known law, lack of a known and indifferent judge, and lack of power to support and execute sentences. (See also II, 136.)

II. EXECUTIVE POWER

As for the third claim, that in anarchy there is no power to enforce sentences, that is surely questionable (provided, of course, that we ignore for the moment the matter, next to be discussed, of whether there can be, in a State of Nature, sentences to be enforced). In fact, Locke does not categorically deny the possibility of such power, but only says that it is "often" wanting (II, 126). This power I take to be of two sorts, or, rather, to have two motives: (1) in the case of persons found not guilty of transgressions, power to protect them (and their property) from unconvinced or disgruntled accusers; and (2) in the case of persons judged guilty, power to exact compensation for injury damage and/or to impose penalties. In a State of Nature can the vindicated be protected and the guilty be dealt with satisfactorily? It will not do, as an argument against anarchism, merely to ask (rhetorically): "But what happens if no persons or organizations are willing to use, or are capable of using, power in support of sentences?" For the same question may be posed in the case of governed societies as well. It is more important to know whether, in a State of Nature, there can be expected to be persons or organizations dedicated to the enforcement of sentences. Clearly, there will be a *motive* for organizing such enforcement powers, because this motive is, according to Locke, supposed to incline men to form political societies in the first place. But when it is asked, above, whether such organized power can be expected to occur in a State of Nature, one or both of two things may be meant: (1) given a condition of anarchy, are people more likely to organize enforcement powers within an anarchical context, or are they more likely to form a political unit in order to effect such powers? (2) Given a condition of anarchy, is it plausible to suppose that organized enforcement powers *could* be maintained without having to establish a political community? The answer to the first question, it seems to me, is clearly that persons are inclined toward the political route. But whatever the history of

human society evidences in this regard, the second question requires something more for its answer.

An organization dedicated to the enforcement of sentences is a group of persons, each of whom makes it his business to coordinate certain of his activities toward a common goal. In this it differs not at all from organizations dedicated to other goals, such as the ploughing of a field, the erection of a building, or the pleasant rendition of a choral tune. Unless it be supposed that anarchists would be incapable of cooperative farming, construction and singing, there must be something unique about enforcement organizations such that free people could not maintain stable enforcement powers. Alas, this uniqueness is elusive. Perhaps it resides, not in any particular characteristics of enforcement power, but rather in the (numerical) singularity of such an organization. It is an easy, though mistaken, supposition to make, that a police agency ought to have no competition in pursuit of its goals. Thus, when Locke says that "in a State of Nature there often wants *Power* to back and support the Sentence..." (II, 126), he may be read as referring to a single or sole power rather than to a certain kind of power. Such a reading becomes more plausible when it is recognized that sections 124 and 125 can be read in a similar way. That is, the three sections (124, 125, 126) which list the important failings of the State of Nature may be taken to indicate that a State of Nature is inconvenient on account of the lack of three special monopoly organizations. Section 134 more explicitly declares that the legislature, which also had judicial power, or else power to appoint magistrates (II, 89), and which also has the executive power, or else power to appoint an executive (II, 143f),

is not only *the supream power* of the Commonwealth, but sacred and unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a *Law*, which has not its *Sanction* from that *Legislative*, which the public has chosen and appointed.

Section 212 declares that

the Members of a Commonwealth are united, and combined together into one coherent living Body... [and] the *Essence and Union of the Society* consist[s] in having one Will, the Legislative....

Considering the executive power in isolation

from legislative and judicial powers, however, there seems to be no very good reason why if one organization has power to enforce sentences, any other organization cannot also have such power. Each person in the State of Nature is the executioner of the Law of Nature, says Locke. But each person has the right to delegate that executive power to some other person or organization. This right of delegation, after all, allows for the formation of political societies by consent.^[2] But if executive power can be delegated^[3] to a political organization, it can be delegated to other organizations, namely, to bodyguards, or (private) protection agencies. If there are good reasons, then, why executive organizations must be without competition, such reasons must be derived (if they can be) from considerations about the nature of judicial power (or legislative power, or both)^[4], which is also supposed to be absent in the State of Nature, and to which we now turn.

III. THE KNOWN AND INDIFFERENT JUDGE

In the State of Nature there wants a *known and indifferent Judge*, with Authority to determine all differences according to the established Law (II, 125).

There are five important points to discuss in connection with Locke's characterization of this judicial power.

(1) The judge must be known. How a person or organization^[5] comes to be known, in a political society, for being a judge, seems to involve nothing more nor less than what would be the means by which a person or organization could be recognized as a judge in a State of Nature. Anyway, how many people in political societies know who the judges are? Locke objected to any claim that some persons are by nature (or by divine appointment) fit to be judges. And even if there were such persons, there are no evident "marks" which would let us know who they were (I, 81). In a Lockean commonwealth, certain persons would be designated as judges. (Judges are created, not born.)

But may not an anarchist also appoint a judge? And may not a person announce that he is now in the arbitration business, in case anyone needs a judge? To be *known* as a judge, I need only advertise that Suits is a judge. It is not so far important whether Suits is a fair judge, a

hanging judge, or an expensive judge. The question of a judge's *authority* to arbitrate disputes will be considered in point (3) below.

(2) The judge must be indifferent. How is a judge determined to be indifferent? The problem arises in a political society no less than in non-political ones. Whether, in a political society, those persons or organizations appointed by, or working with, or under contract to, or forming part of, the governing body of that society, as judges usually are, have the right even to be *presumed* to be indifferent until proven otherwise, is a question I shall not deal with here. (Let the judicial body be independent of the government, if that is possible. But if it is successfully independent, what is there about a political society such that an indifferent judge could be found in it, but not in a State of Nature, in which judges would also be independent of government — since there would be no governments?)

Persons, in the State of Nature, are, according to Locke, apt to be biased when judging their own cases, and may be negligent or unconcerned about the cases of others. Well, if these are failings of the State of Nature, are they not also failings of Commonwealths? Why may not a judge in a political society be apt to be biased in his own case or be negligent or unconcerned with the complaints of others?^[6] Unless there is something unique about political societies which would make for the flowering of indifference in people who arbitrated controversies (whereas in non-political societies these persons would be biased), there seems to be no very good reason to suppose that the unbiased judgments of complaints could not be successfully carried on independently of any governmental actions.

(3) A judge must have authority. (See also II, 19 and II, 90.) Authority comes from somewhere, unless the judge has it by nature. But what authority — what rights — a judge has by nature is what any other person has by nature; a judge is no unique entity in this regard. In a Lockean political community, then, a judge is an authority because he has been delegated the right to pass judgments, and such a transference of rights comes from members of the society, either directly or indirectly (through the legislature). But the delegation of these rights may take place in an anarchical society as well^[7] (unless by merely any kind of delegation of judicial power a State of Nature is transformed

into a political society — a queer claim, and Locke does not make it). And if an anarchist wishes to have a judge, he will ask (or hire) someone to act as arbitrator. But Locke intends something much stronger by urging that a judge have authority.

(4) A judge has authority to determine *all* differences. (See also II, 89.) The delegation of authority may be manifested in two ways: (a) all persons, whose actions might come before the judge, delegate the authority to one man (or organization) or to a certain set of men (or organizations); (b) only some persons, whose actions might come before the judge, delegate the authority to one man (or organization) or to a certain set of men (or organizations). And in both cases two variations are possible: (i) the principals (whether all or some of the people) give to the judge the right to review *all* differences, complaints and controversies; (ii) the principals (whether all or some of the people) give to the judge the right to review only some (or some kinds of) difference, complaints and controversies. Although Locke says that a judge is to decide on all controversies, we may take him to mean all controversies relevant to the Law of Nature (or to the Rule of Political Justice in particular). For I take it that the inconveniences of the State of Nature are such because, in the first place, or most importantly, one's life and property are in hazardous surroundings — are, that is, under the threat of the initiation of force by others (II, 127ff). It is not for the purpose of settling mere differences of opinion that judges are supposed to be useful tools. It is the clash of actions, which fall within the scope of the Rule of Political Justice, which arbitrators are supposed to resolve.

But a judge may be a valuable part of society without having to decide on all controversies (regarding actions) which the society's members might have. A judge might be effective even though his jurisdiction (the scope of the authority delegated to him) includes only one or several kinds of actions relevant to the Rule of Political Justice. A judge, in either a political society or a State of Nature, might appropriately be authorised to decide only on questions of theft of property, for example, or only on matters pertaining to acts involving loss of life or limb, or only on controversies concerning parent-child relationships. To restrict a judge's power in such a way has been a tradition in at least some political communities, and anarchists

might be expected to do the same, perhaps under the assumption that no one mind is omniscient, or under the assumption that effective social arrangements involve a division of labor. Supposing that Locke would agree that the division of jurisdictions is likely or desirable even in a political society, then, when he says that judges must have authority to determine all differences, he ought to be taken to mean that for any controversy there must be some judge or other to decide the matter. That is, it is inconvenient to be a party to a controversy where there is not some judge with authority to decide that particular issue.

These considerations do not by themselves require there to be judges whose authority precedes the occurrences of the issues they are to decide. (Cf. II, 91.) It may be a matter of prudence or insurance to retain someone to act as a judge *in case of* complaints, but the effectiveness of an arbitrator is not necessarily diminished on account of his being given *ad hoc* authority to resolve a dispute. And if various judges may specialize in one or several kinds of controversies, it may be a feasible social arrangement for parties to a dispute to authorize a person (or organization) only temporarily for the purpose of judging the particular case at hand.

Nor need the hiring of judges, for use *in case of* disputes, always involve the unconditional transfer of one's judicial power (even assuming that such a transfer is naturally possible. See note 3 above.) If parties to a dispute can manage to settle their differences out of court, it may be wasteful for there to be a third party as arbitrator who insists on enforcing his own judgment in the matter.

The most conspicuous problem associated with arbitration in a governmentless society has to do with cases of disputes in which the contestants do not agree on which person or organization, if any, to employ in the attempt at resolution. Locke thinks that this problem would be solved (or rather avoided) in a political society

by setting up a Judge on Earth, with Authority to determine all the Controversies...; which Judge is the Legislature, or Magistrates appointed by it (II, 89).

That is, all members of a political society would agree on a *common* judge and authority. I advance no moral complaint against such a procedure, since, if it is authorized by every person,¹⁸¹ no moral complaint can be sus-

stained: I argue only that there are better alternatives. The problem, after all, is not, as Locke thinks, that in a State of Nature there is no one common judge for everyone, but only that in a State of Nature there may be controversies for which there is no judge. Had Locke viewed the matter in this way, he might have come to quite different conclusions.

In some political societies a citizen is allowed to appeal a judge's decision to a higher judge. If this appeal procedure is in aid of safeguarding citizens' rights, then persons are well advised not to give irrevocable and unconditional power to any *one* judge. Better to have a variety of judges from which to choose in the first place. Suppose that each person may choose between a number of judges (such as might be expected in a governmentless society); how can it be assured that any controversy will have a mediator? That is, if there are a number of judges, each party to a dispute might have a different judge, in which case the problem of mediation is not solved, but only pushed back a step. An approach to the solution may be this: people in a State of Nature will have excellent motives for hiring bodyguards or defense agencies. In case a person claims that the Rule of Political Justice has been broken, he might take his claim first to that defense agency, which will have arrangements (it would be in their interests to do so) with other organizations to appeal disputes between them to some judge they both choose.¹⁹⁾

In a political society *à la* Locke there is a judge for every dispute, since there is one judge (or organization) who has been given, by all the members of the society, the authority to hear all complaints. But in an anarchy, there may be some persons who have delegated judicial authority to no one. This may cause some inconveniences in some social interactions, but it does not present any fundamental problem different from what could be found in a political society, wherein a person might claim to revoke the authority he is supposed to have previously granted to the government, or might in some other way refuse to recognize the authority of a judge. Ordinarily, such revocation would be illegal (II, 134), but even Locke admits that a judge loses his authority when he fails to perform, or misperforms, his duties (II, 240ff).

(5) A judge must rule according to established law. An anarchy, as well as a commonwealth, may have established laws, according to which judges form their decisions. But an anarchy,

unlike a Lockean commonwealth, need have no *one* system of, and no single ultimate source of, law. (This, of course, has an alternative: the resolution of conflicts according to some conception of Natural Law instead of according to one of various systems of positive laws.) This matter will be discussed in the following section, which deals with the last of the three features, on account of the lack of which, Locke claims, a State of Nature is to be avoided.

IV. LAW

There is a Law of Nature, Locke says; but apparently not all people consult it, although if they did, they would find it intelligible (II, 125). And there may be expected to be occasions on which people do not understand the application of the Law of Nature to their particular cases. Some people are ignorant, some biased, and some just plain evil. But if people have before them a civil law, they may hold that law up to be the "Standard of Right and Wrong, and the common Measure to decide all Controversies between them" (II, 124). The ability to appeal to this standard takes men out of the State of Nature, where appeal is, according to Locke, only to "Heaven" (i.e. to force). Locke does not insist on a clear distinction between legislative and judicial powers in a political society (but I have separated them for better analysis); hence, the appeal to the standard of right and wrong is also an appeal to certain *persons*, namely, to the lawmakers (or their appointed magistrates). That there can be persons in the State of Nature to whom appeals can be made I have argued above. Can there also be, in the State of Nature, standards by which the judges judge cases?

We should notice first of all that Locke mentions *a* standard, as though there ought to be but one. But a single, or even a unified, system of laws may not be necessary. Indeed, where there is a variety of judges, there might also be a selection of laws (or legal systems). Even some political societies offer a choice not only regarding the person who is to be the judge, but also regarding the laws by which the judgment is to be made. To try a case before a judge or before a jury (and a judge), for example, may be an option in some political communities. In addition, one may have a say in who those persons are who sit on the jury. And

although the right to a choice of legal systems is unusual, it is not non-existent. The apparent advantage of a single legal system for a group of persons is that for any dispute between members of that group a standard of decision already exists. But a single standard is not necessary any more than it is in the case of coevaluations of products or services exchanged on a free market. Any standard will do, just so long as it provided a satisfactory common ground for the parties to that particular dispute. If disputants are content to resolve their controversy by appeal to, say, majority rule; or if they agree to appeal to the gods, as manifested, say, in the configuration of chicken entrails; or if they decide to stage a trial by a jury of peers; or if any other method is mutually agreeable to them, what objection could be raised, as long as the dispute is settled in a mutually agreeable fashion?^[10]

There are, we know, many acts which are in one geographical area penalized by civil governments, but in a bordering geographical area are left untouched by legal devices. And there are acts penalized by local or subordinate governments which go unnoticed by superior governments. There are, that is, jurisdictional boundaries for legal systems, as a result of which there may be different sets of laws even within single nations. These boundaries may be either geographical or constitutional. Imagine such geographical areas to be reduced in size so that for each of them, one person's private estate composes the whole of it. Unless there are constitutional overrides to these geographical jurisdictional boundaries, a condition exists which may be some form of (but certainly not the *only* kind of) anarchism. "When you are on my estate," the owner of such an area might say, "we settle our differences in my court."

On the other hand, there could be legal systems which take no notice of geography,^[11] but have to do solely with the actions of the clients or subjects of the system, never mind where they are: the Catholic Church or the Boy Scouts, for examples. Such organizations may, of course, also stipulate that their members abide by the rules of local political organizations, but such a stipulation is not necessarily a part of such organizations, which may come outfitted with laws, authorities, and methods for adjudicating disputes.

States of Nature, then, need not lack legal frameworks.^[12]

V. SUMMARY AND CONCLUSION

The State of Nature, Locke claims, is inconvenient on account of people's ignorance of, or misapplication of, the Law of Nature. And even those who do not understand that Law may not be able to apply it to some particular cases, especially their own. And even those who can faithfully apply the Law may not have power to enforce its applications. Locke argues that these problems are solved by the introduction of three institutions (or one institution, namely, civil government, which has three important features): (1) an established law, (2) a known and indifferent judge, and (3) power to execute decisions made by the judges on the basis of the law.

While such a solution might conceivably cure the ills of insecurity of a State of Nature, it might on the other hand turn out to be a bit of overcure. Less drastic steps could also be taken, viz. the establishment of private defense agencies, private courts (or occasional arbitrators), and a marketplace of legal systems, all with or without interconnections, depending on the wishes of the clients of such systems. (There are, of course, other alternatives as well.) The question of alternatives to a Lockean political organization as a response to the apparent inconveniences of the State of Nature will be important for two reasons: (1) people, in a State of Nature, may wish to know whether political organization is the most efficient means to their goals; and (2) if people are concerned about acting according to the Law of Nature (and the Rule of Political Justice in particular), and if the operation of a proposed political organization would include either the initiation of coercion or else actions which, on account of their ambiguous moral standing, might be construed as the initiation (or the threat) of coercion, they will want to know if there are less coercive — or at least less threatening — means of achieving their goals. The answer to the first question I believe to be in the negative, but a full account of it would require a discussion of some economic issues which cannot be considered here. For this essay, the second question is the more important one. That a political organization, as conceived by Locke, even though it is established in the first place by the consent of its members, involves or may threaten to involve significant acts of coercion (aside from coercion used in response to transgressions of the Rule of

Political Justice), may be understood by reference to the means whereby the political society determines its particular actions:

the *act of the Majority* passes for the act of the whole, and of course determines, as having by the Law of Nature and Reason, the power of the whole (II, 96).

For if the *consent of the Majority* shall not in reason, be received, as the *act of the whole*, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole: But such a consent is next to impossible ever to be had.... Such a Constitution as this [unanimous consent] would make the mighty *Leviathan* of a shorter duration, than the feeblest Creatures; and not let it outlast the day it was born in: which cannot be supposed till we can think, that Rational Creatures should desire and constitute Societies only to be dissolved. For where the *majority* cannot conclude the rest, there they cannot act as one Body, and consequently will be immediately dissolved again (II, 98).

Just so. It is seen as preferable — were it only possible — to have each individual agree on what everybody, as a whole, ought to do. But since consensus cannot be expected, then some other method (namely, majority rule) is introduced in order to force minority dissenters to act against their own judgments. The problem arises in the first place by attempting to bring it about that all the people, as one body, do the same thing. The whole affair is avoided if alternatives such as private defense, legal, and judicial systems are adopted, where there is no need for the whole body of citizens to act as one.

But even if, for some compelling reason, the founding members of a political community expressly agree to a system of majority rule, it is possible that some actions by the majority will nevertheless take on an ambiguous moral standing. Here is Locke, for example, telling us of one of the limitations placed on the legislature:

The *Legislative cannot transfer the Power of making Laws* to any other hands. For it being but a delegated Power from the people, they, who have it, cannot pass it over to others. The People alone can appoint the Form of the Commonwealth, which is by Constituting the Legislative, and appointing in whose hands that shall be. And when the People have said, We will submit to rules, and be govern'd by *Laws* may be such Men, and in such Forms, no Body else can say other Men shall make *Laws* for them; nor can the people be bound by any *Laws* but such as are Enacted by those, whom they have Chosen, and Authorized to make *Laws* for them. The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and

not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making *Laws*, and place it in other hands (II, 141).

The argument is lame. Once having been given authority and power, the majority may deem it expedient to change radically even the fundamental agreement by which they were empowered. Who is to complain but a minority, who cannot in any case “conclude the rest”? And to whom are complaints addressed but to the majority (or their representatives)? And who is to judge that complaint but the majority (or their representatives), beyond which there is no appeal but to “Heaven”? Locke’s attempts to answer these questions — they occupy his attention for a major portion of the *Second Treatise* — do not carry much conviction. But more subtle surprises may occur. Once having been authorized to act for the whole, the majority may delegate that authority so that they rule not directly but through representatives. These representatives, in turn, may find it desirable to delegate at least some of their authority to subordinates. But does not Locke say that such delegation is prohibited? Yes and no. It is Locke himself who points out that the legislature may give *judicial* authority to magistrates (II, 89). Now, magistrates, of course, are not supposed to have power to make laws — at least not in the sense that legislators do. But magistrates are authorized to determine whether and how laws are applied to specific cases: They are official interpreters of the law, and as such may announce *what the law is*. The more the legislators’ laws are vague, the more power the magistrates have to interpret the laws one way or another, i.e. to determine whether the law does or does not apply to specific cases before them. The tactic of distinguishing “the spirit of the law” from “the letter of the law” (which tactic is almost sure to exist whenever there is a question about whether a law does or does not apply to a certain case) also gives to magistrates the power to say what the law is: Magistrates’ power, if they have it, to pronounce as law what they consider to have been in the minds of the original legislators when they set certain words on paper, could, in principle, void even the written law.

Even if one is morally required to abide by one’s original promise to sustain a principle of majority rule (and surely this is questionable), the possibility of the majority’s ruling on cases not originally anticipated by the founding

members gives to the principle of majority rule a coercive aspect. Cautious persons, on entering agreements with others, might select a revocable principle rather than an irrevocable one. People concerned about what undesirable results having to bow to majority demands might eventually lead to, or knowledgeable about what surprising

consequences people committed to majority rule have in fact had to face, might be wise to choose instead more easily discontinued arrangements for law making and law enforcement — arrangements, perhaps, along the lines suggested in this paper.^[13]

NOTES

1. All references to Locke shall be to *Two Treatises on Government*, edited by Peter Laslett (New York: Cambridge University Press, 1960).
2. Locke insists that a society is legitimately formed only by means of a contract among the members, i.e. by voluntary and explicit consent of all concerned. (II, 14, 15, 57, 73, 87, 89, 95, 106, 112, 122, 171, 211, 243.)
3. I shall not discuss the argument that such powers or rights are inalienable and hence cannot be delegated. Such a tack was taken, for example, by Lysander Spooner in *Letter to Grover Cleveland*, especially pp. 102–104 (*Collected Works*, Charles Shively, ed., Weston, Mass.: M&S Press, 1971, Vol. 1). Such an objection, though interesting, does not meet Locke on his own ground, for he nowhere says that such rights are inalienable in the sense Spooner intends.
4. This is to neglect possible economic arguments to the effect that even given competitive police organizations, there will eventually emerge a single, monopoly police organization (within some geographical area). See Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), esp. chap. 2.
5. Such an organization may be an association of individuals, each of whom may independently judge a case, or it may be an association of persons, each of whom separately has no judging power, only the collective body having the power of decision; trial juries, for example.
6. A judge in a Commonwealth is not *supposed* to judge his own case. (Although see II, 240 ff.) Would an anarchist feel content to let his opponent, in a dispute, be the judge?
7. See note 3 above.
8. The original contract is supposed to be authorized by each person. See note 2 above. The appointment of judges, however, may be by vote of the majority of the voluntary members of the society. In order, then, that such judges be (indirectly) authorized by *all* citizens, each citizen would have to agree to a system of majority rule in the first place. But they might have second thoughts about this later on. See below, section V.
9. See, for example, David Friedman, *The Machinery of Freedom* (New York: Harper & Row, 1973), and Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973).
10. This is a point already made by Thomas Hobbes. See *Leviathan*, esp. what he calls the second Law of Nature, Part I, chap. 14; also chap. 15. See also my "On Hobbes's Argument for Government," *Reason Papers* (forthcoming). One might argue that some standards would be immoral, even if accepted by the parties to a dispute. Perhaps so. But the discussion of that problem is beyond the scope of this paper.
11. ...or, which involve geographical considerations only in case the people who place themselves under those systems also place their estates under those systems, and providing, of course, that the systems allow for doing so.
12. ...unless, trivially, by definition. But I have been trying to point out that the alternation "either a political society with one law and one judge common to all, or else a State of Nature wherein every man is his own judge" — an alternation which Locke, in effect, accepted — by no means exhausts the alternatives.
13. This paper was written while I was a graduate student at the University of Waterloo. Thanks are due to Prof. Lawrence Haworth for his helpful comments on an earlier draft of this paper.