

Consent, legitimacy, well-functioning. Locke seems to hold:

1. A morally legitimate government coerces only those who freely and voluntarily consent to its authority. (See section 95, and elsewhere in the *Second Treatise*.)

Locke also holds that

2. A government that claims absolute, unlimited authority to coerce its subjects cannot be morally legitimate.

Are these claims consistent? Suppose people freely and voluntarily consent to accept a government that claims absolute, unlimited authority to coerce its subjects. If consent establishes moral legitimacy, and you are obligated to obey and support a government to which you give free and voluntary consent, then you can be obligated to support and obey a government that claims absolute, unlimited authority.

In some passages Locke asserts that no one could rationally consent to an absolutist government. The rational basis for establishing government and submitting to it is to bring it about that fundamental moral rights specified by natural law are upheld (chapter 9). Submitting to absolutist government would make it far more likely that fundamental moral rights, one's own and those of other people, would be violated (sections 131, 139, and others). Hence, no absolutist government could arise by consent.

This won't do. People might irrationally freely and voluntarily consent to absolutist government. A contract is not generally invalid just because one of the parties made a mistake by signing it.

Locke has a better response. He says that one does not have an absolute property right over oneself, one's own body, a right that would leave one free to commit suicide for any reason or none, to maim or damage oneself for any reason or none. Since we don't have unlimited rights over our own lives, we are not morally at liberty to transfer such rights to a political ruler by free and voluntary consent. Given this, claims 1 and 2 are consistent.

Some commentators urge that for Locke, free and voluntary consent is necessary, not sufficient for political obligation. One cannot be obligated to obey government unless one consents, but a further condition is necessary.

3. A morally legitimate government protects the fundamental moral rights of those it rules.

Putting 1 and 3 together, we get Locke's considered view (so some say):

4. A morally legitimate government, which coerces by right and which those coerced are obligated to support and obey, is one that both (a) coerces only those who freely and voluntarily consent to its authority and (b) protects their fundamental moral rights.

Locke says things that suggest 3 and 4, but I see two problems. One problem is that I don't see anything in Locke's text that rules it out that people might irrationally consent to an incompetent or malign government that fails to protect fundamental moral rights. Granted, they can't hand over to such a government rights they do not themselves possess, but they could hand over all the rights they do possess to such a government. If they do, they have bound themselves to obey a government that fails to protect basic moral rights. (If they have given up rights to the government, the government would not strictly speaking be violating their rights when it acted against what would have been their rights but for their voluntarily having relinquished them. Also, people could agree to obey a government that is just incompetent, and fails to protect rights that people have not relinquished.) Moreover, if we buy Locke's tacit consent doctrine, merely continuing to reside within the jurisdiction of a government and failing to emigrate from its territory constitutes tacit consent to it. A second problem is, what should we say about people who

irrationally or unreasonably do not consent to a good, competent government that is efficiently promoting and protecting fundamental moral rights? Suppose people should consent to such a government, but fail to do so. According to 4, such a government is morally illegitimate and wrongly coerces its subjects. If we balk at this, we commit to the idea that free and voluntary consent is neither necessary nor sufficient for political obligation and morally legitimate government. Maybe 3 alone suffices for moral legitimacy.

A government of laws not of individuals. In section 137 Locke says, “Absolute arbitrary power, or governing without *settled standing laws*, can neither of them consist with the ends of society and government.” In a slogan, Locke is saying that a morally legitimate government which rightly claims our allegiance must be a government of laws not men. Locke backtracks from this slogan in interesting ways.

In chapter 14 Locke introduces the idea of *prerogative*—the power of public officials “to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it.” Locke says the good of the people is the supreme law, and so a ruler that acts against the enacted laws in ways that advance the common good is acting rightly, and reasonable members of the society will not complain of such state action.

We can distinguish three cases of acting on prerogative: (1) the laws do not specify what to do in a situation that arises, and action is needed quickly, so the public officials cannot wait for new legislation to authorize what they do. (2) the laws actually forbid the action by public officials that is (judged by them to be) what needs to be done to advance the public good, and (3) same as 2, with the addition that the laws explicitly deny public officials authority to invoke prerogative to act against the law in a particular case. I take it Locke holds that public officials might be acting justifiably, in ways that reasonable members of society will endorse, in any of cases 1 through 3. I’m not sure about what Locke thinks about 3. If you accept 3, then prerogative supersedes law and cannot be cabined by law. So do we then have, and need, a government of men (and women) not of law?

The difficulty is built into the enterprise of establishing a government of legal rules which are to constrain the actions of the citizens and public officials as well. Legal rules cannot be indefinitely fine-grained. They need to be fairly simple and administratable. We seek to enact legal rules the operation of which will induce generally good results, given that those administering and enforcing the law and those charged with obeying it, will have limited information, limited disposition to be moral rather than selfish, and limited ability to think straight about what to do in complex situations. The laws cannot do their work and give discretion to officials and citizens—“Do X unless you think doing something other than X would be better on the whole.” A bunch of “laws” of that form would not set up the rule of law.

But given the above, we know situations will arise in which following the legal rule will involve doing what is morally wrong. The judge following the procedures laid down can foresee an innocent person will be wrongly sent to jail. What to do? (In an earlier course reading, John Rawls’s “Two Concepts of Rules” wrestles with similar issues in the context of the appraisal of utilitarianism. I see Locke here wrestling with related puzzles.)

Question: Does Locke’s discussion of prerogative open the way for a possible justification of absolutist government (or something close to that)? Suppose times are tough and perils abound, and political rulers will have to make quick decisions in circumstances we cannot anticipate in advance. So we all freely and voluntarily consent to the rule of Sally, who we think is wise and judicious, and who is to act only on prerogative—doing whatever she sees as right in the circumstances. OK or not OK, according to Locke’s doctrine?

(Locke says that if there is an absolute political ruler, there is no unbiased impartial umpire set in place to resolve conflicts between this absolute ruler and you, so in setting up such a political

regime, we will not have succeeded in creating political society and ending the state of nature in relations among all members of society. But this does not by itself rule out the possibility that by establishing a benevolent despot in power, members of society increase their prospects that their serious rights will be upheld.)

Locke supposes the difficulties here will be greatly eased by the fact—he takes it to be a fact—that all reasonable people will agree as to when an action by public officials that is said to be justified as exercise of prerogative is really advancing the public good rather than retarding or diminishing public good. He does not take up the question, what to do if reasonable people disagree, and how we might set up institutions and practices so as best to deal with such disagreement.

Conquest and the denial that reasonable, conscientious people can disagree on the interpretation of the moral law. Locke's assumption that reasonable, conscientious people will all agree on the interpretation of the natural moral law figures strikingly in his discussion of conquest (chapter 16). This is Locke's interesting take on just war theory. Locke's discussion aims to show that scenarios of war and conquest do not issue in morally legitimate absolutist government. Suppose there is a war. If unjust conquerors triumph, they gain no morally legitimate right to rule the lands they conquer.

What happens if those resisting unjust conquest, or waging a morally justified war of conquest, triumph? In these cases also, Locke holds, the just conquerors do not earn a right to establish an absolute arbitrary government. Those who fought for unjust conquest and those who actively aided them, Locke supposes, forfeit their rights to life and may be killed or enslaved. In a phrase Locke repeats several times in the course of the *Second Treatise*, Locke says those who violently violate the natural law forfeit their rights and may be killed as one would kill wild beasts. However, the peaceable members of the conquering society have not forfeited their rights, and the just conquerors have no right to rule over them or take away their property. Locke qualifies this by allowing that the just conquerors may extract compensation for damages suffered (costs of war) against the property of members of the justly conquered land. But this right to compensation does not take priority over the rights of innocents. If your extracting compensation would cause death (or severe hardship?) to innocents, you may not extract compensation. Locke assumes the claims of just compensation never are so large as to justify taking over the land of the conquered people, at most a few harvests or some moveable wealth. The property of unjust defeated conquerors is not necessarily forfeited, this property very likely rightfully belongs to the innocent children of the unjust warriors as their rightful inheritance. So just conquerors acquire rights (1) to kill or enslave the defeated unjust warriors and (2) to take their property as compensation (subject to qualifications noted) but not to injure the innocent members of the society and not to rule over them without their consent.

Lots of questions arise in considering what Locke says. Here are a few to ponder.

1. Locke does not envisage the possibility that those who fight in an unjust war might be blameless, or not very blameworthy, despite fighting on the wrong side. Maybe they are innocently laboring under mistaken belief about the justice of their cause; maybe they were coerced by bad political rulers to fight. Locke assumes, if you do a serious wrong, you must be blameworthy and forfeit your life. What warrants that assumption? It looks wrong. (For that matter, it could be that those fighting for what is in fact the just cause had malign intentions, and are seriously blameworthy although they actually did nothing wrong.)
2. He does not consider the possibility of varying degrees of blameworthiness among civilians for the unjust war their country fought. There is a range of possible wrongdoing, from support of wrongful policies to helping the unjust cause without actively engaging in it.

3. Why suppose forfeiture of rights can lead to justified slavery? One might suppose the death penalty might be morally permissible but enslavement of the guilty still morally impermissible.

4. Why not think that engagement in a seriously unjust war might render a nation a menace to humanity, and justify imposition by just conquerors of a puppet regime that will prevent the nation that perpetrated this injustice from repeating the offense and that will train the subject populace to internalize just norms? Perhaps the dog that bit once should be prevented from biting again, until it can be trained to be docile and nonthreatening. Locke assumes this is not right, but does not engage the issue. Note that the puppet regime thus justified would be temporary not permanent, and would not be an absolutist regime, rather another form of limited government. But this would be legitimate government absent consent of the governed. (Maybe a people's temporary forfeiture of rights to self-determination and political sovereignty is triggered not merely by their engaging in a seriously unjust war but by engaging in a war that is so unjust or is unjust on such a large scale as to render their state an enemy of humanity.)

The right to rebel. Locke advocates limited government, and limits to the authority of government. If the political rulers are violating people's fundamental moral rights, beyond some threshold of moral indecency, it is right to rebel against constituted authority. In Locke's view there can be morally legitimate government, which those it coerces are obligated to obey and support. But a government that is not based on free and voluntary consent or massively violates people's serious moral rights is not morally legitimate and ought to be opposed. A government may be morally legitimate because the rulers usurp political control to which they have no right (chapter 17) or because the rulers exercise political control in ways that massively violate rights (chapter 18). The latter Locke calls "tyranny." He explains, "As usurpation is the exercise of political power, which another hath a right to; so tyranny is the exercise of power beyond right, which no body can have a right to" (section 199). Tyranny is the use of political power not for the public good but for the private advantage of the rulers. (I suppose a tyranny could also involve wrongful exercise of power not for the private advantage of the rulers but so serve some wrongful cause, e.g., a bad religious crusade.)

Locke adds that people's being disposed to rebel against illegitimate government will help keep political rulers on the straight and narrow path. If the king knows the people will rebel if the king gets out of line, this gives the king an incentive not to get out of line.

Locke says virtually nothing about how the institutions of government might be designed to minimize the risk of tyranny or maximize the chances of legitimate governance. In section 143 he mentions that it is probably a bad idea to unite the executive function and legislative function, placing both in the hands of the same public officials. That's about it. He does not take up questions of constitutional and institutional design.

Locke might say, whatever institutions and constitutional devices you put in place, they will come to nothing and provide no resistance to governmental malfunctioning and government misbehavior unless there is a public culture of vigilant concern that will induce citizens to protest and fight if there is threat of tyranny. This might well be correct. But that point does not downgrade the importance of institutional design. Well-crafted institutions may work in tandem with a public culture of citizen vigilance to reduce the risk of malign governance. The two together, institutions plus culture, might do more in this regard than culture by itself. Also, well-crafted institutions might operate in such a way as to encourage the development and maintenance of a citizenry poised to protect rights.

Locke also does not say much about steps that people might take to act against badly behaving government, short of rebellion aimed to bring down the established authorities. Unruly public protest, encouraging individuals privately and secretly to disobey bad laws, organizing massive public civil disobedience that demands arrest and trial, assassinating tyrannical officials—there is

a tool kit of options, and questions about when each is appropriate, not just the one sledge hammer tool of rebellion.