Legal Philosophy from Plato to Hegel

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Chapter X

Locke

Probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession.

Sir Frederick Pollock

Locke hoped in his political theory, at the core of which was his idea of law, to find, as a basis for the State, some sagacious principle the self-evident virtues of which would be plain to practical men. He was an intelligent man with a large experience in constitutional affairs who wrote on philosophical subjects. But his dominant impulse was not philosophical: he was fearful of the unfamiliar. "Our business here is not to know all things," he wrote, "but those which concern our conduct."¹ His philosophy was thus a philosophy of the middle area; he began with the familiar, and for the most part did not pass beyond it in either of the two directions in which speculative inquiry moves. He did not attempt, in one direction, to justify the primary ideas on which his whole system rested. On this subject he took for granted the thought of his time. Thus, although his connections with the Cambridge Platonists were close, he nevertheless undertook an examination of the nature and extent of knowledge without any prior inquiry into the character of reality, a procedure entirely foreign to their practices and, indeed, to that of philosophy generally. He also failed to move very far in the other direction, towards a consideration of the consequences of the propositions established in his system. This is not a matter of much importance, provided indicia are present in the system which will enable

¹ Essay, I, i, 6.

The Two Treatises of Government and An Essay Concerning Human Understanding were both first published in 1690. The fourth edition of the latter work, with Locke's final revisions, appeared in 1700. All references to the Two Treatises are to the sections of Part II, unless otherwise specified.

335
readers to draw the necessary conclusions themselves. But on significant issues Locke has too frequently halted his speculation at a point which does not permit readers to draw conclusions. Thus Locke argued that government is established by society, and may therefore be disestablished by it. But who is to judge when the government has betrayed its trust to the extent necessary to justify an act of revolution? Locke answers, "the people." 2 But by what means is this judgment to be taken? By a plebiscite? Rioting in the streets? An act of revolution itself? Locke does not provide the answer to the question, nor is it possible to deduce it from the propositions of his system.

By avoiding abstractness at one end and complexity at the other, Locke kept his philosophical position free of elements which are held to discourage popular interest. It may be remarked, however, that the wide acceptance at various times of certain theological systems which embraced those elements to a high degree might have indicated that the foundations of this supposition needed examination. At any rate, not the least of the interest we have in Locke's philosophy today is due to its vast influence on practical affairs. That his basic ideas are at the root of much of the political theory of the eighteenth century is clear; and that the framers of the Declaration of Independence and the architects of the French Revolution, both directly and through the interpretations of such men as Rousseau and Paine, were inspired by his principles is also clear. The power of Locke's system, in fact, is nowhere else so strikingly illustrated than in the idea of the men of 1776 that it was applicable, although framed about the structure of English aristocratic society of 1688, to the entirely different society of the American colonies. Notwithstanding this popularity, his principles throughout the nineteenth century came increasingly under attack at the hands of formal political theorists, and it may well be that World War II will be taken historically as conveniently marking the close of their practical influence, together with that

2 Treatise, 240. It is arguable that he means a majority. See 168 and 299.
of the even more profound doctrines of 1789. Nevertheless, altogether apart from their problematical future, Locke's ideas deserve study as a typical way of approach to the problems of the legal order. It is not the approach of the philosophical specialist, who can exclude nothing from his purview, but that of the temperate sagacious man, whose efforts are directed to things which seem to him really to matter.

**Prepolitical Society**

Locke's first step in the development of his theory of law was to deny, in accordance with his general philosophical position, that the law of nature was innate. He argued that a rule of conduct imposes a duty; but what a duty is cannot be understood without a law, and a law cannot be known, or supposed, without a lawmaker, or without reward and punishment. It is therefore impossible for a rule of conduct to be innate (that is, imprinted on the mind as a duty) without supposing the ideas of God, law, obligation, punishment, and a life after death, also to be innate. But these ideas are so far from being innate, that it is not every studious man, much less every one that is born, in whom they are to be found clear and distinct. However, because Locke denies an innate law, he must not be thought as holding there are nothing but positive laws. He believes there is a great difference between something imprinted on our minds at the outset and something that we, being ignorant of, may attain to the knowledge of by the due application of our natural faculties. Thus, he believes they equally forsake the truth who, running into the contrary extremes, either affirm an innate law, or deny that there is a law knowable by the light of nature, that is, without the help of positive revelation.

Jurisprudence must here wait upon philosophy for a decision

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3 Locke's principles, oddly observes one of the most acute of contemporary English thinkers, "were embalmed in the Constitution of the United States which survives like an ancient family ghost haunting a modern skyscraper." Broad, John Locke (1933) 31 Hibbert Journal 249, 256.

on the relative claims of empiricism and rationalism. Although jurisprudence may not be entitled to speak upon such an issue, the problem of knowledge is nevertheless involved in legal speculation. In general, jurists either fail to perceive the problem and stop just short of the issue, thus leaving the whole matter in the air, or they impliedly assume some solution, or they deliberately avoid raising the issue since it has no bearing upon their speculation. Thus, Cardozo in a strong plea for the use of natural law as a part of the method of sociology takes the position that the judge must appeal to the “teachings of right reason and conscience.” But it is important to know if these teachings are to have their basis in experience or if they are to be found in the mind as a creator of knowledge. Until we know the answer to this question we are unable to take even the first step in Cardozo’s program, which is to consult the “teachings.” Again, theories of law based on such contemporary conceptions of biology and psychology as the “subconscious,” “inborn tendencies,” and “introspection” seem, insofar as the notions have any meaning at all, to be bringing in by the back door, and not too well disguised with false whiskers, what Locke put out the front, namely, Innate Ideas. Finally, and more soundly, writers such as Pound consciously construct their proposals so that the issue is not immediately raised. Thus Pound’s so-called “jural postulates of civilized society in our time and place,” which are in reality natural law doctrines of a highly sophisticated nature, are intentionally framed as the necessary “presuppositions” of a particular legal system or systems. They are thus simply logical constructs, and at the point at which Pound proposes them the issue of empiricism versus rationalism is irrelevant; that is to say, however that controversy may be decided in the future the content of the presuppositions would not be affected unless the decision demanded a change in the legal system itself. We have so far been spared a nominalist-

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5 The Nature of the Judicial Process (1922) 137.
6 Timasheff, An Introduction to the Sociology of Law (1939) 34-36.
realist controversy, with the nominalists sharply demarcated as the upholders of positive law, and with the realists similarly segregated as the supporters of natural law. However, a nominalist-realist controversy would not arise if the natural law system were solely a logical construct.

Locke's next step is to invoke the conception of a state of nature. This condition he defines for men as "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." This conception is a strict deduction from the proposition which he lays down with respect to political power, the self-evident validity of which he takes for granted and which he consequently advances no arguments to sustain: "Political power. . . . I take to be a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and all this only for the public good." Locke's idea of political power is thus a formal one. He finds in the law-making function the single element which distinguishes the power of the state from that of a father over his children, a master over his servant, a husband over his wife, and a lord over his slave. In spite of the large element of truth in Locke's assertion, we must recognize that as a complete factual description of political authority it is inadequate. It enables him to distinguish the State from the family and from economic organizations. But if, as Ratzenhofer and Small have done, we choose to look at the social process as one of a conflict of group interests, we arrive at a conception

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8 That is, the "next step" in Locke's own theory. Prior to his attempt to establish this premise, Locke had indulged in a long detour in which he answered the argument of Filmer's *Patriarcha* (1681) that Charles I derived his title and authority from Adam. However, the substance of Filmer's contention is not as silly as it is made to appear by Locke and his modern supporters. Actually it paved the way for the idea of natural rights as developed by Locke and Rousseau. See Figgis, *The Divine Right of Kings* (1914) 148 et seq.

9 *Treatise*, 4.

10 *Treatise*, 3.
of political power as an arrangement of combinations by which mutually repellant forces are brought into some measure of con­current action.\textsuperscript{11} In the performance of that function law is an important, but not the only, tool. Conciliation, propaganda, war, and many other devices, are instruments to that end. Locke’s premise should therefore be understood as valid only for the purposes of his argument, and inasmuch as one of his conscious and valid techniques was the employment of such abstractions, it is fair to assume that he meant it to be taken in that manner.

Thus Locke arrived at a conception of a state of nature on purely rational grounds; he did not appeal to the thought of the Middle Ages, to the Roman lawyers, to the Stoics or to Aristotle as authorities upon which to base it. He argued merely that political power is the right to make law and to punish for the public good. Take away that power and men have perfect freedom to order their actions within the bounds of the law of nature. As a strictly formal argument—apart from the introduction of the idea of natural law, in which Locke is anticipating himself—no exception can be taken to it. However, the argument must not be understood as asserting an actual historical condition. Locke himself was fully aware of the force—and the limitations—of that criticism by his opponents. “It is often asked as a mighty objection,” he remarks,\textsuperscript{12} thus anticipating his modern critics, “where are, or ever were, there any men in such a state of Nature?” To show that the conception is not entirely fictitious he suggests that the actual state of nature in his sense exists between independent princes and rulers, and between men of different societies who bargain with each other in a place where there is no government, \textit{e.g.} between a Swiss and an Indian who bargain for truck in the wilds of America. “They are perfectly in a state of Nature in reference to one another,” he remarks, “for truth and keeping of faith belong to men as men and not as members of society.” However, he implies that these two

\textsuperscript{11} Small, \textit{General Sociology} (1905) 253.  
\textsuperscript{12} \textit{Treatise}, 14.
examples are really superfluous, inasmuch as he wishes to affirm that all men are naturally in a state of nature, and remain so until they make themselves members of a political society.\textsuperscript{13}

Locke next asserts that all men in a state of Nature are equal by nature, and it is at this precise point that his argument breaks down. He here evokes a studied ambiguity of statement which makes it impossible to ascertain with any confidence his true meaning; but his proposition falls if taken in either of its two possible interpretations. Locke's\textsuperscript{14} actual words are: men are naturally in "a state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty." This statement, if taken formally, in accordance with Locke's argument up to this point, means that no man in a society which is not politically organized has any political authority over any other man. As such, the statement is a truism, and we are at once in the dilemma supposed by Hobbes: \textsuperscript{15} Where there is no political authority, the right of all men to things, is in effect no better than if no man had right to anything. But even within the framework of Locke's argument there is a deeper objection. If he intends his assertion to be taken in a formal sense, then he has reached an impasse. His objective is to pass from a state of nature to a state of politically-organized society; but this he cannot accomplish on his hypothesis if the inhabitants of his society remain formally equal. Thus, when he comes to make the transition he does so by making those inhabitants "biased by their interest," "ignorant" in their knowledge of it, refuse to allow the application of the law of nature to them-

\begin{itemize}
  \item \textsuperscript{13} Treatise, 15.
  \item \textsuperscript{14} Treatise, 4.
  \item \textsuperscript{15} Hobbes, Works (1840) 84.
\end{itemize}
selves, "partial," motivated by "passion" and "revenge," "negligent," and most important of all, without power to back their rights.\textsuperscript{16} Now in Locke's formal system the equality of the members should be self-executing; if it is not, there is no equality. But if the equality is self-executing, in Locke's system the condition would have been an idyllic one, and Locke's imaginary beings would never have consented to the substitution for it of a political society.

But Locke's assertion can be understood in a different sense, one which is equally invalid but which has the virtue of allowing the argument to progress. It also seems to be the sense in which he meant it, if we judge by the subsequent development of his thought. It can be taken to mean that in a state of nature the physical and mental differences among men are so slight that no man can claim authority over another because of them. This is Hobbes' argument, and in Locke's case it can be understood in either an ethical or an empirical sense. We may dismiss the empirical meaning at once—that men would not in fact claim that authority could be predicated on their differences—since Locke's subsequent argument seems to show that he meant it to be taken ethically. Furthermore, Locke could not safely at this stage base his argument on what men would or would not do in fact in a state of nature; he would have to admit on historical grounds that they both would and would not make such claims. He therefore argues: "The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order and about His business; they are His property, whose workmanship they are made to last during His, not one another's pleasure. And, being furnished with like faculties, sharing all in one community of Nature,

\textsuperscript{16} \textit{Treatise}, 124-126.
there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours.'  

In its ethical significance, as distinguished from its theological, the doctrine is an anticipation of Kant's maxim that we ought to treat every man as an end, never as a means only. This asserts that every man is the judge of his own good; and no man, and therefore no government, can impose another good upon him. But this would make government impossible unless everyone acquiesced in the good established by the government for the community. The doctrine of Locke and Kant is the modern democratic doctrine of individualism, but it plainly needs restatement in order to fit the facts of that type of government.

We are therefore at the stage in Locke's argument at which he has abandoned his method of conscious abstraction. Henceforth, his discussion is on an ethical or an empirical level, and may thus be tested by criteria, such as the historical, which would be inappropriate had he continued his initial method. In this respect he stands in sharp contrast to a philosopher such as Leibniz, who constructed two theories of law, one formulated on a set of ideal postulates, the other empirical and based on the facts of positive law.

Locke's state of Nature, as we have seen, was governed by a law of Nature, the basis of which was established both theologically and ethically. The law of Nature, which was known through reason, was at bottom the rule of self-preservation, which was generalized by Locke to include the preservation of all members of the society. "Every one as he is bound to preserve himself," he wrote,  

"so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind." In terms as concrete as Locke thought it advisable to make them, this meant that no one ought to harm another in his life, health, liberty or possessions. From this it followed, in Locke's view, that the

\[\text{17 Treatise, 6.}\]

\[\text{18 Ibid.}\]
execution of the law of Nature was in every man’s hands. Not only may a man punish for the injury done him, but others may assist in that process, because an injury is social as well as personal. Nevertheless, the punishment must not be arbitrary, but must be proportionate to the transgression, that is to say, will be such as will serve for reparation and restraint.

Apparently Locke was concerned over his proposal that every man in a state of Nature had a right to punish and to be the executioner of the law of Nature. He referred to it specifically as a “strange doctrine,” as indeed it was, and he attempted to bolster it by two arguments. The first argument we have already noticed: that an offence is a trespass against the whole society; and since every man has a right to preserve mankind in general, every man therefore has a right of punishment. His second argument bore upon a principle of English law that had just been established. By what right, Locke asked, except on his argument, can a State punish an alien for a crime committed in its country? It is certain, he says, that the laws of a State, by virtue of any sanction they receive from the promulgated will of the legislature, do not reach a stranger. Therefore, if by the law of Nature every man does not have a power to punish offences against it, Locke does not see how the magistrates of any community can punish an alien of another country, since in reference to him, they can have no more power than what every man naturally may have over another.

It is curious that Locke should have advanced such an argument, since the question of the liability of an alien for violations of the local criminal law had recently been settled on another ground by the English courts. Moreover, the argument contradicts a position Locke was to assume later on in the Treatise. Queen Elizabeth’s lawyers had been confronted with the problem in the case of Mary Stuart, both as a question of political necessity and as a matter of law. Elizabeth defended her right to retain her prisoner on the ground that “a man offending in another’s territory, and there found, is punished in the place of

19 Treatise, 10.  
20 Treatise, 9.  
21 Ibid.
his offence, without regard of his dignity, honor, or privilege."  

But a few years earlier, in 1545, the authorities had turned over to his captain a Spanish soldier who had committed a murder in England. Later, Sherley, a Frenchman, committed an act of treason in England against the king, and the court recognized that he owed a local and temporary obedience so long as he was within the king’s protection. Again, in 1594, in the case of the wretched Portuguese Jew, Dr. Lopez, who was Elizabeth’s physician and who was accused by Essex of a conspiracy against her life, the judges followed the principle of the Sherley case. This principle was recognized by way of obiter in 1609 in Calvin’s Case, the longest and weightiest case in substance, according to Coke, that was ever argued in any court. Finally, in 1662, the court expressly decided, in the case of a Quaker born in France, who was on trial for a violation of the Act to Suppress Seditious Conventicles, that aliens owed a temporary allegiance to the government of the country in which they were resident. Locke was well acquainted with the rule established by these cases, because he stated it approvingly in section 122 of the Treatise. “Thus we see,” he writes, “that foreigners, by living all their lives under another government, and enjoying the privileges and protection of it . . . are bound, even in conscience, to submit to its administration as far forth as any denizen.” This rule is binding, in Locke’s opinion, upon the alien in conscience because the alien, through the enjoyment of the government’s protection, has given his tacit consent to obey the rules of the government.

Locke defined a state of nature as a society of “men living together according to reason without a common superior on earth, with authority to judge between them.” This grouping of men is a society, but it is not political, its members possess natural rights, and the ordering of the group is regulated by

23 1 Dasent 170.
24 Sherley’s Case (1557), Dyer 144a.
25 7 Co. Rep. 6a-6b.
26 Kelying, 38.
27 Treatise, 119.
28 Treatise, 19.
29 Treatise, 77.
natural law. There are also certain institutions in the society which are antecedent to the organization of political society: executive power to punish,\textsuperscript{31} property,\textsuperscript{32} money,\textsuperscript{33} war,\textsuperscript{34} slavery,\textsuperscript{35} the family,\textsuperscript{36} religion,\textsuperscript{37} education,\textsuperscript{38} inheritance,\textsuperscript{39} and other elements. Thus Locke's prepolitical society contains all the institutions, some of which are surplusage, for the necessary functioning of a society. He omits, in fact, only one institution—the state, or sovereign governmental group—which is customarily found in societies. That the society he contemplated, from the point of view of the elements he assigned to it, is a possible one, is now entirely free from doubt, inasmuch as many such societies are known to be in existence at the present time and are also known to have been in existence for many generations past. The Pygmies of the Andaman Islands exhibit the characteristics of Locke's society in an even more rudimentary form than Locke was willing to allow.\textsuperscript{39}

Yet, in Locke's view, as we have seen above, the state of nature in reality is such an intolerable one that its inhabitants, however free, are willing to quit it. Every man's life, liberty and property are constantly exposed to invasion by others; the rules of justice and equity are only partially obeyed; and his condition generally is full of fears and continual dangers.\textsuperscript{40} Men therefore agree with other men to unite into a community for their comfortable, safe and peaceable living, and when they have so consented to make one community a government, they are thereby presently incorporated, and make one body politic, in which the majority have a right to act and conclude the rest.\textsuperscript{41}

Thus, political society is established by the freely given
consent of the men who are to be members of that society. Every individual has the natural right to be free from any superior power on earth, and not to be under the will or legislative authority of other men, but to have only the law of nature for his will. He may, however, abrogate that right by consenting to form a political society. When he forms that society he surrenders his power to preserve his property—that is, his life, liberty and estate—against the injuries and attempts of other men, and he surrenders also his power to judge of and punish breaches of the law. At the moment of the formation of political society these natural powers pass to it. In Locke's opinion the possession of these powers by a society constitutes the sole criterion by which to judge whether it is politically organized or not. "There, and there only," he writes, "is political society where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it." The formation of a political society excludes the private judgment of every particular member, and the community comes to be umpire, and to possess the power to punish. The community is authorized to make laws for the public good, but its actions cannot be arbitrary; for the law of nature rules in political society also, and men have surrendered to the community not all their natural rights, but only their right of executive power. Thus Locke holds that an absolute monarchy is inconsistent with civil society, and cannot be a form of civil government at all. Locke further separates the compact which forms the political society from the act which creates the kind of government which will rule the society. Finally, when the government, which is a fiduciary power to act for certain ends, violates its trust, the people have the right to save themselves and to constitute a new government.

Two mistaken assumptions are at the basis of Locke's account of the transition from pre-political to political society,

42 Treatise, 87. 42 Treatise, 90. 44 Treatise, 132. 45 Treatise, 149.
one that he could predict how men would actually behave in a pre-political society; and the other, that he could determine how men ought to behave at all times and everywhere. As for the first, it was a matter of necessity for Locke to establish that conditions resulting from human behavior in the state of nature would be so unsatisfactory that men would be instigated or compelled to form a political society; otherwise mankind would never abandon their liberty to the extent required to submit to a government. But how men will behave in the theoretical circumstances established for them by Locke is clearly beyond the limits of present knowledge to predict. In its abstract form the problem is analogous to a much simpler one in mathematics which is still unsolved—the problem of three bodies. Newton was able to account for the motions of a single planet revolving about its primary; but the determination for a particular time of the positions and motions of three mutually gravitating bodies when their positions and motions are known for some other time, is still so complex a matter that its full solution has never been accomplished. The social sciences are not even at the stage at which they can handle the problem of two bodies. Two men, sworn enemies, are turned loose on an uninhabited island; one is stupid and weak, the other strong and intelligent. Who can conjecture which will survive? We know further that many communities have existed in an even more rudimentary state of nature than the imaginary one constructed by Locke and were not under any apparent compulsion to form a government. Among such communities the most rudimentary are the Andaman Islanders, the Paiute Shoshone of Utah and Nevada, and the Yahgan of Tierra del Fuego, none of whom possess coercive agencies in Locke’s sense, either in the form of institutions or chiefs. Nor need we confine ourselves to the so-called primitive peoples for illustrations of communities functioning for long periods of time in a state of nature. The numerous utopian colonies such as the Shakers, founded in many parts of the United States for the purpose of achieving a communist commonwealth and a life in accordance
with literal Christianity, are examples of the fact that some men at least find the state of nature, as Locke defined it, a desirable one. In this respect in fact, the ideal of theoretical communism is precisely the condition which Locke rejected as intolerable. When organizing production anew on the basis of a free and equal association of the producers, Engels insisted, society will banish the whole State-machine to a place which will then be the most proper one for it—the museum of antiquities, side by side with the spinning-wheel and the bronze axe. Thus, the necessity which in Locke drives men from a state of nature to a political society, becomes in Engel’s theory the necessity which compels a reversal of the process.

Locke’s belief that he could, through reason, frame a set of moral rules which would be universally applicable was put forward in the most emphatic terms. “I doubt not,” he wrote, “but from self-evident propositions, by necessary consequences, as uncontestable as those in mathematics, the measures of right and wrong might be made out, to any one that will apply himself with the same indifference and attention to the one as he does to the other of these sciences.” This, of course, is a reversal of the Aristotelian doctrine that ethics is concerned with things which are for the most part so, things which are capable of being otherwise, and that we must not expect from ethics the perfect demonstrations that are possible for a science which, like mathematics, deals with things that are of necessity. Locke gives two examples of his mathematical morality which he thinks are as certain as any demonstration in Euclid: “Where there is no property, there is no injustice” and “No government allows absolute liberty.” These statements appear to be merely descriptive propositions, and it is not clear why Locke regarded them as moral rules. However, in the Reasonableness of Christianity, Locke took the position that human reason needed the assistance of religion in order to work out a system of ethics. Human reason, he said, never from unquestionable principles made out an entire body of the law of

*Essay, IV, iii, 18.*
nature. He does not tell us what science would have produced the ideal he had in mind, and Sidgwick conjectures that he would probably have demonstrated from man’s nature the body of laws which he had inherited from Grotius and Pufendorf under the name of the law of nature. But as Alexander observes, there is an unresolved problem here: How can propositions which follow from abstract human nature be applicable to or true of a world of concrete men? Moral judgments are relative, and this was one of Locke’s reasons, and a correct one, for denying the innateness of moral principles. Nevertheless he clung fast to his belief in the abstract character of moral laws. Yet it implies either that these varying and conflicting judgments are not moral or else that morality is not abstract. There is the further difficulty, that whether a man has been harmed in his life, health, liberty or possessions must always depend upon the facts of the particular case. It is not enough to promulgate a rule that prohibits such harm. It is exactly the problem of fitting the general rules to this particular case which the courts of the land are attempting to determine every day; and that there is a large element of uncertainty in the solutions, the reversals, new trials and dissenting opinions bear witness. Locke’s principles are so general that opposite results are fully in accord with them. In one type of society, that of the Shakers, an absolute equality in the distribution of property assists in the realization of the ideal end for which it was organized. In another, that of U.S.S.R., a different method of distribution has the same result. But in both instances no member of the society has been harmed in his possessions.

Nevertheless, in its essence, Locke’s method of approach contains a large element of truth. He began by asking a legitimate question, i.e., one for which there exists some possibility of an answer: What is the origin of government? He endeavored to answer the question conjecturally through abstract reasoning, and, from such material as was available in the seventeenth century, empirically. In all this his methods,
abstractly considered, do not differ essentially from those employed in such a work as Lowie's *The Origin of the State*, which exhibits the most refined of modern techniques. Locke's error, however, lay in the fact that he lost sight of his objective. His objective, unlike Lowie's, was not to discover the origin of government, but to prove a political theory. He was therefore compelled to introduce elements, such as ethical norms and the idea of necessity, in a manner which distorted his inquiry and led him to erroneous results if judged historically. But that he was on the right track, apart from his political distortions, the most approved methods of contemporary ethnology are ample evidence.

**The Rule of Law**

At the heart of Locke's theory of civil society was the idea of law. His argument was constructed entirely in terms of law, and the ideal society which he contemplated was organized on the basis of institutions deduced from legal practices. When he came to summarize his view of the state of nature and to make the vital shift from prepolitical to political society his approach was exclusively through legal institutions. The great and chief end of men uniting into commonwealths, and putting themselves under government, is the preservation of their property, he observed. This could not be accomplished in the state of Nature, he thought, because there are many things wanting. First, there is lacking 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. The law of Nature is, of course, plain and intelligible to all rational creatures, but men are biased by their interest, as well as ignorant for lack of study of it, and are not apt to allow it as a law binding on them in the application of it to their particular cases. Secondly, there is lacking a known and indifferent judge, with authority to determine all differences according to the established law. Inasmuch as every

*49* Treatise, 124 et seq.
one in the state of Nature is both judge and executioner of the law of Nature, and since men are partial to themselves, passion, revenge, negligence and unconcernedness, are apt to carry them too far, and with too much heat in their own cases, and make them too remiss in other men's. Thirdly, there often is lacking power to back and support the sentence when right, and to give it due execution. Those who are offended by any injustice will seldom fail where they are able by force to correct their injustice; constant resistance to injustice makes punishment of resistance dangerous, and frequently destructive to those who attempt to punish it. Thus mankind, notwithstanding all the privileges of the state of Nature, are actually in an ill condition while they remain in it and are quickly driven into a political society. In such a society, which has no other end but the peace, safety, and public good of the people, the legislative or supreme power of the commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; controversies will be decided by indifferent and upright judges in accordance with those laws; and the supreme power of the commonwealth will employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion.

In his emphasis upon the desirability of the rule of law Locke was in full accord with one of the great traditions of Western thought. Plato had accepted the rule of law as a "second-best" when contrasted with the administration of a philosopher-king; but from the point of view of the government which society in reality was likely to achieve, he regarded law as a necessity, and accordingly made its observance or non-observance the criterion by which all governments should be judged. To Aristotle, the rule of law seemed preferable to that of any individual. This idea was insisted upon by the mediaeval lawyers and political philosophers and found expression in

50 Politicus.
51 Politics 1287 a 20.
52 S Carlyle, Mediaeval Political Theory in the West (1916) 52 et seq.
Bracton's doctrine that the law and not the prince was supreme. 

"There is no king," Bracton said in a famous phrase, "where will rules and not law." But it was Cicero who clearly formulated three of Locke's basic ideas. Law for Cicero was the bond of civil society, the state was a partnership in law, and was actually a large assemblage of people associated by consent under law. However, he expressly repudiates Locke's view that men are impelled to form political societies because of individual weaknesses; they come together and form a civil society because, in Aristotle's words, man is by nature a social animal.

To lawyers and political theorists schooled in legal thinking the idea of the rule of law, of society held together by its bonds, is apt to be especially appealing. But it is well to remember that the theory has been repudiated as the embodiment of evil by thinkers fully as acute as Locke, and as earnestly concerned with the public good. From Godwin to Proudhon, from Spencer to Kropotkin, it has been insisted that government per se is evil, and that the human action of men in society is best regulated by the uncoerced power of reason, which alone will produce a just and harmonious social order. In Locke's estimate the character of human nature requires government and law; in that of the philosophical anarchist and extreme individualist it does not. It is on the truth or falsity of Locke's proposition that the entire argument of the two attitudes turns. Both schools have an unlimited faith in the rational nature of man, but one demands anarchy as the ideal solution, and the other a form of limited government.

Law to Locke was a branch of ethics, and laws in their essence were moral rules. Rules of morality, including rules of law, were distinguished from other rules by the fact that they were enforced, or were associated with rewards and punishments. The rules or laws that men generally refer their actions

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53 De Legibus et Consuetudinibus Angliae, f. 5b.
54 De Re Publica I, 32.
55 Ibid.
56 Ibid., I, 25.
57 Ibid.
58 Essay II, 28, 6 et seq.
to, to judge of their rectitude or obliquity, seemed to Locke to fall into three classes; the divine law, the civil law, and what he termed the law of opinion or reputation, by which he meant the practice of condemning certain actions as evil or praising them as good. By the divine law he meant the law which God has set to the actions of men, whether promulgated to them by the light of nature, or the voice of revelation. He thought there was nobody so brutish as to deny that God has given a rule whereby men should govern themselves. He has a right to promulgate such rules, we are his creatures. He has goodness and wisdom to direct our actions to that which is best; and he has power to enforce it by rewards and punishments, of infinite weight and duration, in another life; for nobody can take us out of his hands. This is the only true touchstone of moral rectitude; and by comparing them to this law it is that men judge of the most considerable moral good or evil of their actions; that is, whether as duties or sins they are likely to procure men happiness or misery from the hands of the Almighty.

Locke held that it would be utterly vain to suppose a rule set to the free actions of man, without annexing to it some enforcement of good and evil to determine his will. We must, therefore, wherever we suppose a law, suppose also some reward or punishment annexed to that law. It would be vain for one intelligent being to set a rule to the actions of another, if he did not have it in his power to reward the compliance with, and punish deviation from, his rule, by some good and evil that is not the natural product and consequence of the action itself. For that, being a natural convenience or inconvenience, would operate of itself without a law. This for Locke is the true nature of all law which, in a phrase anticipatory of Austin, is "properly so called."

The civil law was defined by Locke as the rule set by the commonwealth to the actions of those who belong to it. This law nobody overlooks; the rewards and punishments that enforce it being ready at hand, and suitable to the power that
makes it. This is the force of the commonwealth, engaged to protect the lives, liberties and possessions of those who live according to its laws, and has power to take away life, liberty, or goods from him who disobeys; this is the punishment of offenses committed against this law. Locke is here following the imperative theory. Hobbes had held that the civil law is to every subject those rules which the commonwealth has commanded him to make use of for the distinction of right and wrong; that is to say, of what is contrary and not contrary to the rule.\(^59\) Similarly, Pufendorf had held a law to be an enactment by which a superior obliges one subject to him to direct his actions according to the command of the former.\(^60\) It is true that Locke elsewhere refers to law as a “positive command,”\(^61\) but at this point he studiously avoided the use of the term.

He did not in truth think of law as a command, but as that which is set up by authority as a rule for the measure of conduct. Law is the standard to which men refer their actions, and by which they judge of their rectitude or pravity, of their criminality or lack of it. In Locke’s phrase “law is the rule set to the actions of men,” a conception entirely different from Hobbes’ view of law as command. One of the important objects of Hobbes’ system was to establish an absolute governmental authority. With Locke, his most significant aim was to prove that government must necessarily be limited. “Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government,” he wrote.\(^62\) Positive laws of a society must be made in conformity with the laws of nature,\(^63\) for “the obligations of the law of Nature cease not in society” but stand “as an eternal rule to all men, legislators as well as others.”\(^64\) In civil society the legislative power is supreme, “for what can give laws to another must needs be superior to him.”\(^65\) In

\(^{59}\) *Leviathan* (1651) 137.

\(^{60}\) *Elementa jurisprudentiae universalis* (1672) def. 13.

\(^{61}\) *Treatise*, 160.

\(^{62}\) *Treatise*, 137.

\(^{63}\) *First Treatise*, 92.

\(^{64}\) *Treatise*, 135.

\(^{65}\) *Treatise*, 150.
making a distinction between law as a "command" and law as a rule which is "set," Locke seems to be distinguishing between a command and a norm coupled with an enforcement mechanism. In Hobbes' sense law was a direct command from the sovereign power in the State to the citizen to follow a particular course of action; in Locke's system the capacity of the supreme power is fiduciary, and accordingly it establishes merely a pattern to which behavior should conform, and with which is associated rewards and penalties for conformity or infractions. Locke's rules of civil law thus partake no more of the character of commands than do his laws of nature, which are based upon "reason," and which "teach" mankind the rules it is to observe. Austin's accomplishment was to add Locke's phraseology to Hobbes' idea of sovereignty, and thus to arrive at the idea of a law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." In this sense, he observes, law comprises "law set by God to men, and laws set by men to men." Moreover, the essential criterion of a positive law is that it is set by a sovereign power which is absolute. Austin also went back to Hobbes in his terminology by explicitly introducing the idea of command as the essence of law. It is not clear what Austin gained by his repeated employment of the Lockean phrase to describe law as a rule which is "set to men," since in Locke's system the words had an entirely different meaning. Locke's theory of law in fact appears to be an anticipation of the powerful modern continental view which Pound has termed the "threat theory of law" and which is exemplified in Binding, Jellinek, Lévy-Ullmann, Kelsen and others. That theory holds that law in its essence is the establishment of norms by the proper authoritative political power, and the enforcement of threats that, given a defined act or situation, neither qualified as good nor bad, certain legal coercion will follow.

66 Province of Jurisprudence Determined (1832) sec. 2.
67 Ibid., Lect. VI. Bentham's theory of law as a volition expressed by a sovereign power in the form of a command was an immediate influence upon Austin's terminology; but Bentham's theory itself also took its origin in Hobbes and Locke.
Locke introduced two additional elements into his conception of law which must not be overlooked—the idea of reward as well as punishment, and the idea of sanction itself. Austin believed that the extension by Locke (in which he was followed by Bentham) of the idea of sanction to rewards produced only confusion and perplexity. He argued that rewards are, indisputably, motives for our compliance with the wishes of others; but to talk of commands and duties as sanctioned or enforced by rewards, or to talk of rewards as obliging or constraining to obedience, is surely a wide departure from the established meaning of the terms. If you expressed a desire that I should render a service, and if you proffered a reward as the motive or inducement to render it, you would scarcely be said to command the service, nor should I, in ordinary language, be obliged to render it. In short, Austin held that I am inclined to comply with the wish of another by the fear of disadvantage or evil. I am also inclined to comply with the wish of another, by the hope of advantage or good, but it is only by the chance of incurring evil that duties are sanctioned or enforced. This argument has not been accepted by Austin's followers in the form in which it is stated. There is the authority of Ulpian that legal obedience is secured "not only by the fear of punishment, but also by the hope of reward." 69 As Jhering pointed out, public recompense had a legal expression at Rome. The general of the army had a right to the triumph, a soldier a right to one or other of the Roman military orders, and in either case the right was one of which the tribunals would take cognizance. In addition, Austin's supporters admit it would be possible to go further than Locke, and claim that a command may be sanctioned by the reverence for an authority as well as the fear of punishment or the hope of recompense. "He alone lives by the Divine Law," said Spinoza, "who loves God not from fear of punishment, or from love of any other object, such as sensual pleasure, fame, or the like; but solely because he has knowledge

69 Digest I, i, 1. I am here summarizing Brown, The Austinian Theory of Law (1920) 8-9n, 342.
of God or is convinced that the knowledge and love of God is the highest good.” Divine law as thus defined is a command, not through fear of punishment, but for love and reverence of the Divine Being. Locke’s modern followers as represented by Kelsen regard punishment and reward as the two typical sanctions, although in social reality they hold the first to play a far more important role than the second.70

Taken strictly, Locke’s idea of sanction breaks down when applied to criminal statutes for the violation of which no penalty is provided. Thus a Federal statute makes it a misdemeanor to harbor or conceal any alien not duly admitted by an immigration inspector or not lawfully entitled to enter or to reside within the United States, but imposes no penalty for the offense.71 So far as the offense of harboring is concerned, a citizen of the United States may commit it without fear of a direct visitation of the State’s coercive power. It is possible that power might be exercised indirectly should the occasion arise; but that would be a different case and would fall within the sanction known as nullity. Thus a landlord who harbored an alien might not be permitted to enforce the terms of his lease. In Cowan v. Milbourn it was held that a contract to let a lecture room for an anti-Christian lecture was void for illegality.72 Baron Bramwell observed in his judgment: “It is strange there should be so much difficulty in making it understood that a thing might be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law.” This type of negative punishment is regarded by Austinians as included within his conception of sanction.73 “I agree with critics of Austin,”

70 General Theory of Law and State (1945) 17.
72 (1867) L. R. 2 Ex. 230.
73 Brown, 9.
Sidgwick writes, "in thinking that the conception of 'command'—implying announcement of wish, together with power and purpose of punishing its violation—can only be applied in an indirect way, and by a process of inference sometimes rather complicated, to many of the rules that make up the aggregate of civil law. Still I think that Austin's conception is always applicable, if it is interpreted as meaning only that the expectation of some penalty, to result from the action or inaction of government or its subordinates, constitutes one motive for conforming to the rules that we call 'laws,' and supplies a broadly distinctive characteristic of such rules: though the penalty (1) may consist only in the enforced payment of damages to a private individual injured by the violation of the rule, or (2) may be merely negative, and consist in the withdrawal from the law-breaker of some governmental protection of his interests to which he would otherwise have been entitled." 74 Whatever may be the case with Austin, it is impossible from Locke's language to determine whether he would have regarded the sanction of nullity as a punishment of sufficient coerciveness to comply with his theory. On one interpretation, however, he would have accepted the sanction of nullity as an additional punishment to be applied in the proper case, and which might or might not arise; but if the prohibition itself provided for no punishment in its particular case then, on his theory, it would not be a law.

By introducing the idea that laws must be enacted solely for the good of society, 75 Locke avoided a difficulty that later was to plague the Austinian dialectic. Austin's idea that the essence of law is command, and that its object therefore is to impose duties, leads to a police conception of the function of law under the restrictions of which the individual moves at his peril. But law is plainly more than a set of police regulations. It is one of the forms of social ordering which allows society to function to maximum effectiveness. This was clearly seen by Locke. "Law, in its true notion, is not so much the

74 Elements of Politics (1891) 22n.  
75 Treatise, 135, 142.
limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law. . . . So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom." 76 Where there is no law there is no freedom, he argues with Spinoza. For liberty is to be free from restraint and violence from others, which cannot be where there is no law. A person who is at liberty to dispose and order as he wishes his person, actions, possessions, and his whole property within the allowance of those laws under which he lives, is not subject to the arbitrary will of another, but is freely following his own.

Locke's theory for the remainder of its development passes over into politics. Long ago Joubert pointed out that Locke's theories in general are incomplete. They do not fully embody their subject matter, because Locke did not have that subject matter all in his mind beforehand. As a matter of political theory Locke held that the legislative is the supreme power, "for what can give laws to another must needs be superior to him." 77 However, the legislature in pursuance of its functions must not be arbitrary over the lives and fortunes of the people; it cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorized judges; it cannot take from any man any part of his property without his own consent; it 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; there are also other limitations. 78 These rules, and much else from Locke beside, were substantially adopted by Blackstone, and thus through him and other sources have had a profound influence on the legal and political thinking of the United States. Today they are all in process of modification, but what will supplant them is not yet clearly discernible.

76 Treatise, 57. 77 Treatise, 150. 78 Treatise, C. xi.
Philosophical theories live long after their brains have been knocked out, Leslie Stephen once observed. Locke’s theories have displayed this customary vitality. In spite of the attacks made directly upon them and indirectly through criticism of the Austinian position, they survive today in the fundamental thought of one of the most vigorous of the modern schools of jurisprudence. Locke is in fact the propounder of an original and profound theory of law. It has been said that had Locke’s mind been more profound, it might have been less influential. Whatever may be the truth in other respects, the depths of his legal analysis have rarely been surpassed by any other philosopher or jurist. His theory of law was incidental to his main argument, and he did not develop it in all, or even in many, of its possible ramifications. But he paused long enough to state its essence, and only today are we aware of the power of the idea he formulated.