

**ANARCHICAL SNARES:  
A READING OF LOCKE'S  
SECOND TREATISE**

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If Mr. Locke's maxims were to be executed according to the letter... they would necessarily unhinge, and destroy every government on earth.

Josiah Tucker, *A Letter to Edmund Burke, 1775*

By the practice of governments themselves, [Locke] argues, 'as well as by the law of right reason, a child is born a subject of no country or government.' Here we seem to be led straight to anarchy.

Leslie Stephen, *History of English Thought in the Eighteenth Century*, Vol. II, 1881

In fact, as Mr. Laslett has so ably shown, neither of these two major opponents [Sidney and Locke] seems to have really understood or answered Filmer's main case or his attack on the libertarianism and the contract theory of the school of thought to which they belonged.

W. H. Greenleaf, *Order, Empricism and Politics*, 1964

## Introduction

**R**.G. Collingwood was certainly correct when he wrote in his *An Autobiography*,

You cannot find out what a man means by simply studying his spoken or written statements, even though he has spoken or written with perfect command of language and perfectly truthful intention. In order to find out his meaning you must know what the question was (a question in his own mind, and presumed by him to be in yours) to which the thing he has said or written was meant as an answer.<sup>1</sup>

I think that this is especially true in the case of John Locke's *Second Treatise of Government*, a work that is, despite its clarity of language, notoriously difficult to understand.

Although early twentieth-century scholars cast this work as being a response to Hobbes,<sup>2</sup> the scholarly tide has turned in favor of viewing the *Second Treatise*, like the *First*, as principally constituting a rejoinder to the seventeenth century Divine Right of Kings theorist Sir Robert Filmer, and more specifically, as a counter to Filmer's Patriarchalism.<sup>3</sup>

My sentiments lie with this revisionary movement: I too read the *Second Treatise* as being in large measure a response to Filmer. In this essay, I shall attempt to make a contribution to this way of reading Locke. However, the focus will not be on Locke's concern with the patriarchal views of Filmer; rather, it will be on Locke's attempt to answer Filmer's polemics against the doctrine of natural rights or freedom. For Filmer, the logic of the doctrine of natural rights inexorably requires the embracing of a theory of anarchism and, as such, entails the impossibility of justifying the existence of any form of government. And to Filmer, this constituted a *reductio ad absurdum* of any natural rights philosophy. Locke's *Second Treatise* can illuminatingly be seen as being animated, at least in part, by the desire to undercut Filmer's contention. Thus, to return to our Collingwoodian beginning, I shall show, in sections I-VIII, that we can make a great deal of sense of the *Second Treatise* if we view Locke as attempting to answer the question of how a natural rights political philosophy can be reconciled with the advocacy of government and, in particular, a limited government.

That we can view the *Second Treatise* in this way says nothing, of course, about Locke's intentions. Although it is impossible to give anything approaching a conclusive proof for this, I do believe that Locke did set out to answer Filmer's attack on the natural rights

philosophy in a comprehensive manner. I offer some reasons for this in the conclusion of this essay.

## I

Filmer is best known, and most frequently read, for his patriarchal political philosophy. For Filmer, political power, *legitimate* political power, is essentially a specific type of paternal power. God created the first political community, Adam's family, with Adam as supreme authority. All further political communities are merely extensions thereof; as such, all political authority must emanate from Adam, and therefore the right to rule has to be traced back to Adam.

Everything else notwithstanding, Filmer's greatest theoretical difficulty was to offer a plausible theory of succession that would allow him to justifiably determine who should rule. In trying to solve this problem, Filmer appealed directly to heredity, and although he was not particularly explicit about it, there are hints that he was willing to rest his case on primogeniture. As Filmer's critics were quick to notice, the epistemological difficulties of tracing the right to rule of James I, for example, to Adam and his first son, as Filmer desired to do, were overwhelming.

Much of Filmer's defense of hereditary absolute monarchy was polemical: it was designed to demonstrate that those arguments that attempt to found political legitimacy on the consent of the governed must fail. And insofar as these arguments were typically predicated upon an appeal to man's natural freedom or natural rights, this appeal too fell under the barrage of Filmer's polemics.

Filmer's critique of the consent argument and the theory of natural rights (or freedom) is ubiquitous throughout the corpus of his political writings;<sup>4</sup> however, its most systematic presentation is to be found in his 1648 tract *The Anarchy of a Limited or Mixed Monarchy*,<sup>5</sup> a work aimed at the "parliamentary publicist"<sup>6</sup> Philip Hunton. In this work, Filmer argues that the doctrine of natural rights or freedom, and the consent theory of political legitimacy derived therefrom, inexorably lead, both in theory and practice, to anarchism. Since upholding anarchism is, Filmer maintains, an absurdity, so too the theories of natural rights and consent must be absurdities.

## II

Filmer's phillipic in *The Anarchy of a Limited or Mixed Monarchy* is put forward in a series of six arguments. I shall consider each in turn, liberally quoting Filmer as I proceed.

*The first argument.*

If they understand that the entire multitude or whole people have originally by nature power to choose a King, they must remember that by their own principles and rules, by nature all mankind in the world makes but one people, who they suppose to be born alike to an equal freedom from subjection; and where such freedom is, there all things must of necessity be common: and therefore without a joint consent of the whole people of the world, no one thing can be made proper to any one man, but it will be an injury, and a usurpation upon the common right of all others. From whence it follows that natural freedom being once granted, there cannot be any one man chosen a King without the universal consent of all the people of the world at one instance, *nemine contradicente*. (*Anarchy*, p.285)

As is the case with the other five arguments to be considered, this argument is a *reductio ad absurdum*. Filmer is attempting to show the absurdities to which a natural rights philosophy leads. In this first instance, the conclusion is suppressed; however, before making it explicit, I shall first lay down the premises that yield it.

Here Filmer considers the possibility that when natural rights theorists write of legitimate political power being predicated upon the consent of the governed, the latter refers to the consent of *all* of mankind<sup>7</sup> as opposed to some part of it. Given the equal freedom or rights of all mankind, any legitimate King, then, must be chosen by the joint consent of all of mankind. For to be governed by a King of whom one does not approve would be a violation of one's freedom: one would be made to suffer a King by force. All of this is highly problematic, according to Filmer. For, and this is the suppressed conclusion, *universal* consent at *one time* is impossible. And if it is impossible, then as Filmer sees the matter, on this reading of a natural rights philosophy, government by its very nature is illegitimate. Yet, Filmer believes, this is absurd.

*The second argument.*

This argument is part of the same paragraph as what I call the first argument, and since Filmer never explicitly set forth a conclusion to that argument, it would be easy to surmise that this second argument is really part of the first. I think this is mistaken; however, the reasons why can be made clear only after a consideration of the third argument.

To turn to this second argument, Filmer writes:

Nay, if it be true that nature hath made all men free; though all mankind should concur in one vote, yet it cannot seem reasonable, that they should have power to alter the law of nature; for if no man have power to take away his own life without the guilt of being a murderer of himself, how can any people confer such a power as they have not themselves upon any one man, without being accessories to their own deaths, and every particular man become guilty of being *felo de se*? (*Anarchy*, p.285)

Filmer begins the argument by supposing that the problem of the previous argument has been overcome, and that we can achieve the requisite universal consent. Nevertheless, Filmer wants to argue that the natural rights position still leads to an absurdity. Filmer's second argument demands that one ask, To what is being consented? The answer must be that individuals are consenting to *alienate* some of their freedom or rights to the King. Filmer believes that this is inconsistent with the natural rights position. To see why, we must turn to Filmer's conception of the theory of natural rights.

For Filmer, the natural rights philosophy is one that holds, among other things, that certain freedoms or rights are in-defeasible, that is, they cannot be taken away or voided by others, and, most importantly in this context, are inalienable, that is, cannot be waived or relinquished by the agent himself.<sup>8</sup> The natural rights tradition is not as uniform as perhaps Filmer suspects; however, there are certainly important strains in the tradition that hold especially to the inalienability of certain rights. It was not unusual, for example, to find natural rights theorists arguing that the rights to life and liberty are inalienable, and thus one does not have the right to commit suicide or to sell one's self into slavery,<sup>9</sup> for that would alienate one's right to life.

Now turning back to the second argument, Filmer is claiming that since the rights to life and liberty are inalienable, on his conception of the natural rights position, then these rights cannot be alienated by relinquishing them to a King. Legitimate political power demands, however, as Filmer conceives of it, that the King have the power over a person's liberty and life; indeed Filmer believes that under the natural rights position, every law constitutes an infringement of liberty.<sup>10</sup> Thus, the natural rights position is again shown to be incompatible with the establishment of government, and finds itself inescapably led to embrace anarchism.

*The third argument.*

Suppose, Filmer writes, that by "the people," Hunton and other natural rights theorists mean "the people of particular regions or countries," (*Anarchy*, p.286) and not all of mankind; and that it is this smaller group which will be the body consenting to a government. Can this extricate the natural rights position from its problems? Filmer asks us to observe the following consequences.

Since nature hath not distinguished the habitable world into kingdoms, nor determined what part of a people shall belong to one kingdom, and what to another, it follows that the original freedom of mankind being supposed, every man is at liberty to be of what kingdom he please, and so every petty company hath a right to make a kingdom by itself; and not only every city, but every village, and every family, nay, and every particular man, a liberty to choose himself to be his own King if he please; and he were a madman that being by nature free, would choose any man but himself to be his own governor. Thus to avoid the having of one King of the whole world, we shall run into a liberty of having as many Kings as there be men in the world, which upon the matter, is to have no King at all, but to leave all men to their natural liberty, which is the mischief the pleaders for natural liberty do pretend they would most avoid. (*Anarchy*, p.286)

In considering this argument, we should begin with the concept of "kingdom" which makes its way into the early lines of this passage. Filmer seems to understand "kingdom" as referring both to a political entity *and* to a determinate geographical area. If nature had "distinguished the habitable world into kingdoms," then we would be in a position to distinguish various peoples, and therefore determine who belonged to which kingdom, and as such, whose consent mattered. But we are not so fortunate as to be able to distinguish various peoples, Filmer points out, for nature does not divide itself into distinct geo-political entities. Indeed, this must be granted by the natural rights theorists, Filmer would claim, since *ex hypothesi* it is only by consent that political bodies are formed. Therefore, Filmer is arguing that the attempt to avoid the difficult straits laid down by the first argument by a different meaning being attributed to "the people" must fail, as there seems to be no way by which to separate mankind into these peoples. But, Filmer contends, things get worse for the natural rights position.

Granted that there are no "natural" kingdoms, and that men possess an "original freedom," for example, the rights to life and liberty, every man and every group of men can choose to be part of whatever kingdom he or they like. To this, Filmer adds the psychological premise that only a madman would choose someone other than himself as King. Filmer thus believes that the natural rights position entails in theory and will lead in practice to there being as many Kings as there are men. This, however, is tantamount to there being no government whatever. Filmer's claim is that, although natural rights theorists recognize the necessity for government, the logic of their position, including the theory of the consent of the governed, precludes there being any justification for such an institution.

Earlier I suggested that what I call Filmer's first and second arguments are different, and that my reasoning for this was based in part on the third argument. I am now in a position to note the basis for my claim. Filmer is quite explicit in this third argument that he is attempting to give the natural rights theorists a "way out" through a more relaxed conception of "the people." He would not do so unless he had already argued that a more stringent notion of "the people" failed the natural rights position. Since what I call the first argument certainly leads to this conclusion, I believe I am justified in assuming that it is there that Filmer is making the more stringent claim, and that the conclusion is simply suppressed.

#### *The fourth argument.*

Here Filmer briefly argues that even if some partition of the world into kingdoms could justifiably be made, and some people did attempt to elect a King, on the natural rights position only those who consented to be subjected would be so bound. But, Filmer asks rhetorically, who would so submit?

#### *The fifth argument.*

Filmer writes,

Yet, for the present to gratify them so far as to admit that either by nature, or by a general consent of all mankind, the world at first was divided into particular kingdoms, and the major part of the people of each kingdom assembled, allowed to choose their King: yet it cannot truly be said that ever the whole people, or the major part, or any considerable part of the whole people of any nation ever assembled to any such purpose. For except by some secret miraculous instinct they should all meet at one time, and place, what one man,

or company of men less than the whole people hath power to appoint either time or place of elections, where all be alike free by nature? and without a lawful summons, it is most unjust to bind those that be absent. The whole people cannot summon itself; one man is sick, another is lame, a third is aged, and a fourth is under age of discretion: all these at some time or other, might be able to meet, if they might choose their own time and place, as men naturally free should. (*Anarchy*, pp.286-287)

This argument assumes, like the preceding one, that a partition into kingdoms is possible without violating the principles of the natural rights philosophy, and has been made. Nevertheless, there is a difficulty that Filmer does not believe that the natural rights philosophy can answer: there is no basis for anyone's having the legitimate authority to call for an election at a particular time and place, for after all, we are theorizing about the origins of government; and to make such a call would violate the natural freedom of someone who either could not attend or who did not want to attend at that time or place. Furthermore, Filmer makes the historical claim that there has never been such an assemblage of either a whole people or most of a people.

Although it is left implicit in this argument, it is worth stressing that on Filmer's reading of the theory of natural rights, legitimate political power can only be established by contemporaneous, universal consent. Thus, Filmer believes that the natural rights position does not sanction majority rule and, as such, that one can be a political representative for another only with that person's direct consent.

#### *The sixth argument.*

Here Filmer argues that mankind is not invariable: it is constantly changing as new individuals are born. On the natural rights philosophy, Filmer asks, Why should these newborns fall under the authority of a King to whom they have never consented? Filmer suggests that one way around this problem is to maintain that "infants and children may be concluded by the votes of their parents." (*Anarchy*, p.287) To this Filmer responds as follows:

This remedy may cure some part of the mischief, but it destroys the whole cause, and at last stumbles upon the true original of government. For if it be allowed, that the acts of parents bind the children, then farewell the doctrine of the natural freedom of mankind; where subjection of children



to parents is natural, there can be no natural freedom. If any reply, that not all children shall be bound by their parents' consent, but only those who are under age: it must be considered, that in nature there is no *nonage*; if a man be not born free, she doth not assign him any other time when he shall attain his freedom[.]... (*Anarchy*, p.287)

In this argument, Filmer is inquiring into the question of why infants and children are subject to the constraints of government. He poses the natural rights philosophy with the following alternatives as to why they are so subject: either 1)infants and children have consented to be governed; or 2)the consent of parents binds their infants and children. Of course, the first alternative can be eliminated as being obviously untrue and impossible of being true on any intelligible sense of "consent."

The second is the more interesting alternative; nevertheless, it must fail as well. And the reason for its failure is not hard to find, for it eliminates consent as the principal ground for the exercise of political power. Nor can this alternative be salvaged, Filmer suggests, by the qualification that it is only infants or children of a certain age that can be concluded by their parents, since if a child is not born free (and hence can be bound by his parents), there does not appear to be any basis for his becoming free at a certain age. The qualification, Filmer believes, would be entirely arbitrary.

It should be added that Filmer's argument does allow the natural rights position yet another alternative, *viz.*, that the consent of neither child nor parents is pertinent to the issue of political legitimacy. However, this would completely undermine the whole philosophy. And thus, Filmer believes that he has impaled his opponents on the horns of a trilemma.

In this sixth argument, as in the prior five, we find Filmer attempting to press home his case against a natural rights political philosophy and its attendant theory of consent. What we once again find is Filmer's insistence that these theories lead directly to anarchism.

For Filmer, the implications of this sixth argument are quite profound, because even if the problems of the previous five arguments could be overcome by the philosophers of natural rights, political power could not legitimately be exercised over the up and coming population of the kingdom. And therefore, within the kingdom, there would not be contemporaneous, universal consent any longer, and the political power would no longer be legitimate. To put this same point somewhat differently, even if we had a legitimate government, it would begin to dissolve before our very eyes.

In examining all six of Filmer's arguments, there is one feature that pervades all of them, namely, his claim that the kind of consent required to establish a legitimate political authority while remaining faithful to a person's natural freedoms is impossible to find. If Filmer's arguments are at all plausible, then it would certainly behoove the natural rights philosophy to show that the kind of consent at issue is possible.

### III

John Locke's *Two Treatises of Government* has as its general theme the issue of political power. The overwhelming importance of this issue to Locke is manifest in his remark in the *First Treatise* that:

The great Question which in all Ages has disturbed Mankind, and brought on them the greatest part of those Mischiefs which have ruin'd Cities, depopulated Countries, and disordered the Peace of the World, has been, Not whether there be Power in the World, nor whence it came, but who should have it.<sup>11</sup>

The *First Treatise* canvassed and criticized, in extraordinary detail, the patriarchal conception of Filmer, the man whom Locke called "the great Champion of absolute Power[.]" (I, 2, p.159) Locke believed that in his *First Treatise* he had successfully made out the case for the position that "it is impossible that the Rulers now on Earth, should make any benefit, or derive any the least shadow of Authority from that, which is held to be the Fountain of all Power, Adam's Private Dominion and Paternal Jurisdiction[.]" (II, 4, p.285) In making out this case, Locke exhibited the most intimate familiarity with Filmer's political writings, a familiarity that included *The Anarchy of a Limited or Mixed Monarchy*, a work that although it is mentioned only once by name in the *First Treatise*, is cited by Locke no fewer than two dozen times.<sup>12</sup>

In the *First Treatise*, Locke recognized quite clearly that Filmer had both a positive and negative (or polemical) program. Locke's summary comment that, "Here we have the Sum of all his Arguments, for Adam's Sovereignty, and against Natural Freedom, which I find up and down in his...Treatises[.]" (I, 14, pp.168-169) is but one of many comments that is indicative of this. Furthermore, Locke recognized just as clearly the kind of arguments that Filmer brought to bear against the doctrine of natural freedom: "[T]he way [Filmer] proposes to remove the Absurdities and Inconveniences of the Doctrine of Natural Freedom, is, to maintain the Natural and

Private Dominion of Adam." (I, 73, p.213) Locke saw, that is, that Filmer's arguments against "natural freedom" took the form of a *reductio ad absurdum*.

Believing himself to have shown numerous errors in Filmer's positive program, Locke announces at the beginning of his *Second Treatise* that we "must of necessity find out another rise of Government, another Original of Political Power, and another way of designing and knowing the Persons that have it, than what Sir Robert F. hath taught us." (II, 1, p.286) Locke's "new way," of course, will be to rest legitimate political power upon man's natural freedom and, by implication, the consent of the governed. In so doing, Locke is taking up what is at least in broadest essence the position that is the object of Filmer's negative program; moreover, it cannot be denied that Locke must have been aware that this was what he was doing.

Given the analysis of this section so far, one would have expected Locke in the *Second Treatise* to tackle Filmer's negative program head on; and yet, there is no direct and systematic critique of Filmer to be found in that work.<sup>13</sup> However, this should not deter us from attempting to find a criticism of Filmer's polemics lurking within the *Second Treatise*, since we do have good reasons for expecting such an attack. And, indeed, I believe such a criticism of Filmer can be reconstructed out of some of the major elements of that work.

#### IV

If we are to find in Locke's *Second Treatise* a response to Filmer's polemics against a natural rights philosophy, then the place we should begin our search is with the role of consent in that work. As such, we must focus (albeit briefly) on the character of the two types of consent that Locke discusses there, namely, express and tacit.

Locke first broaches the distinction in section 119 of the *Second Treatise*. However, discussions of consent, without any qualifying adjective, are ubiquitous throughout the earlier sections of the work. This should provide no confusion since it is fairly clear that these prior discussions are all discussions of express consent. What this suggests, though, is that the notion of tacit consent is invoked to solve a different problem from that of express consent. To see that indeed this is the case, it will be helpful here to quote Locke's statement of the distinction between express and tacit consent.

Every Man being, as has been shewed, naturally free, and nothing being able to put him into subjection to any Earthly

Power, but only his own Consent; it it to be considered, what shall be understood to be a sufficient Declaration of a Mans Consent to make him subject to the Laws of any Government. There is a common distinction of an express and a tacit consent, which will concern our present Case. No body doubts but an express Consent, of any Man, entring into any Society, makes him a perfect Member of that Society, a Subject of that Government. The difficulty is, what ought to be look'd upon as a tacit consent, and how far it binds, i.e. how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no Expressions of it at all. And to this I say, that every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit consent, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government. (II, 119, pp.365-366)

The central issue of this quotation is to be found in the opening sentence: Under what circumstances is a man subject, that is, obligated, to the laws of a particular government? In turning to express consent as a source of such obligation, Locke remarks that such consent makes one a subject of that government and, therefore, obligated to its laws.<sup>14</sup> Locke, then, is perfectly clear that the difficulty is in ascertaining why and to what extent tacit consent binds.

Both express and tacit consent are thus vehicles of political obligation. However, express consent has another function of paramount importance, namely, it is the basis for political legitimacy.<sup>15</sup> Here, then, Locke is rather self-consciously differentiating between two problems of political thought: political legitimacy and political obligation. What we can see is that the real difficulty to which Locke is facing up is that of how a person can be obligated to a Government in which he is not a subject (in the sense of having expressly consented to that government). It is this problem that Locke hopes to solve with his appeal to tacit consent.

It is instructive to probe further into Locke's invocation of the notion of tacit consent and to consider what role it might have to play in answering Filmer's criticisms of natural rights theory. For it is the case, I believe, that the appeal to tacit consent by Locke is an important part of the attempt to remove some of the

sting from Filmer's critique.

This further probing must begin exactly where the lengthy quotation from Section 119 left off. In continuing his account of tacit consent, Locke remarks:

To understand this better, it is fit to consider, that every Man, when he, at first, incorporates himself into any Commonwealth, he, by his uniting himself thereunto, annexed also, and submits to the Community those Possessions, which he has, or shall acquire, that do not already belong to any other Government. For it would be a direct Contradiction, for any one, to enter into Society with others for the securing and regulating of Property: And yet to suppose his Land, whose Property is to be regulated by the Laws of the Society, should be exempt from the Jurisdiction of that Government, to which he himself the Proprietor of the Land, is a Subject. By the same Act therefore, whereby any one unites his person, which was before free, to any Commonwealth; by the same he unites his Possessions, which were before free, to it also; and they become, both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth, as long as it hath a being. Whoever therefore, from thenceforth, by inheritance, Purchase, Permission, or otherways enjoys any part of the Land, so annexed to, and under the Government of that Commonwealth, must take it with the Condition it is under; that is, of submitting to the government of the Commonwealth, under whose Jurisdiction it is, as far forth, as any subject of it. (II, 120, p.366)

In addition to attempting to further explain tacit consent, this passage takes us some distance in understanding how Government can have any territories at all. And we must comprehend this latter point in order to grasp the former.

In sections 73, 117, and 119, Locke writes of the territories of government; yet prior to this section (120), it was far from clear how this could possibly come about. After all, individuals owned land, and the purpose of government, at least in part, was to protect it. From where did government territory come? Put somewhat differently, the question is this: there is no difficulty in understanding how government could be a political enterprise, but how can it be

a *geo*-political enterprise?

In this quotation, Locke puts forth an answer to this question—and it is an answer that is somewhat strange. Its beginnings are not at all perplexing: if one is to enter into a political society for the purposes of protecting one's property, then one must be subject to the means of that protection, namely, the government and its laws. Anything other than this, Locke writes, would involve some kind of contradiction. However, from this Locke leaps to conclude, without marshalling any additional support, that this land must always be subject to that government's jurisdiction, regardless of who its future owners will be. Land thus made a part of a political society, must always remain a part, as long as that society remains extant, and is therefore a territory of the government. Furthermore, Locke certainly assumes that those who join into a political society with one another will be living on land that is contiguous.

In trying to understand tacit consent better, Locke's appeal is to government territories. Indeed, on Locke's analysis, the foothold for tacit consent is to be found in the control that governments have over their territory, a control granted to them by members of that political society. As such, the government acquires certain rights and privileges in relation to property, that is, government acquires a certain kind of property rights. Just as when a person enters the home of another, he "tacitly" consents to certain dictates of the owner, so too when one enters the territory of a political society, there are certain requirements to which he must agree.

## V

Having set out in detail sufficient for our purposes those features of Locke's position on express and tacit consent, and his account of governmental property into which tacit consent is inextricably woven, in the previous section of this paper, this section is devoted to seeing how these three notions serve as a foil against some of Filmer's attacks against a natural rights philosophy.

Although Filmer does not explicitly distinguish between the problems of political legitimacy and obligation, his arguments seem to suggest a concern with both problems. Certainly he could not understand how, on a natural rights philosophy, government could be rendered legitimate. Yet there is also a faint hint of a specific problem of obligation: even if a group of individuals "belonged" to a legitimate government, what of those who did not "belong"? Could they properly be held to be obligated to or liable to the same governmental dictates as those who did? Bearing this in mind, let

us turn to Locke's response to the problem of legitimacy as found in Filmer's first argument and parts of the third.

It is Locke's contention, *pace* Filmer, that it is not necessary for *all* of mankind to decide upon a single government; that is, there is nothing intrinsic to a natural rights philosophy that requires this. Unanimity of all of mankind would be necessary if anything but unanimity would diminish the freedom of another; however, according to Locke, such is not the case: "Any number of Men may...unite into a Community...because it injures not the Freedom of the rest; they are left as they were in the Liberty of the State of Nature. When any number of Men have...[expressly] consented to make one Community or Government, they...make one Body Politick[.]" (II, 96, p.349) Thus, the intractable difficulties of getting all men together at the same time loses its point. Furthermore, with an eye on part of Filmer's third argument, it is not necessary, on Locke's view, that nature divide itself into kingdoms prior to the consent of a particular group of individuals; for if these individuals live spatially contiguous with one another, their consent itself divides nature into kingdoms. The postulate that drives Locke's argument here, of course, is that individuals have a right to property in the state of nature.

There is an important "Filmerian" counter to this last point, namely, has not Locke made a category mistake? Is he not confusing private property with the territory of a government?

Locke's answer to this, however, seems clear. For certainly his appeal is going to be that the private land of individuals acquires the characteristic of being governmental territory when these individuals engage in the kind of consensual arrangement necessary to produce a political society. It is ultimately, then, the appeal to the consensual manner by which governmental territory is formed that allows Locke to arrive at the notion of a *geo-political* society without violating, or so he believes, the rights of any individual.

This appeal to the nature of the formation of governmental territory has even greater significance for Locke. As is somewhat clear in Filmer's sixth argument, Filmer is concerned that even if a legitimate government is formed at a given point in time, nothing will prevent it from dissolving, and hence leading to anarchy. Locke's analysis of governmental property aims at cutting the ground out from under this argument. What is of capital importance here is that once a political society is legitimately established, and a geographical unity exists, dissolution ceases to be problematic, for future owners cannot remove their land from the domain of the government to which it belonged prior to their acquisition. It is the case that a government can fail to fulfill its

trusteeship, and revolution might be justified, but this is a problem of an entirely different sort.

As I suggested earlier in this section, Filmer seems to be concerned with a very specific problem of political obligation. If a natural rights philosophy could ground legitimate government, then, for Filmer, there would be no difficulty in seeing how those who join such a government are obligated to its laws. However, what of those who do not join any government? Are they not subject to any positive law? On Filmer's account, the advocates of a natural rights philosophy must reject the position that an individual can be subject to the positive laws of a government that he did not join. Since, for Filmer, very few people, if any, would become subjects of a government by their own consent, it follows that few people would actually have any legal obligations. And thus most of the world would be *de facto* in anarchy.

It is here that Locke invokes the notion of tacit consent. For it is this notion that is intended to explain how a free man who has not given his express consent to a political authority, can yet be obligated, in certain circumstances, to its laws: without consenting to become a subject of a government, one still consents to be subject to its laws. It is this appeal that allows Locke to say that simply because an individual is not subject to a government does not mean that he has no legal obligations when in the province of that government.

I have been arguing as if the the distinction between tacit and express consent, and the notion of tacit consent, are clearcut in Locke. If this were true, there would not be the scholarly debate that exists over exactly where the distinction cuts and the character of tacit consent.<sup>16</sup> Indeed, John Simmons, for example, has called into question whether Locke's account of tacit consent is really an account of a form of consent at all. I have no desire to jump into this quagmire here since the point of my essay is to show that major parts of the *Second Treatise* can be seen as constituting a rejoinder to Filmer, even if we are somewhat unclear as to exactly what Locke meant in certain pieces of text. One can do "philosophical geography" without doing "philosophical geology."

## VI

The thrust of Filmer's critique is that the kind of consent required by a natural rights philosophy in order to ground legitimate government is prohibited to that view. One of Filmer's principal arguments is his second wherein he argues that since, on the natural rights position, rights are inalienable, they cannot be ceded to a sovereign body in order to establish a government. More



specifically, since it would be logically incoherent on natural rights grounds to speak of a man's having the right<sup>17</sup> to take his own life, so too is it incoherent to speak of a person giving that right to another, in this case a sovereign.

The key to seeing Locke's answer to Filmer can best be approached by examining a distinction which he draws between two ways in which one's rights can be lost. In the first instance, one can *forfeit* one's rights. When one forfeits one's rights one does not cede them voluntarily, but rather cedes them through one's wrongdoing. Thus, while Locke agrees with Filmer that a man cannot voluntarily give away the right to his own life, he can still lose that right by forfeiture.

For a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any one, nor put himself under the Absolute, Arbitrary Power of another to take away his Life, when he pleases. No body can give more Power than he has himself; and he cannot take away his own Life, cannot give another power over it. Indeed having, by his fault, forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it may...delay to take it, and make use of him to his own Service, and he does him no injury by it. (II, 23, p.302)

Of course, this passage not only highlights one manner in which a right may be lost, but also indicates a manner in which a particular right cannot be lost, that is, through one's consent. Therefore, if one takes an *inalienable* right to be one that, at the very least, one cannot give away at will, then Locke is certainly maintaining, in agreement with Filmer, that the right to life is inalienable.

In the second instance, one can lose a right by *divesting* oneself of it or, in other words, *alienating* oneself from it. As Locke makes clear, it is by a certain act of divestiture that one becomes a subject of a political society.

The only way whereby any one de vests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their properties, and a greater Security against any that are not of it. (II, 95, pp.348-349)

For Locke, to be in a state of natural liberty means being "free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his rule." (II, 22, p.301) In alienating one's natural liberty, there

are two principal results. First, one gives up the executive power to judge and punish that one possessed in the state of nature; second, one is made subject to the legislative power of government. In a legitimate government, one is still free; Locke calls it "Freedom of Men under Government," (II, 22, p.302) for one is under the rule of law and not subject to the arbitrary will of another.<sup>18</sup>

Critical for our purposes is that whereas an individual does not have the power to divest or alienate himself of the right to life, he does have the power to divest or alienate his natural liberty. As I have already stated, Locke concurs with Filmer's judgment that one's right to life does not give one the power to undermine that right, including transferring it to a sovereign body. However, on Locke's analysis, such is not required in order to become a political subject. The very purpose of government for Locke, the protection of a person's property in life, liberty, and estate, requires only that one divest oneself of one's natural liberty, and in so doing grant to others executive and legislative powers over oneself. The formation and maintenance of government does not necessitate (nor could it) that one grant to government the right over one's life.

If what Filmer demanded of the natural rights philosophy were required for it to build a legitimate government, then, for this philosophy, such an edifice would not be possible. However, it is just such a demand that Locke is challenging: a government erected on the consent of free men does not require that they give up their right to life.

There is an important qualification that needs to be made here, a qualification that might be thought to bear against Locke's case. It is Locke's position that, in certain situations, through forfeiture, government has the right to take a person's life. Does this not show that an individual has given to government a right that he does not have the power to give? The answer here, which I hope is clear, is that it is, for Locke, within a person's power to forfeit a right through his wrongdoing. The case is really no different in the state of nature or outside of it, for in the former one can forfeit one's life. And although in a political society, government has a privileged status in being the agency charged with the responsibility of capital punishment, individuals within a political society still maintain a right of self-defense which would allow them to take the life of another, a life which the other has forfeited.<sup>19</sup>

In the discussion of this section so far, we have been skirting the periphery of another of Filmer's criticisms and Locke's response to it. Filmer claims in both his third and fourth arguments that, if given a choice, only a madman would choose someone other than himself to rule. Locke's counter to this is clear and well known: the

gain in security and social order from living within a political society far outweighs the loss of executive and legislative power. For Locke, "Man Goes Mad"<sup>20</sup> is not the title of the story of those who choose to be subjects of political society.

## VII

After quoting Locke's remark that "a child is born a subject of no country or government," Leslie Stephen remarks that, "Here we seem to be led straight to anarchy."<sup>21</sup> Certainly this echoes Filmer's sixth argument. Therein Filmer attacked the natural rights theory on the grounds that it could not account for why infants and children are subject to the constraints of government, and indeed even more broadly, it could not account for how infants and children could be bound by their parents. Any kind of subjection of infants and children is, Filmer claims, anathema to their natural freedom.

Ultimately, Locke's response to this problem is to be found in his theory of freedom. In chapter four of the *Second Treatise*, Locke tells us that, "Freedom then is not what Sir R.F. tells us, 'A liberty for every one to do what he lists, to live as he pleases, and not to be tyed by any Laws'." (II, 22, pp.301-302) Freedom,<sup>22</sup> for Locke, is not license, regardless of whether one is in a state of nature or under government. If freedom is not license, then there must be some principle of restraint, some principle of governance. For reasons that will become clear shortly, our concern is with the restraint or governance that one is under in a state of nature, that is, our concern is with natural liberty.

In a comment that should serve as a warning, if one were needed, that Locke is very much part of the natural law tradition, Locke tells us that, "The State of Nature has a Law of Nature to govern it, which obliges everyone: And Reason...is that Law." (II, 6, p.289) Furthermore, Locke writes that, "Law, in its true Notion, is not so much the 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." (II, 57, p.323) In a state of nature, then, the principle of governance is an internal principle, namely, reason. Thus one has natural freedom only when one has a developed faculty of reason.

In chapter six of the *Second Treatise*, "Of Paternal Power," Locke brings this account of natural freedom to bear upon infants and children. Earlier in the *Second Treatise*, Locke had claimed that "all men by nature are equal"; however, here in the sixth chapter Locke "confesses" that "Children...are not born in this full state of Equality, though they are born to it." The principal inequality

becomes clear when Locke continues by writing, "Age and reason...grow up together." (II, 55, p.322) Locke's point here is that children, and a fortiori infants, do not have a developed faculty of reason: adults and children are unequal in this respect. At birth, therefore, children are not under the law of nature, that is, they are not under the law of reason. The upshot of this is that for some period of time children do not have natural freedom: "where there is no law, there is no freedom." (II, 57, p.324) This leads Locke to state that parents have a power over children "till Reason shall take its place." (II, 58, p.324) Therefore, Locke's response to Filmer is that neither government nor parents violate the natural freedom of children and infants because children and infants are not naturally free.<sup>23</sup> When reason does take its place, when a human being reaches a state of maturity, then although that person is not a subject of a political society until he expressly consents to it, because of tacit consent, he is obligated to the political society in which he resides.

## VIII

In section V, we took up Locke's response to Filmer's position that a philosophy of natural rights requires universal consent for the formation of a legitimate government. We examined those arguments in the *Second Treatise* that aimed at showing why such consent was not necessary, and how, in Locke's judgment, a *geo*-political community encompassing less than all of mankind could legitimately form. In this section I would like to briefly turn to a closely allied issue, namely, Locke's response to Filmer's contention in his fifth argument that majority rule is antithetical to government by consent.

On one important point, Filmer and Locke are in complete accord: on a natural rights philosophy, one group of individuals, the majority, cannot by *their* will, render another group of individuals, the minority, subjects of a political society. However, for Locke, the function of majority rule is not to form government, but to run it.

For when any number of Men have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body, which is only the will and determination of the majority. (II, 96, p.349)

Majority rule, or rule by less than the whole, is necessary for the operations of government, since a consent of all members of a political society cannot be had.

Such consent is next impossible ever to be had, if we con-

sider the Infirmities of Health, and Avocations of Business, which in a number, though much less than that of a Commonwealth, will necessarily keep many away from the publick Assembly. (II, 98, p.350)

Locke's position is that in consenting to be a subject of a political society, one consents to certain institutional or procedural features necessary to such a society, and majority rule, or some similar process, is so necessary. Thus, there is nothing incompatible in Locke's view with a philosophy of natural rights and majority rule.

One further difficulty with the natural rights philosophy that Filmer raises in his fifth argument is that no country was ever formed by the consent of its people. Locke elicits just this objection to his own position in section 100 of the *Second Treatise*: "There are no instances to be found in Story of a Company of Men independent and equal one amongst another, that met together, and in this way began to set up a Government." (p.351) In the following twelve sections, Locke attempts to show that indeed history does show such examples, with the principal ones being Rome and Venice. Whatever the value of Locke's history, what is important for our purposes is the attempt to show the error of Filmer's critique.

## Conclusion

In the prior sections of this essay, I have attempted to show that contained within Locke's *Second Treatise* are responses to a set of arguments that Filmer brought forth against the natural rights philosophy. That Locke *intended* the parts of the *Second Treatise* that I have elucidated to answer Filmer's critique, a stronger thesis than the aforementioned one, and to do so in a comprehensive manner, has not been conclusively demonstrated here. And, indeed, given Locke's reluctance to name his opponents,<sup>24</sup> how could such a demonstration be given? Yet, if the reconstruction contained in this essay has been successful, then this would certainly constitute some evidence for the stronger claim.

More can be said, however. Many of the pertinent arguments in the *Second Treatise*, echo the vernacular of the arguments of Filmer that we have canvassed, such that if Locke did not have Filmer directly in mind it would be rather uncanny. There are four instances that stand out.

Consider first Filmer's claim that for the natural rights philosophy, "all mankind" must consent if government is to be

legitimate. In developing the argument in the *Second Treatise* that the formation of a legitimate government rests upon express consent, Locke remarks no fewer than three times in the space of seven lines that “any number of men” (II, 95-96, p.349) may come together to make up a political society.

Secondly, in chapter IV, “Of Slavery,” Locke explicitly puts forward his own analysis of freedom in contradistinction to Filmer’s. Locke expands upon this analysis in chapter VI, “Paternal Power,” especially as regards children. Again in this chapter, Locke explicitly refers to Filmer as the opposing side. (II, 61, p.326) And the central position that develops out of the analysis of freedom is how it is that “natural Freedom and Subjection to Parents may consist together,” (Ibid) a position directly aimed at Filmer’s sixth argument.

Thirdly, Locke’s account of the role of majority rule in sections 95-99 in the chapter on “Of the Beginning of Political Societies,” an account that strikes at Filmer’s fifth argument, paraphrases Filmer’s own words to attempt to show why majority rule is necessary.<sup>25</sup>

Finally, in the aforementioned chapter, Locke again paraphrases Filmer, raising the question whether history shows us any examples of a consensual government. In trying to answer this challenge, two of Locke’s principal examples, Rome and Venice, are two examples whose history Filmer also discusses, in his *Observations Upon Aristotle’s Politiques Touching Forms of Government*. (pp.206-222)

When one adds these four instances to the reasons Locke adumbrates for why someone in a state of nature would want to join a political society, the relationship between tacit consent and legal obligation, and the queer account of the formation of governmental territory, an account which is necessary to fend off problems about the dissolution of government, then I believe a very good case is made that in setting out the *Second Treatise*, Locke had in mind Filmer’s arguments that a philosophy of natural rights leads to anarchy.

I would like to thank Nicholas Capaldi, Gilbert Goldman, Rhoda Kotzin, and Kenneth Winston for helpful comments on an earlier draft of this essay.

1. R.G. Collingwood, *An Autobiography* (Oxford: Clarendon Press, 1939), p.31.
2. Cf., for example, the remarks of C.E. Vaughn, *Studies in the History of Political Philosophy* (Manchester: University of Manchester Press, 1925), Vol. I, pp.130-131: “Locke’s *Treatise* is a gun with two barrels: the one directed against Filmer and Divine Right, the other against Hobbes....[In] the second part of the *Treatise*...he writes throughout with his eye on Hobbes[.]”

3. Cf. the brief discussion of twentieth-century Locke scholarship by Richard Ashcraft in his *Locke's Two Treatises of Government* (London: Allen and Unwin, 1987), pp.298-305.
4. See, for example, *Patriarcha, or the Natural Rights of Kings*, pp.53-55, 57-58, 63-73; *Observations upon Aristotle's Politiques Touching Forms of Government*, pp.211, 217-218, 225-226; and *Observations on Mr. Milton Against Salmasius*, p.256. These three works are to be found in: *Patriarcha and Other Political Works of Sir Robert Filmer*, edited by Peter Laslett (Oxford: Basil Blackwell, 1949). All references to Filmer will be to this edition.
5. This work is also to be found in the Laslett volume cited in n. 4. Perhaps I should note the full title of this work: *The Anarchy of a Limited or Mixed Monarchy or A succinct Examination of the Fundamentals of Monarchy*, both in this and other Kingdoms, as well about the Right of Power in Kings, as of the Originall or Naturall Liberty of the People. A Question never yet disputed, though most necessary in these Times.
- 6 On this notion, see: Julian Franklin, *John Locke and the Theory of Sovereignty* (Cambridge: Cambridge University Press, 1978), pp.22-52.
7. It is far from clear whether we should take the prefix 'man' generically or specifically. I suspect the latter.
8. For an excellent discussion of various kinds of rights see, Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," in *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), pp.221-251.
9. See generally, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979). I should mention that two major exceptions to this view were John Selden and Luis de Molina. On the former see, Tuck, pp.82-100; on the latter see, F.B. Costello, *The Political Philosophy of Luis de Molina, S.J. (1535-1600)* (Gonzaga University Press, 1974), pp.163-198. Also, on the interesting history that the role of indentured slaves played in the development of the United States see, Bernard Bailyn, *Voyagers to the West* (New York: Alfred A. Knopf, 1986), pp.241-352.
10. See *Observations Upon Aristotle's Politiques Touching Forms of Government*, p.217: "it is no law except it restrain liberty."
11. *First Treatise*, section 106, pp.236-237, in *Two Treatises of Government*, a critical edition with an introduction and apparatus criticus by Peter Laslett (Cambridge: At the University Press, 1960). All further references to either of the two treatises will be cited parenthetically following the quotation by book number, section number, and the page number of this edition. I have followed Laslett's text in terms of punctuation and capitalization, however, I have omitted the italics which are prevalent in the text.
12. This work is cited by name only once. However, the edition of Filmer's *Observations Concerning the Originall of Government upon Mr. Hobs, Mr. Milton, and H. Grotius* that Locke used had this work on anarchy bound into it. Therefore, many of Locke's citations to *Observations on Hobbs, Milton, etc.* are to this work. On this see Laslett's editorial preface to *Observations* in his

edition of Filmer's political writings, cited at n. 4 *supra*, p.238. Locke also makes several references to *Anarchy* in his 1667 "Notebook," and in his 1681-82 "Lemmata Ethica." On this see Laslett's introduction to his edition of Locke's *Two Treatises*, cited at n. 11 *supra*, pp.130-137.

13. By a "direct attack" I mean a criticism in which one first names either the person and/or the doctrine being criticized.

14. Here I am intentionally skirting problems having to do with civil disobedience, especially in the context of an illegitimate government.

15. "And thus that, which begins and actually constitutes any Political Society, is nothing but the [express] consent of any number of Freemen capable of a majority to unite and incorporate into such a Society. And this is that, and that only, which did, or could give beginning to any lawful Government in the World." (II, 99, p.351)

16. Cf., for example: John Dunn, *The Political Thought of John Locke* (Cambridge: At the University Press, 1969), pp.131-147; Hanna Pitkin, "Obligation and Consent—I and II," *American Political Science Review* (December 1965), pp.990-999, and (March 1966) pp.39-52; John Plamenatz, *Man and Society*, two volumes (London: Longmans and Green, 1963), vol. I, pp.220-241); and A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), pp.75-100.

17. It is important to note that Filmer speaks of "power" rather than "right." For in the quotation from Locke that I shall proceed to give in the next paragraph, Locke too speaks of "power."

18. For a detailed, although ultimately unsatisfactory, account of what it means to be subject to the arbitrary will of another, see F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), pp.133-47.

19. Perhaps Filmer is making a deeper challenge, namely, how can any natural right, for example, the right to "natural liberty," be alienable? Any attempt to construct Locke's answer to this question must go to the very foundations of his moral theory and, as such, go beyond the scope of this work.

20. The title of an unpublished essay by R.G. Collingwood.

21. Leslie Stephen, *History of English Thought in the Eighteenth Century*, 2nd ed., two vols. (London: Smith, Elder, & Co., 1881), vol. II, p.140; citing II, 118, p.365.

22. Locke uses the terms 'freedom' and 'liberty' interchangeably.

23. This does not mean that parents and the government do not have any obligations to children—they do.

24. Can anyone be so foolish and monomaniacal to believe there was only one?

25. Cf. Laslett's notes on this chapter in his edition of Locke's *Two Treatises* cited at n. 11.