

Flux, Fortuna, and the Role of Philosophy

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ABSTRACT: One of the easier targets for criticism is political legalism, or the conviction that government action is justifiable only as the application of pre-existing general laws to particular cases. This conviction is open to two objections: 1) circumstances can arise which require immediate redress and for which the existing law is poorly suited, and 2) justice cannot be expressed without distortion as a set of rules of the sort desired by political legalism. Different philosophers focus on different objections, yet a generalization can be made: the first is the special concern of modernity, the latter of the Ancient natural right tradition. Locke justifies extralegal public action on the basis of flux, which is in turn a reflection of Machiavelli's *fortuna*. Aristotle, on the other hand, devotes his discussion of extralegality to the second problem. It is clear, however, that Aristotle's objection to political legalism cannot have (nor was it meant to) the same immediately salient implications for actual political practice as the Lockean/Machiavellian objection does. The difference in focus is explained by differing conceptions of the role of philosophy in political thought. The moderns saw the philosopher as properly giving immediate direction to political life, thereby calling into question any account of justice that did not give this direction. The moderns fail by their own standard, however, for in refusing to comprehensively address Aristotle's question they fail to give meaningful philosophic direction to statesmen faced with the necessity to transcend the laws. In this way, Machiavelli's amorality is more philosophically at home with his political philosophy, whereas Locke must either assert a moral fiat or have recourse to ancient natural right.

One of the easier targets for criticism is political legalism, or the conviction that government action is justifiable only as the application of pre-existing general laws to particular cases. This conviction was evident in certain anti-Stuart tracts published surrounding the Exclusion Crisis and the Glorious Revolution of 1688 (cf. Ferguson 1689; Johnson 1689; Rutherford 1644; *Vox* 1681), Justice Davis' opinion in *Ex parte Milligan* (71 U.S. [4 Wall.] 2 [1866], esp. 121), and in criticisms of the Bush Administration's handling of the war on terrorism as unconscionable because unconstitutional, rather than ineffectual and contemptuous.

Political legalism is narrower than support for the rule of law, or at least than a latitudinarian understanding of the rule of law. It is rather the source of the intuition that emergency powers acts undermine the rule of law. Such acts, where well-crafted, guard against government abuse by making the executive accountable for his discretion to another body that oversees his activity, or by stipulating that the body which declares the emergency will not be the one to exercise the emergency powers, like the Roman Senate calling for a dictator. Discretion nonetheless remains within the model of emergency powers acts, however, and therewith a need for trust: discretion is shared, not eliminated. Political legalism, on the other hand, is prompted by a great distrust of government as a whole.

This distrust is seen in one of the reasons that John Locke gives for why the supreme power in society, however constituted, must rule by law, not decrees suited to the circumstances. The rulers must be kept “within their due bound, and not be tempted, by the Power they have in their hands, to imploy it to such purposes, and by such measures, *as they would not have known, and own not willingly*” (2nd Tr., §137; italics added). What rule by law is meant to avoid is the compulsion “to obey at pleasure

the exorbitant and unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justify their actions" (2nd Tr., §137). A well-sounding principle can be produced to justify any action, and so a government by principle alone is in reality a government of arbitrary discretion shrouded in spin. The fear that lies at the root of political legalism is that such discretion is likely to be misused. Law limits discretion in particular cases by the imposition of rules to be followed, not principles or standards to be applied. If one accepts this perspective, it is easy to see why emergency powers might sit uneasily within a society devoted to the rule of law.

Political legalism is a reflection of the more general disposition toward legalism in all affairs (see Shklar 1964). The primary manifestation of this disposition is that morality itself is a matter of behavior spelled out by rules. This is not necessarily held because the highest virtue is thought to be rule-following, humanity's perfection the imitation of a dumb machine, but because of a distrust of the moral man's motivations, or a sense that moral discretion, too, is liable to abuse. A well-sounding principle, after all, can carry any argument by being the only such principle voiced.

It is not my purpose in this paper, however, to examine the sources of the legalists' disposition. It is sufficient to note that each form of legalism renders disputes about which something could be said on both sides indisputable because of an established and determinate rule. If it is not opposed to calculation *per se*, then it at least forbids it in certain spheres, or regarding certain questions. Serious consideration of both sides in certain matters, e.g., whether to betray a friend, is by and large considered morally dubious, even if the moralist trusts that the result of proper deliberation will always be the morally comforting one. Similarly, the application of a

law closes off inquiry into possibly irrelevant and prejudicial questions regarding any tension between, say, individual rights and public security, even if again such analysis would actually lead to the ethically-desired result.

The conviction of political legalism is open to two objections: 1) circumstances can arise which require immediate redress and for which the existing law is poorly suited, and 2) justice cannot be expressed without distortion as a set of rules of the sort that would calm the legalists' fears. Different philosophers focus on different objections, yet I suggest that a generalization can be made: the first is the special concern of Modernity, the latter of Ancient natural right.

These are not two alternative foci, the option for each of which is equally defensible, however, but rather represent two competing conceptions of how philosophy is to relate to politics, of the role of a political philosopher. I argue that the Ancient perspective is the more comprehensive conception. For purposes of comparison, I will treat John Locke's doctrine of prerogative and Aristotle's discussion of absolute kingship (*pambasileia*). My argument is that Locke fails to "moralize" Machiavelli, whereas his liberal (or proto-liberal) project requires that he do so.¹

Lockean Prerogative

Locke is interesting as one who both indulges and disappoints the legalist disposition. The "low but solid ground" upon which the Moderns sought to build meant

¹ I have conceived this paper in large part as a reaction against Nomi Lazar's contention that Locke is immune to her criticism of how emergency powers are handled in both the "republican" (Machiavelli and Rousseau) and "desicionist" (Schmitt and Hobbes) traditions (Lazar 2005, 2006). It is telling, I think, that the list of names whose theories fail to adequately account for the limits of man's control over his environment comprises only moderns.

a turn away from relying on the moral education of a class of aristocrats, and therefore an increased reliance on institutional arrangements to take up the slack. The eventual solution to this problem was checks and balances. But while this required less in the way of education than had classical politics, it still could not do without a great deal of moral and civic education on the part of the leaders, as numerous students of the American regime have pointed out (e.g., Ketcham 1987; Lee 1997; Mansfield 1991; Miroff 1987; Nelson 1987; Pangle 1988; Rahe 1994, esp. ch. 6; Weaver 1997).

The resolution to the dilemmas of institutional design that was favored in Locke's day, and which Locke accepted, was instead legalistic in character: the force of the community would be legitimately deployed against members of the community only pursuant to law. Put another way, the executive would be subordinate to the legislative power. This legalism would be supported by the threat of revolution. The people would certainly need what might still be called moral and civic education, but it would be an education in their own true interest. That is, what the moral and civic education that the people would require boils down to is in essence just prudential advice, and this is an education that is more within the reach of even the lowest and least refined souls.

The legalist solution was more immediately appealing than checks and balances because it flattered the legalistic moral intuition — that there existed a difference between the moral and immoral that mirrored in its simplicity that between the legal and illegal, without shades of gray in between, even if there were many things *outside* of morality and the law as a result to which each was indifferent. This is a particularly attractive notion, for then moral judgment is easy, within the grasp of the meanest capacities so long as they but listen to their consciences.

An interesting representative of the modern tradition must also see the limitations of legalism, however, at least in its political manifestation. And it is here that Locke in particular is interesting. Locke describes two powers that are recalcitrant to control by law, and therefore disappoint the hopes of a political legalist.

The first of these, the federative power, is actually an entire sphere of life, viz. everything which the commonwealth does in relation to those who are not members: for the most part, foreign affairs (*2nd Tr.*, §§145–7). The federative power is not everything which touches upon national security, however: when it comes to taxation to support a war (*2nd Tr.*, §§138–40), or the person who may command the obedience of the members-become-soldiers (*2nd Tr.*, §§142–3), or when it touches upon the member in any way (cf. *2nd Tr.*, §§ 108–9, 177), then we are in the realm of legislation and the application of executive power. What cannot wisely be controlled by law is the *content* of foreign policy, not the means of pursuing that policy (cf. *2nd Tr.*, §147). Since the federative power does not operate upon the members of the commonwealth, it does not consistently evoke the same concerns that lead one to political legalism in the first place.

The second is prerogative, which operates precisely where ordinarily we would see the executive power enforcing legislative decisions. I have written elsewhere about the precise character of Lockean prerogative (Corbett 2006). It is prerogative that needs more of a justification before the tribunal of political legalists, and therefore is a more pressing criticism of their conviction.

Locke justifies prerogative on the basis of “flux.” His frequent statements on the need for extralegal discretion and the limitations of rule by legislation point to the problem of foresight. It is the impossibility of predicting which of all possible futures will arise and the most needful thing in any future set of circumstances which renders

futile the codification of prudence in a rulebook. (This is incidentally one of the reasons why, in all functional legal systems, the law rarely takes the form of rules, but is instead often a series of standards and balancing tests to be applied by judges; cf. Sunstein 1995)

“Things of this World are in so constant a Flux,” Locke announces, “that nothing remains long in the same State. Thus People, Riches, Trade, Power, change their Stations; flourishing mighty Cities come to ruine, and prove in time neglected desolate Corners, whilst other unfrequented places grow into populous Countries, fill’d with Wealth and Inhabitants” (2nd Tr., §157). As a result, human beings are not able “to foresee, and provide, by Laws, for all, that may be useful to the Community” (2nd Tr., §159). Indeed, Locke says that “it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick” (2nd Tr., §160; cf. § 167). Such legislation would require that we be “Masters of future Events” (2nd Tr., §156).

There are indications, it should be noted, that Locke also considered it impossible to codify justice perfectly as a set of rules, that he did not concern himself solely with the problem related primarily to prudence. So, for example, Locke speaks of a man who must be pardoned for a crime on account of which he actually deserves reward (2nd Tr., §159). He lets slip that he does not believe that God would govern the universe according to the law of nature, or by some more sublime, eternal law, but rather as a species of prerogative (2nd Tr., §166). But these are undeveloped, passing remarks. The main concern betrayed in his discussions of prerogative is bound up with the constant flux of worldly things.

Before moving on to Aristotle, I should say something about the character of this flux. Obviously, Heracleitus’ “*panta rhei*” isn’t going to make for a politically interesting prerogative, and most of the examples Locke gives of extralegal discretion answer to

either vague or emphatically human causes. Consider the demographic shifts and the necessity for pardon mentioned already, which in this way mirror the decisions of foreign actors in justifying the exemption of the federative power from legislative control. The only example which involves a natural event is tearing down an innocent man's house to create a fire-break, arresting the spread of an inferno which threatens the entire city (2nd Tr., §159). Yet, even here, the emergency which requires immediate and illegal action does not result from the fire itself, but from the manner in and materials out of which the city was constructed by human beings.

The flux which justifies prerogative, therefore, is a reflection of Machiavelli's *fortuna*. Ultimately, *fortuna* is that which is beyond our control, and this is most importantly other people. *Fortuna* is that which those who lack virtue blame for the results of their lack of virtue, or at least that which the defeated blame for their defeat (cf. *Prince*, ch. 24; *Discourses* II 1, II 5; Mansfield 1979, 189–206). It is a personification of other people's influence over our lives. Locke may differ from Hobbes in focusing more on the subduing of inhuman nature than on the dangers we face from each other (Strauss 1953, 234–51; 1959a, 49), but the dangers we face from each other are still essential to the structure of our government, to the need for law, and to the failure of law.

Aristotle and the Law

Ultimately, Aristotle favors the rule of law over trusting in the magistrates' judgments concerning justice (cf. *Nic. Eth.* 1134a35–b1; *Pol.* 1270b28–31, 1272a35–9, 1272b5–7, 1287b41–88a5, 1292a32–4, 1294a3–9, etc.; Bates 2003; Strauss 1953, 140–3), but along the way he criticizes law for a variety of reasons. Among these is the

incapacity of law to formalize prudence. He might appear to denigrate the importance of chance when he says that “no one is just or sound by fortune or through fortune,” but he is clear that “of all good things that are external to the soul the cause is chance and fortune” (*Pol.* 1323b28–9). Aristotle states that Socrates erred in the *Republic* by attributing the fall of the best regime alone to fortune: rather, it causes *all* types of regime to fall (*Pol.* 1315b39–1316a18). Fortune rules over the foundations of living well, the very things which we hope the rule of law preserves (cf. *Pol.* 1323b26–9, 1332a29–33).

Aristotle’s concerns regarding the rule of law extend beyond the variability of human things, however. Most acutely, the rule of law would not resolve the sorts of conflicts that actually occur within politics. It might be an alternative to tyranny, but only an unfortunate political climate combined with an unenviably poor imagination might lead one to think that every significant problem can be reduced to the presence of a bad ruler, or that a meaningful alternative to tyranny is unambiguous and incontestable. That is, even were it possible for law to rule rather than men — whatever that would mean² — it would not answer the sorts of questions which men who actually possess political power tend to argue about. In the midst of a debate between an oligarch and a democrat, for example, Aristotle allows that “one might perhaps assert that it is bad for the authoritative element generally to be man instead of law.” He immediately answers, however, that this contribution contributes little: “But if law may be oligarchic or democratic, what difference will it make with regard to the questions

² For a summary of views concerning how the strict rule of rules sometimes serves to mask rather than eliminate discretion, see Sunstein 1995; cf. Hobbes 1994, ch. 46, §36.

that have been raised? For what was said before will result all the same” (*Pol.* 1281a4–8; cf. 1282b1–15, 1289a13–4, 1289a21–5).

That the rule of law does not address the question of the regime is not, however, a criticism of law as such: the best regime may still be utterly law-bound. It is this possibility that attracts Aristotle’s attention. He ignores momentarily the prudential problems which so occupy Locke. There, prudence was restricted in order to reduce the prince’s capacity to conceal his injustices. The problem was not so much that injustice would still be possible under the law — where it was possible, Locke would say that the law was not sufficiently narrow — but that the result would be the occasional imprudence, and that the results of this imprudence would at times be unacceptable.

The problem to which Aristotle applies himself is not the disjuncture between norm and exception, but the adequacy of the norm in the first place. The problem with the generality of law is not simply that it advises what is prudent only most of the time. Written rules must be altered because it is impossible to write down everything precisely (*Pol.* 1269a8–13), or to make clear general declarations about everything (*Pol.* 1282b5–6). Yet, this applies to justice as well as to prudence, and it is to the problems with the articulation of law in terms of justice that Aristotle devotes himself in the *Politics*.

Aristotle notes that certain individuals can be so outstanding that they are a danger to the regime itself. He reminds us, however, that it is not only the deviant regimes that are threatened by exceptional individuals, and that the best regimes are not threatened simply by vicious men.

In the case of the best regime, however, there is considerable question as to what ought to be done if there happens to be someone who is outstanding not on the basis of preeminence in the other goods such as

strength, wealth, or abundance of friends, but on the basis of virtue. For surely no one would assert that such a person should be expelled or banished. But neither would they assert that there should be rule over such a person: this is almost as if they should claim to merit ruling over Zeus by splitting the offices. What remains — and it seems the natural course — is for everyone to obey such a person gladly, so that persons of this sort will be permanent kings in their cities. *Pol.* 1284b25–34.

This is because every regime, ultimately, cannot resist saying that the virtuous have a title to rule, at least if the rulers articulate any claim to merit ruling whatsoever (*Pol.* 1288a19–24). If this justifies absolute kingship and not just the permanent generalship of the Spartan mold — i.e., if the perfect ruler would not rule by law — then recognizing the claims of virtue would be destructive of every regime (which helps to explain why deviant regimes either ostracize or kill great men [cf. *Pol.* 1284a17–b3]; the goodness of the best regime seems to prevent its self-preservation in this case).

Aristotle provides another reason for why “when another person is superior on the basis of virtue and of the power that acts [to achieve] the best things, it is noble to follow this person and just to obey him” (*Pol.* 1325b10–2). Virtue’s claim to rule does not flow solely from what less virtuous men say about their own claims to rule, but also as a means of avoiding doing injustice to the virtuous man himself.

If there is one person so outstanding by his excess of virtue — or a number of persons, though not enough to provide a full complement for the city — that the virtue of all the others and their political capacity is not commensurable with their own (if there are a number) or his own (if there is one), such persons can no longer be regarded as a part of the city. For

they will be done injustice if it is claimed they merit equal things in spite of being so unequal in virtue and political capacity; for such a person would likely be like a god among human beings. From this it is clear that legislation must necessarily have to do with those who are equal both in stock and capacity, and that for the other sort of person there is no law — they themselves are law. *Pol.* 1284a3–14.

Aristotle follows this with a discussion of absolute kingship, i.e., with the question of whether the rule of such persons would necessarily be beyond the law, and hence destructive of the regime. (If their rule were bound by law, and consequently more resembled the Spartan mode of kingship than the absolute, the regime could remain intact: Aristotle notes that the Spartan kingship can arise in any regime; cf. *Pol.* 1285a3–16, 1286a2–7) The implicit answer is yes, since the arguments presented against absolute kingship all miss the point of the question by denying that the hypothetical king possesses the virtue or superiority that is assumed in the question (cf. *Pol.* Bk. III, ch. 16).³

Yet, what sort of human being actually satisfies the criteria for one whom all men should obey gladly as an absolute king? Aristotle points to this problem by the peculiar manner in which he describes the virtue of such a person. It is superabundant, even

³ It might be that the answer is more than implicit, since an answer in the negative would require that Aristotle believe in a trans-political standard of natural law. Consider in this regard the description of law and reason offered as an attack on the justice of natural kingship (*Pol.* 1287a28–32). Such a law is more a theme in Stoic and Thomistic thought than Aristotle. Cf. Miller 1991; Strauss 1953, 156–64; 1983, 139–40.

excessive,⁴ yet it somehow differs in kind, as well — the message seems to be that his virtue is so great as to become incommensurable. But, then, how can incommensurable things be greater or lesser? What Aristotle means here isn't clear, though arguments can be made for a variety of different readings (cf. Bates 2003; Lindsay 1991; Mulgan 1974; Newell 1987; Nichols 1992; Vander Waerdt 1985).

In any event, considerations regarding absolute kingship are ultimately irrelevant to political practice, except insofar as they recommend that we not attempt to banish entirely discretion regarding what is just by setting down laws. This means that such discretion will be present within the law. Therefore, it will not be impeachable on the basis of the law.

One might contest this conclusion by saying that it will be impeachable on the basis of the spirit of the law, or the reasons for the laws that are often taken actually to be parts of the laws. Ronald Dworkin, for example, includes such principles within the very laws themselves, and so would say that the law can be used to judge the sort of discretion under consideration (1977, 1985, 1986). In one version of the rule of law, law does not eliminate discretion, but rather guides it, and this might imply that the law is available to settle disputes regarding whether discretion has been exercised well or not (Waldron 2002a).

Yet, such principles must always be interpreted, and lack the indisputability that is oftentimes sought by replacing political disputes with legal ones, or questions of substance with those of structure. (Consider in this regard the popular view that a

⁴ Aristotle says that the absolute king may be outstanding by his excess of virtue, *kat' aretēs hyperbolēn* (*Pol.* 1284a4), which is indeed the same word that he uses when saying that a virtue is a mean between excess and deficiency (e.g., *Nic. Eth.* 1134a6–11).

constitution is useful in taking certain questions completely off the table) That is, discretion that is impeachable on the basis of law is in fact impeachable on the basis of an “expertise” that is frequently taken to accompany, if not to be identical with, virtues of character, and most specifically justice. Decency or equity (*epieikeia*), necessary because political justice cannot be justice, simply, is what would be necessary here (cf. *Nic. Eth.* Bk. V, ch. 10). There is a reason why many who read Dworkin think his interpretivism to be in reality nothing more than the rule of judges, and therefore to question why judges make particular good rulers (cf. Hutchinson 1987; Wasserstrom 1986).

Alternatively, one might say that lawful discretion is impeachable on the basis of the regime rather than of the law, on the basis of what stands behind the laws and justifies them rather than they themselves. From the perspective of the regime, such discretion would be impeachable only on the basis of justice itself, for each regime insists that its partial account of justice is justice, simply. A less partisan political science, however, will identify this as the regime.

In either case, it would be more natural to speak of discretion with which one disagrees as “unjust” or “un-American” rather than “illegal.” This may be seen in the fact that the currently popular move of characterizing the disapproved-of as the illegal dissipates the force of moral condemnation which the disapproval is meant to convey by making the question one of technical skill, spoken in the “artificial reason” of the law. Because recourse to first principles of the regime or of justice is unavoidable, the knowledge necessary to exercise discretion well, and to judge well such exercises, requires the perspective of a founder, or a *nomothetēs*. Even if the notion of a “founder” is a historically inaccurate one — even if most regimes grew organically, which is to say,

blindly, without a single, guiding vision — the perspective of such a mythic figure is what is needed. Some of the arguments against absolute kingship require that justice be easy to ascertain and act upon,⁵ but Aristotle never suggests that it is (cf. *Nic. Eth.* 1137a6–17). Aristotle, unlike the moral legalist, does not flatter mankind by saying that everyone possesses the capacity to make correct moral judgments (cf. MacIntyre 1984, 168). We might lower the demands put upon the magistrate somewhat by saying that he need not be capable of ordering the laws so well to achieve their purposes as he finds them. That magistrate would nonetheless have to be able to divine those purposes and understand them. This requires a civic and moral education that extends beyond the bare technical knowledge of the law. It requires the knowledge that Blackstone says that a gentlemanly study of the law must impart (2003, I 32; cf. *Pol.* 1287a25–7, 1287b25–6).

Yet, this is what every patriot argues — that the core principles that underlie the laws support his cause, and therefore should guide every proposed alteration of the laws, the interpretation of every law, and, now, what is to be done in the failure of the law. Whatever it is that is appealed to in order to judge a magistrate’s actions (when those actions are not the result of the mechanical application of law, at any rate) is the perspective which every politically engaged opinion presumes for itself: the “law” here is a discourse, an idiom, a manner of expression, but it is not primarily something that

⁵ Of the six arguments summoned against absolute kingship in Bk. III, ch. 16 of the *Politics*, the second and third implicitly argue that the principles of justice are readily available. The second (*Pol.* 1287a23–32) asserts that the laws educate men well enough for those times when they must be deviated from, and that all that must be done is to ensure that the intellect governs, not the appetite: this implies that the intellect knows justice well enough, and that men rule unjustly simply because they are controlled by their desires. The third (*Pol.* 121287a32–5) insists that what men seek from the law is not expertise, but rather impartiality.

will settle a dispute (cf. Waldron 2004). This is the result whether we follow Dworkin and call it the law or insist that it is merely the spirit of the law.

So, in practice, Aristotle will have the laws and discretion under the laws, guided by the regime (cf. *Pol.* 1289a13–15). What I wish to emphasize, however, is that this is not the emphasis of Aristotle’s discussions; they instead point to something more than this. If the perspective of a regime is a partial one (cf. *Pol.* 1280a9–11, 1283b27–30), adherence to this perspective will necessarily produce injustice. And if the purpose of deviations from the law is greater justice, then some deviations must go against the regime itself — justice would demand that the magistrate actually act on principles that are revolutionary, even traitorous. Instead of simply the perspective of the founder, the magistrate would need the perspective of the philosopher. And as *no* regime can instantiate perfect justice — even the opponents of aristocracy have sensible things to say (cf. *Pol.* 1281a28–34 with 1278a34–8; 1281b28–30; 1283b30–3) — then this would be true of every regime. Yet the practical upshot of this is to leave the magistrates in a position where they violate the law for the sake of a decent regime, not as a corrective to that regime. Deviations from this rule of thumb are rare and concealed. That is, in politics, it is usually best to blur the distinctions among “unjust,” “un-American,” and “illegal.” Violations of the law, interpretations of the law, and alterations of the law, should be in keeping with the regime. Aristotle pushes us further than what practical considerations require.

The Role of the Philosopher

Locke does not focus our attention on whether the law of nature is actually just or is indeed a law properly speaking, at all (cf. Strauss 1953, 229–30); Aristotle pushes us

to question legalism at a moral level, as well (cf. Strauss 1953, 157–64). Locke’s focus is on practicality, and his emphasis is therefore on those things that are of greatest interest to practical politics. Justice in any meaningful sense of course demands that the ruler look to the safety and material well-being of society (cf. *Pol.* 1281a19–20), but it is not a problem for justice, *per se*, if this cannot be done according to law. The subtleties of moral philosophy are for the most part irrelevant, and indeed a little bit of philosophic skepticism can be a dangerous thing in a statesman. The passages in the *Two Treatises* that point to a deeper understanding are short and ambiguous. A critic may just as well say that it is misleading to “read too much” into them as that they are Locke’s esoteric hint at some truer substratum of his political ideology. We cannot take clear-sightedness or care in writing as a premise, only as a working hypothesis, and with Locke I don’t think that it is a hypothesis that can ever be anything more than provisional.

Interestingly, Locke’s pragmatic focus requires of him a greater rhetorical project: he must convince his reader of the existence and significance of flux, just as the practically-oriented Machiavelli was compelled to make *fortuna* a major theme of the *Prince* and the *Discourses on Livy*. A concern with material goods — and this is what an “emphasis on practicality” actually boils down to, an elevation of the material prerequisites of life in deliberations concerning life as a whole — increases the significance of things that threaten material well-being. Aristotle, by the same token, does not dwell on the role that chance and fortune play in human affairs, but neither does he devote much energy to establishing their role.

If we may presume that Locke and Machiavelli at the very least divined the characters of their audience — and their success suggests that they did indeed appeal to

something that was present in their audiences' souls — and if we may say the same thing about Aristotle, then we may cautiously infer from their varied presentations something about the relationship between our concerns and our beliefs about the world. In Aristotle, not only is there less conscious concern with the equipment of virtue, but there also seems to be less recalcitrance to the ephemerality of those goods. Man's inability to guarantee material felicity through prudent regard, on the other hand, is less acceptable to those whose life's work is more caught up in the pursuit of a livelihood.

Neither perspective, of course, is entirely coherent, or more particularly, neither vision is comprehensive. The aristocrat's disdain for the lowly prerequisites of his existence, and blindness even to some of the injustices that are required for his position, is as unreasonable in Aristotle's view as it is in that of the Moderns.⁶ Yet the securing of the foundations of life might not only distract one from the pursuit of happiness, fully understood — life may become nothing more than the “joyless quest for joy” (Strauss 1953, 251) — but it may also make one fearful to accept certain facts the recognition of which is essential for that quest in the first place. The aristocrat must think himself noble, and so must be inclined to ignore the ugly, or at any rate undignified, foundational supports of his noble concern, while it seems that the industrious conquer of nature must exaggerate the control over his fate that his industry brings, or the extent to which nature allows herself to be conquered by the rational.

Both Locke and Aristotle, each in his way, attempt to disillusion their respective audiences by subtly presenting them with the perspective which their position and goals in life incline them to overlook. What is crucial to understanding their differing

⁶ Consider the defenses of slavery in both Aristotle and Locke, defenses which fail to defend the institution as either's society knew it.

emphases is the role each one saw himself playing in politics, or the relation of political thought to politics, proper.

We can identify the perspective that is unpleasant for the aristocrat to adopt with one that demotes the haughty claims of personal responsibility that are the shared premise of both the gentleman's pride and the moralist's condemnation, viz. that human behavior is willed, not caused. We can identify the perspective that is unpleasant for the industrious rationalist to adopt with one that demotes the haughty claims of human chauvinism and the allure of escaping from harsh realities.

So, we can say that it seems, at least, that Locke's critique of legalism is more geared toward producing a political order that would better manage threats to the foundations of living well (flux or *fortuna*), Aristotle's more toward correcting those prejudices which would prevent one from living well once those foundations have been established. Locke would be more political, Aristotle more ethical. Even the latter's discussions of absolute kingship and the injustice of subjecting the man of exceptional virtue to the ham-fisted judgments of the law would have primarily an ethical importance rather than a political one.

Indeed, some more in thrall to the modern separation of politics from ethics, reflected in the distinction between justice and comprehensive notions regarding the good life (cf. Rawls 1996, 1999), might say that Aristotle's questioning has nothing to do with justice at all. As his account of justice could not give immediate direction to political life, even in an aspirationalist manner, it might seem by that very fact to fail as an account of justice. As a result, we might be tempted to say that Locke was the better political theorist regarding the rule of law and exigent circumstances, even as the purpose of such theorizing is consequently excluded from the theory itself. For Locke,

the philosopher who speaks about politics is providing political prescriptions, and so what he says must be more bounded by what is politically feasible; while for Aristotle, the philosopher speaks primarily to human beings about things of the greatest importance for human beings, and for this reason must address the problem of political life. If Aristotle's emphasis on the ends of life means that he does not speak at a similar length about the foundations of life, and so does not provide the solaceful certitude sought from those whose focus is the state of nature, then at least a meditation upon his political thought does not incline one toward nihilism.

Locke's Dilemma and Aristotle's Solution

Is Locke actually the better theorist of the extralegal, even were we to accept his view of the relationship between the philosopher and political theory? Aristotle certainly moves beyond what is necessary for the statesman to know, but does Locke actually deliver on his promises?

In Locke's schema, the executive is to act in times of grave emergency upon his own discretion, yet such actions are not blessed with the patina of legality. They are not, therefore, obligatory, meaning that the executive is not authoritative over the private judgments of the commonwealth's members at the moment he is exercising prerogative: the members must actively *choose* to lend their support to his actions, if they do so, or at the very least acquiesce in not opposing them (Corbett 2006). Because such actions stand outside of the law, there is no way to judge their permissibility by a known legal standard, and so they can be opposed only by some further discretionary judgment — in Locke, by the people (*2nd Tr.*, §168), but perhaps by some other institution of government (cf. Mansfield 1989, 211–46).

In standing so far outside of the law, these are actions and judgments concerning which the law cannot educate. They differ in kind from the sorts of actions and judgments involved in obedience to the law, or even in the execution of law. The difference is one between obedience and judgment, and their previous obedience to the law has not practiced them in judgments that have consequences. Accepting Locke's understanding of political society, the standards of judgment would actually be apolitical. That is, there is a psychological problem at work here.

There is also a pedagogical problem. Life in political society would have to prepare one for an apolitical understanding of ethics. In protecting against oppression guarded by the aegis of law — an oppression to which men feel obligated — Locke leaves only the apolitical “law of nature” as a moral check upon the extralegal discretion that is required as a result. Yet, the law of nature, in being so far removed from the everyday business of politics, is not taught by the laws. Indeed, Locke says that the laws of most commonwealths are a poor guide to the content of the law of nature (*1st Tr.*, § 58). And, in order to bring about his revolution in thought, he cannot have the law of nature be “code” for the principles of the particular regime. The law of nature must be available to unassisted reason, and indeed is nothing but that reason (*2nd Tr.*, §§6, 25, 31, 32). That law may be discoverable, but it must be more than that: it must be plain. And most men, it turns out, can be expected to be ignorant of it; this is why political society must come along and provide unmistakable, positive law (*2nd Tr.*, §§124, 129, 136–7).

A third problem involves the content of the law of nature. Locke ultimately distinguishes between ordinary and extraordinary politics (Mansfield 1989, 181–211), between what Nomi Lazar terms the politics of norm and exception (2005, 2006). Lazar argues that Locke differs from Machiavelli (and from Rousseau, Hobbes, and Schmitt)

by subsuming the apparent exception under a more general norm — the law of nature. Yet, the guidance this natural law gives to the magistrate is no different from that which the Senate would on occasion give to the consul: “See that the republic comes to no harm” (cf. *2nd Tr.*, §159). It is Lazar, not Locke, who attempts to provide substantive content to this norm, suggesting five “nascent, potential principles for safety, which might serve as means of guiding moral judgment consistent with those liberal values emergency powers are intended to uphold” (Lazar 2006, 268). Still, where does this fleshed-out content come from?

The greatest hurdle that Locke faces here involves the *source* of the law of nature, however. Machiavelli’s amorality is more at home in his political theory than Lockean natural right is in Locke’s, for it takes more seriously the separation of politics from ethics. Of course, if we look to the averred content of the law of nature, Locke places a substantially greater constraint on what the prince may do than Machiavelli does, in the way that something is more than nothing. The question, however, is the nature of this constraint. Locke declares that such extralegal, even extra-political discretion may be employed only for the public good, but what does he have to back this up? The law of nature, as the law of reason, claims to be something more than a moral *fiat*, but this means that Locke must establish that he has correctly understood its content. Surely, Locke claims for it some foundation more durable than intuitionism.

Reason, in both Machiavelli and Locke, teaches self-preservation above all else; Locke appends some duties toward others to this, subordinating them to self-preservation, but does not permit one to prefer oneself simply (cf. *2nd Tr.*, §6). The criminal who aggrandizes himself further than is needed for his preservation *deserves* the punishment that comes to him for not being stronger than the police in a way that

his victim — who also suffers for not being stronger than the one harming him — does not. And this must be the case if the prince exercising discretion is in any way blameworthy after he persuades the people that he has simply exercised his prerogative for the good of the community when in fact he has not. And how *this* works in Locke is unclear.

Jeremy Waldron draws this obligation from Locke's Christian faith (Waldron 2002b). But if this is the case, then the law of nature would no longer be founded upon secular reason alone, it would no longer be philosophy, and so would no longer be a law of nature. Locke distinguishes the law of nature from divine revelation and providence (*1st Tr.*, §16). Leo Strauss and Thomas Pangle see a Hobbesian foundation to Locke's law of nature (Strauss 1953, 1959b; Pangle 1988; cf. Coby 1987), but in Hobbes one is a fool for acting like a Machiavellian prince only if one is not in fact a sovereign prince, whereas Locke needs a natural law that will confine the rulers' actions, as well.

If there is a reasonable chance that the people will be prudent enough to make usurpation an ill bargain, there might be reason enough for a prince to avoid usurpation. Yet, this will not provide a reason for a prince to approve the teaching of Locke's ideology, or forebear from spreading his own, or from mouthing verses from the liberal hymnal while pursuing his own ends, and it certainly won't make him *deserving* of punishment even in success. And, most damagingly, the perception of such desert seems necessary for the people to rise up in the first place — self-interest does not seem a reliable motivation to disobey authority, especially when justice is oftentimes set opposed to selfishness.

The question is, What sort of theory would support Locke's constraints on a political leader without recourse to moral fiat? — especially as such fiats must be

phrased as commands, and both Locke and Aristotle agree that law cannot fully capture what a clear-sighted moralist might do?

I think that Locke got himself into trouble by beginning in the state of nature, and therefore positing an apolitical law of nature, i.e., with his tacit assertion that ethics is separate from and conceptually prior to politics and life in a political community. Machiavelli's amorality is more at home in Lockean theory than Lockean natural right is because Locke followed Machiavelli and Hobbes and their disciples, witting and unwitting, in seventeenth-century England, in rejecting Ancient natural right, based upon man's being by nature a political animal, and therewith the impossibility of an apolitical ethics (see Strauss 1953, 81–164, for much of what follows). Or rather, this strand of Ancient thought denied the relevance of the apolitical for ethics, or of the likely character of a human being outside of a political community. Such would not reveal the "nature" of a human being, since human beings are not naturally isolated in such a way. In fact, our having been reared in a community with others, and the natural directedness toward a political community that this engenders or discloses, is so central to our being that we would have to say that anyone who did *not* share this with us would not be recognizably human.

A natural ethics would not, therefore, have to be foreign to the opinions one acquired as a result of living together with other people: it could instead be the perfection or purification of those opinions. On a political level, one would always apply the law of one's community. In unfamiliar circumstances one would simply apply a better understanding of it than was written down. This improved understanding might asymptotically approach justice, like Dworkin's Hercules approaching the law beyond

law (cf. Dworkin 1986, 400–16), but one never steps beyond it, or imagines oneself doing so. It is never apolitical in the same way that Locke’s law of nature is.

We might say, with Aristotle, that the law beyond law with which Dworkin concludes *Law’s Empire* is a myth. It is an illusion which seems plausible because it is what is aimed at when one takes seriously the claims of one’s community regarding justice and seeks to clarify them or render them as best as they can be. Yet it is an illusion nonetheless: such claims, when clarified and rendered their best, are trans-political, and do not admit of a necessary political reflection. Wise rulership is never a matter of following a law, nor can it be reduced to law, and the laws of every community must sacrifice some legitimate claims in order to satisfy others. Therefore, there will always be something arbitrary and decisionistic about the best interpretation of any community’s laws when that interpretation is political. We might raise the question of who it is who gets to make these decisions — in a decisionistic way to be sure, but the necessity of politics means that they must be made nonetheless — but that is nothing other than the question of who should rule, and to answer this question is already to side with one regime against another, to abandon the comprehensive view for that of the partisan.

In any event, even restricting our thoughts to the realm of the political, such interpretation of one’s community’s fundamental principles requires a broader conception of law and politics than Locke would allow. To navigate these more open political waters well requires precisely the sort of education that Locke’s theory is designed to avoid reliance upon, and therefore a more elevated tone to society than the Baconian conquest of nature for the relief of man’s estate would normally permit. It requires leisure, not industry.

Conclusion

Statesmen cannot be replaced with bureaucrats, controversial judgments with regulations, although the temptation to imagine a future political order in which there was only administration is not inhumanely bizarre. The question is why such a future political order is chimerical. Locke focuses more on practical challenges this would occasion, and these challenges may be summed up under the rubric of “flux.” Leaving aside the question of what being administered does to one’s soul, Aristotle points us more toward the fact that rulers cannot avoid making disputable and even partial judgments regarding justice. Law, of the sort that might preclude such judgment, cannot be simply just, and every regime is compelled to choose one way of life as more publicly permissible than other. For the most part, however, politics cannot be conducted with a view to the limitations of politics — human beings do not usually and unmistakably fulfill the criteria for absolute kingship — and so extralegal action is in practice defensible for Lockean more than Aristotelian reasons.

Yet this insight still leaves us with two very different conceptions of law and politics. Since Aristotle’s purpose is to educate human beings about the highest human good — a good which transcends the limitations of political practice — while Locke sees his project as emphatically guiding practice, we might suspect that Locke’s will be better suited to practice. Perhaps, given certain non-philosophic supplements, it may be. These supplements, however, from the perspective of Lockean philosophy, have the character of moral fiats, and so are foreign to any attempt at providing a simply rational account of and justification for political action. The sources of these moral constraints

are therefore foreign to a rational society, and in this sense hostile to it. The Lockean commonwealth cannot do without them, however.

Locke's law of nature, insofar as it actually does guide the prince when he steps outside of law and politics, cannot be the dictate of reason that Locke would have it be because Locke follows in the modern rejection of Ancient natural right and the understanding of human nature that underlay it. In this way, Aristotle presents the more philosophically sound account of political action.

Bibliography

- Aristotle. 1984. *The Politics*. Translated and with an Introduction, Notes, and Glossary by Carnes Lord. Chicago: Chicago University Press.
- . 2002. *Nicomachean Ethics*. Translated, Glossary, and Introductory Essay by Joes Sachs. Newburyport, MA: Focus Publishing.
- Bates, Clifford Angell, Jr. 2003. *Aristotle's "Best Regime": Kingship, Democracy, and the Rule of Law*. Baton Rouge: Louisiana State University Press.
- Blackstone, William. 2003. *Commentaries on the Laws of England*. Edited by Thomas Cooley. Reprint, Clark, NJ: The Lawbook Exchange.
- Coby, Patrick. 1987. "The Law of Nature in Locke's *Second Treatise*: Is Locke a Hobbesian?" *The Review of Politics* 49, no. 1 (Winter). Pp. 3–28.
- Corbett, Ross J. 2006. "The Extraconstitutionality of Lockean Prerogative." *The Review of Politics* 68, no. 3 (Summer). Pp. 428–48.
- Dworkin, Ronald. 1977. *Taking Rights Seriously*. Cambridge: Harvard University Press.
- . 1985. *A Matter of Principle*. Cambridge: Harvard University Press.
- . 1986. *Law's Empire*. Cambridge: Harvard University Press.
- [Ferguson, Robert]. 1689. *A Brief Justification of the Prince of Orange's Descent into England, And of the Kingdoms Late Recourse to Arms. with A Modest Disquisition of what may Become the Wisdom and Justice of the Ensuing Convention in their Disposal of the Crown*. London. Reprint, Early English Books Online (eebo.chadwyck.com), Wing F733.
- Hobbes, Thomas. 1994. *Leviathan, with Selected Variants from the Latin Edition of 1668*. Edited by Edwin Curley. Indianapolis: Hackett Publishing.
- Hutchinson, Allan C. 1987. "Indiana Dworkin and Law's Empire." *Yale Law Journal* 96. Pp. 637–65.
- Johnson, Samuel. 1689. "Of Magistracy," "Of Prerogatives by Divine Right," "Of Obedience," and "Of Laws." Reprinted in *State Tracts: Being a Farther Collection of Several Choice Treatises Relating to the Government From the Year 1660 to 1689*. London: 1692. Reprint, Early English Books Online (eebo.chadwyck.com), Wing S5331. Pp. 269–72.
- Ketcham, Ralph. 1987. "Executive Leadership, Citizenship, and Good Government." *Presidential Studies Quarterly* 17, no. 2 (Spring). Pp. 267–79.

- Lazar, Nomi Claire. 2005. *The Ethics of Emergency Powers in Liberal Democracies*. Ph.D. dissertation, Yale University.
- . 2006. “Must Exceptionalism Prove the Rule? An Angle on Emergency Government in the History of Political Thought.” *Politics & Society* 34, no. 2 (June). Pp. 245–75.
- Lee, Emery G. 1997. “Representation, Virtue, and Political Jealousy in the Brutus-Publius Dialogue.” *The Journal of Politics* 59, no. 4 (November). Pp. 1073–95.
- Lindsay, Thomas K. 1991. “The ‘God-Like Man’ versus the ‘Best Laws’: Politics and Religion in Aristotle’s *Politics*.” *The Review of Politics* 53, no. 3 (Summer). Pp. 488–509.
- Locke, John. 1988. *Two Treatises of Government*. Edited with an Introduction and Notes by Peter Laslett. Student Edition. Cambridge: Cambridge University Press.
- Machiavelli, Niccolò. 1996. *Discourses on Livy*. Translated by Harvey C. Mansfield & Nathan Tarcov. Chicago: University of Chicago Press.
- . 1998. *The Prince*. Translated by Harvey C. Mansfield. 2d ed. Chicago: University of Chicago Press.
- MacIntyre, Alasdair. 1984. *After Virtue*. Second edition. Notre Dame: University of Notre Dame Press.
- Mansfield, Harvey C., Jr. 1979. *Machiavelli’s New Modes and Orders: A Study of the ‘Discourses on Livy’*. Chicago: University of Chicago Press.
- . 1989. *Taming the Prince: The Ambivalence of Modern Executive Power*. New York: The Free Press.
- . 1991. *America’s Constitutional Soul*. Baltimore: Johns Hopkins University Press.
- Miller, Fred D., Jr. 1991. “Aristotle on Natural Law and Justice.” In *A Companion to Aristotle’s ‘Politics’*. Edited by Fred D. Miller and David Keyt. Cambridge, MA: Blackwell Publishing.
- Miroff, Bruce. 1987. “John Adams’ Classical Conception of the Executive.” *Presidential Studies Quarterly* 17, no. 2 (Spring). Pp. 365–82.
- Mulgan, R. G. 1974. “A Note on Aristotle’s Absolute Ruler.” *Phronesis* 19, no. 1. Pp. 66–9.
- Nelson, Michael. 1987. “Constitutional Qualifications for President.” *Presidential Studies Quarterly* 17, no. 2 (Spring). Pp. 383–99.

- Newell, W. R. 1987. "Superlative Virtue: The Problem of Monarchy in Aristotle's 'Politics'." *Western Political Quarterly* 40, no. 1 (March). Pp. 159–78.
- Nichols, Mary P. 1992. *Citizens and Statesmen: A Study of Aristotle's Politics*. Savage, MD: Rowman & Littlefield Publishers.
- Pangle, Thomas L. 1988. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of John Locke*. Chicago: Chicago University Press.
- Rahe, Paul A. 1994. *Republics Ancient & Modern*. Vol. 3, *Inventions of Prudence: Constituting the American Regime*. Chapel Hill: University of North Carolina Press.
- Rawls, John. 1996. *Political Liberalism, with a New Introduction and the "Reply to Habermas"*. New York: Columbia University Press.
- . 1999. *A Theory of Justice*. Revised Edition. Cambridge: Harvard University Press.
- Rutherford, Samuel. 1644. *Lex Rex: The Law and the Prince*. London. Reprint, Early English Books Online (eebo.chadwyck.com), Wing R2386.
- Shklar, Judith N. 1964. *Legalism*. Cambridge: Harvard University Press.
- Strauss, Leo. 1953. *Natural Right and History*. Chicago: Chicago University Press.
- . 1959a. "What is Political Philosophy?" In *What is Political Philosophy? and Other Studies*. Chicago: University of Chicago Press.
- . 1959b. "Locke's Doctrine of Natural Law." In *What is Political Philosophy? and Other Studies*. Chicago: University of Chicago Press.
- . 1983. "On Natural Law." In *Studies in Platonic Political Philosophy*. Chicago: University of Chicago Press.
- Sunstein, Cass R. 1995. "Problems with Rules." *California Law Review* 83 (July). Pp. 953–1023.
- Vander Waerdt, P. A. 1985. "Kingship and Philosophy in Aristotle's Best Regime." *Phronesis* 30, no. 3. Pp. 249–73.
- Vox Populi: Or, The Peoples Claim to their Parliament's Sitting, to Redress Grievances, and to provide for the Common Safety, by the known Laws and Constitutions of the Nation*. 1681. Reprinted in *State Tracts: Being a Farther Collection of Several Choice Treatises Relating to the Government From the Year 1660 to 1689*. London: 1692. Reprint, Early English Books Online (eebo.chadwyck.com), Wing S5331. Pp. 219–24.

- Waldron, Jeremy. 2002a. "Is the Rule of Law an Essentially Contested Concept (in Florida)?" *Law and Philosophy* 21. Pp. 137–64.
- . 2002b. *God, Locke, and Equality: Christian Foundations in Locke's Political Thought*. Cambridge: Cambridge University Press.
- . 2004. "The Rule of Law as a Theater of Debate." In *Dworkin and his Critics, with Replies by Dworkin*, edited by Justine Burley. Oxford: Blackwell Publishing.
- Wasserstrom, Silas. 1986. "The Empire's New Clothes." *The Georgetown Law Review* 75. Pp. 199–314.
- Weaver, David R. 1997. "Leadership, Locke, and the Federalist." *American Journal of Political Science* 41, no. 2 (April). Pp. 420–46.