begins to frustrate God's purpose for the world. The moment for rebellion happens when enough men are prepared to repudiate their contract with their rulers and fall back on the original contract of society. In all events, the Lockian Sovereign is a party to the contract to set up government. The king is king on terms.

It follows that only my own, explicit consent can make me a member of a commonwealth, though Locke notoriously waters this down later with his doctrine of 'tacit consent'—just by walking on the king's highway I tacitly invite the protection of the law, so tacitly consent to obey that law myself. So what happens to the non-joiners? Locke is as ruthless as Hobbes on this point. In the beginning non-joiners, like dissenters later, may be killed if they appear to threaten Civil Society. A man who denies God's Law by invading other men's Natural Rights is at war with God and men, and killing in war is no crime. Locke is one of the first political thinkers to think that capital punishment is a special case of punishment and needs a special justification in a way that ordinary punishment—fines and imprisonment—does not. A man who violates another's Natural Rights by taking his life, or threatening to, is irrational, hardly a man at all, because his natural reason doesn't function well enough to tell him that his own enjoyment of rights implies the duty of respecting those same rights in others. This argument is the basis of all right to punish, either in the State of Nature or in Civil Society. If a man breaks God's Law in Civil Society, he is no better than a wild beast and may be killed.

What happens if, in Civil Society, I withdraw my consent? Locke thinks that that would not alter my obligation to obey the law, because I would then become as a stranger or visitor in my own country, and nobody ever argues that foreigners are not obliged to obey the laws of the particular country they happen to find themselves in. Strangers implicitly invite the protection of the laws in a foreign country, and they are subject to Natural Law punishments anyway. (The exception would be a group of men coming into another country bringing their own law with them, and therefore not implicitly asking for the protection of that country's laws. A group of men like that would be called an invading army, or a group of English football supporters.) Locke also uses the analogy of visiting another family. Guests are obliged to follow the habits and customs of that family where they differ from the habits and customs of their own.

LOCKE ON FORMS OF GOVERNMENT

What good, then, does it do a man to consent to become a member of a commonwealth if he is obliged to obey the law in whatever commonwealth he happens to find himself in? If the law does not differentiate between natives and strangers, then the only advantage which membership of a political community could bring would be some kind of exercise of political rights, including the right of rebellion. The commonwealth is *my* commonwealth, and the law would be in some sense my law. Locke holds the Whiggish doctrine of the supremacy of the legislature: that which gives legitimate commands to others must itself be supreme. What we have come to call the 'executive' and judicial powers must be secondary, because, being unmoved until they enforce the decisions of

the legislature, they must be subordinate to it. For legislation to be *my* legislation, the laws a polity gives itself, I must be in some way represented in the process by which law is made. There is nothing especially radical about this proposal. It certainly does not necessarily imply democracy with universal suffrage: I might well be 'virtually' represented by my betters with no direct or indirect role in the matter of legislation at all. Nor is it intended to be anti-king. Locke is perfectly content that the legislature in England should be king-in-Parliament, and for the king to be head of the executive (but the judiciary presents special problems). A plural legislature is safer, and Locke can see no reason, a few special privileges like parliamentary immunity apart, why all the members of that plural legislature should not be bound like anybody else by the law it makes. The king in England might reasonably be called supreme because, as a branch of the legislature and head of the executive, he is called upon to exercise more power than anyone else, but this can be made perfectly clear without reference to a high-flown theory like Divine Right.

Locke thinks that there are even moments of national emergency in which the king may act without law, or even against law, in order to preserve the realm: *salus populi suprema lex* (public safety comes before everything else). This is a residual power, inherent in all government and best exercised by the head of the executive, because he, being one man, can make the quick decisions which are necessary at times of national disaster, say a flood, or foreign invasion. (This inherent or residual power of executive government was to be much invoked by President Lincoln at the time of the American Civil War, when he argued that to save the Union, the president had to make executive decisions which were probably illegal and almost certainly unconstitutional.)

The executive and the legislative powers are distinct in theory but, in the English case, they are clearly so close to each other that to read a separation-of-powers, checks-and-balances argument in Locke is to find something which isn't really there. Locke's theory is much more like the old idea of mixed government in which all the estates of the realm have a legitimate share. A theory of the separation of powers was later read into Locke, but that is a different matter. The exception is Locke's insistence of the independence of the judges. English common lawyers had been worried about the judicial power of monarchy ever since Sir Edward Coke had to explain to James I why he could not sit as a judge, and judges sitting by royal appointment and, more importaritly, subject to royal dismissal instead of serving during 'good behaviour' *(quam diu se bene gesserint)*, sent a shiver down the spines of right-thinking Englishmen. A judiciary dependent on the king was dangerous, and a judiciary dependent on kings who believed they ruled by Divine Right was really frightening. Hence Locke's insistence on the judges' independence.

In Locke's theory, any form of government which protected Natural Rights, and especially property, would be a legitimate government, but that leaves entirely open the question: Which form of government is most likely in practice to protect Natural Rights? A day would come in America when men would think that a democratic republic with a wide exercise of political rights, including the right to vote, was the only practicable solution to the protection of Natural Rights, but that was long in the future, and probably later than the new American Constitution ratified by 1789. But Locke is nothing if not a constitutionalist. Even though he fails to distinguish clearly between the executive and

legislative functions of government, he is wary enough of power to want to put clear constitutional limits on its exercise. This had always been implicit in the mechanical theory of the state. If political power was originally created for a specific purpose, then power itself must be limited to that purpose.

The theory of *limited* government must never be mistaken for a theory of *weak* government. Government is still government, even if it is restricted government. In this sense Hobbes makes his presence felt in Locke's *Second Treatise*. We have become used to the idea that political power is quantifiable: we speak of institutions as being 'more or less' powerful. To concentrate state power for a few restricted ends, like the protection of life, liberty and estate, is to make government more powerful, not less. If power is a quantity, perhaps even a fixed quantity, then to try to do less with it is something like a guarantee that what government is set to do, it will do thoroughly and well. Locke himself makes the distinction between restricted and weak government with a graphic example drawn from war: a general may order a soldier to certain death, but cannot touch a penny-piece out of the soldier's pocket because the power of taxation lies elsewhere. This is constitutional government, but it is hardly weak government as far as the soldier is concerned.

MEN AND THE STATE: THE PROBLEM OF LIBERTY UNDER LAW

Locke obviously thinks of men as natural bargainers, and he also thinks that men's automatic reaction to the world outside themselves is not to try to dominate it but to protect themselves from it. Natural Rights create a kind of moral space for the individuals who possess them, and that moral space may not be intruded upon except by explicit consent. Natural Rights in this sense create a proper moral distance between men, a claim to a certain individual autonomy. Men's natural liberty is their chief moral resource, and they will be inclined to spend that resource wisely. Giving up some natural liberty in order to enjoy the rest more securely immediately presents a problem: suppose too much has been given up for too little? There is a market in security, so security has its price, and that price would depend on the amount of security available and the demand for it. In the ordinary course of events, men might think they have paid too much for security under law, and that would always be a source of potential discontent. This Locke would approve of: perpetual suspicion of the state is healthy for liberty. Men in the State of Nature made the contract to form political society because they feared the power of others over them, the Law of Nature notwithstanding. By creating the state, men save themselves from the power of others, but in so doing they create in government a power which is much greater than the power of any individual or group of individuals in the State of Nature. What could be more natural, then, than to want protection from the state? The assertion of the Natural Rights of life, liberty and estate is therefore just as important in a commonwealth as outside it. Perpetually discontented men in Civil Society, grumbling that they've paid out too much of their liberty for security, are healthy for liberty.

But this might not always be the case. The price of anything, security included,

depends on supply as well as demand. If there is not much security available in the world as it is, then its price might become unreasonably high. Take the cases of terrorism, or of a steeply increasing incidence of violent crime. Security is then at a premium as an ever-increasing number of people begin to feel insecure. The only way out of their difficulty would be to give the state larger powers to cope with the new situation. This is not the same case as national emergency, when the executive has to act quickly. Terrorism and crime are longer-term problems, about which the legislature might be asked to act. Men would be in the position of bargaining away more and more liberty in the hope of getting more and more security and it is conceivable that a point would be reached at which, security being very scarce, a huge amount of liberty would have to be spent on a very small, and therefore very valuable, amount of security, and in the end the bargain might not be worth it. What this amounts to is that the Lockian scheme of things would only work in societies which were already fairly stable and law-abiding.

CONSENT AND THE TITLE TO GOVERN

Nothing could seem to be clearer than Locke's assertion that only consent can make me a member of a commonwealth, and even when Locke qualified positive consent into tacit consent, the doctrine still seems clear: when I walk on the highway I consent to those laws whose protection I implicitly ask for. Consent confers title. Government is legitimised by consent. I obey because I actually or tacitly promised that I would, provided certain conditions are met.

The question immediately arises: Can promises, by themselves, create genuine obligations?, and the simple answer is: No. What I promise to do must be in some prior sense 'right' (or at least not wrong). (If I am caught in adultery *in flagrante delicto,* it would not console my wife if I told her I was committing adultery because I made an agreement with my partner to do it.) Promises are a way of explaining how I came to *think* I was under an obligation, but promises alone do not tell me enough to know that I really am obliged.

The further question then arises: If I know that there are some things I may or may not do, then am I not obliged to do the one set of things and abstain from doing the other set, with or without promises? Am I not obliged to do the 'good' and not do the 'bad' in any case? What differences, then, can promises make? Locke's answer to this problem is straightforward: it is not enough that law is good. It must also be made in the proper form and in the proper way. In Locke, the consent of the governed identifies the persons of those entitled to make law. It is not enough that law should be good law. It should also be made by the right people in the right form, otherwise any conqueror or usurper who left the laws of his acquired state unchanged (a tactic highly recommended by Machiavelli) would be a legitimate ruler.

Consent entitles specific people to rule under specific conditions. As a lawyer, Locke has a very juridical view of what it is to enter into political association. Like the ordinary law, Locke is less concerned with the question of whether it is *good* that certain persons should possess the law-making power, than with questions about their title. (The law

doesn't ask whether it is *good* that I own my house but asks whether I really own it in law.) Giving up my right of judgement to the state cannot be permanent, because I may not permanently alienate Natural Right. Locke, again thinking juridically, sees government as a trust: trustees are entrusted with my right of judgement of when my Natural Rights have been violated, and if they betray that trust I may resume the exercise of the right of judgement myself, and even feel free to begin again and reform political society by a new contract. This is not as radical as it may appear at first sight. Things would only turn out like that in a political crisis caused by a government stupid enough to offend enough property owners for the return to the State of Nature to be attractive as an alternative to rational men. Something like that might have happened in England in the 1680s, and again in America in the 1770s, but it is a rare occurrence.

Consent always implies some sort of consensus. Locke insists on the priority of society over the state, and that profoundly affects how men should view government and how government should treat its citizens. What we ordinarily call 'opinion', or public opinion, arises in what Locke would call society, so it is thinking in society which decides what form the state should take. The state is the sum of opinion already formed, and it follows that it is certainly not the state's job to try to change men's opinions. Locke believed in the toleration of heterodox opinions (within limits) and the one thing he did not want was for the state itself to be an opinion-former. There has always been something English, even Anglican in the broad sense, about Locke as a political thinker. He himself seems to speak for a body of opinion already formed rather than trying to change anybody's mind.

Locke speaks for those who have had enough of the Stuarts for the second time round. The theory of the Divine Right of Kings had not made much of a splash in England before the Civil War. It was there, an irritant among other royal irritants, but it was not central. The execution of the king in 1649 after two Civil Wars and the virtual usurpation of the sovereignty by Cromwell changed all that. When the movement to exclude Charles II's brother James from the throne because he was a Catholic gathered momentum, the possibility of another Civil War on a grand scale, not to mention Monmouth's ill-starred rebellion, gained many supporters for Divine Right's contention that, no matter what happened, there was always a lawful, hereditary Sovereign in England. Locke speaks for the others. His patron was the Earl of Shaftesbury, leader of the exclusion party (in his other role as medical man Locke had performed a successful operation on Shaftesbury for the stone), and it seems that Locke began writing the *Second Treatise* early in the 1680s when exclusion was in the air, and he had probably finished it by 1683. It was published to support the Glorious Revolution of 1688 because it fitted that case so perfectly, not least because, *pace* Hobbes and James II, the State of Nature which England returned to after the departure of its Sovereign, James II, turned out to be Lockian, not Hobbesian, after all.

LOCKE AND THE FOUNDATIONS OF LIBERALISM

Liberals have always shown a certain fondness for Locke, and it is easy to see why. Certain assumptions which Locke makes, certain attitudes which he held, and certain