

## A FEARFUL ASYMMETRY: LOCKE ON LEGAL MORALISM, TOLERATION, AND SEXUAL LIBERTY

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### Abstract

Is John Locke a legal moralist? In his *Letter concerning Toleration*, Locke argues that, while the state should not punish people for their private religious beliefs, it is still permissible, indeed desirable, for magistrates to enforce prohibitions against people's private sexual behavior. This suggests that he countenances moralist legislation. However, I argue that, in spite of his position on sexual liberty, Locke in fact holds a distinctive liberal conception of state power and of its scope in regulating people's private behavior. I offer an interpretation of his views on sexual liberty that shows them to be compatible with this conception.

Keywords: philosophy of law, liberalism, political philosophy, early modern philosophy, sex and the law

### INTRODUCTION

Is John Locke a legal moralist? He has earned a central place in the liberal canon both for his aggressive defense of religious liberty and for his doctrine of inalienable natural rights that restrict the power of the state. But in his *Letter concerning Toleration*, Locke insists that, while the state should not punish people for their private religious beliefs, it is still permissible for magistrates to enforce prohibitions against people's private sexual behavior—indeed, he thinks they *should* impose such prohibitions. However, he does not offer any thorough defense of this view.

Locke's endorsement of restrictions on private sexual behavior should, at least on its face, be troubling to those who see him as one of the founders of modern liberalism. Scholars have not yet provided an adequate explanation for the apparent asymmetry in Locke's treatment of private religious beliefs, on the one hand, and private behavior on the other. They have left his texts on sexual liberty almost entirely unexamined.<sup>1</sup> But I believe that such an explanation exists and that it shows that Locke cannot be classified as a legal moralist. If we draw together the full range of relevant texts, we can identify two rationales for the regulation of private behavior that are consistent with legal liberalism.

I will argue that Locke thinks, first of all, that, if the state does not regulate sexual morality, people will be led to reject religion, and they will thus pose a threat to the social order. Second, he thinks sexual immorality threatens the natural right of children to be supported by their parents and to inherit a fair share of their property. As I will demonstrate, both of these arguments depend on appeals to the overall good of society, rather than the enforcement of morality per se. Though Locke's arguments will not persuade a modern reader, I believe that, by showing they are compatible with legal liberalism, I can also show that Locke does not defend an expansive conception of state power when it comes to private behavior. This helps us understand his political philosophy as a whole.

#### MORALISM AND LIBERALISM IN LOCKE AND HIS CONTEMPORARIES

Sexual liberty has, over the past decades, come to the forefront of legal and political debates about the nature and extent of civil rights in a modern democracy. Many people now take it as axiomatic that the basic liberties protected in a liberal society include the right of adults to engage in private, noncommercial sex without interference by the government. In 2004, the United States Supreme Court, in *Lawrence v. Texas*, a decision granting citizens the right to engage in consensual same-sex relations, commented that a right to sexual liberty "has been accepted as an integral part of human freedom" in numerous liberal-democratic jurisdictions around the world.<sup>2</sup>

The broadening of sexual liberty has proceeded hand in hand with the increasing acceptance of a more general view about the role of the criminal law in a liberal democracy. Joel Feinberg calls this view simply "liberalism," though for the sake of clarity—since I will be using the term "liberalism" in more than one sense—I will call it "legal liberalism." Legal liberalism, rooted in John Stuart Mill's famous "harm principle," is the view, as Feinberg puts it, that "the prevention of harm or offense to [nonconsenting] parties other than the actor is the only morally

legitimate reason for a criminal prohibition” (1987, 249). Legal liberalism stands in contrast to “legal moralism,” the view that it can at least in some cases be legitimate for the criminal law to punish someone’s actions merely because those actions are “*inherently immoral* even if those actions cause no harm or offense to nonconsenting third parties” (Feinberg 1987, 249).

The phrase “legal moralism” is a modern one, invented by scholars. However, the idea of legal moralism has a long history, as U.S. Supreme Court Justice Antonin Scalia pointed out in a 1991 opinion, where he asserted that “our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ *i. e.*, immoral.”<sup>3</sup> In Europe and North America, laws dating back to the Middle Ages prescribe punishments for such private sex acts as homosexuality, contraception, and sex outside marriage, alongside other private actions such as blasphemy.<sup>4</sup>

Legal moralists in the Western tradition have appealed to one of two bases to justify restrictions on private behavior: the law of God and natural law. Many have appealed to both, and the two were often said to be perfectly congruous. The language of a Massachusetts statute from 1697 shows that, in Locke’s era, moralistic laws continued to appeal to this dual basis. The statute deals with “buggery,” a catch-all term that could refer to gay sex, bestiality, or non-procreative sex among heterosexuals. It says that buggery is both a “detestable and abominable sin” and “contrary to the very light of nature.”<sup>5</sup>

Legal liberals might assume that they will find an ally in Locke, who has been called “the father of liberalism” (Oakeshott (1932, 74). Indeed, they might expect him to be their ally twice over. First of all, Locke is an advocate for toleration. He says that, in matters of religious belief, magistrates must accept a diversity of views. This reasoning might seem to extend naturally from one’s private convictions to include those behaviors that do not affect others, such as private consensual sex. Second, Locke defends a theory of the state that grounds its legitimacy in a doctrine of natural rights. These rights accord citizens a significant degree of personal liberty and grant them the right to resist governments that abridge that liberty unjustly. According to Locke’s theory, we begin in a state of nature, in which we have total liberty, and we agree to form a government in order to protect our basic rights to life, liberty, and property. But we do not give up those rights, and the state’s legitimacy depends on its willingness to respect them. Many people would put private sexual behavior within the sphere of liberty retained by citizens in forming the social contract.

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But Locke's interpreters have by no means agreed unanimously to classify his philosophy as straightforwardly liberal, and some would not be puzzled by his failure to defend personal liberty in private sexual behavior. On the contrary, some scholarship resists assimilating Locke to modern liberalism. John Dunn (1969) remains perhaps the best-known proponent of this view.<sup>6</sup> An interpretation along these lines can begin from the undeniable fact that Locke's view of toleration is less than absolute. In fact, as a modern editor of his *Letter concerning Toleration* points out, his position is decidedly narrow:

Locke's liberalism is not, however, the same as modern secular liberalism. His *Letter* can surprise and disconcert by the apparently limited basis and extent of its tolerance. It is not just that Locke excludes Roman Catholics and atheists from tolerance, but also that his very premises are rooted in Christian evangelism. (Goldie 2010, xi)<sup>7</sup>

The question of private sexual behavior provides a useful test case to determine what Locke thinks are the true limits of state power over individual citizens. I do not suppose that, by answering this question, we can decide whether Locke should be considered a liberal philosopher *tout court*. This question would require a more careful definition of what is meant by "liberalism," and its resolution would go beyond the scope of what I can accomplish here. However, I believe a case can be made that Locke takes a distinctively liberal, rather than moralist, position on one question in particular: what should be the extent of the state's power to regulate the private behavior of citizens? I also believe that his views on sexual liberty, despite their apparently moralist character, can be understood as compatible with this liberal position.

### LOCKE'S LEGAL LIBERALISM AND THE PROBLEM OF SEXUAL LIBERTY

Locke does not discuss at length the question of what, if any, limits should constrain the state's power to regulate people's private behavior. But he says in his *Letter concerning Toleration* that regulating morality is within the civil magistrate's authority:

A good life, in which consists not the least part of religion and true piety, concerns also the civil government: and in it lies the safety both of men's souls and of the commonwealth. Moral actions belong therefore to the jurisdiction both of the outward and inward court; both of the civil and domestic governor; I mean, both of the magistrate and conscience. (Locke 1824, 5: 41)

But this is a very general principle—that at least some "moral actions" are within the scope of state power. We are not told *which* moral actions these

are or how they are to be governed. Elsewhere, Locke seems to commit himself to a position compatible with legal liberalism. In his *Two Treatises on Government* (1689), he argues that government is formed to protect people's basic interests and that its power is legitimate only insofar as it serves that end. In his chapter "Of the Extent of the Legislative Power," he calls legislative bodies "the *Supream* Power in every Common-wealth." But he insists that "their Power in the utmost Bounds of it, is *limited to the publick good* of the Society. It is a power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave or designedly to impoverish the Subjects" (Locke 1988, 2.135: 357).<sup>8</sup> Locke reiterates this view in the *Letter*. There he says that "the commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests," which consist of "Life, Liberty, Health, and Indolency of Body; and the Possession of outward things, such as Money, Lands, Houses, Furniture, and the like" (Locke 1824, 5: 10). And he insists that "the magistrate cannot use force for ends for which the commonwealth was not constituted" (5: 212).

Locke goes further: sinfulness is not in itself sufficient for making a particular behavior illegal. He says that

it does not follow, that because it is a sin it ought therefore to be punished by the magistrate. For it does not belong unto the magistrate to make use of his sword in punishing every thing, indifferently, that he takes to be a sin against God. Covetousness, uncharitableness, idleness, and many other things are sins, by the consent of all men, which yet no man ever said were to be punished by the magistrate. The reason is, because they are not prejudicial to other men's rights, nor do they break the public peace of societies. (1824, 5: 36–37)

Locke thus thinks that the law may act only against those sins that threaten others directly or threaten the public peace. Sinfulness—or immorality—in itself is not enough to justify criminalization.

This leaves us with a puzzle about sexual liberty. When we examine Locke's (sparse) discussions of sexual behavior, he appears to support laws against what he calls "vice." He asserts an asymmetry between private religious belief and (at least certain kinds of) private personal behavior. He says in his *Letter concerning Toleration* that there is no right of toleration for those who "lustfully pollute themselves in promiscuous Uncleaness" (1824, 5: 33).

Locke's language here is not precise. He does not say what actions count as "promiscuous uncleaness." But elsewhere in the *Letter*, he is more explicit about some behaviors that he includes within the category of intolerable acts. In part, Locke's *Letter* is a response to the antitolerationist Jonas Proast, whose arguments Locke quotes at length. Proast

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resists Locke's defense of religious toleration by asserting that there is no meaningful distinction between unorthodox religious beliefs and immoral personal practices, including private sexual behavior.<sup>9</sup> Proast insists that, if Locke argues in favor of tolerating religious unorthodoxy, he places himself at the top of a slippery slope that ends by condoning sexual deviancy. In a passage that Locke quotes in full, Proast lists some of the behaviors he thinks Locke's arguments commit him to tolerating:

But if you except [things such as the rejecting the true Faith, and the refusing to worship God in decent Ways], and will not allow them to be call'd by the name of Vice; perhaps other men may think it as reasonable to except some other things, which they have a kindness for. For instance: Some perhaps may except arbitrary Divorcing, others Polygamy, others Concubinary, others simple Fornication, others Marrying within Degrees which have hitherto been thought forbidden. (Proast 1691, 13)<sup>10</sup>

As divorce, polygamy and "marrying within forbidden degrees" affect marriage as a public institution, not just private behavior, even legal liberals might concede that the state may take a role in regulating them. But Proast's list also includes "concubinary" or unmarried cohabitation and "simple fornication" or sex between unmarried persons—what Locke calls the "unlawful mixture of an unmarried couple" (1824, 7: 113n2). These private behaviors do no direct harm to unconsenting third parties and involve no state institution, and a legal liberal should not endorse state intervention to prevent people from engaging in them.

Locke rejects Proast's assertion that his argument for religious toleration implies a symmetry between private religious beliefs and such private sexual behavior. He says that, in fact, he "contra-distinguish[es]" between "Error in speculative Opinions of Religion, and Ways of Worship," which must be tolerated, and what he calls "dishonesty and debauchery" of the sort Proast has just identified (Locke 1824, 5: 241). He hopes that "the Magistrates would severely and impartially set themselves against Vice in whomsoever it is found" while "leav[ing] Men to their own Consciences in their Articles of Faith, and Ways of Worship" (5: 242). Once we see that Locke's "debauchery" includes private behaviors such as "concubinary" and "simple fornication," we may understand the implications of other statements he makes about the role of magistrates in governing people's behavior. Elsewhere in the *Letter*, he writes that, "as for the toleration of corrupt manners and the debaucheries in life, . . . I do [not] plead for it, but say it is properly the magistrate's business, by punishments to restrain and suppress them" (5: 416). And in a similar passage he says that magistrates "may and ought to interpose their Power, and by Severities, against Drunkenness; Lasciviousness, and all Sorts of Debauchery. . . . This is their proper business every where; and

for this they have a commission from God, both by the light of nature and revelation” (5: 469).

In his posthumously published *Paraphrase on the Epistles of St. Paul*, Locke seems to add adultery to the list of actions that should be illegal, commenting that it cannot be “tolerated in any civil society, that one man should have the use of a woman, whilst she was another man’s wife, i. e. another man’s right and possession” (1824, 7: 111).

We can see from these passages that Locke is committed to the legal regulation of at least some private sexual behavior. There are several possible explanations. First of all, his views could be entirely ad hoc, motivated perhaps by his own personal distaste for sexual transgression. It could be that they reveal a hidden commitment to legal moralism more broadly, at odds with his apparent commitment to a liberal view of the limits on state power. Or it could be that his views on sexual liberty are consistent with the “legal liberal” interpretation I have proposed. I will now examine his views more closely, in order to show that the last of these possible explanations is correct.

### THE SCRIPTURAL BASIS FOR SEXUAL REGULATION

The arguments for religious toleration in his *Letter* enable Locke to assert a disanalogy between heterodox beliefs and immoral acts. It is possible to regulate acts, but it is not possible to regulate beliefs. Locke says that the “subduing of Lusts” and “other immoralities . . . come properly under [the magistrate’s] Cognisance” because they “may be corrected by Punishments,” whereas coercive force is useless against heterodox belief (Locke 1824, 5: 468). A central claim of the *Letter* is that we should tolerate religious nonconformists because we have no way to modify people’s beliefs by coercion:

laws are of no force at all without penalties, and penalties in this case [that is, in governing people with heterodox views] are absolutely impertinent, because they are not proper to convince the mind. . . . It is only light and evidence that can work a change in men’s opinions; and that light can in no manner proceed from corporal sufferings, or any other outward penalties. (1824, 5: 12)

Locke thinks it is not even possible to know the content of people’s beliefs, whereas actions are at least in principle discoverable: “Law-makers have been generally wiser than to make laws that could not be executed: and therefore their laws were against non-conformists, which could be known; and not for impartial examination, which could not” (5: 124).

Though this is a compelling argument *against* the punishment of no-conformists, it provides no argument *in favor* of punishing sexual

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immorality. The fact that we can regulate people's actions obviously does not mean we should. Locke himself says that, even if, *per impossibile*, force could be effective against heterodox belief, that would not justify its use. He says to Proast, "But suppose force, applied your way, were as useful for the promoting true religion, as I suppose I have showed it to be the contrary; it does not from hence follow that it is lawful and may be used" (1824, 5: 80). By the same token, we need to show that laws governing private sexual behavior are not just possible but desirable and defensible.

Locke seems to find one justification for such laws in his reading of Christian doctrine, which implies that the regulation of private behavior is sanctioned by biblical teaching in a way that the regulation of private belief is not. In the passage I quoted above, Locke says that, in suppressing private "debauchery," magistrates "have a commission from God, both by the light of nature and revelation." The use of the term "commission" is significant here. In the *Letter*, Locke says that the case for religious toleration could, theoretically, be overridden by divine commission:

When you can show any commission in scripture, for the use of force to compel men to hear, any more than to embrace the doctrine of others that differ from them, we shall have reason to submit to it, and the magistrate have some ground to set up this new way of persecution. (1824, 5: 82)

Again, Locke is arguing counterfactually here. He thinks that, in fact, there is no such commission in scripture. But his writings on theology explain why he might think that magistrates have a commission to regulate private acts. In his work on *The Reasonableness of Christianity*, Locke explains his reading of the Bible more fully. He thinks that God demands that believers follow a specific moral code for behavior, rather than any set of doctrines. He says that, if we look to the texts of the New Testament, "we may observe, none are sentenced or punished for unbelief, but only for their misdeeds" (1824, 6: 126). He tallies "all the Places where our Saviour mentions the last Judgment" and concludes, "it is remarkable, that every where the Sentence follows, doing or not doing; without any mention of believing, or not believing" (6: 127).<sup>11</sup>

The "misdeeds" for which people are punished by God are those that violate what Locke calls "the law of works," which he thinks binds all of humanity: "the moral part of Moses's law, or the moral law, (which is every-where the same, the eternal rule of right,) obliges christians, and all men, every-where, and is to all men the standing law of works" (1824, 6: 15). He is not specific on what he thinks this law of works contains. But he says that the relevant elements of Mosaic law were reaffirmed by Jesus in the Sermon on the Mount, and he adds: "In the following part



of his sermon, which is to be read Luke vi. and more at large, Matt. v. vi. vii. he not only forbids actual uncleanness, but all irregular desires, upon pain of hell-fire” (6: 115). Though this is oblique, it is reasonable to infer that “irregular desires” include “debauchery” of the sort he discusses in the *Letter*. This is confirmed by a passage in his paraphrase to the Epistles of Paul, where he presents a long list of actions that Paul has forbidden as “works of the flesh,” a list that includes sexual transgressions:

Now the works of the flesh, as is manifest, are these: adultery, fornication, uncleanness, lasciviousness, Idolatry, witchcraft, enmities, quarrels, emulations, animosities, strife, seditions, sects, Envyings, murders, drunkenness, revellings, and such-like: concerning which I forewarn you now, as heretofore I have done, that they, who do such things, shall not inherit the kingdom of God. (1824, 7: 68–69)

The paraphrased passage occurs in a section of Acts where Paul is specifically addressing an issue of sexual misbehavior, and Locke catalogues “the arguments, that St. Paul uses . . . to prove fornication unlawful,” which he says are all drawn from various biblical precepts: “That our bodies are made for the Lord, ver. 13. That our bodies are members of Christ, ver. 15. That our bodies are the temples of the Holy Ghost, ver. 19. That we are not our own, but bought with a price, ver. 20” (7: 112).

Even if we accept that certain kinds of sexual behavior violate the “law of works” that all human beings must follow, there is an additional difficulty, nonetheless, in justifying the magistrate’s commission to suppress this behavior. I have already said that Locke thinks the law is limited to protecting the public good and that sinfulness is not sufficient grounds for legal prohibition. He can consistently defend criminal punishments for acts of sexual morality only if he can show that private sex acts such as adultery, “concubinage,” and “simple fornication” present threats to the public peace. In the *Letter*, Locke suggests that there is a link between immoral behavior and the peace of society:

A good life, in which consists not the least part of religion and true piety, concerns also the civil government: and in it lies the safety both of men’s souls and of the commonwealth. Moral actions belong therefore to the jurisdiction both of the outward and inward court; both of the civil and domestic governor; I mean, both of the magistrate and conscience. (1824, 5: 41)

It is, however, uncontroversial to say that at least certain immoral actions must be punished by law. Theft, rape, and murder are all immoral actions, and no one would dispute the magistrate’s commission to suppress them. The task now, if my “legal liberal” interpretation of Locke is to be sustained, is to show that the private behaviors he wants to forbid

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can be included among moral actions that fall within the magistrate's jurisdiction to protect the safety of the commonwealth. I think this can be done.

### THE DANGERS OF PRIVATE IMMORALITY

There are two passages where Locke offers an explanation for why at least some private behaviors should be prohibited by law. First, there is the passage from the *Letter*, where he asserts that magistrates are commissioned by God to suppress various forms of immorality. There he suggests that the magistrates are not merely enforcing certain moral precepts because they are rooted in biblical prohibitions: they are doing so because people find certain vices especially hard to give up, so they are willing to abandon Christianity altogether rather than forgo these vicious pleasures. Locke argues that we can solve the problem by taking away people's freedom to commit the vices. Once people lack the option of doing so, Christianity will prevail by default. As Locke explains, it is a point of agreement between him and Proast that they both think many people forsake Christianity precisely because it requires its adherents to undertake what he calls, quoting Proast, "the difficult task of mortifying their lusts." Locke writes,

Why . . . does not the true religion prevail against the false, having so much the advantage in light and strength? The counterbalance of prejudice hinders. And wherein does that consist? The drunkard must part with his cups and companions, and the voluptuous man with his pleasures . . . and every one must live peaceably, uprightly, and friendly with his neighbour. Here then the magistrate's assistance is wanting: here they may and ought to interpose their power, and by severities against drunkenness, lasciviousness, and all sorts of debauchery . . . and by their administration, countenance, and example, reduce the irregularities of men's manners into order, and bring sobriety, peaceableness, industry, and honesty into fashion. This is their proper business every-where; and for this they have a commission from God, both by the light of nature and revelation; and by this, removing the great counterpoise, which lies in strictness of life, and is so strong a bias, with the greatest part, against the true religion, they would cast the balance on that side. For if men were forced by the magistrate to live sober, honest and strict lives, whatever their religion were, would not the advantage be on the side of truth, when the gratifying of their lusts were not to be obtained by forsaking her? In men's lives lies the main obstacle to right opinions in religion. (1824, 5: 469)<sup>12</sup>

We can represent Locke's argument in the following form, which I will label as "L":

- i. Because of its “light and strength,” people will, absent some countervailing force, adhere to Christianity.
- ii. Some people have a strong desire to engage in certain acts, which Christianity forbids them from engaging in. Let us call these “urgent vices.” (This is my term, not Locke’s.)
- iii. People must choose between adhering to Christianity or engaging in these urgent vices.
- iv. The force of urgent vice is strong enough that, if given the choice between adhering to Christianity and the freedom to engage in urgent vices, many people will choose the latter.
- v. If they are not allowed to engage in urgent vices, these people will adhere to Christianity.
- vi. Magistrates can, through laws forbidding people from engaging in these urgent vices, remove the choice between them and adherence to Christianity.
- vii. Magistrates can thus, by forbidding urgent vices, promote adherence to Christianity.

This argument does not argue specifically for the prohibition of immoral sexual behavior. It implies that magistrates should look at all the Christian moral precepts governing people’s behavior and enforce through law whichever ones people find the hardest to adhere to. Our sexual desires are among the strongest we have and, in virtue of this strength, will be natural targets for legal regulation. But Locke suggests both in this passage and elsewhere that the excessive consumption of alcohol will be another.

There is also a passage in the *Two Treatises* where Locke provides a different justification for the immorality of certain apparently private sexual behaviors. While he does not in this text explicitly discuss the legitimacy of forbidding them by law, I believe that the passage, correctly interpreted, provides a second rationale for why private sexual behavior may be subject to legal restrictions. He says,

adultery, incest and sodomy [are] . . . sins, which I suppose have their principal aggravation from this, that they cross the main intention of nature, which willeth the increase of mankind, and the continuation of the species in the highest perfection, and the distinction of families, with the security of the marriage bed, as necessary thereunto. (1988, 1.59: 183)

As I interpret this passage, it indicates three separate concerns that Locke has about the impact of certain private sexual behaviors: (T1) a concern about “the increase of mankind” or, in other words, about

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the need to maintain a growing population; (T2) a concern about “the continuation of the species in the highest perfection,” which I interpret as its continuation in societies that are stable and law-governed; and (T3) a concern about “the distinction of families,” which I interpret as a concern about the effect of widespread illegitimacy on children’s ability to inherit from their parents. I think that each of these claims requires a somewhat fuller explanation in order to understand precisely what Locke has in mind and why he would think that tolerating the behaviors he wants to prohibit might raise these concerns.

### THE CASE AGAINST IRREGULAR DESIRES

As I have laid out Locke’s argument in L, he looks to the law to prohibit those behaviors that, though they may be in many cases entirely private, make it impossible for people to maintain “right opinions in religion.” Given what he says about theology, that it is subject to an endless “variety and contradiction of opinions,” it might seem unclear how he thinks we can know which “opinions” are the right ones or even if there can be one uniquely correct set of religious beliefs.<sup>13</sup> But as the title of his main theological treatise indicates, Locke thinks Christianity is a “reasonable” rather than an arbitrary religion. While, as I have said, he thinks the moral law is that which is “delivered in the New Testament,” he thinks that its core tenets correspond to the natural law, “the eternal rule of right,” the precepts of which bind everyone and are at least in some sense available to everyone. He says that “God is an holy, just, and righteous God, and man a rational creature. The duties of that law, arising from the constitution of his very nature, are of eternal obligation” (1824, 6: 112).

I believe there is a reason that Locke thinks Christianity targets certain kinds of desires. He has not identified these forbidden desires arbitrarily. Instead, because he thinks that these desires draw us into excessive indulgence, he believes they make both individual happiness and collective living impossible. I have already quoted Locke’s comment about Jesus’s confirmation of the “law of works” in the Sermon on the Mount. There, says Locke, Jesus “not only forbids actual uncleanness, but all irregular desires, upon pain of hell-fire.” In L, Locke says magistrates must seek to “reduce the irregularities of men’s manners into order.” It is significant that Locke thinks Christian morality targets “irregular” desires and that magistrates must try to reduce the “irregularities” of people’s manners. The phrase “irregular desire” was not a common one in Locke’s time, and I believe that it has a special meaning for him. By “irregular,” he means “unregulated”—in other words, outside the control of reason. Such desires have the effect of undermining reason’s hold on

us more generally; as a result they make it impossible for us to adhere to the moral laws on which society depends.

Locke does not condemn our natural desires or “appetites” outright. On the contrary, he thinks that they, correctly understood, are guides to the dictates of natural law—dictates that, in turn, are means of leading us to true happiness. But we cannot just follow these guiding desires spontaneously. If we are to become truly happy, we must learn to regulate them—to control them through reason. In *Some Thoughts concerning Education* (1689), he writes that “the principle of all virtue and excellency lies in a power of denying ourselves the satisfaction of our own desires, where reason does not authorize them” (1824, 8: 32 [§38]). In the *Essay*, throughout the chapter on “Power” that deals with principles of action, Locke describes the “pursuit of happiness” as a process by which we subject our appetites to rational control to ensure that we pursue only those appetites conducive to our long-term well-being.<sup>14</sup>

I believe that Locke, in discussing sexual immorality, points toward the connection between true happiness and the regulation of desire in the passage from the *Treatise* I have labeled T2. There he says that sexual morality supports “the continuation of the species *in the highest perfection*.” The term “perfection” is not one Locke uses frequently, at least with reference to human nature. But when he does, its meaning is remarkably consistent. It always refers to the proper regulation of desire through reason. In the *Essay*, Locke calls it “a perfection of our nature, to desire, will, and act according to the last result of a fair examination” (1975, 2.21.47: 264). More specifically, there are—besides its occurrence in T2—only two other occasions when, speaking in his own voice, he uses the phrase “highest perfection.” In both cases the phrase also refers to the pursuit of happiness through the regulation of desire. In paragraph 51 of the *Essay*’s chapter “On Power,” Locke says that “the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness, so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty” (1975, 2.21.51: 266). He concludes this paragraph by saying, “we are, by the necessity of preferring and pursuing true happiness as our greatest good, obliged to suspend the satisfaction of our desires in particular cases” (2.21.51: 266). The second time the phrase occurs is in *Some Thoughts concerning Education*: “the right improvement and exercise of our reason [is] the highest perfection that a man can attain to in this life” (Locke 1824, 8: 18). In each case, then, our “highest perfection” entails regulating desires to achieve true long-term interests.

I submit that sexual immorality, in Locke’s view, risks undermining reason’s control of our appetites. Someone who indulges an appetite to

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excess can loosen reason's hold entirely and thus lose the ability to act morally. In this context, the *Letter* refers to excessive drinking as well as sexual debauchery, and the chapter of the *Essay* that discusses our "highest perfection" uses the example of a drunkard again.<sup>15</sup> Both lust for drink and desire for sex are dangerously "irregular" desires: left unchecked, they have enough strength to leave us unable to submit to rational self-control. The vices that I have called "urgent" threaten "the continuation of the species in the highest perfection" because, if allowed, they threaten to reduce us en masse to a society of what Harry Frankfurt (1971, 11) has called "wantons"—people who pursue immediate gratification without any ability to form long-term plans for their lives.

Locke does not explain why such irregular behavior becomes a concern for the state. It is possible, however, to understand how this might be. People in the grip of uncontrollable desire do not just undermine their own happiness: they are also unable to submit to the moral precepts on which society depends. For Locke, sexual immorality is apparently intolerable for the same reason that atheism is intolerable: atheists cannot be tolerated because they cannot be trusted to subject themselves to any sort of moral law. In an earlier work, the *Essay on Toleration* (1667), Locke calls belief in a deity "the foundation of all morality . . . without which a man is to be considered no other than one of the most dangerous sorts of wild beasts, and so incapable of all society" (1997, 137). He confirms this view in the *Letter*: "Those are not to be tolerated who deny the Being of God. Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist. The taking away of God, tho but even in thought, dissolves all" (1824, 5: 47).<sup>16</sup> People who give in to sexual immorality or drunkenness do not, like atheists, actually choose to reject God. But Locke thinks they too put themselves—and others—in a position where a shared morality cannot prevail because reason has become ineffective against such impulses. Seemingly private vice threatens society as a whole.

If my reconstruction of Locke's thinking is correct, it would provide at least one explanation for the asymmetry between laws governing religious belief and laws governing sexual behavior—an explanation consistent with his views on limits to state power. I doubt that many modern readers will be convinced by Locke's position. Though it was widely accepted in Locke's day that people who rejected conventional sexual morality were destined to become criminals and outlaws, no empirical evidence supports such a connection, and the loosening of sexual morality in modern times has not been accompanied by a widespread increase in criminality. However, I believe that Locke can offer a second justification for laws against sexual immorality, one that refers specifically to the natural law as it applies to human sexuality.

THE “INCREASE OF MANKIND”  
AND THE PROTECTION OF CHILDREN

To explain this second justification, I return to the passage in the *Treatise* that expresses concern about the effects of sexual immorality on “the increase of mankind” and “the distinction of families”—claims labeled T1 and T3. This is the only passage in Locke’s works where the harms of sexual immorality are the only topic. Locke says there that adultery, incest, and sodomy “cross the main intention of nature”: he sees them as direct violations of the natural law.

Again, Locke does not condemn natural desires or “appetites,” which, correctly understood, are guides to the dictates of natural law and hence show a way to true happiness. In *Two Treatises on Government*, he writes that, if a desire, like a sexual urge, is “wrought into the very Principles of [our] Nature,” we should see this as a sign of a specially ordained purpose for human beings (1988, 1.88: 206–7).<sup>17</sup> Therefore, if God “planted in Men a strong desire also of propagating their Kind,” he must have had a purpose (1988, 1.88: 206). The book of Genesis reveals this purpose, in Locke’s view. In the *Treatises*, he explains that God’s command in the Bible to “Be fruitful, and multiply, and replenish the earth and subdue it” is central to the divine plan for the human race (1988, 1.33: 164, quoting Gen. 1:28–29).<sup>18</sup> Philosophers and theologians from ancient Greece to Locke’s era usually accepted that the purpose of sexual desire was to motivate reproduction and propagate the species. Locke goes beyond this, adding that the human species has a specific mandate: not just to perpetuate itself but to increase the population in order to expand its dominion over the earth. We must have children so that humans can spread across the planet and subdue it through their industry.<sup>19</sup>

We can at least imagine how the “increase of mankind” might be threatened by “sodomy,” used at the time for all non-procreative sex. If large numbers of people gave up all procreative sex over a long period of time, populations would indeed shrink. This is, of course, exceedingly unlikely. Nevertheless, even in modern times, judges and lawmakers have taken the prospect seriously. Justice Lewis Powell, justifying his deciding vote in *Bowers v. Hardwick*—a 1986 case that upheld Georgia’s antisodomy statute—wrote, “I think a good deal can be said for the validity of statutes that criminalize sodomy. If it becomes wide-spread, civilization itself will be severely weakened as the perpetuation of the human race depends on normal sexual relations just as is true in the animal world.”<sup>20</sup>

Still, this implausible fear does not explain why such sexual behaviors as fornication, adultery, and incest, effect of which would be

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to increase population, should be treated as immoral or illegal. But propagating the species requires more than just begetting offspring: children must survive and thrive, a condition discussed in Locke's response to Robert Filmer. In the context of his larger argument, Locke's remarks on the "principal aggravation" of sexual immorality aim to show that Filmer's belief in absolute paternal authority leads to intolerable consequences.

Filmer asserts that first Adam, then the Patriarchs, and ultimately all fathers enjoy dominion over their children that is (as Locke puts it in *Two Treatises*) "as large and ample as the absolutest dominion of any monarch which hath been since the creation" (see Filmer 1991, 228). If this were so, Locke concludes, nothing would prevent fathers from eating their children. But Locke thinks that the natural law rules out child-eating because it commands the preservation and increase of humankind. This law imposes duties on parents: "an obligation to preserve, nourish, and educate the children" born to them (1988, 1.56: 181). And this obligation is, like the prohibition on suicide, rooted in our nature as products of God's workmanship. People are "by a like obligation bound to preserve what they have begotten, as to preserve themselves" (1988, 1.88: 207). For Filmer, children are obligated to obey their parents, who enjoy total authority over them. For Locke, parents are also bound by obligations toward their children—obligations derived from the responsibilities given to humankind generally by God.

Locke is using a strategy against Filmer that is strikingly similar to the one Proast used against Locke. He is claiming that Filmer's position would imply that we should find nothing wrong with sodomy, adultery, or incest. And he asserts that such wrongs are as bad as eating one's own children—they threaten the survival of these children. It is not obvious, however, why the sexual acts that Locke identifies actually threaten the survival of children. It is also unclear how such acts could violate God's command to increase the species and populate the earth.

We can help resolve the puzzle by looking to other writers of the era, who discussed these issues more expansively. One of Locke's concerns was well known in his time and also familiar to Aquinas and other medieval thinkers: damage caused by births regarded as illegitimate.<sup>21</sup> A contemporary of Locke's, John Brydall, links this problem explicitly with preserving the social order: "It is of public concern that there should be no suppositious births and that the dignity of families and of the different ranks of men be preserved entire" (1703, 127). Another contemporary, Samuel Pufendorf, also makes arguments that parallel Locke's in justifying sexual regulation by the need to preserve the social order. His work *Of the Law of Nature and Nations* contains a chapter



“On Matrimony” that argues in favor of prohibiting “wandering lust,” “indiscriminate course,” “venery,” and “chance beds.” He maintains that rampant promiscuity will lead men to fight over women, threaten the reproduction of the species, and destabilize inheritance. Pufendorf therefore describes marriage as “the foundation of social life” and “the foundation of all good order,” insists that “without this a decent and well-ordered society among men and the development of civil life are inconceivable” (1936, VI.I.7: 849); (1936 VLI.15: 867); (1991, II.II.3: 120).<sup>22</sup>

However, we can find in a somewhat later author a text that I believe best captures Locke’s thinking on this point: Henry Home, Lord Kames, who first published *Sketches of the History of Man* in 1774. There he took Locke’s idea up and enriched it with a comprehensive account of social values linked to social utility. Kames devotes a chapter to asking whether “man is directed by nature to matrimony.” He says that both chastity and matrimony are indeed “instituted by nature” to ensure the survival of the species. Unlike animals, humans desire sex perpetually. Were men to succumb to it without restraint, they would never commit to the care of women or children. And women would then simply abandon the children. Kames says,

Let the consequences of a loose commerce between the sexes be examined. The carnal appetite, when confined to one object, seldom transgresses the bounds of temperance. But were it encouraged to roam, like a bee sucking honey from every flower, every new object would inflame the imagination; and satiety with respect to one, would give new vigour with respect to others: a generic habit would be formed of intemperance in fruition; and animal love would become the ruling passion. Men, like the hart in rutting-time, would all the year round fly with impetuosity from object to object, giving no quarter even to women suckling their infants: and women, abandoning themselves to the same appetite, would become altogether regardless of their offspring. In that state, the continuance of the human race would be a miracle. (2007, 1: 264)

Kames’s more robust analysis helps explain how Locke could have thought that sexual morality should be enforced by law. Total sexual liberty causes both men and women to become “altogether regardless of their offspring.” And since parents do not have the right to abandon their children, any more than they do to eat them, Locke believes that the state must ensure that they do not surrender to unrestrained desire.

Kames’s scenario may seem implausible to modern readers. It is hard to imagine that the loosening of sexual morality could lead to the sort of debauchery that he describes. In Locke’s T3, however, we find a separate,

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related, and also more believable rationale for laws restricting sexual behavior. When Locke refers there to the “distinction of families,” I think it is possible to understand a threat, not to the survival of children but to their property. For Locke, parental obligations extend beyond basic survival. He says that there is a “Right [of children] to be nourish’d and maintained by their Parents, nay a right not only to a bare Subsistence but to the convenience and comforts of Life, as far as the conditions of their Parents can afford it” (1988, 1.89: 207). He also says that children have “a Title to their Father’s Estate for their Subsistence” (1988, 2.183: 391). “Men are not Proprietors of what they have,” he says, “meerly for themselves; their Children have a Title to part of it, and have their Kind of Right joyn’d with their Parents.” And children’s titles to their parents’ estates must depend on “the distinction of families”—which is to say, the secure knowledge of *who* their parents are and thus to *whose* property they have a legitimate claim.

Of the arguments Locke has put forward for the illegality of sex outside marriage, only this one is at all persuasive. Long before reliable birth control was available, extramarital sex often produced extramarital offspring. Moreover, it was entirely conventional and surely reasonable for Locke to hold that children have a right to share in whatever wealth their parents possess. But if parents produce children outside marriage, children within the marriage will see their inheritance diminished unless illegitimate children do not inherit at all. But leaving illegitimate children without support violates our natural duty to provide for our offspring. And at the very least, endless disputes will result. In this sense, preserving the “distinction of families” protects individual rights. Arguably, therefore, such a principle puts laws enforcing sexual morality within the bounds of legitimate state action.

### CONCLUSION

Locke’s position on sexual liberty, that it may and indeed should be severely circumscribed by law, is one that is decreasingly popular in modern liberal democracies. A modern reader will recognize an obvious symmetry between purely private sexual behavior and private religious beliefs, providing the grounds for putting both outside the scope of state regulation. I make no case for increased legal regulation of people’s private acts. However, I see Locke’s defense of such regulation as compatible with a widespread contemporary views of limits on state power like those that Locke held.

Locke thought that certain private sex acts violate God’s law. However, he also thought that legal regulation of these acts is based not just on divine prohibition but on society’s overall interests—including the

interests of children. First, he believed that sexual libertines abandon all religion and so, as atheists, threaten the social order. Second, he believed that sexual libertinism causes people to abandon their duties as parents, leading to a breakdown of family structure that threatens the social order and deprives children of their right to support. These arguments, whether we accept them or not, show why Locke's position is compatible with his liberalism—and with a view about the limits of state power shared by many contemporary advocates of sexual liberty. Hence, the answer to the question that we started with, whether Locke is a legal moralist, is *no*. Locke consistently limits the power of the state, allowing it to implement laws only to protect individual rights and serve the public good.

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## NOTES

1. Mark Goldie (1993, 167), for instance, admits that “the asymmetry in Locke between religious tolerance and moral intolerance remains a puzzle.” See also Swan (2010, 96) and Cranston (1991).

2. *Lawrence v. Texas*, 2003, 539 U.S. 558; quotation at 277.

3. *Barnes v. Glen Theatre, Inc.*, (90–26), 1991. 501 U.S. 560; quotation at 575.

4. For a comprehensive survey of medieval attitudes and laws, see Brundage (1987).

5. *Acts and Laws* (1724, 110).

6. A more recent example is Stanton (2018).

7. See also Forde (2001) and A. Tuckness (2002).

8. John Simmons (1992, 53) says that Locke's theory of government creates a “robust zone of indifference,” meaning that the state should generally allow people to make their own decisions concerning the governing of their lives. Simmons borrows the phrase from Fishkin (1982, 23). See also M. Tuckness (2002), especially Chapter 2.

9. The supposed association between heterodox belief and immoral behavior was frequently used against defenders of toleration, and Proast was not alone in attacking Locke on that basis. See Long (1689, 4) and Dabhoiwala (2010).

10. Locke misquotes Proast very slightly in the *Letters*. See Locke (1824, 5: 241).

11. See Wolfson (2010, 77n7).

12. Cf. Locke (1824, 5: 65–66).

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13. See Locke (1824, 5: 12). Cf. Locke (1824, 5: 424–25). For a discussion of the role religious skepticism plays in Locke’s arguments for toleration, see Black (2007), Nicholson (1991), Passmore (1978), Rogers (1992), and Tuck (1988, 34).

14. Locke (1975, 2.21.43: 259–60); (1975, 2.21.47: 263–64); (1975, 2.21.50: 265–66); (1975, 2.21.51: 266); (1975, 2.21.59: 273). See Forde (2013, 127ff.).

15. See Locke (1975, 2.21.35: 253); cf. 1975, 2.21.43–44: 260–61.

16. Alex Schulman asserts that “Locke is never entirely clear in the *Letters* as to how far beliefs should be considered predictive enough of actions to be considered inimical to social peace and thus a violation of the social contract a priori” (2009, 336).

17. Cf. Locke (1988, 2.170: 381).

18. Cf. Locke (1988, 1.39: 169); (1988, 1.59: 183); (1988, 1.86: 204–5).

19. Locke was not the first person to emphasize the importance of this verse. See Cohen (1989).

20. *Bowers v. Hardwick*. n.d. Supreme Court Case Files Collection, box 129. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia. Available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1161&context=casefiles>, accessed January 26, 2020.

21. See Sommerville (1995, 148).

22. For a detailed analysis of Pufendorf’s texts, see Sreedhar (2014).

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