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Natural Law, Judgement, and Toleration in Locke

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Abstract:	Locke's views on toleration and natural law have recently received a 'reassessment' at the hands of John William Tate. This article demonstrates some of the many and various ways in which Tate has mangled Locke's positions and misconstrued the views of interpreters of Locke (myself included) whose interpretations he finds uncongenial. It finds that there are no textual grounds for Tate's claims and invites readers to reassess whether and how far they ought to be taken seriously.

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Natural Law, Judgement and Toleration in Locke

John Tate has used the pages of this journal to renew the clamour he raised against the present writer in 2012 on the subject of natural law and toleration in Locke. His article contains some things which are not new, and some things which are not true, and one regrets to say that these together comprise most of its key claims as stated by Tate himself.

Tate asserts that emphasising natural law in Locke is 'mistaken' and that 'it misrepresents and distorts far more than it illuminates of his political philosophy'. It is 'mistaken' (i) because it is 'based on a misreading of Locke's position on natural law itself' and (ii) because it neglects the 'normative' as well as 'practical imperatives' upon which Locke relied in moving from an early opposition to toleration in the texts printed as *Two Tracts on Government* to 'the prescriptive conclusions of his later political writings'. What evidence is adduced in support of these assertions?

Tate begins with Bou-Habib's claim, attributed to Harris, that 'it was Locke's affirmation of natural law, in the wake of the *Two Tracts*, which allowed him to move beyond those texts and affirm toleration'. But, Tate notes triumphantly, this claim is based on 'a fundamental error of chronology', for 'natural law was something that Locke openly affirmed in the *Two Tracts* itself [sic], with all the normative commitment and prescriptive force which characterised his later invocations of it'. Quite so: this is the point Harris himself was making. His point was not that Locke suddenly became conscious of natural law in 1663/4, having been ignorant of it in 1660, but that in 1663/4 he developed an account of the same adequate to be assured of just what it was—and what it was not—thus helping him out of the position he had occupied in 1660 and had sensed was weak in 1661 (See Harris 1998: 44-107, esp. 67-73, 93-105). If there is a fundamental error, it is one of understanding, not chronology, committed by Tate, not Harris.

Tate then turns to my 'view of natural law' in *Two Tracts* and thereafter. Stanton [he states] believes that from 1663/4 Locke shifted to seeing natural law as an external source of divine direction. Because its contents could be known with certainty by human reason, all human agents were now able 'to agree on appropriate limits within civil society, concerning liberty and authority', and to know with certainty when these limits were being breached. (I said no such thing, for reasons that will become apparent). But Stanton does not see that Locke explicitly denied that natural law was 'legislated by conscience' in *Two Tracts* and fails to understand that it cannot by any means provide adequate direction to all. Natural law is a source of 'conflict rather than "harmony"' (not a term I ever used in this connexion). Dispute is inevitable because some individuals 'are less conscientious in their use of reason (a question-begging phrase) or are swayed by interest and appetite in their interpretation of natural law' and there is no agreed judge capable of settling this dispute because the law is unwritten. Besides which, Locke's natural law contains what Gerald Dworkin termed non-neutral principles—principles which would be endorsed

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by all at the level of general principle but necessarily generate contention when applied to particular cases. Accordingly it is 'of no use in the practical management of political authority, or the reconciliation of individual liberties with that authority'. Stanton, he repeats, misses all these points (Tate 2015: 3-6). Let me address them in turn.

Tate's assertion that I fail to see that Locke explicitly denied that natural law was 'legislated by conscience' is puzzling, because I state that Locke 'discussed conscience under the rubric of private law', not natural law, in an essay to which Tate proffered a 'Response' (Stanton 2011: 17; Tate 2012 and see Stanton 2012). Indeed I found it relatively easy to see: I simply read what Locke wrote. What is harder to see—what, as I take it, Locke saw even if Tate cannot—is that this position was difficult to accommodate stably within the nexus of ideas bequeathed to him by his predecessors.

Conscience, they agreed, provided direction in matters of external practice. The importance of this direction lay in its specifying the acceptability to God of particular actions. The difficulty is that the notion that conscience provides direction is ambiguous between providing laws and providing judgements about them. This difficulty is evident in Robert Sanderson, whose arguments Locke used in *Two Tracts*, who wrote of people having 'right reason, imprinted in their hearts… which is as truly the Law and Word of God, as is that which printed in our Bibles' (Sanderson 1663: 64). The effect of this position is to elide reason, law, and judgement so that, as Samuel Parker later put it, 'whatsoever some men affirm or fancy to be written upon their Hearts… may be as wildly pleaded in all cases [for] Principles of natural Reason and Conscience, as the Spirit of God has been' (Parker 1681: 5). For Parker, this notion of right reason was of a piece with the Quaker doctrine of the inner light. Locke seems to have agreed.[1] Writing to a correspondent in 1659, he had observed,

> 'tis Phansye that rules us all under the title of reason…every one thinkes he alone imbraces this Juno, whilst others graspe noething but clouds, we are all Quakers here and there is not a man but thinks he alone hath this light within and all besids stumble in the darke,

adding that 'every ones Recta ratio is but the traverses of his owne steps' (Locke 1976-, i: 123). God, it seemed, had not been so sparing to men as to give them principles of natural law and left it to Professor Dworkin to make them non-neutral.

Locke's response to this difficulty was to disambiguate reason, law, and

[1] One of the many merits of Harris's treatment of these matters is that it offers an *explanation* of how Locke came to recognise and attempted to address this problem. To suggest that his position reduces to the view that Locke's 'personal experience' of the Quakers was decisive (Tate 2015: 2) is to miss the point entirely. The Quakers brought to light a profound difficulty with the scholastic conceptions Locke had inherited. See (Locke 1976-, i: 17): 'Aristotle and Scotus cannot secure us from lys and deceivers whereof we have an other experiment in the quakers'.

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judgement. Part of this response was to treat natural law not as innate principles but rather as an external source of direction, cognoscible via sense and reason. Tate apparently thinks that the empiricist thesis that knowledge of natural law is in principle available to all by this route commits me to the thesis that such knowledge *eo ipso* terminates all disagreement and discord. But this is an absurd *non sequitur* that comes from his having confused what Locke, from 1663/4 onwards, was careful to distinguish. In *Essays on the Law of Nature* Locke states that the fact that rational agents disagree indicates that they all suppose a law but differ in what it prescribes on any given occasion. For 'if there were no law of nature which reason declares we must show ourselves obedient to, how does it come to pass that the conscience of people who recognize the precepts of no other law whereby they are either guided or bound in duty, nevertheless passes judgement upon their life and conduct and either acquits or declares guilty…seeing that without some law no judgement can be pronounced?' (Locke 1954: 115, 117). So there is law, and there is judgement.

Reason and sense disclose this law, its content, and its binding force. Its injunctions, as I wrote, require actions of one sort rather than another—dutiful actions. Tate interprets this (and similar statements from Harris) as a claim that natural law discloses with finality what is to be done on every occasion, presumably because I state that reason 'discovers' and 'discloses' our duties under natural law and that reason is 'univocal' and 'infallible' (Tate 2015: 4). But in the transition from general duties to the particular actions required to fulfil them there is obviously a gap. The injunction to preserve oneself is one thing—a duty in natural law—but identifying which particular actions are requisite to fulfil the duty requires something more, which includes attention to the situation in which one finds oneself. The 'something more' is judgement.[2]

The model of conscience Locke had inherited ran law and judgement together.[3] Locke found it necessary to distinguish the two emphatically. Thus he would insist that 'Conscience is not ye law of Nature but judging by y^{t} wch is taken to be ye law', that 'conscience dictates not but acquits and condemns upon the dictates of a superior power' and that those dictates were not imprinted in the mind but acquired from without ([Anon] 1699: 5, 10, 11).[4] Judging is the mind's way of bridging the gap between the general and the particular by 'putting *Ideas* together…where their certain Agreement or Disagreement is not perceived, but *presumed*' (Locke 1975: 653). Judgement, even right judgement, is thus to be contrasted with demonstration, in which the agreement or disagreement of ideas is 'plainly and clearly perceived' and there is '*Knowledge*' (Locke 1975: 532). The point made by Harris and myself was that Locke treats natural law as an object of knowledge.

It follows that 'we are always in a position to understand this law and its

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[2] See e.g. Tate (2015: 12, note 2) for incomprehension of this difference.

[3] See Sanderson (1660: 32, 29), for conscience as law written in the heart (*Notiones et ipsius Naturae dictamine cordibus humanis inscriptae*), and judge of particular actions (*Actus particulares Proprii*).

[4] Notes transcribed from Locke's copy, held at Yale University, Beinecke Rare Book and Manuscript Library, call number K8 L79 Zz 697 Pb. Authorship of this anonymous work traditionally has been attributed to Thomas Burnet.

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requirements', that natural law 'speaks universally', that its contents can be known with 'certainty', and that we are 'able to evaluate our political society…and to identify *subsequently* instances of power without right' (Tate 2015: 4, my emphasis), for, as Locke says, 'without some law no judgement can be pronounced'. Nowhere did I say that judgement was unnecessary—on the contrary its necessity is implicit in what I said. But I was concerned with something else. Nothing in what I said 'requires that we know, indubitably, when 'God's fixed purposes' have been violated' (Tate 2015: 12, note 8).[5] That is a matter of judgement, not knowledge, and judgement, unlike knowledge, admits of great variety about the same matter. Nothing in what I said is inconsistent with my declaration that God alone possesses knowledge in the matter (ibid), for God is omniscient (Locke 1975: 621). Readers will, I hope, agree that human beings are not. But they must judge.

I shall not linger long on the claim that the 'unwritten' character of natural law 'explains' the widespread disagreement about it that Locke observes. I merely point out that the same disagreement may be observed about written law. Or perhaps Tate has 'failed to see' what Locke and Bagshaw were disagreeing about?

So much for Tate's assertion that Locke's position on natural law has been misread. What of his claim that the 'normative and practical imperatives' on which Locke relied have been overlooked?

Tate's position is that in Locke's later writings 'the 'people' 'consent' to the magistrate's authority being exercised for a limited range of ends', which includes 'the necessity of the state' and 'the welfare of the people' but excludes 'the religious practice of the individual'. Tate does not explain why. Their consent is expressed through a contract which Tate represents as 'a new normative source that Locke affirms in the wake of the *Two Tracts*'. Natural law, Tate concedes, does 'authorise' this process, 'it being from God, Locke declares, that individuals derive their entitlement to transfer some of their natural rights…to government', but 'otherwise'—how was the theatre otherwise, Mrs. Lincoln? —'the process arises by 'the contrivance and appointment of men alone'' (Tate 2015: 8). Tate takes it to follow that contract, not natural law, is the 'normative instrument' of Locke's preference.

It further follows, on Tate's account, that Locke's position is unstable, because the 'practical imperative' of civil peace is potentially at odds with the extensive individual liberty Locke valorizes: '[t]heir respective limits, concerning individual liberty (on the one hand) and the scope of governance necessary for civil peace (on the other) are determined by practical political negotiation between competing parties' which means, in the final analysis, by force (Tate 2015: 10, compare paragraphs 1 and 3). Contrary to Bou-Habib, Harris and Stanton, he concludes, 'they are not determined by natural law' (Tate 2015:10-11).[6]

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[5] For recognition of the need for judgment in this situation, and interesting discussion, see Nacol (2011).

[6] This is Tate's phrase, not Harris's or my own, and, one might add, the meaning of it is far from obvious: determined how?

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All of this is belied by Tate's own statement that natural law is delivered to men by God (Tate 2015: 4). For natural law is a normative code which is superior to every human being and human government alike, and which contains duties that regulate aspects of life beyond the scope of the latter, requiring the love and worship of God, the preservation of others, and of oneself (Locke 1954: 156-58). The question then becomes, how best to produce the ends in view—to worship God and to secure terrestrial survival? The answer is that the rational means include institutions, as, for instance, religious society and civil society. The ends in view for each of these societies are prescribed by natural law, they being its vehicles. A religious society is a society of people combining in order to worship God publicly in the way they judge to be acceptable to Him to the end of their salvation (Locke 1968: 71). A civil society is a society of people constituted solely (*solummodo*) for the end of conserving and promoting civil goods (Locke 1968: 64/65). Both are defined by Locke in terms of an end, and an end wholly different in content from the other.

These definitions are inferences from natural law. Natural law implies the abilities to understand and to will it. By inference, these abilities reach recognition of means to the ends of natural law and voluntary adherence to those means. Thus Locke's definition of a church includes the fact that people combine *sua sponte* to worship for the end of their salvation: the exercise of will is implied in the definition, and declared in the ensuing paragraph where a church is termed 'a *free and voluntary society*' (Locke 1968: 71). Likewise civil society is a product of will and agreement, as men consent to unite with others 'to make one Body Politick' (Locke 1988: 332). People originate both religious and civil society as institutions for their ends, and in this respect the origins of both are found in human will.

This is a supposition of natural law thinking, not an alternative to it. The ends for which those societies are brought into existence are ends in natural law, and they are limited to the pursuit of those ends.[7] Nowhere did I deny that these societies originate in consent (Locke says they do). But that is a causal claim, not a normative one.[8] My point was that 'the contrivance and appointment of men alone' is not what determines those ends or makes them authoritative in relation to human beings. Still less could the consent of human beings substitute other ends in their place. Tate seems oblivious to the fact that in conceding that natural law 'authorises' what human beings can legitimately consent to he concedes the case entire.

One must add that the idea that individual liberty is a normative imperative has no textual support in Locke. Locke's *Epistola* tells us that men have liberty in religion in order to worship God in the way they judge will be pleasing to him (Locke 1968: 103).[9] It figures as a means to a divinely instituted

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7 In Locke's words, the 'boundaries on both sides are fixed and immovable' (Locke 1968: 85-87).

8 For wider discussion of lockean causality as it bears on this point, see Harris (2007). I am afraid that it is not entirely clear to me what Tate means by the phrase 'normative imperative'.

9 Hence Locke's asseveration that in religion man (*homo*, all human beings) 'must be left to himself and his own conscience' (1968: 101)—that is to say, his [or her] own judgement of how to fulfil the duty to worship God publicly.

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end, relating not to *whether* one worships but how. In *Two Treatises of Government* people are likewise said to possess the degree of liberty proper to beings bounded by the law of nature (1988: 269), which is again to identify a means to ends that that law specifies rather than an end in itself. It is precisely because Locke regards it in these terms, as a necessary means to the performance of certain duties under natural law, whether to preserve ourselves and others or to worship God publicly, that he so often speaks of these liberties as rights, and why he declares, as Tate admits, that people cannot do whatever they like with those rights. For rights are powers coordinated to ends, and the ends in view are ends in natural law. The idea that liberty *per se* might be 'a normative imperative' does not seem to be coherent anyway, though one sees that the exercise or protection of liberty might be.

Tate declares that in *Two Tracts* this is 'a liberty which exists in the inward realm of individual conscience alone', which by the time of the 'Essay concerning Toleration' has expanded 'to include outward expression as well as inner conscience'. This is false. Locke's position is that people can give up their liberty of action in indifferent things to the civil magistrate in a contract but (as one might expect someone who 'affirmed natural law' to argue) they cannot give up the liberty to perform duties derived from divine laws, including the duty to worship God publicly (Locke 1967: 126).[10] So liberty is not, in fact, being confined to the 'inward realm of conscience alone'. The operative distinction is between indifferent things, in which people are not bound by divine laws, and necessary ones, in which they are, and the issue is which beliefs and actions fall into which category. As Locke states plainly, people 'never had the liberty to give up to another's injunctions' (Locke 1967: 130) the power to do or omit what is necessary in religion, and this extends beyond inner belief to outward expression as much in *Two Tracts* as in Locke's later writings.[11] To say that the 'inclusion of outward religious expression' moves Locke's argument 'beyond the *Two Tracts*' (Tate 2015: 8) is to commit two blunders in one.

What of 'the imperative of civil peace' Tate discerns in Locke? The end of civil society, the preservation of life and civil goods, and by inference the commonwealth itself, is an end in natural law, and civil society being 'a State of Peace, amongst those who are of it', civil peace is upholding the end by abiding by the terms of this society (Locke 1988: 407). The end is non-negotiable. 'Practical political negotiation between competing parties' 'determines' neither

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[10] Recall Dr. Tate's observation that 'natural law was something that Locke openly affirmed in the *Two Tracts* itself, with all the normative commitment and prescriptive force which characterised his later *Essays on the Law of Nature*' (Tate 2015: 4).

[11] A point which escapes the chronological vigilance upon which Dr. Tate earlier prides himself: see Locke (1967: 214-15): 'The outward acts of religion are also called 'divine worship'. Since God ordained that man should be composed of body as well as soul…he demands those outward performances by which that inner worship of the spirit is expressed…[by which] we…bear witness here and now to the love, faith, and obedience of the soul[;] and this…worship…is everywhere ordained by God in his law, and…we are bound to fulfil [it], nor does the magistrate possess any right over this worship since it can be altered by none but the Divine Lawgiver himself'.

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3 the end in view nor the legitimate scope of means to it.[12] If Tate's point is merely that, in practice, human beings sometimes breach those terms, or that, when they confront one another, the stronger often prevails, whoever denied it? Not me. Not Locke, for whom '*Polyphemus*'s Den gives us a perfect Pattern of such a Peace' (Locke 1988: 417). But 'the question here is about the rule of right action, not the outcome of doubtful cases' (Locke 1968: 131). The question is whether emphasising natural law in Locke is 'mistaken' and whether 'it misrepresents and distorts far more than it illuminates of his political philosophy'.

The answer to which one is obliged to come is that it is Tate who misconstrues and mistakes Locke's positions, that his own claims misrepresent and distort not only the positions he takes himself to be attacking but also Locke's political philosophy, early and late, that he 'fails to account for key elements of Locke's political philosophy, as well as some of its main outcomes', that it is his own position, and his own reasoning, that 'lacks cogency' (Tate 2015: 10, 2). The 'mistakes', 'errors', and 'inaccuracy' of which Tate speaks so liberally are, I am afraid, his own.

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12 The end of religious worship, salvation, meanwhile, differs by 'a whole heaven' (*toto coelo*) and Locke suggested accordingly that it would give rise to few conflicts between civil law and religious conscience (Locke 1968: 126). Notwithstanding Tate's tendentious gloss, the 'busie heads' and 'turbulent spirits' discussed by Locke in *Two Treatises* are not 'individual religious dissidents' but individuals with an insatiable will to power over others. Readers may wish to compare Tate (2015: 10) with the contents of the string of passages cited, in which religion is nowhere mentioned.

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