

When Was the State of Nature?
A Lockean Response to Rousseau's Critiques

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INTRODUCTION

When was the state of nature? Rousseau views the state of nature much differently than other natural rights theorists, including Hobbes, Pufendorf, and Locke, and vigorously critiques their philosophies.¹ While the differences between these two states of nature are vast, a key distinction can be reduced to one concept; time. Ostensibly, the dissimilarity is the temporal location of the state of nature, defined as how far removed that epoch is from the present time. In this essay, I will explore the concept of when the state of nature was located. In the process, I will seek to vindicate Locke's oft-attacked notion of the state of nature, and weaken many of Rousseau's critiques. Further, I will venture a guess how Locke, if given the opportunity, would have responded to some of Rousseau's attacks.

First, I highlight Rousseau's critiques of Locke's state of nature. In discussing these criticisms, I focus on Rousseau's argument that savage man in the state of nature lacked reason and language, could not consent to the social compact, and did not cohabitate in families. Contrary to Locke, Rousseau contended these human characteristics are products of civil society and did not exist in the state of nature.

Second, I explore whether Locke and Rousseau considered the state of nature to be a hypothetical or a historical period. I contend that both philosophers viewed the state of nature solely as a hypothetical construct useful to discuss human nature and civil

¹ In this paper, I focus exclusively on Locke's state of nature. In addition to Locke, Rousseau most frequently discusses Hobbes, and to a lesser extent Grotius, and Pufendorf. However, I chose to compare Locke and Rousseau because they seek to answer different questions through polar opposite conceptions of the state of nature. While Rousseau's critiques against the natural law scholars are primarily directed against Hobbes, many of his arguments apply with equal force to Locke's philosophy.

society. Assuming the state of nature is a fictitious and hypothetical state, I query why should philosophers study it? In answering this question, I focus on Locke's purposes in writing the Second Treatise, and how the state of nature conveys that message. This analysis attempts to vindicate Locke's philosophy against cynical attempts to disparage his state of nature, and shows why it remains a valid and persuasive method to explain the origins of civil society.

Third, I propose a Lockean defense to Rousseau's critiques. Because many of Rousseau's criticisms are styled as if Locke actually viewed the state of nature to be a historical, provable fact, which Locke did not, many of Rousseau's critiques are blunted. I contend that Locke and Rousseau are answering different questions, and therefore many of Rousseau's criticisms are inapt.

I. Rousseau's Critiques of Locke's State of Nature

The main thrust of Rousseau's criticisms is Locke did not go *back* far enough.² "The Philosophers who have examined the foundation of society have all felt the necessity of going back as far as the state of nature, but none of them has reached it." Rousseau critiques Locke's state of nature, in that he "spoke of savage man and depicted civil man." In contrast with his predecessors, Rousseau "goes further back to the *pure*

² John T. Scott, *The Theodicy of the Second Discourse: The "Pure State of Nature" and Rousseau's Political Thought*, THE AMERICAN POLITICAL SCIENCE REVIEW, Vol. 86, No. 3, pp. 696, 699 (Sep. 1992). ("[Rousseau's] complaint [of the natural law philosophers is that they] have not pursued their inquiries far enough in that direction."). See also Henry V. S. Ogden, *The Antithesis of Nature and Art, and Rousseau's Rejection of the Theory of Natural Rights*, THE AMERICAN POLITICAL SCIENCE QUARTERLY, Vol. 32, No. 4, pp. 643, 645 (Aug 1938) ("When [Rousseau] considered the juristic state of nature described by such authors as Hobbes, Pufendorf, and Locke, he found much in them that he could not regard as truly natural. The trouble with such writers, he asserts in the foreword to the *Second Discourse*, is that they do not go far enough back in their search for the state of nature. They include, among other things, various psychological characteristics of man, such as cultivated reason and artificial passions, which belong to civilized life.").

state of nature, a new revelation of what sort of beings we truly are by nature.”³ Rousseau assailed the moralists for attributing to man in the state of nature characteristics derived from civil society. From Rousseau’s perspectives, “his predecessors have overestimated the needs, passions, and rational capacity natural to” man.⁴ Specifically they “have assumed that [men are] naturally social or moral beings” and that men have “social and moral passions and faculties.”⁵

Further, the moralists improperly attributed to man in the state of nature characteristics that could only have developed over time as a result of passions.⁶ Locke presumes certain characteristics and attributes of man that could not be inherent in man in Rousseau’s earlier state of nature.⁷ These faculties are the result of progress, spurred by passions and desires, emotions that are absent in original man. Finally, Rousseau critiques the notion of the savage man possessing “need, greed, oppression, desires, and pride.”⁸ Rousseau argues that all of these ideas were wrongfully “taken from society” and “transferred to the state of Nature.”⁹ Flowing from this critique, in the Second Discourse, Rousseau systematically dissects Locke’s savage man, focusing on, among other traits,

³ Scott, *supra* note 2, at 707 (emphasis added).

⁴ *Id.* at 700.

⁵ *Id.*

⁶ JEAN JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, in ROUSSEAU: THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS, 111, 132 (Victor Gourevitch, ed., Cambridge Univ. Press 2008). *See also*, Scott, *supra* note 2, at 704 (“When he criticizes Locke for not going “back” far enough, [Rousseau] indicates that Locke has not properly conceived of how different conditions (conditions that tend to develop in a certain general direction over time) affect the character and extent of man’s ‘needs.’ . . . In other words, Rousseau denies that humans by nature have what he calls moral needs or passions-needs and passions with particular, conscious regard for other individuals, of which moral love is his archetypical example.”).

⁷ Scott, *supra* note 2, at 704 (“Assuming humans always to have been the beings he sees around him, Locke has improperly attributed to us faculties and passions that (Rousseau argues) we do not possess by our original nature.”).

⁸ Second Discourse, *supra* note 6, at 132.

⁹ *Id.*

reason, consent for entering the social compact, language, and the concept of family, as anachronistic concepts that did not prevail in the state of nature.

A. Reason

In Locke's state of nature, reason is the essence of the law of nature. "The state of nature has a law of nature to govern it, which obliges every one: and *reason, which is that law*, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."¹⁰ Rousseau disagrees, and views reason as a characteristic men lacked in the state of nature. Rather, reason is a trait acquired from civil society. Rousseau views the proliferation of passions as the cause of man's evolution, spurring the development of reason.¹¹

From savage man's lack of passion in the state of nature, Rousseau infers that they would have had no need for reason.¹² Based on the premise that the laws of nature are difficult to understand, Rousseau reasons "that men must have used, for the establishment of society, *enlightenment* which only develops with great difficulty, and in a very few people in the midst of society itself."¹³ While the natural rights theorists "assume in one way or another that humans are naturally and in some way primarily

¹⁰ JOHN LOCKE, *The Second Treatise of Government* in TWO TREATISES OF GOVERNMENT § 6 (Peter Laslett ed., Cambridge Univ. Press 2008) (emphasis added).

¹¹ Second Discourse, *supra* note 6 ("Whatever the moralists may say about it, human understanding owes much to the passions, which by common agreement also owe much to it.")

¹² *Id.* ("It is impossible to conceive why one who had neither desires nor fears would go to the trouble of reasoning.")

¹³ Second Discourse, *supra* note 6, at 126.

rational,” Rousseau criticizes this view, and “accuse[s] them of failing to realize that humans are not by nature moral beings in any sense.”¹⁴

Because early man was simple and lacked the ability to reason, they could not grasp the laws of nature. Rousseau writes, “it is impossible to understand the law of nature and consequently to obey it without being a great reasoner, and a profound metaphysician.”¹⁵ Because they could not realize these laws, there were no consequences for disobeying these laws. Thus, the laws had no effect. In order for men to have followed these laws, they must have applied enlightenment, that could only have derived from the evolution of society; these conditions did not exist in the state of nature.

Further implicit in the lack of rationality is the inability for man to have created laws. Whereas Locke viewed justice as a condition existing in the state of nature based on the laws of nature, Rousseau viewed law as a prerequisite to justice. According to Rousseau, “Law comes before justice and not justice before law.”¹⁶ No reason, no law; no law, no justice. Rousseau notes that in the state of nature, man could not understand the notion of “the just and the unjust,” and argues that justice would likely not “have been useful to” man in the state of nature.

Even though Locke contends that “the law of nature be plain and intelligible to all rational creatures,” he concedes that men are “biased by their interest, as well as ignorant for want of study of” these laws with respect to protecting property.¹⁷ As a result, savage

¹⁴ Scott, *supra* note 2, at 702.

¹⁵ Second Discourse, *supra* note 6, at 126.

¹⁶ Jean Jacques Rousseau, ON THE SOCIAL CONTRACT, WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY 191 (R. D. Masters, Ed. 1978).

¹⁷ Locke, *supra* note 10, at § 124.

men did not necessarily recognize the law of nature “as a law binding to them.”¹⁸ From this quote, it would seem that Locke would agree in part with Rousseau’s charge that the law of nature is too difficult for primitive man to understand. Locke’s position can be defended on the ground that possessing reason, and choosing not to exercise it is different from not possessing it at all, Rousseau’s view. Ultimately, it is a distinction without a difference. Simple man with no reason, and ignorant man not exercising his reason will yield the same result; Rousseau’s savage nation without laws or justice.

B. *Consent for the Social Compact*

Locke requires a majority of men to unite, not a unanimous agreement, in order to exit the state of nature and begin the social compact.¹⁹ Rousseau disputes this form of the social compact, and argues that unanimous consent is required.²⁰ According to Rousseau, Locke puts the cart before the horse. Majority rule is a construct derived from civil society.²¹ Before man can develop parliamentary procedures like majority rule, the initial foray into civil society must be unanimous.

Locke concedes the significance of unanimity,²² but counters that unanimous “consent is next to impossible ever to be had, if we consider the infirmities of health, and avocations of business, which in a number, though much less than that of a common-

¹⁸ *Id.* at § 124.

¹⁹ *Id.* at § 95.

²⁰ JEAN JACQUES ROUSSEAU, *The Social Contract* in POLITICAL WRITINGS 117 (Frederick Watkins trans., ed., The University of Wisconsin Press 1986) (1762 (“There is only one law which, by its very nature requires unanimous consent; this is the social contract.”)).

²¹ *Id.* at 14 (“The law of majority rule itself is a conventional institution, and presupposes unanimity on one occasion at least.”).

²² Locke, *supra* note 10, at § 95 (“For if the consent of the majority shall not, in reason, be received as the act of the whole, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole”).

wealth, will necessarily keep many away from the public assembly.”²³ Locke continues that the “the variety of opinions, and contrariety of interests, which unavoidably happen in all collections of men” would prevent the sustained existence of the social compact.²⁴ If the “majority cannot [decide for] the rest, there they cannot act as one body, and consequently [the society will] be immediately dissolved again.”²⁵ Such a fickle “constitution as this would make the mighty Leviathan of a shorter duration, than the feeblest creatures, and not let it outlast the day it was born in.”²⁶ Locke’s response presents a substantial collective action problem, which pragmatically necessitates majority rule. Man could never practically enter into a social compact without permitting majority rule.

Responding to Locke’s criticism, Rousseau’s unanimity requirement would seem to relegate man to an eternity in the state of nature, for obtaining unanimous consent is a herculean, if not impossible task. By requiring unanimous consent, could men ever leave the state of nature? Since Rousseau viewed the savage state of nature as the “happiest and most durable epoch,”²⁷ he may have relished in society’s inability to emerge from this period. Perhaps his requirement of seeking unanimous consent expressed his desire that man never leave this hypothetical state. But Locke’s willingness to allow majority rule reflects the laws of nature’s ability to deal with holdouts and collective action problems, and permits men to form a social compact.

²³ *Id.* at § 95.

²⁴ *Id.* at § 98.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Second Discourse, *supra* note 6, at 167.

C. *Language*

Locke's savage man requires reason and language in order to grasp the laws of nature. In Rousseau's "pure state of nature,"²⁸ neither faculty prevailed, and thus the laws of nature were unobtainable. Rousseau critiques Locke for assuming that language existed in the state of nature. Rousseau queries why language would exist if people had no reason to relate to one another.²⁹ Rousseau argues that the development of language entailed "inconceivable difficulties," and he could not calculate the "the infinite time which the first invention of language must have cost."³⁰ And prior to the evolution of language, Rousseau argues that man's mind needed to have evolved from the simplistic brain possessed by savage man in the state of nature. Rousseau questioned "how many thousands of centuries it must have required for the sequential development in the human mind of the operations it is capable of."³¹ Thus, savage man was not intelligent enough to have even understood language.³²

Because reason can only develop as a result of language and communication, which is derived from society, "solitary natural man could not possibly have known the supposed laws of nature."³³ And in the absence of language, and the means to communicate, Rousseau argues that obtaining the intricacies of natural law would have

²⁸ Second Discourse, *supra* note 6, at 132.

²⁹ *Id.* at 145 ("The first which presents itself is to imagine how languages could have become necessary. For since men had no connections with each other, nor any need for them, one cannot conceive why this invention was necessary or possible, unless it was indispensable.").

³⁰ *Id.* at 144.

³¹ *Id.* at 144.

³² *Id.* at 188-89 ("All knowledge that requires reflection, all knowledge acquired only by the linking of ideas and perfected only successively seems to be altogether beyond the reach of savage man for want of communication with his fellow men- that is to say, for want of the instrument which is sued for that communication and for want of the needs to make it necessary.").

³³ Arthur M. Meltzer, *Rousseau's Moral Realism: Replacing Natural Law with the General Will*, THE AMERICAN POLITICAL SCIENCE REVIEW, Vol. 77, No. 3. Pp. 633, 639 (Sept. 1983).

been impossible.³⁴ But this syllogism raises an inherent contradiction. If man needs language to develop reason, yet needs reason to develop language, neither could have ever emerged. Thus, it would seem Rousseau's approach condemns (or in Rousseau's mind, rewards) man to forever stay in the state of nature, perpetually unable to communicate and reason to create a social compact.

Locke would likely dispute this proposition. Locke may argue that even though savage man lacked the full capabilities of reasoning, and did not possess language replete with grammar, syntax, and elaborate vocabulary, in the state of nature men could communicate very primitively to establish the initial charter. Even if it consisted of a series of grunts to allocate acorns, savage man could have arranged this with minimal intelligence or vocal communication. From this initial point, reason and language could have developed and flourished through cohabitation and interaction to enable men to craft more elaborate and intricate social compacts. Through this iterative process, savage man, even in the absence of formalistic language could have departed the state of nature and begun the development of civil society.

D. Family

In the Second Discourse, Rousseau vociferously critiques Locke's view of the family. Locke contends that the "conjunction betwixt male and female ought to last, even after procreation" in order to sustain and nourish the child.³⁵ He posits that because the

³⁴ Second Discourse, *supra* note 6, at 144 ("In a word, even if we should suppose him to have a mind as intelligent and as enlightened as it must be, and, indeed, is found to be, heavy and stupid, what use would the species derive from all this metaphysics, which could not be communicated and would perish with the individual who had invented it?").

³⁵ Locke, *supra* note 10, at § 79.

“assistance of the male is necessary to the maintenance of their common family,” the male and female work together.³⁶ Locke derives the support of this theory from “the infinite wise maker” and argues that all creatures obey this precept.³⁷ Rousseau strongly rejects this seemingly conclusory argument.

Rousseau disputes Locke’s reasoning regarding why a man stays attached to an expectant mother during pregnancy.³⁸ Rousseau assails Locke for assuming that a man will “attach himself to her after conception.”³⁹ According to Rousseau, once the natural man’s appetite is satisfied, he “has no more need for that particular woman, nor the woman for that particular man.” After copulation, the two parties go their separate ways, destined to forget one another, for “there is no likelihood that at the end of nine months they retain the memory of having known each other.”⁴⁰

Underlying Rousseau’s critique of Locke, is the accusation that Locke presumed certain characteristics in natural man that did not exist in Rousseau’s earlier state of nature. “For this sort of memory by which one individual gives preference to another individual for the act of procreation demands, as I demonstrate in the text, more progress or corruption in human understanding than one can assume in the condition of animality which we are talking about here.”⁴¹ According to Rousseau, the human faculties requisite

³⁶ *Id.*

³⁷ *Id.*

³⁸ Second Discourse, *supra* note 6, at 212.

³⁹ *Id.* at 215.

⁴⁰ *Id.* at 145. *Id.* (“At first the mother suckled her children to satisfy her own need; then, once the habit made them dear to her, she later nourished them for their need. As soon as they had the strength to seek out their own food, they did not delay in leaving the mother herself, and since there was hardly any way of finding each other again other than to remain within sight, they were soon at the stage where they did not even recognize one another.”).

⁴¹ *Id.*

in maintaining a relationship, including memory and thought, were developed as a result of the “corruption” of the passions and civil society.⁴²

Rousseau further attacks Locke advanced state of nature; “Locke’s reasoning tumbles in ruins, and all this philosopher’s dialectic has not saved him from the mistake which Hobbes and others have committed.” In Rousseau’s pure state of nature, “men lived by themselves” and did not have any “motive to live near another given man.” In this savage nation, without any consequences for actions, human relationships, especially between those of a man and a woman could not be maintained. “For although it may be advantageous to the human species that the union between man and woman be permanent, it does not follow that it was so established by Nature; otherwise it would have to be said that Nature also instituted Civil Society, the Arts, Commerce, and everything that is claimed to be useful to men.”⁴³

Simply because an institution benefits mankind, does not prove it existed in the state of nature. If all positive institutions that were useful to mankind existed in the state of nature, that epoch would be almost identical to the present day, thus diminishing the value of this supposedly pristine state. This is the crux of Rousseau’s arguments. He seeks to draw a wide divide between modern day and the state of nature, and to strip away all pretenses and accretions resulting from civil society.

Rousseau chastises Locke for he “did not think of taking [himself] back before the centuries of society, in other words, before those time when men always have a reason to

⁴² JEAN JACQUES ROUSSEAU, *Essay on the Origin of Languages* in ROUSSEAU: THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS, 253 (Victor Gourevitch, ed., Cambridge Univ. Press 2008) (“the origin of languages is not due to men’s first needs . . . To what may this origin then be due? To the moral needs, the passions.”).

⁴³ Second Discourse, *supra* note 6, at 213.

live close together and where a given man often has a reason to live near a given man or woman.” That period, centuries before, is the “pure state of nature.” At that time, man did not have any inclination or desire or need to live near another man. In this time, attachment during pregnancy could not occur.

But Rousseau’s view of family is not unassailable. If parents did not care for their offspring, how could the species propagate? No matter how sturdy savage infants were, they would still need the care of their mothers. A reader would not believe that an infant could fend for himself once outside the womb. Thus, Rousseau is willing to concede a single emotion. The only emotion Rousseau grants to man in this early state is pity.⁴⁴

Pity is the reason why a mother cares for her child. From pity flows “all the social virtues . . . including generosity, clemency, humanity.”⁴⁵ Rousseau attributes the departure from this primitive state as a consequence of the development of passion. Only when man develops the passions, including pride and “*amour propre* [vanity] and *amour de soi-meme* [self-love]”⁴⁶ do encounters between men become more than “natural events.”⁴⁷ Locke could argue that Rousseau’s savage men were not totally lacking humanistic and familial qualities, and ask why this one emotion is allowed. If pity is allowed, why not other traits, such as reason or language? Locke may criticize Rousseau for presuming emotions that did not exist in the *purest* state of nature, and assail Rousseau for not going back far enough.

⁴⁴ *Id.* at 152 (“I do not believe I need fear any contradiction in granting to man the only Natural virtue which the most extreme Detractor of human virtues was forced to acknowledge. I speak of pity, a disposition suited to beings as weak and as subject to so many ills as we are; a virtue all the more universal and useful to man as it precedes the exercise of all reflection in him, and so Natural that even the Beasts sometimes shows evident signs of it.”).

⁴⁵ *Id.* at 153.

⁴⁶ *Id.* at 152.

⁴⁷ *Id.* at 218.

But why does man in this early stage need pity, Locke may ask? Because without pity, Rousseau's theory could not explain reproduction of the species, and without propagation of man, his entire thesis crumbles. Without pity, many could never have survived to progress from the state of nature to the present state, thus undermining Rousseau's entire philosophy. Rousseau critiques Locke for attributing many emotions to savage man, but in his own state, he is forced to concede this single emotion so that his theory can sustain.

II. Was There Actually A State of Nature?

Is Rousseau right, that the state of nature took place earlier? Is Locke ignorant or naïve about human nature for placing his state of nature later? In order to answer these questions, I will first explore whether Locke and Rousseau viewed the state of nature as an actual historical epoch, or rather as a hypothetical construct. If Locke believes that the state of nature preceded civil society in the same sense the Triassic Period preceded the Jurassic Period, then Rousseau's criticisms are apt. But if the state of nature is a hypothetical concept, something derived from Locke's mind and reasoning, much of Rousseau's criticisms are blunted.

A. Locke's State of Nature

Locke is somewhat ambiguous as to whether he considers the state of nature as hypothetical or historical. He seems to view it both ways. In the Second Treatise, Locke attempts to reconcile his views on the state of nature with scriptural accounts, as noted by

Richard Hooker.⁴⁸ Does he use these examples to prove his state of nature actually occurred? Or does he cite these stories merely to validate that his state of nature could have occurred, and his vision is consistent with what people believed happened.

Rousseau criticizes this approach. Rousseau's reading of the "sacred books" reveals that "that the first man . . . received his understanding and precepts directly from God, [and] was not himself in th[e] state of nature."⁴⁹ Preaching from the pulpit, the Citizen of Geneva pontificates that "once we accord the writing of Moses the faith which every Christian philosopher owes them, we must deny that, even before the flood, men ever found themselves in the pure state of nature, unless they fell back into it by some extraordinary event."⁵⁰ No such relapse was mentioned in the Bible. If the Bible is accorded the weight it deserves, when would Locke's state of nature have occurred? Reasoning from this biblical premise, Rousseau argues Locke's state of nature could never have existed view. According to Rousseau, Locke makes no effort to resolve this "paradox [which is] most embarrassing to defend, and altogether impossible to prove."⁵¹ But, Rousseau's writings also suffer from this same defect, as he attempts to tracks his state of nature with the Scripture.⁵²

History shows no record of men being born free and joining to form a social compact to depart from the state of nature. If the state of nature existed, Locke queries,

⁴⁸ Locke, *supra* note 10, at § 15 ("But I moreover affirm, that all men are naturally in that state, and remain so, till by their own consents they make themselves members of some politic society; and I doubt not in the sequel of this discourse, to make it very clear.").

⁴⁹ Second Discourse, *supra* note 6, at 132.

⁵⁰ *Id.* at 132.

⁵¹ *Id.* at 132.

⁵² See *infra* Part II.B.

why is there no record of it?⁵³ Locke answers that it is unsurprising that “history gives us but a very little account of men, that lived together in the state of nature,” for the “inconveniences of [living in] that condition” quickly brought man together, wherein they united and incorporated to form a civil society.⁵⁴ Locke finds that because of the uncertainties in the state of nature, and the benefits the social compact provides, man was “quickly driven into society.”⁵⁵ For this reason, “we seldom find any number of men live any time together in this state.”⁵⁶ This may explain the dearth of historical records of man existing the state of nature.

Locke also postulates that history does not record men’s early dealings in the state of nature for much the same reason that we know little about the childhoods of the “armies of Salmanasser or Xerxes,” but learn about them when they “were men, and imbodyed in armies.”⁵⁷ Locke continues to defend the lack of a historical record of these early compacts, and writes, “[g]overnment is every where antecedent to records, and letters seldom come in amongst a people till a long continuation of civil society has, by other more necessary arts, provided for their safety, ease, and plenty.”⁵⁸

But did Locke actually see the state of nature as a historical epoch? Locke addresses this riddle, wrapped in a mystery, inside an enigma in the Second Treatise, and poses the objection critics may raise; were there ever “any men in such a state of

⁵³ Locke, *supra* note 10, at § 100 (“That there are no instances to be found in story, of a company of men independent, and equal one amongst another, that met together, and in this way began and set up a government.”).

⁵⁴ *Id.* at § 101.

⁵⁵ Locke, *supra* note 10, at § 127

⁵⁶ *Id.*

⁵⁷ *Id.* at § 101.

⁵⁸ *Id.*

nature.”⁵⁹ To answer this question, Locke obtusely discusses that men *still* are in the state of nature whenever “men may make [promises and compacts with] one with another.”⁶⁰ He provides examples of two men on a desert island and agreements with Indians in the Americas to illustrate that compacts between men in certain contexts are formed not “as members of society” but rather as members “perfectly in a state of nature.”⁶¹ This hints that Locke did not view the state of nature as occurring in any particular time, but as a condition that exists when certain circumstances are present.

If the state of nature can exist when Indians transact, the state of nature always exists, in a hypothetical sense. According to this view, the state of nature is a metaphysical construct that exists between men when specific conditions prevail, not a historical period. Thus, Locke views many historical occurrences as examples of *a* state of nature, but he does not definitively say that a period in the past was *the* state of nature.

Based on the tenor of his argument, and how he utilizes historical events as illustrations, and not irrefutable proofs, Locke likely viewed the state of nature as a hypothetical construct to understand the origin of government and political power. Scholars tend to agree with this view. According to Henry Ogden, to Locke, the state of nature was juristic, in the sense that it was designed as “the basis of political theory and not as a description of what the state of nature must have been culturally.”⁶² John Scott writes that according to Locke, the State of nature is essential in “explaining the foundations of society.”⁶³ Did Rousseau also view the state of nature as a hypothetical

⁵⁹ *Id.* at § 14

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Ogden, *supra* note 2, at 644-45.

⁶³ Scott, *supra* note 2, at 698.

period? The answer is likely yes, but it is not as conclusive as Rousseau would have you believe.

B. *Rousseau's State of Nature*

According to Rousseau, should the state of nature be reconciled with historical and scriptural accounts, or rather should it be viewed as a hypothetical state? While Rousseau criticizes Locke for reconciling his state of nature with scripture, Rousseau adopts, in select places, a similar approach. He writes, “[b]y following [the thread of] these entirely natural ideas it is easy to reconcile the authority of Scripture with ancient records, and there is no need to treat as fables traditions that are as old as are the people that have handed them down to us.”⁶⁴ Rousseau makes frequent references to biblical figures in his discussion on the state of nature.⁶⁵

In his discussion on the origin of language, Rousseau posits, “What we call the age of the [biblical] patriarchs is very remote from the first age [the state of nature].”⁶⁶ According to the Bible, there are “ten generations between them in those centuries when men lived a long time.”⁶⁷ In the beginning, wrote Rousseau, “Adam spoke; Noah spoke; granted. Adam had been taught by God himself.”⁶⁸ During this later time, the people “lived scattered” without language, and left no record.⁶⁹ In the Discourse, Rousseau subtly challenges the dogma of the church, and observes “Religion orders us to believe

⁶⁴ Origin of Languages, *supra* note 42, at 271.

⁶⁵ *Id.* at 269 (References to Cain and Noah).

⁶⁶ *Id.* at 270.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

that God Himself took men out of the state of nature immediately after the creation and that they are unequal because He wanted them to be.”⁷⁰

Here, it seems that Rousseau is attempting to reconcile his view of the state of nature with scripture. Hewing closely to the Bible, when would Rousseau’s state of nature have occurred in the Church’s scriptural chronology? The Bible’s history makes no reference of a state of nature where savage man sat under the tree and sustained himself on acorns. Like Locke, the citizen of Geneva makes no effort to resolve the “paradox [which is] most embarrassing to defend, and altogether impossible to prove.”⁷¹

But, the inability to reconcile the state of natural with scripture need not necessarily undermine Locke or Rousseau’s philosophy.⁷² Even a cynical view of the theological underpinnings of Locke and Rousseau can acknowledge the persuasiveness of the metaphysical force behind these theories.⁷³ Professor Sanders argues that even viewing natural law agnostically, the scriptural accounts “provide[] the theory with normative force and [they] provide[] a metaphysical explanation of how people, and the rest of the world, came to be the way they are.”⁷⁴ That the state of nature does not fit in neatly with biblical chronology should not be seen solely as a demerit, but may be viewed as edification of the state of nature.

Rousseau in several places alludes to the temporal location of his state of nature. “The times of which I am going to speak are far distant. How much you have changed

⁷⁰ Second Discourse, *supra* note 6, at 132.

⁷¹ Second Discourse, *supra* note 6, at 132.

⁷² John T. Sanders, *Justice And The Initial Acquisition Of Property*, 10 Harv. J.L. & Pub. Pol’y 367, 373 (1988) (“rejection of Locke’s theology does not rob his property theory of contemporary philosophical significance.”).

⁷³ *Id.* at 374 (“The theology is an attempt to provide normative force and metaphysical dimension to the property theory, and as valuable as such efforts are, one can very easily react skeptically to this attempt while affirming the value of the practical argument.”).

⁷⁴ *Id.* at 373-374.

from what you were!”⁷⁵ In *The Origin of the Languages*, he writes “In the first times men scattered over the face of the earth had no society other than that of the family, no laws other than those of nature, no language other than gesture, and a few inarticulate sounds.”⁷⁶ When was this “first time?” Rousseau answers “I call first the times of men’s dispersion, regardless of the age one chooses to assign to mankind at that period.”⁷⁷ These passages provide conflicting evidence of whether Rousseau considered this time period as an actual chronological epoch.

But, elsewhere Rousseau insists that the state of nature is merely hypothetical, and not historical. According to Rousseau, “[t]he inquiries that may be pursued regarding this subject ought not to be taken for historical truths, but only for hypothetical and conditional reasoning’s.”⁷⁸ In the *Discourse*, Rousseau regales the Republic of Geneva with the complexity of his task, noting the difficulty of understanding “a condition which no longer exists, which perhaps *did not exist*, which *probably never will exist*.”⁷⁹ This language implies that at best, the state of nature no longer exists, but likely, it is a conjectural period that never existed. Yet, this conflicts with his other writings where Rousseau uses Scripture to solidify his chronology of the state of nature.

Does Rousseau actually believe that the Bible and the State of Nature can be reconciled? Is he paying mere lip service to the Church to avoid persecution? Regardless of how Rousseau would answer these questions, his state of nature should be viewed as hypothetical state similar to Locke. Rousseau seems to utilize historical and biblical

⁷⁵ Second Discourse, *supra* note 6, at 133.

⁷⁶ Origin of Languages, *supra* note 42, at 267.

⁷⁷ Origin of Languages, *supra* note 42, at 267.

⁷⁸ Second Discourse, *supra* note 6, at 132.

⁷⁹ *Id.* at 125.

accounts to fortify his reasoning by way of examples. Locke would likely have no qualms with this approach, as he employed similar techniques.

C. *Why Study the State of Nature?*

If the state of nature is hypothetical, why study it? Why do philosophers use it to convey their ideas? What is the purpose of the state of nature? What questions does the state of nature seek to answer? If Locke views his conception of civil government as the ideal form, why does he need to use the state of nature to justify his idea? Why couldn't he simply present some principles and instruct his readers that this is the ideal form of government. In order to answer this question, one must conjecture what question does Locke seek to answer?

Locke's stated purpose was to understand political power and civil governments. At the beginning of the Second Treatise, Locke premises that one of his goals is to "to understand political power."⁸⁰ To accomplish this end, Locke seeks to "derive it from its original" condition, and considers "what state all men are naturally in."⁸¹ Locke views this condition as "a state of perfect freedom [for men] to order their actions, and dispose of their possessions and persons."⁸² These actions are left to man's discretion, but are bounded by the "law of nature."⁸³

In Locke's state of nature, "every man has a property in his own person: this no body has any right to but himself."⁸⁴ A person acquires property when "he hath mixed his

⁸⁰ Locke, *supra* note 10, at § 4.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Locke, *supra* note 10, at § 27.

labour with” something he “remove[d] out of the state that nature hath provided.”⁸⁵ Why does man leave the peaceful state of nature? Why would he “part with his freedom [and] give up this empire, and subject himself to the dominion and controul of any other power?”⁸⁶ Because, the “enjoyment of [life, liberty, and property] is very uncertain” as savage man is “constantly exposed to the invasion of others.”⁸⁷ For this reason, man is “willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, [known as] property.”⁸⁸

To Locke, “civil government is the proper remedy for the inconveniences of the state of nature.”⁸⁹ Locke theorizes that “the great end of men's entering into society” is to protect the “the enjoyment of their properties in peace and safety.”⁹⁰ Civil governments can be justified in order to protect property. The means to effect these ends is the establishment of the laws of civil society, embodied in the “legislative power.”⁹¹

But why did Locke not merely start from the precept that civil government is the ideal means to protect property? Why did he need to derive this from the hypothetical state of nature where property was not protected? In answering this question, I will strive to follow the philosophical principle of charity.⁹² One possible answer, is that the state of

⁸⁵ *Id.*

⁸⁶ Locke, *supra* note 10, at 123.

⁸⁷ *Id.*

⁸⁸ *Id.* at § 123. *See also, id.* at § 124 (“The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.”).

⁸⁹ *Id.* at § 13.

⁹⁰ *Id.* at § 134.

⁹¹ Locke, *supra* note 10, at 134.

⁹² OXFORD DICTIONARY OF PHILOSOPHY 62 (1996) (defining the principle of charity as when an author “constrains the interpreter to maximize the truth or rationality in the subject’s sayings.”). *See also* Adam Mossoff, *Locke’s Labor Lost*, 9 University of Chicago Law School Roundtable 155, 159 (2002) (“The principle of charity is intended to prevent philosophers from engaging in strawman attacks, i.e., mischaracterizing the nature of their opponent’s arguments.”). In the Second Discourse, Rousseau employs the principle of charity, and refers to Locke as “wise Locke.”

nature make his notion of government valid. In order to legitimate the institution of civil government, Locke needed to imagine this previous state, where society was lacking, and property was not protected. If the previous society was better than the modern state, why would men have left this state to make themselves worse off? The problems of this previous world would justify man venturing into the modern world.

Perhaps Locke chose the state of nature as a vehicle to justify his vision of civil government because it is a persuasive and plausible concept. It comports with the innate, though often suppressed, human desire for freedom. People do not want to believe they are controlled. They seek deep down to be a free. If Locke were to have written his *Treatises on Government* as a civil code, starting with the precept that everyone must follow the rules of his government, because he says they are ideal, people would have objected. But, by positing these rules as the product of free people uniting, modern man feels somewhat liberated. Of course, the notion that a person's ancestors gave consent to a social compact does not totally appease modern man. However, in civil society, it would be impossible, short of a revolution, to allow modern man give consent to a government. The notion of one's ancestors consenting can be seen as the next best alternative, and is more desirable than a person being subsumed into a government because of the rule of a tyrant. Regardless of why Locke chose to use the state of nature, he can take solace and refuge in the fact that Rousseau, his ideological antagonist, adopted the same tool. On this ground, the philosophical due would likely agree.

III. A Lockean Response to Rousseau's Critiques

Conceding that the State of Nature is a manifestation of the mind, and not an epoch of time, are Rousseau's critiques that Locke's State of Nature too recent apt? Or does Locke's *later* State of Nature simply answer a different question than Rousseau's *earlier* State of Nature? Rousseau's criticisms of Locke are premised on the fact that Locke did not go back in time far enough. In other words, it is ahistorical. But if the State of Nature is viewed as a hypothetical state, much of Rousseau's criticisms fall apart.

Rousseau's analytical critique of Locke's State of Nature is poignant. He systematically shows why many of the premises underlying Locke's State of Nature could never have occurred, and why man in the State of Nature could not have possessed certain characteristics. But I argue that it is wrong to consider the State of Nature as if it were a scientific experiment or archaeological excavation, reducible to Bacon's scientific method. Rather, I would inspect the State of Nature as a hypothetical and conjectural mental exercise. As discussed, I believe both Locke and Rousseau accepted this understanding.⁹³

An example illustrates this dynamic. Assume that I seek to prove that humans and dinosaurs lived at the same time. To establish this premise, I could theorize that the two species could have coexisted by making certain assumptions about when one species developed, and when the other species became extinct. Of course, these assumptions would be empirically wrong, and could be discounted by inspecting fossil records and studying evolutionary theory. The criticisms you would launch against this historical

⁹³ See also, Scott, *supra* note 2, at 699 ("The principal role of the hypotheses [of the state of nature] . . . was to elucidate the character of the universally available and applicable natural law.").

fallacy, are the same criticisms Rousseau aims at Locke. Rousseau attempts to empirically prove why Locke's State of Nature was anachronistic. But what Locke is devising is not a descriptive account of what was. Locke did not set out to write a history treatise of how man evolved from the beginning of time. Rather, Locke sought to write a treatise on government. Locke engaged in a normative discussion of what philosophically could have caused, preceded, and justified modern civil government. Rousseau's criticisms are aimed at a question that Locke is not answering.

If Locke is postulating the State of Nature as the framework for a certain system of political government, why can't Locke assume the people possessed reason, had language, and cohabitated in families? Conversely, if Rousseau is conjuring a State of Nature to discuss the inequalities of man, it would be unnecessary to consider man possessing reason, language, and family relations, for in the original state everyone would be equally primitive. If the State of Nature is hypothetical, and not historical, Locke's *later* state and Rousseau's *earlier* state can mutually coexist, unlike dinosaurs and human beings, for they answer different questions.

Rousseau and Locke both posit hypothetical, and not historical states of nature. The temporal placement of the State of Nature is only as useful as the purpose the State of Nature is intended to serve. Because Locke and Rousseau respectively seek to use the State of Nature to establish different precepts of the civil society, the placement of the State of Nature is a subjective judgment. As both states were hypothetical, they were *answering different questions*, and not describing the same period in conflicting manners. The validity of the origin of State of Nature is intrinsically tied to the purposes the state

seeks to serve, and why the author chose to design it as he did “does not much matter.”⁹⁴

Does one need to accept all the intricacies and potential contradictions of Locke in order for the Lockean theory of the State of Nature to persuade? Professor Sanders forcefully answers no; “as long as human beings and the world in which they live have the characteristics that Locke thought they had, it does not much matter, for the property [and government] theory that follows from those characteristics, how they got that way.”⁹⁵

To Locke, Rousseau’s critiques about the chronology of his State of Nature would have probably seemed rather petty. In the Second Treatise, Locke invites future critics to challenge his work, and writes “[i]f any one, concerned really for Truth, undertake the Confutation of my Hypothesis, I promise to recant my mistake, upon fair Conviction; or to answer his Difficulties.”⁹⁶ But he warns future cynics, who are “already sharpening their pencils--or, today, booting up their computers,”⁹⁷ that he “shall not take railing for Arguments” and “(t)hat Cavilling here and there, at some Expression, or little incident of my Discourse, is not an answer to my Book.”⁹⁸

To Locke, where the State of Nature should be placed chronologically, or whether man did or did not have language in this state would seem to be of “little incident” to his underlying theories of government, political society, and property. Rousseau’s trivial

⁹⁴ Sanders 374 (“if the preservation and well-being of humanity are goals worth pursuing, and if injunctions to protect, promote, and preserve humanity do actually have normative force, it does not much matter--for purposes of property theory--how they got that force.”).

⁹⁵ John T. Sanders, *Justice And The Initial Acquisition Of Property*, 10 Harv. J.L. & Pub. Pol’y 367, 374 (1988) (“But as long as human beings and the world in which they live have the characteristics that Locke thought they had, it does not much matter, for the property theory that follows from those characteristics, how they got that way. In other words, if the preservation and well-being of humanity are goals worth pursuing, and if injunctions to protect, promote, and preserve humanity do actually have normative force, it does not much matter--for purposes of property theory--how they got that force.”).

⁹⁶ Locke, *supra* note 10, at 138.

⁹⁷ Adam Mossoff, *Locke’s Labor Lost*, 9 University of Chicago Law School Roundtable 155, 164 (2002).

⁹⁸ Locke, *supra* note 10, at 138.

“caviling” about such details would not be an “answer to [Locke’s] Book.” Rousseau’s criticism against Locke should be a normative critique of his purpose and view of civil government, not a veiled descriptive critique of the chronology of his State of Nature. Therefore, Rousseau’s criticisms, to a large extent, ring hollow.

CONCLUSION

Because the State of Nature is admittedly hypothetical, and not historical, when deciding when the State of Nature occurred, the author must make a judgment as to what characteristics and qualifications in man should define the State of Nature. Locke takes a later point. Rousseau takes an earlier point. There is no “correct” starting point. Since the State of Nature is intended to be hypothetical, the chronological placement of one state in no way diminishes the normative force of the State of Nature. Rather, it counsels against one State of Nature attempting to trump over another State of Nature.

I began this article by asking, when was the State of Nature? But this is not the proper inquiry. The statute of nature is not a *when*. If anything, it is a *how*. That is, the State of Nature exists in the minds of philosophers as a metaphysical vehicle to explain *how* human nature and society evolved.