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Appealing to Heaven: Jephthah, John Locke, and Just War



Abstract: This paper asks why John Locke relied so heavily on the biblical exemplum of Jephthah in the “Second Treatise of Government.” The proposed answer is that Locke took Jephthah to stand for the situation of judgment about the validity of norms under uncertainty. It was the contention of norms in a moment of potential warfare, not the absence of applicable norms, that Jephthah symbolized. On this specific point, Locke fits within a tradition of Protestant invocations of the story. If so, there was no need for Locke’s political theory to follow the details of the Jephthah story in other particulars. The paper pursues this argument by attributing to Locke a distinction between subjective conviction and objective validity, the latter of which he thought God alone could judge.

...*Jephtha*, who by argument, Not worse than by his shield
and spear, Defended *Israel* from the *Ammonite*.

—John Milton, *Samson Agonistes*

When General Putnam gave the Signal, the whole Army
shouted their loud Amen by three Cheers, immediately upon
which a Cannon was fired from the Fort, and the Standard
lately sent to General Putnam was exhibited[,] flourishing in
the Air, bearing... this Motto, Appeal to Heaven.

—Anonymous, *Account of Continental Army*, July 18, 1775

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1. INTRODUCTION

John Locke's interesting and wholly neglected obsession with the story of Jephthah, a minor figure in the book of Judges, plays a crucial role in the *Second Treatise of Government*. It may even illustrate the indispensably religious origins of the commitment to a polity based on the consent of the governed. As Andrew Rehfeld recently emphasized in the lone article ever written on the subject, Locke's treatment of this biblical character is so selective that it is bewildering Locke could have made use of him at all. Nevertheless, I will argue in what follows that Locke's invocations of Jephthah flowed out of and developed a Protestant tradition of interpreting the sequence, a tradition for which the Jephthah story illustrated the applicability of norms of justice to warfare even in a situation of opposing claims of right.¹ This function, and not other elements of the biblical story that were of little or no interest to Locke, is the proper focus. Indeed, Locke's obsession with Jephthah may reveal that modern liberalism, which is prepared to tolerate more contention in morality and politics than any other doctrine so far, could have emerged only because of the religious assumption that God would judge otherwise unfettered and unguided human choice, when no other authority obtained.

2. WARS OF WORDS AND WEAPONS

Over the ages, what readers have found most memorable about Jephthah, the illegitimate son of a harlot who is summoned from his life as a bandit to lead Israel's military defenses, is his vow. When he resolves to commence battle against the Ammonites in return for rule over Israel if he succeeds, he promises to sacrifice to God the first creature he sees upon returning home victoriously. This ill-fated creature is, of course, his own daughter, who is duly put to death (though some rabbinic commentators struggled mightily to find some other way of interpreting the verses). This tragedy is the subject of G.F. Handel's oratorio and many other works of literature and art in the Western tradition.² What interested Locke, however, is something else, quite marginal in the overall history of the

¹ Andrew Rehfeld, "Jephthah, the Hebrew Bible, and John Locke's *Second Treatise of Government*," *Hebraic Political Studies* 3:1 (2008), pp. 60–93, which the author kindly shared with me in advance after he and I learned of our independent work on this striking omission from the literature.

² See Wilbur Sypher, *Jephthah and His Daughter: A Study in Comparative Literature* (Newark: Rutgers University Press, 1948); Mikael Sjöberg, *Wrestling with Textual Violence: The Jephthah Narrative in Antiquity and Modernity* (Sheffield: Sheffield Phoenix

reception of this decidedly minor figure: Jephthah's colloquy with the Ammonites before going to war.

Jephthah sends a query to the Ammonite king, according to Judges 11, asking why he is preparing to invade. The answer is that the Israelites took the land, "from Ammon even unto the Jabbok, and unto Jordan," and now the Ammonites want it back.³ Though the prior history is, as is usual in these cases, not entirely clear, Jephthah responds by pointing out that the Ammonites had been displaced by a former king, Sihon, who lost the land when he attacked the Israelites, who were trying to pass through at a later date.⁴ But Jephthah soon turns to a different argument. Whatever their specific catalysts, it fulfilled a divine purpose for the Israelites to win these campaigns: Yahweh gave the Israelites the land, and the Israelites took it—just as the Ammonites, Jephthah says, would keep with a clear conscience what their deity gave them.⁵ Anyway, Jephthah concludes, the Israelites have been there three hundred years; if the Ammonites wanted to make some claim to the land, why wait all this time to assert it? In the crucial verse, Jephthah concludes, "Wherefore I have not sinned against thee, but thou doest me wrong to war against me: the Lord the Judge be judge this day between the children of Israel and the children of Ammon."⁶

To this message, the Ammonites "hearkened not," whereupon Jephthah brings the battle to the enemy amidst "very great slaughter" and wins out; not long after, he leaves the stage of history.

It is noticeable, first of all, that Jephthah gives two seemingly different kinds of replies in his messages to the Ammonite king. The first one might justifiably call "secular." Apparently, Jephthah thinks that the Israelites won the land fair and square in an unsought and defensive war. No one can doubt that he thinks that warfare to reverse this possession—even in favor of the original inhabitants—is explicitly an unjust cause. Alternatively, a long passage of time has supervened on these now distant events. Jephthah might be suggesting that the Ammonite claims are simply a pretext for aggression. Otherwise, why make them now and not before? More creatively read, he could be invoking what Anglo-American

Press, 2006). For Handel in context, see Ruth Smith, *Handel's Oratorios and Eighteenth-Century Thought* (Cambridge: Cambridge University Press, 1995).

³ Judges 11:13.

⁴ Cf. Numbers 20–21, to which the Jephthah story is linked as a haftarah.

⁵ Technically, Jephthah refers to Chemosh, who was the Moabite deity, suggesting that at this point the Ammonites and Moabites were federated and that Jephthah was addressing both throughout, or else he was simply confused.

⁶ Judges 11:27.

law calls adverse possession: even supposing for the sake of argument that the conquest of Israel had been tainted (he does not appear to dispute that the Ammonites were dispossessed), time has settled the title in favor of the current occupants.

But then, in the end, Jephthah shifts. Israelite sovereignty is God's promise and plan. Jephthah has moved from the secular to the sacred. Still, the secular, argumentative colloquy is there; it prefaces the usual boast that God is on the Israelites' side. John Milton specifically claimed that Jephthah *by argument* defended his people. Or, as Amos Oz narrates this moment in his fictional rendition of Jephthah's life:

Calmly the judge of Israel waged a war of words with the king of Ammon by means of envoys who passed to and fro: to whom did the land really belong, whose forefathers had settled it first, what was written in all the chronicles, who was in the right and who had justice on his side.⁷

Whatever the place for normative deliberation, however, the biblical text also makes clear that in the end it is not easy to know who has justice on his side. The crux of interpreting the passage is determining what Jephthah means when he says, "the Lord the Judge be judge." The simplest interpretation is that God will decide the coming war: the battle will show what God wants, or which god wins. In the end, it is a matter not of rival arguments, but of rival powers—or rival deities. God will "judge" in the sense of making world history the world court, *Weltgeschichte* becoming *Weltgericht*. This episode could fit, at first glance, with the "Yahweh war" or divine war ideology of much of the Hebrew Bible's discussions of the topic.⁸ There is, however, a major glitch in this interpretation. If it is correct, why does Jephthah bother making the "secular" arguments at all? It seems as if there are some normative considerations worth mentioning—the war of words—independently of God's undoubted power to advance his inscrutable designs and unfathomable election of his preferred nation.

The invocation of God the judge here is not wholly unlike other passages, such as Genesis 16:5 and I Samuel 24:12, but it nowhere else involves "international relations." Indeed, a few biblical scholars have emphasized the uniqueness of this moment as a *divergence* from the Yahweh war

⁷ Amos Oz, "Upon this Evil Earth," in Oz, *Where the Jackals Howl and Other Stories*, trans. Nicholas de Lange and Philip Simpson (New York: Houghton Mifflin, 1981), p. 211.

⁸ See Gerhard von Rad, *Holy War in Ancient Israel*, trans. Marva J. Dawn (Grand Rapids, Mich.: W.B. Eerdmans, 1991); and Sa-Moon Kang, *Divine War in the Old Testament and in the Ancient Near East* (Berlin: Walter de Gruyter, 1989).

tradition. Susan Niditch, perhaps a little hyperbolically given how spare the text is, calls Jephthah's "concern with political ethics stunning... wars require just causes and to fight without just cause is to do evil."⁹ On closer inspection, then, Jephthah might mean that God will "judge" in the sense of actually assessing the legitimacy of the claims on each side—the Israelite claim of just possession of the land versus the Ammonite "right of return." It is even possible that Jephthah, unsure of where the arguments fall out in this case, appeals to God to determine who is right. The first half of the decisive verse ("Wherefore I have not sinned against thee") defiantly states his subjective confidence in the morality of his side, but the second half might acknowledge that there are two sides and that there are plausible arguments for each; and Jephthah is hardly the right person to decide between their objective merits.¹⁰ No one can be judge in his own cause; fortunately God is there to make the call. (Of course, the Ammonites also have their own god.)

If this last interpretation is correct—and I have developed it, of course, because I shall argue that it is Locke's interpretation—then this story illustrates that there are just and unjust wars in the Bible, not simply just and unjust methods of war.¹¹ But there is a twist. It would not be the case that the Jephthah story indicates an implicit doctrine not only of permitted but also of proscribed wars in biblical sources. For Jephthah—supposing for a moment that when he invokes God the judge, he is actually uncertain about the legitimacy of his cause—still proceeds forthwith to battle. But this interpretation would say that the distinction between permitted and forbidden wars cannot be the same as that

⁹ Susan Niditch, *War in the Hebrew Bible: A Study in the Ethics of Violence* (New York: Oxford University Press, 1993), p. 126. Similarly, Jacques Cazeaux marvels that "l'étonnant discours que Jephthé adresse au défi des Ammonites le fait passer sous nos yeux du statut de bandit à celui de théologien averti. Non seulement il récite l'Histoire sacrée des Israélites, mais lui, l'homme de main et de violence, flanqué de gredins, il ne retient de l'épopée que la volonté de douceur, de paix." Cazeaux, *Le refus de la guerre sainte: Josué, Juges et Ruth* (Paris: Cerf, 1998), p. 183.

¹⁰ One biblical scholar says the appeal to heaven is "not a prediction; not necessarily even said in absolute confidence of Israel's winning." Robert G. Boling, ed., *Judges* (The Anchor Bible) (Garden City, N.Y.: Doubleday, 1975), p. 204.

¹¹ While there are *jus in bello* norms in the Bible, Michael Walzer restates the traditional view that it lacks *jus ad bellum* norms; but like Grotius, Locke thought otherwise and reasoned that the Jephthah pericope proved it. See Walzer, "War and Peace in the Jewish Tradition," in Terry Nardin, ed., *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton: Princeton University Press, 1998). Aviezer Ravitzky disagrees in the same volume. Both pieces are reprinted in Walzer, ed., *Law, Politics, and Morality in Judaism* (Princeton: Princeton University Press, 2006). Compare Hersch Lauterpacht, "Some Biblical Problems of the Law of War," in his *International Law: Being the Collected Papers of Hersch Lauterpacht*, ed. Elihu Lauterpacht, vol. 5 (Cambridge: Cambridge University Press, 2004), pp. 715–727.

between just and unjust ones, *if the war has to be fought either way*. If it is possible for God to deem one's cause unjust, in other words, that does not mean one does not fight. According to this reading of the story of Jephthah, there is indeed a difference in the Hebrew Bible between just and unjust wars, but it is decided only by God, perhaps by means of the war itself (or visible in its results), perhaps in some other way. In sum, it may be that there are no forbidden wars in the Bible, not because there are no unjust wars, but because their injustice is not always possible to fully ascertain in advance of fighting them. If Jephthah introduces secular "political ethics" into the theory of warfare, it is not to displace sacred decision, and thus divine war, but ultimately to depend on it. Jephthah may exhibit the existence of secular argument, but not its independence.

The trouble with this "strange doctrine" (as Locke once called another part of his theory) is that it is not really the doctrine of just and unjust wars one may have wanted to find in the biblical sources. Locke, we will see, was surprisingly unfazed by it, and it is important to consider why. It is a crucial question at the heart of his social contract theory: he took the episode as the touchstone for reflecting on the morality of war, not really among states, but in their formation out of prepolitical conflict among individuals, as well as in their potential dissolution in violent insurrection. His point, apparently, is to vindicate the existence of norms even at those moments in human affairs when they seem to have least hold over conduct, with frequently catastrophic results.

3. APPEALING TO HEAVEN

In Locke's *Second Treatise*, Jephthah is discussed in detail at three critical points and referenced half a dozen times more—more than Abraham, Isaac, Jacob, Moses, Joshua, Saul, and David, not to mention Jesus (or any other New Testament character). Only Adam, the central figure in the biblically saturated *First Treatise*, is explicitly discussed as much as Jephthah in its sequel, and far less if implicit references are counted.¹² But this unusual prominence for a biblical cipher has yet to be given any real attention in Locke scholarship, even in the present golden age of acknowledgment of the religious origins and cast of his thought in general.

In his epoch-making 1960 edition of Locke's *Two Treatises*, Peter Laslett commented at two points in passing footnotes that Jephthah

¹² On Locke's knowledge of the Bible and uses of Adam and others in the *First Treatise*, see Kim Ian Parker, *The Biblical Politics of John Locke* (Waterloo, Ont.: Wilfrid Laurier University Press, 2004).

was “critical to Locke’s use of Scripture to sanction his political theory” and “crucial to the scriptural foundations of his case about civil society and justice.”¹³ That Locke plucked Jephthah from obscurity to make him the biblical exemplum of the *Second Treatise* seemingly would have then been set for attention. Inaugurating the age of taking Locke’s religiosity seriously, John Dunn insisted that “Locke continues to use [the Hebrew Bible’s] exemplary resources as the accredited vocabulary for discussing political issues.” And while he footnoted the Jephthah story as his first proof, he did not otherwise discuss it in his book.¹⁴ Further, in John Marshall’s study, the most imposing monument left (so far) by the Cambridge school on Locke, Jephthah doesn’t merit a mention, contextual matters submerging a point of apparent textual importance.¹⁵ Meanwhile, in his brilliant, recent *God, Locke, and Equality*, Jeremy Waldron—dissenting from the Cambridge school’s methods but certainly vindicating its intended stress on religion and Scripture—spends a chapter on why Locke referenced the Old Testament more than the New Testament in the *Two Treatises*. And yet Waldron is interested in Locke’s argument for basic equality rather than his social contract theory, and so references Jephthah only once in passing.¹⁶

For Locke, the story of Jephthah illustrated, most of all, that violence is justified when there is no other way to be true to one’s moral principles. This is not because one’s interpretation of morality will always be correct. Rather, it is because Jephthah shows that war is justified in circumstances of subjective conviction of the justice of one’s cause, because God will confirm or deny if this subjective belief is objectively correct. Jephthah’s symbolic importance in this regard immediately comes to the fore as part of Locke’s natural law teaching, where the state of nature devolves into the state of war—when he comes to the problem of where the “strange

¹³ John Locke, *Two Treatises of Government*, student ed., ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), notes to II, §§260 and 263. I will cite the *Second Treatise*, per convention, by section number. Kirstie McClure, noting this material and a few other historical invocations of Jephthah, has done the most to give this biblical figure’s importance for Locke its due, in several extended footnotes. See McClure, “Between the Castigation of Texts and the Excess of Words: Political Theory in the Margins of Tradition,” in Aryeh Botwinick and William E. Connolly, eds., *Democracy and Vision: Sheldon Wolin and the Vicissitudes of the Political* (Princeton: Princeton University Press, 2001), p. 229.

¹⁴ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the “Two Treatises of Government”* (Cambridge: Cambridge University Press, 1969), p. 99, cf. 180.

¹⁵ John Marshall, *John Locke: Resistance, Religion, and Responsibility* (Cambridge: Cambridge University Press, 1994).

¹⁶ Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* (Cambridge: Cambridge University Press, 2002), ch. 7.

doctrine” that individuals may execute the law of nature might lead. Of course, this executive power should not exclude peace, and in any case the fearful consequences of the strange doctrine have to be assessed in a fair comparison to a sometimes despotic state.¹⁷ But this power might lead, Locke forthrightly acknowledges, to a situation in which there are rival claims about which side in a conflict is just, which interpretation of the law of nature is correct.

The most important passage is as follows:

To avoid this State of War (wherein there is no appeal but to Heaven, and wherein every the least difference is apt to end, where there is no Authority to decide between the Contenders) is one great *reason of Mens putting themselves into Society*, and quitting the State of Nature: for where there is an Authority, a Power on Earth, from which relief can be had by *appeal*, there the continuance of the State of War is excluded, and the Controversie is decided by that Power. Had there been any such Court, any superior Jurisdiction on Earth, to determine the right between *Jephtha* and the *Ammonites*, they had never come to a State of War: but we see he was forced to appeal to *Heaven*. *The Lord the Judge* (says he) *be Judge this day between the Children of Israel and the children of Ammon*, *Judg.* 11. 27. and then Prosecuting, and relying on his *appeal*, he leads out his Army to Battle.¹⁸

This section obviously calls for a great deal of commentary. One place to begin is by noting that whatever the biblical passage was once about, its stakes have increased dramatically, as the norms of international society have suddenly become equivalent to prepolitical norms as such. And, as we shall see momentarily, they are always there as a source of appeal in cases where the state breaks down or one believes it has so fundamentally transgressed justice that war is necessary to right the situation.

In a masterful study, Richard Tuck has shown that in early modern natural law thinking a momentous analogy was forged between the contest of powerful sovereigns and the relations of individuals *in statu naturalis*.¹⁹ Locke hardly invented this by-then hoary analogy, based as it was on the post-Westphalian (and, as Tuck emphasizes, colonizing) state rather than the intertribal warfare of the biblical scene. Yet, unlike in the case of Thomas Hobbes’ *Leviathan*, the model of competing states on which the state of nature is explicitly based for both thinkers does not

¹⁷ Locke, *Second Treatise*, §13.

¹⁸ *Ibid.*, §21.

¹⁹ Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).

lead Locke to an assumption of no norms whatever. What the Jephthah story means in the first instance to Locke, then, is that if the international scene is to be the template against which the state of nature is drawn, then the Bible—at least this story in it—shows that the international scene is not a normless “anarchical society.” As for Niditch, for Locke the Jephthah story illustrates that there may be a political ethics that legitimates (or not) conflict.

Indeed, Locke may take this reading of the story very far. Before Locke, Hugo Grotius, who expressed no other interest in the Jephthah story, appealed to it to make the point that there are norms in warfare. In his chapter “Whether ’tis ever lawful to make war,” in *The Rights of War and Peace*, Grotius noted that “GOD himself prescribed to his People certain general and established rules for making War, *Deut.* xx. 10, 15. thereby plainly shewing, that War might sometimes be just, even without a special command.” This claim, of course, clearly resonates with Grotius’ more famous general interest in discovering valid norms that might hold independently of the still indubitable premise of God’s authority. But since in the Bible God “did not declare the just Reasons of making War,” Grotius continued, “he thereby supposes that they may be easily discovered by the Light of Nature. Such was the Cause of the War made by *Jephthah* against the *Ammonites*, in defense of their Borders, *Judges xi.*”²⁰ In other words, there was a tradition before Locke that holds Jephthah to illustrate that norms, not their absence, govern warfare.

But Locke takes this reading much further, introducing a powerful fallibilist note in Jephthah’s thinking. The light of nature is there, but it is not strong enough. The problem that Locke underlines—which is present in the biblical story of Jephthah only implicitly, if at all—is that the contending arguments for just and unjust cause under general norms constitute an *epistemic* problem as much as a *political* one. More accurately, it is *because* resolving the just cause in a dispute is an epistemic problem that it is a political one. For Locke, Jephthah wants to subsume his personal conduct under general norms, but the trouble is that it is very hard for him to know that he is properly doing so, especially when the other side claims to be doing the same thing. The war of words can seem irresolvable—and this very fact can undermine the certainty with which both sides began.

²⁰ Hugo Grotius, *The Rights of War and Peace*, 3 vols., ed. Richard Tuck (Indianapolis: Liberty Fund, 2003), book 1, ch. 2, §2, p. 186. On Grotius and the counterfactual assumption of God’s nonexistence or apathy, see, for example, James St. Leger, *The “Etiam si Daremus” of Hugo Grotius: A Study in the Origins of International Law* (Rome: Pontificium Atheneum Internationale, 1962).

Another way to put this point is to say that Locke anachronistically imputes to the story the modern sense of “judging” as an intellectual activity. This is so even while elsewhere in the text he cites the story of Jephthah for the proposition that in biblical times judging meant military-political leadership. “And thus in *Israel* it self,” Locke says,

the *chief Business of their Judges*... seems to have been *to be Captains in War*, and Leaders of their Armies; which... appears plainly in the Story of *Jephtha*.... And the People made him head and captain over them, *Judg.* 11.11. which was, as it seems, all one as to be *Judge*. And he judged *Israel*, *Judg.* 12. 7 that is, was their *Captain-General*.²¹

It is easy to detect in this passage—as is made wholly explicit in his one invocation of this story in the *First Treatise*—that Locke is attracted to Jephthah because he thinks his “election” is not patriarchalist but *popular*.²² This interpretation is perhaps Locke at his weakest, for while Jephthah’s eventual rulership is clearly an alternative to patriarchal succession, Locke has filtered out two glaring and incontestable facts: that Jephthah is chosen by the Israelite elders before the people ratify that choice, and that he becomes judge not when he is made military head but when he is victorious.²³ In any case, it suits Locke to register his awareness in these passages that the office of judge that Jephthah holds, and that gives its name to the book of the Bible in which his story figures, is a title of leadership and rule. But in his other deployments of Jephthah, and thus in his central uses, Locke cuts across this historical admission to present judging as a deliberative activity determining the validity of contending norms deployed in good faith. This is why, overall, Hobbes and Locke posed the problem of a lack of a common authority so differently: for Hobbes, it was the absence of general norms, whereas for Locke, it was the difficulty of knowing how they fall out when in contention. And Locke selected the story of Jephthah because he thought it

²¹ Locke, *Second Treatise*, §109.

²² In the *First Treatise*, §163, Locke cites the book of Judges for examples of rulers who are not chosen on the basis of fatherly lineages. Raising the potential counterargument that God has perhaps simply transferred fatherly authority to new people in those stories, Locke responds that this scenario “is manifestly not so in the Story of *Jephtha*, where he Articled with the People, and they made him Judge over them, as is plain, *Judg.* 11.”

²³ To put it differently, Locke’s interpretation that becoming military captain is “all one as to be *Judge*” is clearly mistaken, as it ignores the initial colloquy between Jephthah and the Israelite elders of Judges 11:4–11, where Jephthah specifically negotiates political leadership (thus, judgeship) contingent upon success in separate and prior military leadership. Rehfeld’s article explores many other divergences between parts of the Jephthah story in which Locke was not interested and Locke’s doctrines.

illustrated precisely the situation he thought could come to prevail in the state of nature.

Of course, the moralized nature of wars of words does not mean wars of death and destruction do not come to pass. Nevertheless, Jephthah's tale is useful to Locke for illustrating that these actual conflicts are moralized, too. The most obvious way in which they are moralized is noted by Waldron, who observes (citing *Second Treatise*, §21, and the Jephthah story) that for Locke

awareness of the existence of God also underpins people's ability to take seriously the idea of objective right answers to the moral questions to which their actions give rise. For example, think how important it is for Locke, in his theory of revolution, to be able to invoke the idea of an "appeal to Heaven," which is not at all the same as an appeal for divine intervention, but a kind of acknowledgment that a person embarking on a course of active resistance makes to show that he understands there really is an objective right and wrong of the matter, and that he is ready to take the consequences at God's hands if it turns out that he is disturbing the peace and order of the realm for no good reason.²⁴

That (unlike for Hobbes) there are norms and that the justice and injustice of the causes they underwrite is unclear does not mean the state of war does not come to pass. One way out in this "inconvenient" situation is to form a political society in the Hobbesian way of creating a common judge who will settle disputes. But for Locke, the Jephthah story illustrates that the warfare one might have to choose in the alternative to political compact is never without moral constraint. When there is no judge on earth, and no way of creating one, there is always one in heaven, watching over the battle. And that means there are just and unjust wars, even if sometimes only God can tell which is which. What if this trust in God was one of the conditions for Locke's bold insertion in social contract theory of consent as a condition of sovereignty, given the risks of bloody contention he knew it entails?

Insofar as Jephthah is the model for action when norms conflict, he appears in the *Second Treatise* more or less continuously. He is there, roughly, anytime there is no judge on earth to settle disputes, and Locke frequently uses variations of the idea of appealing to heaven, often apart from when (in fact, even before) Jephthah is cited by name.²⁵ Waldron errs slightly in forgetting what is at issue in the first invocation of the

²⁴ Waldron, *God, Locke, and Equality*, pp. 225–226.

²⁵ Locke, *Second Treatise*, §§19–20, 87, 91, 94, 168, and 242.

Jephthah story that he cites—the state of nature, or, more accurately, the state of war—but forgivably so, since Locke himself allows Jephthah's example to resonate throughout the treatise, eventually culminating in his discussion of the right of revolution from *within* political society. “*Who shall be Judge*,” Locke asks at the tail end of the text in the famous section, “whether the Prince or Legislative act contrary to their Trust?” To the best-known part of his answer (“To this I reply, *The People shall be the Judge*”) he adds:

But farther, this Question, (*Who shall be Judge?*) cannot mean, that there is no Judge at all. For where there is no Judicature on Earth, to decide Controversies amongst Men, *God* in Heaven is *Judge*.... [One can] appeal to the Supream Judge, as *Jephtha* did.²⁶

Just as in the prepolitical state of war, in intrapolitical contention, Jephthah's appeal to heaven is available, even necessary, when no other recourse is possible. Leo Strauss was correct to note, “Jephtha's statement, which refers to a controversy between two nations, is used by Locke as the *locus classicus* concerning controversies between the government and the people.”²⁷ Except that this transposition—as Tuck has shown, hoary by Locke's time—allows Jephthah's tale to be, much more broadly, the signature of fundamental conflict as such, prepolitical and intrapolitical.

4. SUBJECTIVE CONVICTION AND OBJECTIVE VALIDITY

But does the story of Jephthah really show that there are moral constraints on the initiation of warfare or simply that, as a later philosopher would put it, a good war hallows any cause? One of the more interesting features of Locke's account is that while he insists that warfare is initiated under moral norms, he also clearly insists that one's assessment of how the conflict of norms is to be decided—indeed, one's assessment of whether they are in violation at all—is an absolutely personal and subjective decision. This point must be emphasized, because it can easily—some have said, too easily—lead to doubts that Locke could have seriously intended his stress on the objectivity of norms.

In the central passage of §21, Locke clearly shows that the threat of decisional regress can make the validity of the “appeal to heaven” exclusive:

²⁶ *Ibid.*, §§240–241.

²⁷ Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), pp. 214–215.

and therefore in such Controversies, where the question is put, *who shall be Judge?* It cannot be meant, who shall decide the Controversie; every one knows what *Jephtha* here tells us, that the *Lord the Judge*, shall judge. Where there is no Judge on Earth, the *Appeal* lies to God in Heaven. That Question then cannot mean, who shall judge? whether another hath put himself in a State of War with me, and whether I may as *Jephtha* did, appeal to Heaven in it? Of that I myself can only be Judge in my own Conscience, as I will answer it at the great Day, to the Supream Judge of all Men.

One response to the lack of a judge in a substantive controversy is to ask for a judge to determine whether and when the controversy is irresolvable. Who wins the war of words is one thing; when it is legitimate to break it off and move to some other sort of resolution (for example, violence) is another. That latter question, Locke insists, is completely and equally up to each side to answer. Similarly, in a new version of the regress in the right of revolution section, not just resolving a conflict between a revolutionary and the existing government, but knowing exactly when it is legitimate to become a revolutionary in the first place (including presumably knowing when one's "People" have lost all confidence in their government), is in the end entirely one's own conscientious choice, checked only by heaven's validation: "[God] alone, 'tis true, is Judge of the Right. But *every Man* is *Judge* for himself, as in all other Cases, so in this, whether another hath put himself into a State of War with him, and whether he should appeal to heaven." The upshot is that asking, "Who shall judge?" at a moment of irreconcilable claims is in fact a *warrant for violent action*. This is so even if one wants to read the theoretical acquisition of the *Second Treatise* as the lodging of constituent authority in the people; for, as §242 makes clear, normative contention over whether the prince has betrayed his trust is likely to be another *casus belli*.²⁸

Leo Strauss founded a tradition of interpretation in which, in fact, this very point is the crux of the case for Locke's nihilism. Locke, Strauss noted in *Natural Right and History*, "quotes more than once Jephtha's saying, 'the Lord the Judge be Judge'.... The statement of Jephtha takes the place in Locke's doctrine of Paul's statement 'Let every soul be subject to the higher powers,' which he hardly, if ever, quotes."²⁹ On Strauss' reading,

²⁸ "But if the prince, or whoever they be in the administration, decline that way of determination [namely, by the people], the appeal then lies no where but to heaven; force between either persons, who have no known superior on earth, or which permits no appeal to a judge on earth, being properly a state of war." Cf. Julian H. Franklin, *John Locke and the Theory of Sovereignty* (Cambridge: Cambridge University Press, 1978).

²⁹ Strauss, *Natural Right and History*, pp. 214–215.

the way I have reconstructed Locke's appeal to the objectivity of norms is not just mistaken but the reverse of the truth. Strauss correctly saw Locke's use of biblical "international society" as a fundamental template for conflict. But he found in appeals to heaven a wily means of releasing human conduct from any external constraints.

Only the simpleminded, the Straussian would say, could conclude (as I have) that the essence of Jephthah's appeal to heaven is self-subjection to higher powers. "In the *Second Treatise*," Thomas Pangle writes,

heaven and the "appeal to heaven" is certainly a frequent theme. But it signifies not so much *God's* executive enforcement of the law of nature, in another life, as God's placing in *man's* hands, in this life, the responsibility and right of the executive enforcement power.... in a well-organized and properly educated civil society, the threat of popular armed resistance substitutes for threats of hellfire and promises of paradise as a check on civic injustice. *Vox populi, vox Dei.*³⁰

Another Straussian writer explains: "The appeal to heaven is not to have God's power in the decision of victory, because armies and not God win battles.... In other words, the appeal to heaven is a euphemism for rebellion."³¹ The point Strauss and his followers want to press is that far from placing himself—and politics—under biblical authority, Locke was in effect pioneering a full independence of human conduct from divine superintendence, since the practical effect of availability of the appeal to heaven is to war on-demand.

But like the overall Straussian interpretation of Locke, this specific reading of the function of the Jephthah story in Locke's political thought seems to be deeply implausible. The Straussian view quite simply misses both the careful analysis and the subjective certainty required in all appeals to heaven and—most important—Locke's subtle distinction between this subjective (and therefore possibly unwarranted) conviction and God's undoubted objective judgment of right and wrong. The first point is that if one wants to claim that the true meaning of Locke's category of "the appeal to heaven" is merely "license for war," then one should at least acknowledge the textual fact that Locke put strenuous

³⁰ Thomas Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988), p. 204.

³¹ Margaret Michelle Barnes Smith, "The Philosophy of Liberty: Locke's Machiavellian Teaching," in Paul A. Rahe, ed., *Machiavelli's Liberal Republican Legacy* (Cambridge: Cambridge University Press, 2006), p. 55. She alludes to Machiavelli's conclusion that "all the armed prophets conquered and the unarmed ones were ruined," suggesting that Locke shared the Machiavellian conclusion that God has no role in human (and military) affairs.

barriers before anyone who hoped to take advantage of this dreadful option. When mentioning Jephthah in a consideration of the right of conquest, Locke first responds to the objection that the possibility of appeals to heaven would cause “endless trouble” with the bravado reply that it would create “no more [trouble] than justice does.”³² But Locke does not only find that such appeals have to be treated as last resort.³³ He also clarifies that “he that appeals to heaven must be sure he has right on his side... as he will answer at a tribunal that cannot be deceived, and will be sure to retribute to every one according to the mischiefs he hath created to his fellow subjects; that is, any part of mankind.”³⁴ Locke thus insists that anyone appealing to heaven must really believe he is in the right, because the grief suffered by “any part of mankind” due to one’s premature or mistaken choice of the extreme solution is to be counted against him. There seems little reason for him to have entered these warnings, especially about the scope of harm that will be considered in cases of error, unless he sincerely believed that appeals to heaven were a terrible business foreclosed except in circumstances that justice required them.

The second and more important point is that Locke fundamentally distinguished between the subjective certainty required for appeals to heaven and the objective validity that he thought in those cases, as in Jephthah’s straits, God alone could provide. Locke never mentions the biblical narrator’s convinced statements—from the very verse whose end features the appeal to heaven—that Jephthah himself had “not sinned,” and that his enemy was clearly in the wrong.³⁵ One might want to interpret this omission as making his emphasis on epistemic uncertainty seem less inconsistent with the biblical text: the biblical narrator stresses not Jephthah’s uncertainty but his conviction. Yet the logic of Locke’s argument should lead him to see no problem on this score. He clearly does not want to confuse subjective warrant for belief in the justice of one’s cause—on which he strenuously insists—with its objective validity as

³² Locke, *Second Treatise*, §176. It has been suggested that this material, together with that on property, was written separately from the rest of the work, but it is then interesting that Jephthah retained his prominence in different stages of drafting (though not in Locke’s other works) and is invoked in a similar spirit. See J.R. Milton, “Dating Locke’s *Second Treatise on Government*,” *History of Political Thought* 16 (1995), pp. 356–390.

³³ Locke, *Second Treatise*, §20, where in the first discussion of the appeal to heaven it is explicitly described as available only when there is no common judge and it is therefore “the only remedy in such cases.”

³⁴ *Ibid.*, §176. Locke also says there one must be sure that invoking one’s right of appeal “is worth the trouble and cost,” but this deliberation can be reached only on condition that one is subjectively convinced that it is legitimate.

³⁵ Judges 11:27.

determined by a neutral judge. The idea that norms of conduct are “easily discovered by the Light of Nature,” as Grotius had put it, is deemed by Strauss and his followers to be contradicted by the idea that there sometimes have to be wars over their interpretation. But this inference ignores that Locke seems fervently to have wanted to hold onto both points: that there are norms governing human conduct, and that it is not always clear where they point (especially when invoked against each other). As Kiyoshi Shimokawa has insightfully argued, “Locke’s account involves two distinct judgments”:

First, every man judges in his own conscience whether another party has put himself in a state of war with him, and whether he may use force to settle the dispute. At this level, there is no common judge, and every man acts as judge in the inner court of his conscience. The judgment made is bound to be subjective, however conscientiously it may be made. Second, God alone is the supreme judge who can objectively or impartially judge whether every man’s judgment and his consequent actions are right.³⁶

There is nothing conceptually inconsistent about combining an emphasis on subjective conviction with one on objective uncertainty.³⁷

5. CONCLUDING THOUGHTS

The implausibility of just this distinction of epistemic capacities between God and man certainly makes Locke’s approach to just and unjust wars unviable in the present day. But his doctrine is interesting because there is a sense in which he was at the middle point between the Bible and the

³⁶ Kiyoshi Shimokawa, “Locke’s Concept of Justice,” in Peter R. Anstey, ed., *The Philosophy of John Locke: New Perspectives* (New York: Routledge, 2003), p. 77.

³⁷ The Straussian reading is more easily available, because Locke’s Protestantism led him to individualize judgment and postpone it till after death. Instead of the immediate confirmation that the Bible seems to provide, the Lockean Jephthah awaits later and personal adjudication. Though I cannot explore this here, the final Jephthah reference in the text makes clear that Locke also may have been driven to this conclusion by his belief that the just do not always win the battle, which may lead them to legitimately prepare another try. “Perhaps Justice is denied,” he says in *Second Treatise*, §176. “If God has taken away all means of seeking remedy, there is nothing left but patience. But my Son, when able, may seek the Relief of the Law, which I am denied: He or his Son may renew his *Appeal*, till he recover his Right. But the Conquered, or his Children, have no Court, no Arbitrator on Earth to appeal to. Then they may *appeal*, as *Jephtha* did, to *Heaven*, and repeat their *Appeal*, till they have recovered the native Right of their Ancestors.... If it be objected, this would cause endless trouble; I answer, No more than Justice does, where she lies open to all that appeal to her.” Among other problems raised by Locke’s postponement of the appeal’s resolution—for the sake of a people more like the Ammonites than their enemies!—is that the possibility of repetition it affords suggests divine judgment may not be so authoritative after all.

present day. He was no longer able to stress that God judges in the strong sense of determining events not just in heaven but on earth, and so he felt the need to effect a transfer to human judgment: his fidelity to the biblical tradition of trust in God survives only in the rare situation when humanity absolutely fails to resolve differences. Appeals to heaven are only for fearful moments when there are no other choices, and the state is supposed to help avoid only the most irresolvable impasses. The spirit of the Lord still comes to Jephthah in Judges 11:29, so the rabbis invoke him to illustrate that the most humble can be raised up to serve divine purposes (“Jephthah in his generation is like Samuel in his generation”). For Locke, by contrast, human equality is founded precisely on God’s now seemingly permanent absence, with Jephthah providing guidance only when usually workable human institutions are unavailing.³⁸ Yet, while the sacred is displaced by the secular to an astonishing degree in Locke’s account, the appeal to heaven remains in cases of last resort.

We are no longer able to share Locke’s faith in divine judgment over our moral acts, to the point that—with Strauss—it is tempting to attribute to Locke the cynical perspective that his invocations of God simply cloak a secret but resolute anthropocentrism and immoralism. Strauss’ view, in other words, is unwittingly revealing of an important truth. The irony is that Strauss—who chose biblical epigraphs for *Natural Right and History* and sometimes suggested he was defending a biblical, and not just classical, alternative to destitute modernity—could simply not believe that Locke believed. He was wrong, but we share the assumptions that allowed for his mistake.

The premise the Bible and John Locke shared, that secular moral reasoning and sacred moral judgment cannot be separated in the end, is no longer available. We still seek grounds for knowing when our wars are just or unjust, but, for better or worse, we may no longer permit ourselves to trust that there is some nonhuman judge to check our best guess or adamant conviction about when to fight. We have to make do with the secular alone in crafting doctrines of war and peace, and we should not pretend otherwise; and the memory of God’s rule that still persisted in Locke must now give way to his argument that if there is a need for a common judge to settle our disputes, internally or internationally, we must find a way to provide it ourselves. But perhaps that memory made the argument possible at

³⁸ “Unless,” as Locke famously says, “the Lord and Master of them all should, by any manifest Declaration of his Will, set one above another, and confer on him, by an evident and clear appointment, an undoubted Right to Dominion and Sovereignty”—but this does not happen anymore (*Treatise*, §4). For the rabbinic dictum, see *Babylonian Talmud*, Rosh Hashana 25b.

all—as a kind of parting gift, and fading guarantee, that Locke still needed in order to claim the risky autonomy of human self-government.

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