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Retribution and Restitution in Locke's Theory of Punishment

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Locke's theory of punishment initially appears to be a confused combination of retributive considerations that base punishment on desert and forward-looking considerations that base punishment on future benefits. A more coherent theory emerges, however, if his argument is set in its historical context and compared with that of Grotius, Hobbes, and Pufendorf. Locke rejected retributivism in all but its weakest version and grounded punishment in two distinct rationales, protection of society and restitution for victims. In doing so, Locke's theory challenges the dichotomy between forward-looking and backward-looking rationales and contemporary conceptions of the domain of "punishment."

John Locke defined political power as “a *Right* of making Laws with Penalties of Death, and consequently all less Penalties” to protect the property of the community, defend it from foreign attack, and promote the public good (*TT*, 2.3).¹ The power to punish is thus at the very center of Locke's understanding of political power. As will be seen below, discussions of punishment permeate almost all of Locke's major writings as well as numerous minor works and unpublished manuscripts. Nonetheless, Locke's theory of punishment remains understudied compared to other aspects of his thought such as property or toleration. When Locke's theory of punishment is discussed, the main topics are normally Locke's claim that any individual may punish violations of natural rights in the state of nature and his account of how the right to punish is transferred from individuals to the government. This article instead examines the question of what types of actions for Locke count as punishment and what rationales should govern the implementation of punishment.

For several decades, philosophers who debate punishment theory have often divided rationales for punishment into those that are forward-looking

or backward-looking (Ellis 1995; Goldman 1982; Honderich 2006; McDermott 2001; Thompson 1966). Forward-looking rationales justify punishment by showing that there will be likely future benefits (normally for the society) and thus often seek to punish in a way and to the degree that most benefits society in the future. Typical forward-looking reasons for punishment are protecting society from a dangerous person, deterring future crimes, reducing recidivism, rehabilitating the criminal, and helping the economy by engaging the convict in productive labor. Backward-looking reasons, on the other hand, mete out punishment by looking at something in the past. Retributive rationales, for example, try to proportion the punishment to the wickedness of the crime. Rationales of restitution look at some previous state of affairs that existed between the criminal and victim and seek to restore that state to the extent possible by means of punishment. Any given theory of punishment must decide which of these rationales to recognize and how much weight to give them since they often suggest different punishments.

These debates are more than theoretical. Some empirical evidence links public endorsement of

¹References to the Locke's primary works will be given as follows: *ECHU* = *Essay Concerning Human Understanding* (Locke 1979) by book, chapter, and section number; *L* = *Letter Concerning Toleration* (Locke 1983) by page number; *PE* = *Political Essays* (Locke 1997) by page number; *R* = *The Reasonableness of Christianity* (Locke 1965) by paragraph number; *STCE* = *Some Thoughts Concerning Education* (Locke 1996) by section number; *TT* = *Two Treatises of Government* (Locke 1988) cited by treatise and section number; *W* = *Works* (Locke 1963) by volume and page number. References to Grotius (2005) and Pufendorf (1934, 1991) will be by book, chapter, and section number. Original formatting and punctuation in primary texts are retained unless otherwise noted, but spellings have been modernized.

retributive punishment to support for more severe punishments (Darley, Carlsmith, and Robinson 2000; Warr, Meier, and Erickson 1983). The question is also of significant interest internationally. The governing document of the International Criminal Court (ICC) espouses deterrence in its preamble while including language that suggests both retributivism and restitution in its main text (Rome Statute of the ICC 1998, Preamble and Articles 75 and 79). To the extent that the ICC is guided by early war crimes trials, such as Nuremberg, it is likely to justify punishment using retributive rationales. More recent predecessors such as the International Criminal Tribunals for Yugoslavia and Rwanda often try to combine retributive and deterrence rationales without giving a coherent account of how these are to be reconciled when they conflict (Henham 2003, 85–89). New governments trying to grapple with human rights violations by the previous regime must also grapple with trade-offs between retributive punishment of offenders and forward-looking considerations aimed at furthering the public good (Allen 1999) and will thus have to make assessments about the importance of competing rationales for punishment.

Locke's views on punishment are particularly important to understand at a time when the language of "victims' rights" is often used to justify harsh retributive punishments while little is done to actually provide restitution for the victims of crime (Dubber 2002). If Locke's views are set in their historical and intellectual context, we see that Locke rejected retributivism in both its moderate and strong forms. In its place, Locke identifies two distinct grounds for punishment: the protection of society (including deterrence) and restitution (or "reparation" as Locke sometimes says). Restitution can be thought of either as a rationale for punishment or as a policy of punishment justified by other rationales. Locke's account of restitution shows that Locke saw restitution as a distinct rationale that affirmed both the value of the victim being compensated and the offender making payments. The significance of this account is both historical and contemporary. Historically, it improves our understanding of Locke by connecting his theory of punishment more closely with his view that governments exist to uphold the rights of individual citizens and presenting a more coherent, less contradictory theory of punishment. Locke's theory of punishment also contributes to contemporary debates in two ways. First, Locke's conceptual categories challenge current conceptualizations of the domain of punishment. Contemporary approaches

often (though inconsistently) conceptualize the question of compensation as distinct from the question of punishment. Locke does distinguish the compensation of victims from the protection of society, but he sees both of these as part of punishment. Second, Locke's account of restitution renders problematic the distinction between forward and backward looking reasons for punishment and suggests that we should move beyond that distinction. Restitution as a distinct Lockean rationale for punishment is not adequately described as either forward-looking or backward-looking, but rather as a rationale that allocates future benefits on the basis of historically grounded claims.

Punishment in Seventeenth-Century Theory and Practice

Locke's theory of punishment is easily misunderstood if it is not placed in its historical and intellectual context. Locke's occasional use of words that to a modern reader signal the presence of a retributive theory actually show commonalities between him and earlier seventeenth-century thinkers who occasionally used such language while clearly rejecting retributive theories. While Locke's most important seventeenth-century predecessors disagreed on many aspects of punishment, there is surprising agreement on the claim that punishment should only be inflicted if it will bring about some good in the future, most notably deterring other potential criminals, restraining the criminal himself,² or even helping (reforming) the criminal. Both Hugo Grotius and Thomas Hobbes rejected retributive rationales for punishments. Samuel Pufendorf did as well, but also added an important nuance in that he continued to use the word "retribute" in a positive way even though he had rejected retributive theories. This is important because there is significant evidence that Locke was influenced by Pufendorf as he was writing the *Two Treatises* (Marshall 1994, 145).³ In fact, there is evidence that he was reading Pufendorf at the same time he was composing it.

²Masculine pronouns are used so as not to prejudge how seventeenth-century writers would have applied their theories to women.

³On Pufendorf's influence, see also Seidler (1990, 9). For Locke's praise of Pufendorf see *STCE*, 186. They disagreed about whether there could be punishment in the state of nature (Pufendorf 1934, 8.3.7).

Hugo Grotius argued in his unpublished *Commentary on the Law of Prize* [*De Jure Praedae*] that the goals of public punishment are chastisement, which aims at correcting the offender to render him “more useful to humanity,” exemplary punishment, which seeks to deter future crime, and security (2006, 30–32). It is a fault, he claimed, to punish “when neither the good of the person nor the common good is kept in view” (2006, 63). In his more well-known work, *The Rights of War and Peace* [*Ius ad Belli ac Pacis*], he stated that “one Man cannot justly be punished by another, for Punishment’s Sake” (2005, 20.5.4). Rather, there must be some future benefit that the punishment will achieve for the offender, the victim, or society (2005, 20.6.2–20.9.6).

Hobbes also took a forward-looking view of punishment. In *The Elements of Law* (1994, 91), *On the Citizen* [*De Cive*] (1998, 49), and *Leviathan* (1991, 106), he argued that punishment should be inflicted based on the future good to be achieved rather than past wrongs. There is no sense that a given amount of punishment must be inflicted based on the severity of the crime. He said in *Leviathan*, “*That in Revenges*, (that is, retribution of Evil for Evil,) *Men look not at the greatness of the evil past, but the greatness of the good to follow*. Whereby we are forbidden to inflict punishment with any other design, than for correction of the offender, or direction of others” (1991, 106). In a later passage Hobbes wrote: “seeing the end of punishing is not revenge, and discharge of choler; but correction, either of the offender or others by his example,” therefore the severest punishments should be directed at those crimes that are most dangerous to the public (1991, 240). What Hobbes is doing in these passages is identifying “revenge” and “retribution” with a passion, the desire to hurt those who have hurt us. He acknowledges the reality of that passion, but encourages people to restrict its application so that it does not guide punishment.

Pufendorf wrote that “the purpose of punishment is either the good of the criminal, or the interest of the person for whom it would have been better if the crime had not been committed and who thus has been injured by the crime, or everyone’s interest without distinction” (1991, 2.13.7). In his more detailed treatment he defines punishment as “an evil of suffering that is inflicted in proportion to an evil of action, or as some troublesome evil which is imposed upon a man by way of coercion, and by the authority of the state, in view of some antecedent crime.” (1931, 8.3.4). While this definition (“in proportion”) at first glance implies a retributive view of punishment, Pufendorf claimed later that:

the fact that the more guilty are punished more severely, and the less guilty less severely, comes about only by consequence and by accident, not because that was intended primarily and for its own sake. For in imposing a penalty for a crime, that crime need not necessarily be compared with another, nor the punishment meted out in both cases be proportioned in accordance with the respective gravity of the offences, but to each crime, separately, as it were, from all others, there is accorded a punishment, more or less severe, as it appears more to the advantage of the state, although it usually happens that the punishment in question is proportioned to the seriousness of the crime. (1934, 8.3.5)

Here we see a crucial step in the redefining of retribution. In general worse crimes will get harsher penalties, but this is only “accidental” since the punishments are set with the public good as the goal, not retribution.

Pufendorf, therefore, determined the amount of punishment based on the future good it will produce (1991, 2.13.6–7). In this he followed Grotius and Hobbes. What Pufendorf added was a conscious decision to take retributive-sounding phrases, like deserved punishment, and use them in a nonretributive way. One might, for example, think Pufendorf was being inconsistent when he wrote “Nor is it in fact always unjust to return a greater evil for a less [in war], for the objection made by some that retribution should be rendered in proportion to the injury, is true only of civil tribunals, where punishments are meted out by superiors” (1934, 8.6.7). In this passage Pufendorf seems to endorse the idea that civil punishments should be based on proportionate retribution while denying that punishments in war follow the same pattern. This is precisely the sort of statement Locke occasionally makes.

In fact, Pufendorf explains that retributive-sounding language need not be taken in a retributive way. When he takes up the idea of pardons, he considers claims by Seneca and other stoics that pardons are unjust if they give the offender a lighter sentence than what his deeds deserve. This forces him to deal with the issue of desert directly. Pufendorf responds:

But there lurks a mistake in the word “deserved” [*debita*]. For if you understand that punishment is “deserved” by him who has sinned, that is, that he can be punished without injury, or without just cause for complaints, it will not follow that, if a man does not inflict punishment, he does what he should not do. For . . . it is not correct to say that a transgressor is owed [*deberi*] punishment, as though there was within him some right which must be satisfied by punishment . . . But if we take the word “deserved” in the sense that a wise man is under some obligation to require punishment,

we must say, first, that no man is under an obligation in the matter before us, unless the guardianship of the laws has been publicly or privately entrusted to his keeping. And, secondly, that the obligation lying upon sovereigns concerns not transgressors but the whole state or social group whose safety they should provide for also by means of this method of coercing wicked men by means of punishments. (1934, 8.3.15)

Here Pufendorf shows an alternate way of understanding words such as *deberi*: “to deserve” or “to be owed” in contexts of punishments. Normally we think of “owed” as a backward-looking concept, where some action in the past means that someone now ought to receive something. In this context, the punishment that is owed is the one the magistrate owes to society as a whole in order to protect society. Thus Pufendorf and those who follow his reasoning may use words that sound retributive while having an entirely different meaning in mind.

Pufendorf was willing to follow this line of reasoning to its logical conclusion. He thought it important that laws be clear and maximum punishments specified in advance, but did not think it terribly important that more evil crimes receive stronger punishments explicitly denying the claim that similarly evil acts must receive similar punishments (1934, 8.3.23). No one reading Pufendorf would have thought him a retributivist because of his occasional references to deserved punishment or punishment proportionate to the injury; Pufendorf is too emphatic in explaining what he means by “deserved” for that to happen. Yet it is still of interest that Pufendorf did not say that we should quit using the word “deserved” in discussions of punishment. Instead, Pufendorf signaled that he would use the word *deserved* to describe the punishment which is fitting for advancing the legitimate interests of the state.

There are several reasons why Locke's predecessors favored this approach to punishment, all of which apply to Locke as well and thus provide reasons for thinking that Locke held the same position. In the seventeenth century, some groups argued that the penal laws should mirror the Old Testament penal code (Cohen 1988; Shapiro 1975; Zaller 1987). Grotius, Hobbes, and Pufendorf would have preferred an approach to punishment that gives the sovereign more flexibility. By rejecting retributive rationales, they imply that harsh laws cannot be justified by showing that they were inflicted in the Old Testament if they will not benefit the public under present conditions. Additionally, by framing the power to punish as a power to be used for the public good, this approach helps to legitimate cen-

tralization of the power to punish under the authority of the sovereign.

They also had concerns about whether it makes sense for human beings to try to imitate the retributive justice of God, though for different reasons. Pufendorf wrote “It is beyond our grasp to understand what rules the vindictive justice of God observes” (2.3.5). Hobbes went even further in claiming that our knowledge of God is limited (1991, 23, 271). Grotius (1889) developed a theory of the atonement under which God punished Jesus not because the demands of retributive justice required it but instead because it would discourage future sin by setting an example, sometimes called the governmental theory of the atonement. Locke, as will be seen below, also developed a nonretributive theory of divine punishment.

Perhaps the most interesting reason they adopted this position has to do with the logical structure of the natural law arguments that figure prominently in their work. All of them understand the laws of nature to be laws that direct human beings to the attainment of some future good such as the preservation of life or the maintenance of sociable relations between human beings. Hobbes' laws of nature are precepts that advise a person about how to preserve his life in the future (1991, 91). Grotius speaks of natural law as showing what is fitting for a “reasonable and social nature” (Grotius 2005, 1.1.12), and Pufendorf treats laws of nature as principles directing human beings in how to live sociably with one another (1934 8.3.5, 10, 20). Locke similarly stated that the fundamental law of nature is “the preservation of mankind” (*TT*, 2.16). Since the law of nature casts its shadow over the particular decisions about punishment and since the law of nature in these theories is oriented around future goals, it is not surprising that the general trend of these theories is away from retributive punishment.

Locke's Rejection of Strong and Moderate Retributivism

The most thorough previous treatment of Locke's theory of punishment argues that while it is possible that Locke's views on punishment are purely forward-looking, it is more likely that his thought is simply overdetermined, combining language that is clearly backward-looking and retributive with forward-looking goals such as deterrence and protection of society (Simmons 1992, 128). In fact, Locke's

theory of punishment is only retributive in the weakest sense of the term, and Locke was part of a tradition in the seventeenth century that used language that sounds retributive to contemporary readers in a nonretributive way. The backward-looking aspect of Locke's theory does not come from a retributive rationale, but rather a reparative one.

Simmons has argued that Locke's thought, in general, is overdetermined in that Locke presents both Kantian and rule-consequentialist justifications for his main principles. Simmons argues that precisely this phenomenon is at work in passages like the following where Locke wrote:

And thus in the State of Nature, *one Man comes by a Power over another*; but yet no Absolute or Arbitrary Power, to use a Criminal when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own Will, but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for *Reparation and Restraint*. For these two are the only reasons, why one Man may lawfully do harm to another, which is that [which] we call *punishment*. (TT, 2.8)

Locke here combines talk both about retribution proportionate to transgression and punishment based on future protection of society and restitution.

Similar examples can be drawn from elsewhere in the *Second Treatise*. Locke wrote a few paragraphs later that "Each Transgression may be *punished* to that *degree*, and with so much *Severity* as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrify others from doing the like" (TT, 2.12). This passage supports the forward-looking reading of Locke's theory (even bringing the offender to the point of "repenting" is a future goal), but Simmons cites two other places where Locke uses retributive language. Locke speaks of an act that "deserves Death" (TT, 2.23) and says that a man in the state of nature has a power "to judge of, and punish the breaches of that Law in others, as he is persuaded the Offence deserves, even with Death itself, in Crimes where the heinousness of the Fact, in his Opinion, requires it" (TT, 2.87).⁴ To these passages cited by Simmons could be added others in Locke's various writings where he uses the word "retribute." The English translation of Locke's *Letter*

⁴Even these passages about capital punishment are not as clear as they may seem, since in other contexts Locke describes people who act contrary to natural law as people who give up the rights of human beings and consent to be treated as dangerous wild animals. While Locke may think they "deserve" this demotion in status, it is unlikely that the amount of force to be used against an animal would be a matter of desert.

Concerning Toleration in Locke's day, by William Popple, says that when there is a conflict between the magistrate and the people, "God, I say, is the only Judge in this case, who will retribute [*rependit*] unto everyone at the last day according to his Deserts; that is, according to his sincerity and uprightness in endeavoring to promote Piety, and the public Weal and Peace of Mankind" (L, 49).⁵ This quotation is typical as Locke often says God will reward and punish people as their deeds deserve (R, 6). Simmons thus has significant textual grounds for saying that Locke is combining both kinds of arguments.⁶

To say that Locke was not a "retributivist" risks anachronism because contemporary usage of the word may carry connotations that Locke's use of the term "retribute" did not. This article will deal with this issue by getting behind the label to identify several substantively different positions that might be classified as "retributive"⁷ and then asking whether Locke did or did not affirm them. The term "retributive" is now generally used of backward-looking theories that inflict punishment based on desert, but there are several versions of retributivism. The weak version of retributivism, made famous by Hart (1968), claims only that guilt is a necessary condition for inflicting punishment on someone, not that notions of desert should determine how much punishment a person receives. It is an alternative to utilitarian theories where an innocent person could be punished if doing so would produce enough utility. The moderate version of retributivism would claim that notions of desert are an important aspect of the criminal sentencing process, but not the only part. While notions of desert might provide a starting point for determining the proper punishment, other considerations could legitimately increase or decrease the punishment. The strong version of retributivism would claim that we have a duty to punish people proportionately to the seriousness of the moral wrong they have committed irrespective of other considerations. Kant has often been read this way, though not all Kant commentators agree with that interpretation and

⁵I utilize Locke 1968 edited by Klibansky and Gough for the Latin text.

⁶Simmons cites Farrell (1988) as an example of someone whose view of Lockean punishment is consequentialist, though it should be noted that Farrell makes this point only in passing in an article about the permissibility of punishment apart from the state. See also Lamprecht (1962, 161–63). For a discussion applied to the international context see Lang (2008).

⁷There is a vast literature in contemporary philosophy on retribution and punishment. See, for example, Cottingham (1979), Dolinko (1991), Honderich (2006), Morris (1968), Murphy (1992), and Walker (1991).

those who utilize Kantian approaches today are found in both the moderate and strong camps.⁸

The weakest sense of "retributivist" is one that forbids punishment on grounds of usefulness alone. There are texts which call into doubt whether Locke was a retributivist even in this weak sense. Locke takes up the issue of just punishment in the *Essay Concerning Human Understanding* when he considers the relationship between punishment and personal identity. "Person" is for Locke a "forensic" term indicating that one can be held responsible for one's choices (*ECHU*, 2.27.26). In one of his most famous examples, he wrote:

to punish *Socrates* waking, for what sleeping *Socrates* thought, and waking *Socrates* was never conscious of, would be no more of Right, than to punish one Twin for what his Brother-Twin did, whereof he knew nothing, because their outsides were so like, that they could not be distinguished; for such Twins have been seen. (*ECHU*, 2.27.19)

The clear upshot of this argument is that, in principle, it is wrong to punish a person for actions that he cannot reasonably regard himself as having voluntarily chosen. If in one physical body there are effectively two different centers of consciousness with no ability to regard the other's choices as one's own, then one cannot be punished for what the other has chosen.

If Locke were a weak retributivist, one might assume that he would never allow the punishment of people who have no conscious memory of their crimes, such as sleepwalkers. Locke took up this very issue, but instead claimed that a drunk person who has no memory of his crime or a person sleepwalking in a similar predicament are still justly punishable by human legal systems. "Human Laws punish both with a Justice suitable to their way of Knowledge: Because in these cases, they cannot distinguish certainly what is real, what counterfeit; and so the ignorance in Drunkenness or Sleep is not admitted as a plea" (*ECHU*, 2.27.22). There is no way for human courts to know for sure if such a claim is truthful and thus, although it is a valid excuse, it is not allowed. The implicit reason seems to be consequentialist. While there would be some injustice to the bona fide sleepwalker who is punished, allowing such excuses would encourage people to commit crimes in hopes of using such an excuse to evade punishment. This illustration could, therefore, be used to show that Locke permits punishment of innocent people on consequentialist grounds.

⁸Compare for example Corlett (2001, 78) with Moore (1989, 104) for moderate and strong Kantian arguments, respectively.

Despite this counterexample, there are good reasons to think that Locke did in fact limit punishment to those who are guilty. When Locke gave fuller expressions of his theory of punishment in his later writings on religious toleration, he consistently argued that it was wrong to punish someone who had not, in fact, done anything wrong. In the *Second Letter on Toleration*, he wrote that it is unlawful "to punish a man without a fault" and it is not made lawful because some good effect should accidentally arise from the punishment (*W*, 6: 69). This is a clear repudiation of the notion that actual guilt is irrelevant.

Locke made use of a similar line of argument in response to his opponent, Jonas Proast, who claimed that dissenters from the state church should be punished to force them to duly consider the arguments on behalf of the state religion. Locke's response was that such a law would be unjust because there was no way to observe whether a person had diligently considered something. In practice dissenters would simply be punished for dissenting. Locke wrote that "to punish men for that, which it is visible cannot be known whether they have performed or no, is so palpable an injustice, that it is likelier to give them an aversion to the persons and religion that uses it than to bring them to it" (*W*, 6: 78). In context, Locke is describing several negative consequences of persecution and so it is possible that Locke is affirming a higher order rule about not punishing people who cannot be known to have committed the crime in question based on the consequences of such a rule. The puzzle is that Locke here says we cannot know whether they have failed to consider adequately, so punishment is illegitimate, yet in the *ECHU* he argued that although we cannot know if the sleepwalker was really sleepwalking, we can punish him anyway because the common good requires it.

The best resolution to this puzzle lies in noting the difference in the burden of proof in each case. In the case of the drunk or the sleepwalker, some action has been performed that has injured another person. The person offers an excuse to avoid punishment, but the excuse cannot be confirmed (Lamprecht 1962, 163). Locke wrote in the case of the sleepwalker: "the Fact is proved against him, but want of consciousness cannot be proved for him" (*ECHU*, 2.27.22). In the case of the religious dissenter it is whether the law has even been broken that cannot be determined, and thus Locke thinks prosecution unjust. Locke is thus willing to punish in cases where innocence cannot be ruled out, but not in cases where it is impossible to verify the crime itself. The consequences of the two

principles would be different and so Locke might justify the distinction on those grounds. The weak retributivist objects to cases in which one *knowingly* punishes an innocent person. In the case of the sleepwalker, one cannot know that the person one punishes is innocent. The state can regulate observable actions in a way it cannot regulate unobservable mental states. If one could do so reliably, Locke presumably would have no objection to admitting it as a defense. In the case of the sleepwalker, the state asserts jurisdiction over an action that has harmed others, whereas in the toleration case the state is trying to claim jurisdiction over a belief that Locke believes has not been shown to harm others.⁹

The weak version of retributivism that Locke adopted merely stated that people must have committed some wrong act before they can be punished. Normally, when debates are about whether retributivism should guide criminal sentencing, this is not the version of retribution that is meant. What is of more importance, therefore, is to discern whether Locke's theory uses retributive considerations as substantive factors in determining how much punishment, or what type of punishment, a person should receive.

It is a relatively easy matter to show that Locke was not a strong retributivist. A strong retributivist would insist that only retributive considerations be used when deciding punishments. The earlier passages where Locke appeared to combine retributive and forward-looking elements are enough to show that those forward-looking elements have some place in his theory. Locke wrote in the *Second Treatise* that the magistrate "can often, where the public good demands not the execution of the Law, *remit* the punishment of Criminal Offences by his own Authority" (*TT*, 2.11). The power to impose a lesser penalty based on considerations of the public good is precisely the power strong retributivism denies. This same logic is also used in Locke's defense of prerogative (*TT*, 2.159). Moving from theory to practice, Locke indicated support for an "Act of Oblivion" (*PE*, 308–09; Stacey 2004, 70) to heal the animosities after the Glorious Revolution.

Most contemporary advocates of retributivism are not strong retributivists, so the more interesting question is whether Locke is a moderate retributivist, that is, someone who uses notions of desert as the normal starting point (though not the sole determin-

ing factor) for determining the proper amount of punishment. Here it is appropriate to turn to Locke's most formal definition of punishment. As noted above, Locke dealt with the question of punishment in his writings on religious toleration. In the *Second Letter Concerning Toleration*, Locke wrote:

Now all punishment is some evil, some inconvenience, some suffering; by taking away or abridging some good thing, which he who is punished has otherwise a right to. Now to justify the bringing any such evil upon any man, two things are requisite. First, That he who does it has commission and power so to do. Secondly, That it be directly useful for the procuring some greater good. (*W*, 6: 112)

This passage strongly implies that Locke, like Pufendorf, saw the public good, rather than the allocation of just deserts, as the goal toward which punishment aims.

The only reasons to question this conclusion are the occasional places where Locke talks about punishment being deserved or about the magistrate engaging in retribution. Given the evidence from Locke's predecessors, we already have reason to doubt whether these phrases should be taken to be an endorsement of retributive theory when Locke's more extended discussions all point in the opposite direction. This position is strengthened if we look at some of Locke's treatments of punishment in other parts of his thought. Locke deals with punishment in both his theological writings and his educational writings. It does not, of course, automatically follow that because someone does or does not support retributive punishment in one of these spheres of life that one will or will not support it in another. Nonetheless, we will see Locke's tendency in these areas to think of punishment in terms of future benefits even though he sometimes uses language that sounds retributive.

In *The Reasonableness of Christianity*, Locke takes up the question of God's punishment of sin and argues that "it seems the unalterable purpose of the divine justice that no unrighteous person, no one that is guilty of any breach of the law, should be in paradise: but that the wages of sin should be to every man, as it was to Adam, an exclusion of him out of that happy state of immortality, and bring death upon him" (*R*, 10). He then takes up the question of why God would demand perfect obedience as the condition for entering paradise, knowing that man could not meet this standard. Locke stated that "It was such a law as the purity of God's nature required" since God otherwise:

would have countenanced in him [man] irregularity and disobedience to that light which he had [reason],

⁹Pufendorf held the same view, namely that while a backward-looking criterion (commission of a crime) is necessary for punishment to begin, it should only proceed where future benefits are likely (1934, 8.3.8).

and that rule which was suitable to his nature, which would have been to have authorized disorder, confusion, and wickedness in his creatures—for that this law was the law of reason, or, as it is called, of nature, we shall see by and by, and if rational creatures will not live up to the rule of their reason, who shall excuse them? If you will admit them to forsake reason in one point, why not in another? Where will you stop? To disobey God in any part of his commands, (and it is he that commands what reason does) is direct rebellion, which, if dispensed with in any point, government and order are at an end, and there can be no bounds set to the lawless exorbitancy of unconfined man. (*R*, 14)

To say that God's purity demands punishment of the wicked at first sounds retributive, but it turns out that God's purity is forward-looking. God does not punish rebellious men with infinite torment,¹⁰ but does exclude them from his kingdom since he will not countenance rebellion against his authority. God's just punishment is thus presented as necessary for preserving order (perhaps showing the influence of Grotius). Thus while some of the language seems retributive, even God is presented as having forward-looking reasons for punishment. Even when talking about God's punishment, deserved punishment can simply mean that punishment which is proper for maintaining good order.

These statements of Locke's make sense against the background of his command-based understanding of natural law. In Locke's theory, God is the legislator of natural law and he chooses his laws based on what the likely outcomes of those laws will be in practice (*W*, 6: 213).¹¹ Similarly, Locke imagines governments ruling by stated standing laws so that punishments are announced for different kinds of infractions that are sufficient to make the crime "an ill bargain" for the offender (*TT*, 2.12). If the rule is a just one and a proper punishment is announced, then Locke would have no problem saying that the ruler must retribute accordingly, that is, hand out the punishment decreed for the crime. In a very real sense Locke would say the person has chosen that punishment by breaking a law clearly announced in

¹⁰Locke rejected the view that Adam's original sin placed all human beings in danger of hell in *The Reasonableness of Christianity*. Locke argued that the punishment for Adam's offspring was simply death, not eternal life in misery (*R*, 4–6). The simplest reconciliation of Locke's statements about the punishment of the wicked is that it would be of limited duration (Wainwright 1987, 52–53). Infinite torment is difficult to support if punishments are not retributive, but limited torments of this sort might reasonably be expected to encourage obedience to God's law.

¹¹See Tuckness (2002) for a discussion of this argument.

advance with clear punishments attached to it. Such a punishment is fitting, just. Locke can speak in this way and thus appear to speak the language of a contemporary retributivist, but we have seen above that Locke repeatedly distances himself from such views when he provides more extended discussions of the topic of punishment.

Locke thought that a good ruler, whether God or a human magistrate, would articulate clear rules and punishments and that it is fitting for those who break those rules to be punished. In setting the punishments, however, the ruler is not to be looking to inflict pain for the sake of satisfying some antecedent moral principle that those who do such and such must suffer to such and such an extent. In a 1680 journal entry, Locke explained God's justice in this way:

the punishments he inflicts on any of his creatures, i.e. the misery or destruction he brings upon them, can be nothing else but to preserve the greater or more considerable part, and so being only for preservation, his justice is nothing but a branch of his goodness, which is fain by severity to restrain the irregular and destructive parts from doing harm; for to imagine God under a necessity of punishing for any other reason but this, is to make his justice a great imperfection (*PE*, 278)

Even God, who could hand out perfectly just sentences based on his perfect knowledge, only punishes with a view to promoting the preservation of more of his creatures.

Locke's views on the right of parents to punish children are parallel to his view about God's punishment. This power, he claimed, is to be used for the benefit of the children.

And therefore God Almighty when he would express his gentle dealing with the *Israelites*, he tells them, that though he chastened them, *he chastened them as a Man chastens his Son*, Deut. 8. 5. i.e. with tenderness and affection, and kept them under no severer Discipline than what was absolutely best for them, and had been less kindness to have slackened. This is that power to which *Children* are commanded *Obedience*, that the pains and care of their Parents may not be increased, or ill rewarded. (*TT*, 2.67)

In Locke's view both God and parents are presented as punishing only out of benevolent motives. Interestingly, another parallel between his account of parents and his account of God is that in both cases Locke cites the need to stop rebellion as the reason that legitimates harsher punishment. The one place where Locke supports corporal punishment by parents is in cases where the child is rebellious and refuses to submit to authority (*STCE*, 78), just as Locke argued (as previously noted) that God's

punishments are necessary to prevent rebellion in God's kingdom.

Locke and Restitution

Based on the analysis of his predecessors above, Locke's rejection of retributivism as a rationale for the extent of punishment as shown in the previous section was not unusual. It was the typical position of other seventeenth-century natural rights thinkers. It would be a mistake to conclude from this, however, that Locke was a consequentialist about punishment in the modern sense of the word. Some distinctions among various concepts of restitution will help to explain why. First we can distinguish restitution as a policy from restitution as a ground for punishment. One could endorse restitution as a policy on consequentialist grounds by arguing that restitution schemes happen to improve the net happiness of citizens (to use utilitarian language) or (using Locke's language) to help fulfill the natural law mandate to preserve mankind as much as possible (*TT*, 2.134–35). Restitution as a ground of punishment is different in that the restoration of the conditions that existed before the rights violation occurred constitutes a distinct reason for punishing. In some cases compensating a victim is not the action most conducive to maximizing either happiness or the preservation of human life, yet theories that recognize restitution as a distinct ground for punishment would still call for restitution in such cases.

The second distinction is between theories of restitution that demand that as much as possible payment come from the offender, on the one hand, and those that aim only at compensating the victim, on the other. Two contemporary examples illustrate the difference between these two conceptions of restitution. In the United States judges can order restitution awards in which the victim is compensated by the specific criminal responsible for the crime. In many cases the criminal is unable to pay restitution and some of the shortfall is made up by a Victim Compensation Fund. The United States takes funds from criminal fines and places them in a fund used to provide compensation and other services to victims. In Fiscal Years 2005 and 2006, the U.S. Government collected more than \$1.5 billion in this way (a substantial portion of this money coming from corporate fines; Office for Victims of Crimes 2007). Many states have similar programs. By contrast, the South African Truth and Reconciliation

Commission provided immunity from civil as well as criminal prosecutions for those who confessed, meaning that the full weight of reparation demands fell on the centralized state process (Stanley 2001, 533). In other words, victim compensation in South Africa was separated from the imposition of fines, compensatory damages, or punitive damages on perpetrators.

As we locate Locke's theory of restitution among these distinctions, we see that his approach presents restitution as a distinct rationale, not merely a policy tool, and that his understanding of this rationale involves both compensation of the victim and payment by the offender where possible. Locke stated that there are two distinct foundations for the right to punish: "the one of *Punishing the Crime for restraint*, and preventing the like Offence, which right of punishing is in every body; the other of taking *reparation*, which belongs only to the injured party" (*TT*, 2.11). We saw earlier that the magistrate has the authority to remit punishments based on the first ground where the public good demands it (*TT*, 2.11). Locke then explains that the magistrate:

cannot *remit* the satisfaction due to any private Man, for the damage he has received. That, he who has suffered the damage has a Right to demand in his own name, and he alone can *remit*: The damnified Person has this Power of appropriating to himself, the Goods or Service of the Offender, by *Right of Self-preservation*, as every Man has a Power to punish the Crime, to prevent its being committed again, *by the Right he has of Preserving all Mankind*, and doing all reasonable things he can in order to that end[.] (*TT*, 2.11)

Individuals have the right to press for restitution even in cases where doing so does not immediately benefit the public. Locke does not specifically consider limit cases where a weak state, perhaps after a regime change, might be destroyed if it permitted individuals to push for the full restitution they were due, and Stacey (2004) is likely right that Locke would have permitted some flexibility in such cases. Locke's doctrine of prerogative does, after all, allow valid legal claims to be set aside when pressing needs call for it. Nonetheless, Locke clearly made victim restitution a high priority by establishing it as a distinct rationale for punishment.

Even more telling is the following passage from the 1680 journal entry on God's justice cited above. Locke first stated that "we cannot suppose the exercise of it [God's justice] should extend further than his goodness has need of it for the preservation of his creatures in the order and beauty of the state he has placed each of them in" (*PE*, 278). This passage is

further confirmation for the position noted above, that even God is presented as punishing based on forward-looking considerations. The very next section explains that it is because "our actions cannot reach unto him, or bring him any profit or damage" (*PE*, 278) that God's justice is always oriented toward the benevolent preservation of his creatures. The qualifying clause is instructive. It is only because our actions cannot bring God "any profit or damage" (and thus God never requires restitution) that the only remaining reason to punish is to bring about good consequences. Locke's qualification here is further evidence that Locke regarded the right of restitution as a distinct right that injured parties are allowed to claim even if doing so causes harm to others.

One slightly puzzling aspect of Locke's account of reparations is the underlying justification he gives for it. In *TT* 2.11, quoted at the beginning of this section, Locke stated that the injured party has a right to the goods and services of the offender "by *Right of Self-preservation*." Locke never explains why this would be sufficient to ground restitution claims that go beyond what is needed for reasonable assurances of self-preservation.¹² Perhaps Locke regarded preserving one's property as part of preserving one's life and so for Locke the right of self-preservation includes the right of preserving all of one's justly acquired property. Locke does, after all, at times use "property" in this broad sense (*TT* 2.87 and 2.123), so it would not be shocking if "self-preservation" sometimes included preservation of property.

Locke also wrote in a manuscript, unpublished in his lifetime, that "it is just that he who has impaired another man's good should suffer diminution of his own" (*PE*, 218). Locke thus not only wanted to see the victim's property restored, he wanted to see the offender's property diminished as a way of pursuing that goal if possible. The earlier quoted passage also specified that the right is not merely to compensation but to "the Goods or Service of the Offender" (*TT*, 2.11 my emphasis). This implies that Locke's account is both about requiring payment by offenders and compensating victims. This is related to Locke's statement that when fulfilling the natural law command to preserve lives as much as possible, where a choice must be made "the safety of the Innocent is to be preferred" (*TT*, 2.16). While Locke would not advocate either killing the guilty or taking their

property in cases where no one would directly or indirectly benefit (because of his rejection of retributivism), Locke does think that it is morally desirable that the lives and property of the innocent be protected by imposing loss on the guilty.

The Significance of Locke's Theory of Punishment

This account of Locke's theory of punishment is significant both historically and in terms of its implications for contemporary theories of punishment. Regarding the historical point, we can now return to the opening pages of the *Second Treatise* where Locke defines political power as "a *Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property" (*TT* 2.3) and see its relation to the end of the paragraph where Locke explains that this power is only to be used "for the Public Good." From one perspective there is a possible tension between restitution claims that seek to vindicate property rights and the public good. While the government is to seek after the public good, victims are given an independent right to seek reparations. Locke resolves this potential contradiction because of the way he understands the public good. The public good consists in upholding property rights, broadly defined. Restitution claims in that sense are almost by definition part of the public good, though Locke could use prerogative to override them in cases of extreme necessity. Whether a person harms my property by theft (which we would call a criminal offense) or breach of contract (which we would call a matter for civil law), from Locke's perspective governments are created to impartially adjudicate such matters and to inflict penalties that will make it an "ill-bargain for the offender." In other words, Locke's theory of punishment with its emphasis on preventing crimes against the life, liberty, and property of citizens and his strong interest in restitution in cases where these rights have been violated are part of his larger account of the purposes of government.¹³

While Locke's theory at first glance appears to be a confused mix of statements for and against retributive punishment, when we situate his statements in the *Second Treatise* against the background of the seventeenth-century natural law writers who preceded

¹²Interestingly, in one of the passages where Locke talks about some criminals deserving death (*TT*, 2.23), his point is that it is fine for the victim and offender to agree to a lesser punishment, slavery. Deserved death, in this context, likely means that it is owed to the victim to ensure his future safety.

¹³So understanding the purposes of government does not mean that governments are limited to pursuing libertarian policies. On this see Tuckness (2008, 474–76).

him as well as the larger corpus of his work, a more coherent picture emerges. Like Grotius, Hobbes, and Pufendorf, Locke rejected punishments that were purely retributive. Like Pufendorf he sometimes used the language of retribution, but meant something different by deserved punishment. Deserved punishment for Locke is the punishment appropriate to protect the rights of citizens.

Locke's account also challenges our contemporary understanding of the domain of punishment. Today, we carefully distinguish between civil cases and criminal cases such that a single act of killing may require a criminal trial for a charge of murder or manslaughter and a separate civil trial where a family might sue for damages for wrongful death. We place fines in one category and compensatory damages in another. In these ways we tend to think of restitution in a different conceptual category from punishment. Yet the edges of our practice betray the fact that matters are not quite so simple. Civil trials can result in "punitive damages," which generally carry the implication that they are assessed either to deter similar acts in the future or for the retributive reason that the conduct in question was so wicked as to deserve additional penalties. It would be odd to say that punitive damages are not punishment. The mirror image of having "punitive" damages awarded in civil cases is the fact that judges often have authority to require restitution as part of criminal proceedings. Despite our attempts to separate them, we find ourselves punishing people in civil cases and requiring compensation in criminal cases. While one could say that when Locke uses the term punishment for restitution he uses the term "punishment" differently than we use it now, part of the reason for investigating earlier thought is to raise questions about whether our current ways of categorizing things really are better. Both civil and criminal cases often involve imposing penalties on people who are judged to have violated a legal right. To the extent that governments exist both to deter rights violations and to restore property, Locke's broader conception of punishment is insightful.

The new conceptual model need not imply that we overhaul the legal system by getting rid of the legal distinctions between civil and criminal cases or between punitive and compensatory damages. There are other reasonable grounds for keeping them separate. Worries about state tyranny create a reason to demand a higher level of proof in criminal cases than in civil cases, for example. The point rather is that we should view the distinction between criminal and civil law as pragmatic rather than principled.

Even more significantly, Locke's conception of restitution challenges the distinction between backward-looking and forward-looking rationales for punishment. As noted above, restitution can be viewed either as a policy or as a rationale. As a policy there are any number of other rationales for punishment that could support it. Restitution as a policy can serve as a deterrent and provide benefits for victims, both forward-looking reasons. As a rationale, we can distinguish between restitution that aims only at compensating victims and restitution that also aims to compensate them by taking money from criminals. Either version of restitution as a rationale includes a backward-looking element. If we ask why either the criminal or the government should give a sum of money to a still wealthy victim when there are people on the verge of starvation who could benefit much more, we see that restitution is different than a standard account of benevolence. Benevolence is forward-looking and simply looks at present needs and asks how one might benefit people. Considerations of the past would only enter into the decision making indirectly in cases where the story about how the need arose is relevant to how beneficial aid will actually be. In cases of restitution, by contrast, the past plays the leading role in determining how much should be given and to whom it should be given. Restitution is thus backward-looking insofar as it tries to approximate a previous state of affairs, yet forward-looking in that it is only imposed when it can benefit others.

Locke's theory of punishment grew out of a seventeenth-century approach to political theory that thought in terms of laws of nature that are morally obligatory yet are also oriented toward future goods. For most of these writers, human punishment of violations of the law was set against a background in which God would punish violations of natural law as well. Locke's theory of punishment can be instructive even for those who do not agree with the theology underlying it. Those committed to a more retributive view of God's punishment than Locke could still accept Locke's account if they believe that the epistemic differences between divine and human knowledge of just deserts means that it is wrong for humans to apply the divine rationale. For those who reject theological approaches altogether, the basic account of the goals of punishment in terms of vindicating rights could be affirmed on the basis of a secular commitment to rights.

By making a theory of restitution one part of a larger theory of punishment in a way that transcends the forward-looking/backward-looking dichotomy, Locke created a substantive account that has several

attractive features. Many scholars are critical of what they take to be the overly retributive tendencies of current punishment practices in the United States and argue that we must move beyond backward-looking views of punishment and take a forward-looking view instead. If long prison sentences seem to do little to reduce crime then they should be reduced. Despite the popularity of this view in academia, there continues to be strong support for retributive policies from the broader public. Locke's account has the potential to provide a new way of reconciling these positions. With the reformers a Lockean account would hold that punishments that merely impose harm and do not benefit either victims or the society as a whole should be done away with, but with popular opinion the Lockean account can still affirm the common sentiment that those who have wronged others deserve to suffer loss if that loss can benefit the victims of crime. Although retribution and Lockean restitution are distinct, they both share a concern for imposing appropriate losses on those who have wronged others. A scheme of punishment that emphasizes restitution more strongly may do better at harmonizing our conflicting intuitions about punishment. Locke's theory thus suggests channeling the common sentiment that harms be imposed on criminals to set aright the scales of justice in the direction of reparations instead of the direction of retribution.

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