

Quarterly Journal of Ideology

A Critique of Conventional Wisdom
An electronic journal at:
www.lsus.edu/la/journals/ideology

A Lockean Defense of the Death Penalty: Some Timely Observations

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I. Introduction

The death penalty, since the execution of Socrates at the hands of his fellow Athenian citizens and Plato's ensuing account in the *Apology*, presents one of the most pronounced rights based conflicts to ever broach Western political thought and public practice.¹ It seems, on one hand, that people have an inviolable right to live –regardless of what actions they might have taken– and hence it is morally impermissible for the state (or anyone else) to kill as a form of punishment. On the other hand, however, it seems morally permissible to punish with death those who maliciously take the life of another. Simply put, those who knowingly and willfully deprive another of her life deserve (at

¹ See Thomas Brickhouse and Nicholas Smith, *Introduction to the Trial and Execution of Socrates: Sources and Controversies*, (N.Y.: Oxford University Press, 2002) for an extremely well documented account of Socrates' trial and execution.

least some of the time), as a just form of punishment, to die, and the state acts permissibly when it sees that such deserts are handed out.²

This essay offers *theoretical* support for the claim that, at least in some limited cases, it is morally permissible for the state to practice capital punishment. In support of this claim we will rely primarily on John Locke's thought as articulated in his *Second Treatise of Government*.³ (All references to Locke in this paper are drawn from this text, and indicated with the use of section numbers (§).) Locke promotes a healthy discussion of the death penalty in a number of theoretically important and contemporarily interesting ways. For instance, Locke's treatment of the death penalty underscores many contemporary debates including the execution of children, the insane, and the mentally retarded. It is fair to say that Locke's *Second Treatise*, in addition to offering a strong theoretical defense of the death penalty, offers thoughtful insight into important issues contemporarily related with capital punishment.

It might be the case, although we are highly skeptical of such a result, that the death penalty is morally permissible in principle as a theoretical matter but *never* morally permissible in practice as an applicable matter. To be clear, such a conclusion, even if it were true, would not serve to defeat the thesis of this paper. (We merely mean to support the claim that the death penalty is theoretically morally permissible –at least some of the time- as a just means of punishment.) This caveat should be kept closely in mind as this paper moves along.

² Kant argued that murders deserve the death penalty, and if we did not give them their “just deserts” then we would not be respecting them as persons. In order to respect persons as ends in themselves we must, for Kant, give them what they deserve, even if what they deserve is death.

³ All ensuing references to Locke will be drawn from his *Second Treatise of Government*. In our research for this paper we primarily utilized the following treatment of the source: *The Second Treatise of Government*, ed. and introduction C.B. Macpherson (Hackett, 1980). We highly advise this book for a proper reading of the *Second Treatise* as Macpherson offers an extremely fruitful introduction.

II. Talking about Rights

Before offering our Lockean defense of the death penalty, we offer here a brief discussion of rights. This discussion is imperative because theoretical opposition to the death penalty typically involves the claim that persons have a right to live, and that the state should *never* infringe this right as it administers punishment. We deny (as Locke did) that a right to live can offer a person strict moral assurances against being executed as a means of punishment. We accept, nonetheless, in the Lockean tradition that: (i) people possess moral rights that serve to constraint the fashion in which others may treat them, (ii) these moral rights are natural rights and as such not contingent upon social or legal convention, (iii) moral rights are possessed in virtue of one's rational personhood.⁴ All persons, according to Locke, have *natural* rights to life, liberty, and property (§6) (especially property in one's body §27), *even if* the society in which they live does not recognize such rights. For instance, slaves in the antebellum south had the same *natural* rights as their owners. That such rights unfortunately went unrecognized does not detract from their *moral* force.

Rights are legitimate claims that a person (X) makes, or presses, upon another person (Y) that: (i) constrain the fashion in which Y may permissibly treat X, and (ii) entail correlative obligations on the part of (X). Important in this definition of rights is the observation that rights are legitimate claims contingent upon a correlative obligation. No one justly claims a right "for free." Rights are claims against others that are bought

⁴ To be clear Locke *ultimately* grounds rights theistically (§1,6,8). That is, for Locke persons have rights because God gave persons rights or because God gave persons the requisite rationality to be rights-holders. We prefer to ground rights solely in personhood. This is to say, persons have rights because they are persons and would have rights even if God did not exist.

and paid for with obligations. For instance, if X has, “a right to live,” this entails, 1) “X has a right that Y not take her life” and 2) “X has an *obligation* not to take the life of Y.” (This is merely a very general account and would have to be modified to include cases of self-defense, defense of an innocent, and other such cases.)

Death penalty abolitionists often suggest that persons have an unconditional “natural right” to live. In other words, one’s right to live, according to the death penalty abolitionist is both *natural* and *absolute*. (Here, we use the phrase death penalty abolitionist to mean one who opposes the death penalty in *all* cases on *theoretical* grounds.) This appeal to natural and absolute rights as a means to deny the morally permissibility of the death penalty is understandable although ultimately misguided. A person’s right to live (or more properly stated as the right not to be killed) is actually a component of a more encompassing right, the right of self-ownership. That is, a person has full moral ownership in her body and may, at her own choosing, exclude others from her body. One fully owns her body, period. Locke clearly endorsed something along the lines of self-ownership as he notes in (§27) that, “every man has property in his own person; this nobody has any right to but himself.” The ownership of one’s body (or bodily property) is a natural moral right. Even if the world was without legal sanction or civil society, every person would have a natural right to full ownership in his or her body. It is the right of self-ownership that offers moral protections against our lives being taken and our bodily sphere from being crossed (e.g. assaulted) absent our consent.⁵

⁵ Typically modern day defenders of natural rights will allow that a person’s rational and informed consent is sufficient to allow others to cross her bodily sphere. That is, if a person rationally, and in an informed fashion, wishes to engage in a consensual boxing match then others are not permitted to physically interfere with that choice. Obviously it is a difficult task to figure out what it means to offer “rational and informed” consent, and we do not try to broach that issue here.

It would, however, be strongly counter-intuitive to hold that a person's bodily sphere may *never* justly be crossed absent consent. For instance, when an innocent person is physically attacked by a moral villain⁶ most people think that it is morally permissible for the innocent to defend his body by using all *necessary* force against the attacking moral villain. (Further, it would be morally permissible for a third party to use all necessary force against the moral villain to prevent or repel his aggressive and unjust action against the innocent.) However, the physical actions taken against moral villains pursuant to the practice of the right of self-defense (and the right to defend innocents other than one's self) *does* cross the bodily sphere of the moral villain absent the villain's consent. Defensive actions, however, against a moral villain (by an innocent party) do not violate the self-ownership rights of the moral villain. This is because the villain has taken action(s) that forfeit (*at least* during the time of the attack) his right of self-ownership. In fact, Locke (§23), went so far as to argue that some acts are so horrible that the actor, through his fault, forfeits his life and indeed "deserves death." Rights, as discussed earlier, are contingent upon the fulfillment of the correlative obligation that the right in question entails. We are morally obligated to respect the rights of others only as long as they fulfill their obligations pursuant to the right in question. The reason why it is morally permissible to kill an intruder who has broken into your home and threatens the life of your family is because the intruder has abandoned his obligation that he not maliciously violate the self-ownership of others. The intruder has abandoned reason. Indeed, the right of self-ownership can be forfeited when the bearer of the right abandons his moral obligation not to interfere with the self-ownership of other(s).

⁶ Moral villain is understood here as one who knowingly and willingly attacks an innocent without provocation

Of course, the right of self-defense and the moral permissibility of a state's punishing (with death) are two different matters, and we do not intend the discussion thus far to have shown that we have provided theoretical support for the claim that state execution is morally permissible. Nonetheless, we have taken a first, very important, step toward such a claim by arguing that the right of self-ownership is *not* absolute. The right may indeed be forfeited, and it is exactly on these grounds of forfeiture that allow moral room for the permissibility of self-defense. Locke argues persuasively that all innocent persons have a natural right to defend their lives from moral aggressors as he notes in §16 that:

I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him.

After having defended the permissibility of self-defense against moral villains we now turn the discussion toward state execution as a morally permissible form of punishment for violent offenders, particularly murderers, who abandon their natural rights claim that they not be killed. In defense of this claim we reference Locke's thought defending the natural right to punish in a state-of-nature, and extend this line of thought to the pressing question of the moral permissibility of the state (within civil society) to punish with death.

III. Reason and the "Law of Nature" in a State-of-Nature

Locke most clearly articulates the notion of the state-of-nature in §19 as, "men living together according to reason, without a common superior on earth with authority to judge

between them, is properly the state of nature.”⁷ Locke is quite careful, unlike his contemporary Thomas Hobbes, to describe his conception of the state-of-nature in rather congenial terms. This is because Locke, again unlike Hobbes, had a rather positive view of persons and how they treat one another absent a common sovereign to oversee behavior. Locke argued that even without a common sovereign men in a state-of-nature would use their reason to abide by the *natural* law. In §4 Locke explains the intricate role of the “law of nature” in the state-of-nature by noting:

What all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they see fit, within the bounds of the law of nature.

For Locke, morality, or moral action, pre-exists political communities and their coercive legal proclamations. People generally (without the coercive force of a state) abide by the “law of nature.” Locke endorsed the notion that people are generally disposed by a natural understanding of the “law of nature” to treat each other in certain morally permissible ways. While custom and habit might help foster and facilitate this moral treatment, it does not create such treatment. The basic idea here is that people treat each other relatively well without coercive threat from the state or anyone else to do so.

With this important consideration in mind, Locke attaches an important obligation with the natural rights of people, namely the obligation of reason. It is one’s ability to reason that allows for her appreciation of the “law of nature,” and in turn this

⁷ The notion of exactly what is Locke’s state-of-nature is hotly debated within Lockean scholarship. For instance, is the notion supposed to be a real historical place in which people actually lived before the advent of the civil state, is the notion supposed to be merely a useful heuristic device to better understand human nature, or could the concept be what John A. Simmons describes as a “relational” notion? In this paper we treat the notion in its real historical form and talk *as if* the state-of-nature actually existed in our world before the advent of the civil state. But at the same time we offer that understanding the notion is highly complex and this paper does attempt to become very entrenched in this issue. We realize that this is speculative and subject to challenge, but we present the notion in this fashion because this treatment of the idea breeds a high degree of descriptive and explanatory power and moreover because we find it plausible that Locke can accurately be read as treating the state-of-nature in a real historical fashion.

appreciation of the “law of nature” generally breeds a morally decent treatment of others. Here Locke expresses the thought that immorality is born from a type of irrationality, an irrationality that blinds people from seeing or acting in accordance with the natural law. Readers should pause here and note that this notion of irrationality is different than modern notions of instrumental or means-end rationality. Locke’s irrationality is *not* instrumental irrationality. The murderer might employ a very calculating and instrumental means-end act of reasoning as they carry out their evil deed, but for Locke the murderer will qualify as irrational irrespective of how calculating he was in the performance of his evil act. Simply put, for Locke a necessary and sufficient condition of X acting irrationally is that X acts so as to abandon the natural law. Irrationality and immorality are, for Locke, woven tightly together.

Admittedly an articulation of the “law of nature” is difficult to come by in Locke (or other proponents of the notion for that matter, such as Aquinas). Nonetheless, Locke in §6 gives a fairly clear notion of the concept:

Every one, as he is bound to preserve himself, and not to quit his station willfully, so by like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on the offender, take away, or impair, the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.

The “law of nature” obligates everyone to refrain from taking the life or property of another unless in an act of defense or justice. In a state-of-nature, therefore, we have the natural rights to life, to exercise liberty, and to accrue property. If we are to justly exercise these natural rights it is imperative we “preserve ourselves and the rest of mankind” as best as possible. When we maliciously take the life or property of another we abandon the obligation of reason that allows for our natural rights. To be clear, for Locke, a necessary condition of one possessing natural rights is the ability to (and non-

abandonment of) reason. This is because, for Locke, natural rights exist only for persons who adhere to the correlative obligation of reason, and he argues in §11 killing and stealing (absent an act of defense or justice) demonstrate an abandonment of reason in the form of the rejection of the law of nature.

IV. Punishing in a State-of-Nature

If all people would follow nature's law, there would be little need to create a governmental/legal structure or civil state.⁸ But, for some people, temptation overcomes reason, and they decide to abandon reason and violate the "law of nature" by taking the life and/or property of another. By abandoning reason and violating the "law of nature" by a "settled design upon another man's life (§16)" a person puts himself in a state-of-war with another. It is in this state-of-war, wherein a person, by *choosing* to abandon her reason, loses the natural right to live. Locke is very clear (§11) that in a state-of nature all persons have the moral power or right to justly

kill a murderer, both to deter others from doing the like injury, which no reparation can compensate, by the example of the punishment that attends it from everybody, And also to secure men from the attempts of a criminal who, having renounced reason –the common rule and measure God has given to mankind- has, by the unjust violence and slaughter he has committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts with whom men can have no society nor security.

And further in §7 Locke makes clear:

Everyone has a right to punish the transgressors of that law (the "law of nature") to such a degree as may hinder its violation; for the law of nature would, as all others laws that concern men in this world, be in vain if there were nobody that in that state of nature had a power to execute that law and thereby preserve the innocent and restrain offenders.

⁸ Locke does suggest that the state was created for reasons other than punishing violators of natural law. For instance, he maintains that problems of distribution and inefficiency haunted the state-of-nature. Civil society can offer a codified monetary currency and can offer much more stable and reliable economic foundations.

The “law of nature” would have little or no real force if people could be allowed to break the law and not be punished from such a transgression. The above two passages are important because they suggest that while people are born with the potential to develop reason and *come to* enjoy the right of self-ownership, the right is forfeited by surrendering reason and abandoning the “law of nature.” As Locke (§181) makes clear:

It is the unjust use of force then, that puts a man in a state of war with another; and thereby he that is guilty of it makes a forfeiture of his life: for quitting reason, which is the rule given between man and man, and using force, the way of beasts, he becomes liable to be destroyed by him he uses force against, as any ravenous being, that is dangerous to his being.

A person’s natural right to live exists only so long as she fulfills the correlative obligation of acting in accordance with reason and abiding by the “law of nature.” Natural rights, as conceived by Locke, were never understood as absolute or inviolable claims.

Expressing the equity of punishment in a state-of-nature Locke argues in §7 that:

And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of the law, every one must needs have a right to do.

This idea clarifies the moral permissibility of punishment in the state-of-nature. In the state-of-nature we are all “judge in our own case,” there is no human higher authority in which to appeal.⁹ It is in this sense that Locke speaks of equality in the state-of-nature. In the state-of-nature, all persons possessing and exercising reason are all, in a moral fashion, *equally* the highest (lowest?) authority. In such a state of affairs there are no political authorities to serve as an arbiter when conflicts arise. Every person in the state-of-nature is judge, jury, and executioner against those who would violate the “law of

⁹ Locke (§20) uses the illustrate phrase of “appealing to heaven” to describe the lack of human authority in which to appeal in the state-of-nature.

nature” and act as “noxious wild beasts” (§ 8, 11, 18). As Locke, in §8, clearly and eloquently articulates this point:

In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, which is the measure God has set to actions of men for their mutual security; and so becomes dangerous to mankind, the tie which is to secure them from injury and violence being slighted and broken by him. Which being a trespass against the whole species and the peace and safety of it provided for by the law of nature every man upon this score, by the right he has to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one who has transgressed that law. ... And in this case, and upon this ground, *every man has a right to punish the offender and be executioner of the law of nature* (emphasis Locke).

We agree with Locke that persons who abandon reason and behave like beasts have forfeited the just claim that others respect their natural right to self-ownership, and further that all persons in the state-of-nature possess a natural right to punish an offender of the “law of nature” and as such serve as executioner of that law.

Locke (§18) suggests that when one begins a state-of-war by the act of theft his victim may rightly take his life. That is, one need not be physically victimized in order to justly take the life of one who abandons reason and violates the “law of nature.” Locke reasons that if one is willing to steal property, then he would have little difficulty with taking your life as well. Accordingly, Locke argues in §18 that:

This makes it lawful for a man to kill a thief, who has not in the least hurt him, nor declared any design upon his life, any farther than, by use of his force, so to get him in his power, as to take away his money, or what he pleases, from him; because using force where he has no right, to get me into his power, let his pretence be what it will, I have no reason to suppose, that he, would not take away my liberty, would not, when he had me in his power, take away every thing else.

The idea that a sufficient condition of punishing with death (in the state-of-nature) is that the person being punished has “merely” stolen might sound draconian or unfair to many contemporary observers. But what Locke says here is not wholly implausible. He does make the plausible observation that if someone is willing to steal from you, then he is

likely to escalate this (especially if his act goes unpunished). Surely, not all such potential *escalations* will involve the thief injuring or killing his past victim at a later time, but the risk is arguably *high enough* that the drastic measure which Locke advocates as just (punishment by death) is, arguably, a morally permissible action. Here, it seems that Locke might have been more persuasive by marking a distinction between violent and non-violent transgressions of the “law of nature.” Such a distinction might be used to argue that *generally* violent transgressions against the “law of nature” could be justly punished with violent means, and that non-violent transgressions against the law could be punished with non-violent means (e.g., shunning or banishment).

Locke (§12) does give some, albeit limited, guidance to the proper measure of punishment in the state-of-nature as he notes:

May a man in the state of nature punish the lesser breaches of that law (law of nature)? It will perhaps be demanded with death? I answer, 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.

Here, Locke suggests that just punishment in the state-of-nature is properly administered on a case-by-case basis. In some cases it will be morally permissible to kill a thief as punishment for a transgression of the “law of nature” because doing so: 1) suffices to make it an ill bargain to the thief, 2) gives the thief cause to repent, and 3) terrifies others from doing the like. Locke’s conditions regarding the severity of just punishment seem somewhat plausible, but again we suggest that the above consideration given to a distinction between violent and non-violent offenses, that Locke neglected to consider, also be included into an analysis of just punishment in the state-of-nature.

V. Moving from the State-of-Nature Toward a Civil State

The practical difficulty with punishment is that it might make a wild beast of everyone. As Nietzsche reminds, “he who fight monsters should look to himself that he too does not become a monster.” Locke correctly realizes (§13) that such a reminder is easily neglected when we are “judge in our own case” and as such our own highest authority in which to appeal.

Accordingly, Locke (§ 8, 13, 125) advises that the punishment we decide to unleash in the state-of-nature ought to be pursuant with prudent and collected reason as opposed to passionate revenge. When someone brings violence to us, our family, or friends, our first reaction is not, and arguably cannot be, cool and collected reason. Indeed, Oliver Wendall Holmes once quipped that “detached reflection cannot be expected in the presence of an uplifted knife.” It is, quite plausibly, when we judge the case of others who have wronged strangers that reason and punishment are most likely to find common ground. For this reason it is easy to see why we insist that jury members (or judges) have no relevant personal connection to either the victim or the alleged offender. As Locke (§12) readily admits:

I easily grant that civil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great, where men may be judges in their own case, since it is easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce as to condemn himself for it.

Locke in §123 extends this line of thought by explaining why we “surrender” our natural right to punish in the state-of-nature in exchange for a more secure legal (non-natural) right to be judged by a neutral magistrate within the confines of civil society. Here he argues:

Why will he give up this empire (the state of nature) and subject himself to the domination and control of any other power? To which it is obvious to answer that though

in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of other: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure.

Does the political evolution from the state-of-nature toward civil society speak toward prohibiting capital punishment? Now, we turn toward addressing this question. After all, none of us live in the state-of-nature. And, as Locke argued, within the confines of civil society capital punishment is morally permissible *only if* it is handed down by the political community in question (§207).

VI. Punishing with Death in Civil Society

The transition toward civil society and away from the state-of-nature represents the consent of persons agreeing that they live under a common sovereign power (§96), and as such be subject to the judgment and punishment of a neutral magistrate. Locke argues that in civil society, people have the right (albeit negotiated *via* a social contract) to be judged by a neutral magistrate, but this right entails that people have a moral obligation to leave punishment as a function of the state (§ 87, 88, 130). Persons may use force to defend their lives, but may no longer punish, only the magistrate may justly do this (§89). Locke makes clear (as we have already seen) that punishment in the state-of-nature, up to and including killing, is justly done to: (1) redress grievances against the “law of nature,” (2) make breaking the “law of nature” an ill-bargain to the offender, (3) give the wrongdoer cause to repent, (4) deter others from transgressing the “law of nature.” Alternately, justly punishing transgressions against the law of nature in civil society serves a public-oriented function. Locke extensively argues (§ 3,131,135) that the civil law is to be directed, “to no other end, but the peace, safety and public good of the people.” In a

passage commonly quoted to demonstrate Locke's clear approval with the death penalty as a form of *civil* punishment he notes in §3 that:

Political Power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws and in the defense of the common wealth from foreign injury; and all this only for the public good.

Further, Locke argues in §131 that within a commonwealth both legislative law and the “indifferent and upright judges who are to decide controversies by those laws” are to be directed, “to no other end but the peace, safety, and public good of the people.”

These passages clearly indicate Locke's conviction that capital punishment can be justly enforced, within the parameters of civil society, against those who abandon reason and violate the “law of nature.” However, for Locke, the punishment of death, or any other punishment for that matter, within civil society must be done “only for the public good.” Simply put, if punishment in civil society is not done “for the public good,” then it is not just. Accordingly, if the death penalty is not done “for the public good,” then it is not a just form of punishment. For Locke, the moral permissibility of punishing with death has become much stricter within a civil society than in a state-of-nature. In order for the death sentence to be morally permissible in civil society the person being punished must have violated the “law of nature” *and* the punishment must be for the public good.¹⁰ These conditions are *jointly* sufficient for the state to justly punish with death.

¹⁰ One could interpret Locke as suggesting that violating the law of nature is, after the consent and creation of civil society, not even a necessary condition for punishment. After all, at first glance we can imagine cases where the public good might be enhanced without the “transgressor” ever having actually disregarded the law of nature. Consider, for instance, the classic objection to utilitarian ethics, which postulates the framing of an innocent passerby in order to squelch the passions and vengeful demands of an angry mob. Could Locke allow the moral permissibility of executing a innocent passerby if doing so satisfied the condition of enhancing the public good? Our reading of Locke suggests not, and we stand by the claim that

Here an interesting question presents itself, was Locke a retributionist or a utilitarian as punishment is concerned? The answer is that Locke tried desperately to be both while taking pains not to unequivocally endorse either view. Locke's retributionism rears its head as we notice that he thought that some people, by virtue of engaging in acts that forfeit their right to live, deserved to die (§23). Additionally, it is difficult to ignore the beastly metaphors that Locke attributes to people that opt to abandon reason and violate the "law of nature." In fact, it is not even clear if Locke would refer to such beings as *people* (or at least as having the moral standing of persons) as he is clearly fond of considering such *beings* to be "wild noxious beasts."

On the other hand, Locke clearly expressed a multitude of utilitarian sentiments as punishment is concerned. Locke argued that civil law and punishment must be done *only* for the public good. To be just, punishment within civil society must have the *consequence* of being "in the public good." Additionally, Locke clearly argued (§11, 12) that a goal of punishment, even in the state-of-nature, was to *deter* others from transgressing the "law of nature."

How can these retributionist and utilitarian minded sentiments best be reconciled? Clearly, many answers could be offered here. For instance, one could attempt to offer that Locke moved from endorsing a retributionist to utilitarian position as his view moved from concerns of a state-of-nature toward that of civil society. But this explanation is incorrect as Locke has clear utilitarian concerns when he discusses punishment in a state-of-nature as well as clear retributionist concerns when he discusses punishment within the purview of civil society. Locke is probably best understood as

actually transgressing the law of nature is a necessary condition for the moral permissibility of punishment in civil society; however it is troubling that Locke was less than clear about this point.

advancing retributionist punishment as morally appropriate when it is done “for the public good” (or in the case of a state-of-nature when it is done to deter an offender who violates the law of nature). In this vein, the death penalty is indeed a form of punishment that *can be* consistent with the public good, and hence, is a type of punishment that is, in principle, morally permissible within the purview civil society.

Here it is worthwhile to pause and consider the possible avenues of argument available –within a Lockean framework- to the (theoretical) death penalty abolitionist. The abolitionist appears to have two promising options of argumentation available.

First argument a Lockean could plausibly offer to support death penalty abolishment

First, an argument could be made that given the Lockean importance of consent in forming the civil state, that people, upon leaving the state of nature, thought it appropriate to *never* allow their new political state the opportunity to punish *any* moral villains with death. And accordingly the social contracts in which people enter (upon leaving the state-of- nature) would simply not allow for capital punishment.

Second argument a Lockean could plausibly offer to support death penalty abolishment

Second, an argument could be advanced that: the public good is *never* enhanced by having a death penalty, or to put another way; among the alternatives of punishment it is *never* in the interest of the public good to vie for the death penalty.

Notice importantly that if either of these arguments could be adequately supported, it would be possible for one to embrace the political philosophy of Locke and at the same time consistently be a death penalty abolitionist. We, however, find both of the above arguments to be implausible, and argue (absent another possibility not considered here) that a thorough acceptance of Lockean political thought must at least

make theoretical room for the death penalty. Below we sketch out our initial case for thinking that neither of the above arguments should be accepted.

Our primary reason for rejecting the above arguments is that the universal generalization advanced in both arguments is simply too strong. Further, we are not being unfair by assigning the universal generalization in both arguments to the death penalty abolitionist. They argue, after all, that the death penalty is never acceptable, *even in principle*.¹¹ Below we sketch out an argument against the first argument which a Lockean might offer to support to the death penalty, and then we move toward arguing against the second such argument.

Response to the first argument

When political power, including the power to punish, was handed over to a political community, the people granting this power (from the right of punishment they justly held in the state-of-nature) likely would not have done so if the death penalty was *completely* “off the table.” Recall, that although people generally abided through a use of reason to the “law of nature,” they did not always do so. Such transgressions against the “law of nature” were serious enough to play a substantial role in people deciding to abandon a state of perfect freedom (state-of-nature), and consent to be members of a civil society and accordingly place the moral power to punish –and in a sense protect– exclusively in the hands of a neutral magistrate. This suggests that some transgressions by those opting to abandon reason were both serious, and frankly, scary enough to greatly encourage the construction of civil society. It is plausible that persons emerging from the state-of-nature, under these Lockean conditions, did regard *severe* moral villains as on

par with “wild noxious beasts.” It is no coincidence that many (if not most) people refer to the notorious mass murders of the past century as animals. We actually mean this; it is more than just talk. But, the important point is that an argument based on the *consent* of those constructing a civil state to prohibit *all* sentences of death is not very plausible. Of course, the power to punish with death might have been (rightly) subject to tight controls. People would likely not have wanted to endorse a political system that had a high probability of putting an innocent person to death, for instance. Notice, however, that no amount of tight applicable controls over the *administration* of the death penalty will help the death penalty abolitionist advance a successful *theoretical* argument against the death penalty *per se*.

Response to the second argument

Death penalty abolitionists can say a number of things to better motivate their second argument. The abolitionist can argue that the death penalty could never advance the public good because: (1) it breeds a type of “blood lust” and desensitization to violence that will always be detrimental to civic life and a flourishing state, and (2) the death penalty is the *only* punishment for the which the state cannot compensate one who has been wrongly convicted and as such this gives the punishment special status as a punishment that should *never* be administered.¹²

The first defense relies on the assumption that the death penalty encourages “blood lust” or desensitization to violence, and that this is detrimental to civil life or a flourishing state. This defense of the second argument fails for two reasons. First, the

¹¹ We do worry that such a position might appear to be straw-man. But given that many people talk as if they are theoretically opposed (and we assume genuinely so) to the death penalty *in principle* we do not find the position to be a straw-man.

death penalty need not encourage blood lust. Certainly it might do so, but it need not. Executions need not be held in public, nor do their details need to be made available to the public. In fact, the state could execute wrongdoers in secret. This, of course, *might* be wrong for other reasons, but it demonstrates that the death penalty need not desensitize the citizens of a state to violence. This is because citizens of a state need not even know or realize that their state is using execution as a form of punishment. Whether or not such secretive action by a state is wrong is a subject for a different paper. But clearly, the death penalty (if administered in secret) need not de-sensitize a political community to violence.

Moreover, the claim that desensitization to violence is necessarily counter to the public good is questionable. Again, the death penalty could be (under certain conditions) counter to the public good, but it need not be. For instance, sociologist Emile Durkheim argued that violent and public punishment of the worst possible criminals was advantageous to society because it bred a type of fruitful social cohesion. Those who share almost no common bonds “come together” in their revulsion against the worst criminals. The violent punishment of such criminals, as Durkheim theorized, does indeed create a type of social cohesion that would likely not exist, in especially highly pluralistic societies, absent such punishment. The idea is simply that a political community’s shared hatred for evil brings it together and creates opportunities for social cohesion that would otherwise not exist. Surely, some people prone toward a disdain of violence and a proclivity toward pacifism will find this awful. But this repulsion will not help advance the first defense of the second argument. If the public good is enhanced in ways that

¹² Here we will not again re-hash whether the death penalty is wrong because it violates rights. We agree with Locke, and has argued extensively already, that the answer here is that the death penalty clearly does

sadden the pacifist, then so much the worse for pacifism as the first defense of the second argument goes.

The second defense of the second argument is promising, but it too ultimately fails. It should be noted, to begin, that *all* punishment of any type risks, in practice, wrongly being directed against an innocent. The only way to *ensure* that no innocents are ever wrongly punished is for a state to endorse no system of punishment at all. We stress again that *any* applied system of punishment will stand *some chance* of error in punishing the innocent. Any punishment system will be administered by people, and people are fallible agents who make honest mistakes. Thus, the proper question regarding the state's power to punishment is not "do we endorse a system that *might* punish the innocent," but instead is more aptly, "what risks of punishing the innocent do we find morally acceptable?" The principle supported by the death penalty abolitionist in defense of the second argument implies, we argue, that it would be unjust for a state to sentence persons to life in prison. But of course it would be an absurd view to hold as it seems fairly obvious to us that a just system of punishment can indeed sentence people to life in prison. Thus the death penalty abolitionist endorses a view that entails an absurd consequence.

But why think that the death penalty abolitionist (who accepts the second defense of the second argument) is committed to endorsing the view that it would be unjust to sentence people to life-time jail sentences? The uncomfortable commitment of the death penalty abolitionist results because the state's holding a person in prison until they die cannot be compensated for if (after the death of the person) new evidence surfaces which exonerates them. How can this person be compensated anymore than the person who is

not pose an *in principle* threat to one's natural rights.

executed by the state be compensated? They cannot be, of course. Further, the irreversibility of the death penalty is often cited as a reason not to accept the practice, and no doubt the death penalty is certainly irreversible. But we suggest that the same worry here also applies to the irreversibility of life prison sentences. Isn't a life-long prison sentence just as irreversible as a death sentence. Innocent people who die in prison serving life-sentences are just as subject to the "non-compensation worry" and "irreversibility worry" as are innocent people who are executed by the state. But we take it that no one could seriously defend the position that the state acts unjustly when it sentences certain criminals to life imprisonment.

One could try to save this defense by arguing that the state is wrong when it executes (and not wrong when it imprisons for life) because in the case of execution they take actions to "speed up the process" and in so doing make compensation - in the case of execution- much less likely. If we knew a "life sentence" given to a severe moral villain would severely "speed up the process of his death," and thereby invoke a worry about compensation *were he innocent* would we nonetheless lack just grounds for imposing the sentence? We doubt it. Prison sentences, like executions, might well serve to "speed up the process of death," and it is quite interesting that such an observation seems to have no moral pull in abolishing life sentences. If the causal role the state plays in issuing the life sentence may speed up death (and we find *this* "speeding up of the process" morally permissible), then it seems we must also find the causal role of death penalty to be on par with this.

Much more could be said here both for and against the position we offer, but we close this discussion by noting that the similarities (relevant ones we think) between the

death penalty and (certain types) of life sentences should be more critically examined. Perhaps some death penalty abolitionists will accept the consequence here and grant that life-sentences are morally unacceptable (for similar reasons as to why death sentences are morally unacceptable), but we feel confident that this would be a desperate tact to take, and not one which would find tenable support.

At this juncture we are done offering our Lockean defense of the moral permissibility of the death penalty. We have offered a plausible case for thinking that the death penalty as an individual activity in the state-of-nature and as a communal activity within a civil state is morally permissible. Besides offering our Lockean case for thinking this we also addressed (we think successfully) a number of pressing objections to our view. Now we turn the discussion toward some contemporarily relevant issues related with the death penalty.

VII. Executing the Insane, Mentally Retarded, and Children

Is it ever permissible to punish children, the insane, or the mentally retarded with death? We contend, as Locke implies, that it is *never* morally permissible to punish (in any fashion) such classes of people. This is because punishment, within civil society, is permissible only for those who violate the law of nature, *and* only if the punishment in question is done pursuant to the public good. Children, the insane, and the mentally retarded cannot violate the “law of nature,” because they lack the reason that places them under such a law. As Locke nicely puts this point in §57:

For nobody can be under a law which is not promulgated to him; and this law being promulgated or made known by reason only, he that is not come to use the use of his reason cannot be said to be under the law.

Moreover, Locke argues in §60:

But if, through defects that may happen out of the ordinary course of nature, anyone comes not to such a degree of reason wherein he might have supposed capable of knowing the law and so living within the rules of it, he is never capable of being a free man, he is never set loose to the disposal of his own will (because he knows no bounds to it, has not understanding, its proper guide), but is continued under the tuition and government of others all the time his understanding is incapable of that charge. And so lunatics and idiots are never set free from the government of their parents.

Thus, we interpret Locke to suggest that children, the insane, and the retarded, are simply not free to follow the “law of nature,” because it is simply impossible for such persons to be under such a law. We add (although not explicit stated by Locke) that it would be morally impermissible to punish anyone (in any fashion) for violating a law, which they are not under. In practice, the criminal justice system operates in agreement with Locke as children¹³, the mentally retarded¹⁴, and the criminally insane¹⁵ are categorically exempt from capital punishment.

What is to be done with children, the insane, and the mentally retarded who violently violate the “law of nature” which the rest of us are under? We suspect, and suggest Locke would agree, that such persons undergo a type of civil confinement. This would not be punishment *per se*, but instead a measure to keep society, and (possibly) the offender, safe while not being overly cruel to them. This is appropriate because even if executing such individuals satisfied the public good, it would not be morally permissible to do so because such person would not have *abandoned* the law of nature – one cannot abandon a law they are not under.

¹³ *Roper v. Simmons*, 543 U. S. 551 (2005).

¹⁴ *Atkins v. Virginia*, 536 U. S. 302 (2002).

¹⁵ *Ford v. Wainwright*, 477 U. S. 399 (1986).

VIII. Conclusion

In the Lockean tradition the death penalty is a morally permissible form of punishment. We argued this largely by relying on Locke's conception of natural rights and the just powers (right) to punish those who abandon reason and transgress the "law of nature." People, do indeed possess a natural right to live, but this right carries with it the obligation of reason in the form of adherence to the "law of nature." Further, we argued positively, and by responding to some promising suggestions to the contrary from the death penalty abolitionist, that the death penalty can be used to serve the public good, and as such it is a morally permissible form of punishment for the state to levy against those who knowingly and willingly transgress the "law of nature" or civil law derived thereof. According to Locke, children, the insane, and the mentally retarded cannot justly be punished at all, and certainly not with a death sentence. We believe that exceedingly little room remains to offer a Lockean theoretical argument against the moral permissibility of the death penalty.¹⁶

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¹⁶ We thank two anonymous reviewers from *QJI* who took the time and care to offer helpful comments on our paper.