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# To Kill a Thief: Punishment, Proportionality, and Criminal Subjectivity in Locke's *Second Treatise*

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## Abstract

This essay argues that the thief, a liminal figure that haunts the boundary of political membership and the border between the law of reason and the law of beasts, drives Locke's accounts of the foundation of the commonwealth and the right to rebellion in the *Second Treatise of Government*. Locke's political theory is best read through punishment as a theory of subject formation, which relies on an unstable concept of proportionality to produce this liminal figure in order to secure the member as a "stable" political subject.

## Keywords

punishment, Locke, subjectivity, proportionality, thief

Nathaniel Hawthorne opens *The Scarlet Letter* writing, "The founders of a new colony, whatever Utopia of human virtue and happiness they might originally project, have invariably recognized it among their earliest practical necessities to allot a portion of the virgin soil as a cemetery, and another portion as the site of a prison."<sup>1</sup> The seeming inevitability of punishment, as certain as human mortality, pervades not only Hawthorne's text but also the

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cannon of political theory, especially in its social contractarian modes. Punishment is, as David Garland argues, “a distinctive social institution which, in its routine practices, somehow contrives to condense a whole web of social relations and cultural meanings,” making it akin to a “total social fact.”<sup>2</sup> It has rightly become an increasingly useful lens through which to understand the subtleties of our political history, our present, and our practices.

Contemporary theory has, for quite some time now, taken punishment and its fellow travelers as centrally important to the study of political life, as a few brief (and controversial) examples can illustrate. Michel Foucault, following thinkers as diverse as Nietzsche, Durkheim, and Bentham, powerfully demonstrates both the centrality and mutability of punitive power in modernity in *Discipline and Punish*, and continues this work in his public lectures.<sup>3</sup> Giorgio Agamben’s scathing critique of contemporary liberal and democratic politics relies on an archaeology of “criminal” figures and their punishments.<sup>4</sup> The outlaw and bandit are merely early-modern instances of the paradigm of the *homo sacer*, a figure that effectively draws the boundaries of membership of a political community as one who may be killed without being murdered. Punishment, Agamben insists, is the paradigmatic form of sovereign violence within the commonwealth, linking those being punished and the sovereign, blurring the distinction between the natural and the social by each asserting a right to others as a bare life, living both inside and outside of the law. Jacques Derrida, a critic of both Agamben and Foucault, spent the final six years of his life lecturing on questions of crime and punishment, specifically focusing on the death penalty, the pardon, perjury, and ultimately, the notion of sovereignty itself. Derrida’s readings of Rousseau and Hobbes track the analogical linking of the beast and the sovereign through the looming spectre of the *bandit*, who like a wolf approaches without being seen, marking out the boundaries of the political community through a conceptual blurring of those very boundaries. “Rogue states,” he claims, are figured as delinquents, criminals, and those that behave “like brigands, like highway robbers or like vulgar rascallions who just do as they feel.”<sup>5</sup>

European thinkers are not alone in turning to criminal figures and punitive concepts. Within American political theory, Judith Shklar compares herself to the great liberal “reformers” of punishment, arguing that the central state cruelty that must be guarded against is the state’s abuse of the criminal justice system.<sup>6</sup> Liberalism is subtended by this persistent fear of state power, the ultimate form of which is nowhere more clear than in the state’s ability to punish. Going further, Keally McBride describes the ways that liberalism in particular *relies* on punishment to establish itself as a political order. As she puts it, “Because liberalism is based upon abstractions such as the social

contract, natural rights, and even personhood that have no empirical referent, it has from the very start relied upon practices of punishment to make these terms operable.”<sup>7</sup>

Even if we are not swayed by such diverse accounts, there is surely merit in rereading the canon of political theory from the perspective of punishment and, in particular, through the organizing figurations used in those works. This essay takes up this task and asks, quite simply, what can we learn by reading John Locke’s *Second Treatise of Government* from the point of view of punishment?<sup>8</sup> By carefully following the *figures* of the *Second Treatise*, most notably the thief, I argue that reading the *Second Treatise* from the perspective of punishment not only provides insights into the text’s accounts of political foundation and rebellion, but also shows us that Locke manages punishment by producing criminal figures in contradistinction to innocent members.

I am hardly the first to take the question of punishment in the *Second Treatise* as an object of analysis. The right to punish is routinely explored by readers of Locke interested in natural law and natural right.<sup>9</sup> These accounts, however, tend to read punishment as subordinate to other key terms in Locke’s lexicon, such as freedom, right, or equality. Punishment is at best illustrative of these ideas or at worst a deeply confusing mess to be either resolved or ignored.<sup>10</sup> Authors who afford punishment a central or integral place in their readings of Locke (most notably Simmons, Von Leyden, and Ashcraft) nevertheless strive to reduce the problematic character of punishment in Locke’s thought as much as possible.<sup>11</sup> In general, they spend relatively little time on the important role that *proportionality* plays in Locke’s account, and even less on the figure of the *thief* in his rhetoric.<sup>12</sup>

I depart from most readers of Locke by arguing that it is *because of punishment’s instability* that Locke is able to put it to such powerful and productive use, motivating the formation of the commonwealth and justifying the right of rebellion. The interpretive power of Locke’s theory of punishment stems from making sense of its confusing and unstable qualities without trying to resolve them definitively. Locke’s account of punishment is fascinating in how it reveals an inherently unstable and excessive quality of punishment itself, and it shows that the task of civil society is not to eradicate this excess but rather to manage and use it productively. Locke is conscious of the problem that punishment presents, and responds to it not by “fixing” or “solving” it but instead putting it to use. That is, punishment does its foundational and definitional work not through its perfection as a practice but through its excesses and instability.

Specifically, Locke uses punishment to produce relatively stable subjects as a means of managing that excess and instability. I argue that the creation of a subject capable of entering into a social compact and for whom full membership is possible requires the production of a figure that carries the burden of danger and irrationality. The argument of the *Second Treatise* relies on the figuration of criminal kinds as a source of physical and ontological threat, and constructs them as persons who, along with the “savages” of North America, generate a space between animals and “reasonable” persons. Locke’s account of the foundation of the commonwealth and the right to rebellion are driven by the liminal figures that haunt the boundaries of membership and the border between the law of reason and the law of beasts, the human and the animal. Ultimately, the traces of this work are visible in the terms of animality and existential threat that pervade Locke’s descriptions of tyrants, criminals, and all those persons who are *degenerates*, those *homini sacri* who manage the inside and outside by simultaneously marking and obscuring its boundary.<sup>13</sup> It is our task to be attentive to what these figures can tell us.

## Punishing Thieves

The right to punish, shared by all in the State of Nature to “preserve the innocent and restrain offenders” (§7), is explicitly a limited right for Locke. The natural requirement of proportionality is established early in the *Second Treatise*:

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 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* (§8).

This “strong principle of limitation,” as Waldron describes it, means that punishment is constrained in reference to the specific transgression of the law in both the terms of retributive justice and utilitarian deterrence theory, limited in effect by its purposes (deterrence, recompense, and incapacitation) and its extent (only so much as to satisfy these purposes).<sup>14</sup> The proportionality requirement is on its face a strong constraint, directly limiting the punitive response even though the criminal has, according to Locke, revealed himself<sup>15</sup> to be so radically dangerous as to be no longer a fully rational human (§8). The death penalty is permissible not because of a simple symmetry

(akin to the *lex talionis*), but because there is no possibility of recompense for death, and a murderer continues to be dangerous to others (§11).

Immediately after opening the door to the death penalty, Locke restates the proportionality requirement in even stronger terms:

By the same reason, may a Man in the State of Nature *punish the lesser breaches* of that Law? 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 terrifie others from doing the like (§12).

This articulation of punishment—proportional, based in natural right, justified by retribution (in the sense of reparation and recompense) *and* deterrence, and rooted in claims of a natural moral universe in which justice and right exist in full force even prior to the presence of a political order—characterizes both Locke’s view and the bulk of commentary about Lockean punishment. If punishment can include the death penalty, it only extends to the most egregious crimes, since Locke goes out of his way (in §12) to insist that punishment must be proportionate to some specific quality about the offender’s assessment of the relative gains of crime, his desire to repent, and the fears of others in society.

The rearticulation of a limited right to punish in §12 begins to shift the measure of proportion from transgression to transgressor. What will count as sufficient reparation and restraint for a transgression, given the rephrasing quoted above in §12, cannot be determined without reference to what fits a particular transgressor. This determination requires a certain kind of knowledge about the transgressor, a knowledge that will be especially suspect in the absence of a commonwealth, and which is grounded only through the attempt to stabilize the unstable right to punish.<sup>16</sup> Locke’s logic of proportion is meant to impose a meaningful constraint on punishment and this constraint is “founded on the Law of Nature,” and therefore knowable through reason.<sup>17</sup>

Within only a few sections of his statement of proportionality, Locke nevertheless insists that it is “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 then by the use of Force, so to get him in his Power, as to take away his Money, or what he pleases from him” (§18). In §19, he affirms this right: “Thus a *Thief*, whom I cannot harm but by appeal to the Law, for having stolen all that I am worth, I may kill, when he sets on me to rob me.”<sup>18</sup>

Is theft not a “lesser breach” of the law than murder? Perhaps not, given what Locke says later, in defining one’s property to include “life, liberty, and estate,” in §87 and §123. Locke’s immediate purpose in the text, however, is not to define theft as a general form of crime (he is careful to note that not all theft by fraud is punishable by death in §207) but rather to mark the “*difference between the State of Nature, and the State of War*” (§19).<sup>19</sup> Theft and *its proportional punishment* define both the boundary between these states and underscore the necessity of leaving the state of nature. Locke places punishment squarely within a constellation of conceptions and practices that complicate a straightforward understanding of proportionality: war and slavery.

An aggressive word or action begins the State of War as a state of enmity and destruction (§16), because, Locke famously insists, “He who would get me into his Power without my consent, would use me as he pleased . . . and destroy me too when he had a fancy to it: for no body can desire to *have me in his Absolute Power*, unless it be to compel me by force to that which is against the Right of my Freedom, *i.e.*, make me a Slave” (§17). The only imaginable purpose for placing another under one’s power is to revoke entirely the subject’s freedom. Any transgression of this magnitude is also presumed to be an attempt to take away the freedom of everyone else as well (as stated earlier in §11). If the fundamental Law of Nature includes a right to self-preservation, then “the safety of the Innocent is to be preferred,” meaning that “one may destroy a Man who makes War upon him, or has discovered an Enmity to his being, for the same Reason, that he may kill a *Wolf* or a *Lyon*” (§16).

By placing me under his power, the thief opens the door to the possibility of ultimate destruction. Locke writes, “I have no reason to suppose that he, who would *take away my Liberty*, would not when he had me in his Power, take away every thing else” (§18). To be held under force, even for the purpose of mere robbery, is to be vulnerable to more than just losing one’s “Horse or Coat” (§19). When the thief sets upon me, he puts the entire Law into question by his use of force to put me into his power. This opens the possibility that not just my estate but also my entire property, my life and my liberty, are no longer protected by the law. The only rational response to the unjust use of force is to respond with equal force, or else risk giving up my life.

Throughout the *Second Treatise*, the paradigmatic thief is the highwayman. In addition to the reference to one’s “Horse or Coat” in §19, Locke refers in §182 to the “Thief that sets on me in the Highway,” and again in §207, while likening tyranny to theft, he refers to “A Man with a Sword in his Hand demands my Purse in the High-way.” The image would have easily invoked popular and well-known conception of the highway bandit, the exemplary seventeenth-century “outlaw” who preys upon victims precisely

where, as Locke puts it, there is “no common Superior on Earth to appeal to for relief” (§19).<sup>20</sup>

Further, figuring the thief as a highwayman reminds the reader that the *essential* aspect of the crime is the use of force, which can occur inside a duly constituted commonwealth as well as outside of it. That is, the figure underscores how a State of War can emerge both within the State of Nature and within civil society, because the use of force without appeal to a common judge distinguishes the state of war from the state of peace. The moment of the robbery is one in which “the Law, which was made for my Preservation, where it cannot interpose to secure my Life from present force, which if lost, is capable of no reparation, permits me my own Defence, and the Right of War, a liberty to kill the aggressor, because the aggressor allows not the time to appeal to our common Judge, nor the decision of the Law” (§19). The thief’s use of force has closed off the possibility of an appeal to a judge or the law, closing off any possible remedy in the case, and making clear that war (and all its corresponding rights) is deployed during that moment and within that space.

Locke makes this explicit throughout the text (most strongly in §§19 and 207), insisting that it is force without right that triggers a state of war between persons. A thief who does not use force (but instead steals through fraud or deception) is in fact not to be punished with death. The reason, Locke writes,

is plain; because the one using *force*, which threatned my Life, I could not have *time to appeal* to the Law to secure it: And when it was gone, ‘twas too late to appeal. . . . But in the other case, my Life not being in danger, I may have the *benefit of appealing* to the Law. (§207)

That is, what the thief/highwayman conveys is an *immediate* moment of force, demanding action. When I am caught in the moment of uncertainty over the thief’s intentions, I am necessarily caught outside the aid of the law. Even a duly constituted civil society is interrupted by the outbreak of a relation of war between the thief and me.<sup>21</sup>

The right to kill a forceful thief, thus, is not simply a right to self-defense, but is also the execution of the Law of Nature, a *proportional punishment*, grounded in natural right and justified by the use of force where there is no right.<sup>22</sup> Because Locke provides no conceptual distinction between crime and war in these early chapters, the response to theft is still rightly called *punishment* and the constraint of proportionality continues to apply, although without any moderating effect.<sup>23</sup>

The problem is temporal: during the crime, the thief has yet to become only a thief. A threat made against me during a highway robbery extends the aggression beyond my estate to include my liberty and, potentially, my life. Unable to flee for fear of further violence, to refuse to hand over my coat and horse is to seemingly accept death. The thief is in this moment indistinguishable from the murderer. In fact, were he not indistinguishable in this way, he would be unable to bring me under his power and successfully take away my property. The temporal quality of the robbery shows how simple crime and open war overlap, giving me the justified right to respond in kind, striking down the aggressor. The aggressor only becomes a “thief” in retrospect, when it turns out that his design was not my death but merely the appropriation of my horse and coat.

So long as the State of War persists (i.e., during the crime), proportionality continues to exist formally but fails to impose effective limits. The task is to determine when the crime ends and the proportional response becomes something other than death. It is not that proportionality is required in one state and not in another but rather that the practical meaning of proportionality is different in these two states. In the condition of civil society (i.e., where there exists a “Common Superior on Earth”), we can expect a proportional punishment less than death: “When the actual force is over, the *State of War* ceases between those that are in Society, and are equally on both sides Subjected to the fair determination of the Law; because then there lies open the remedy of appeal for the past injury, and to prevent future harm” (§20). When the thief escapes with my property, and I am under civil society, the moment of actual force has ended, and the *thief has finally turned out to be just a thief and not a murderer*.

In the State of Nature, however, where there continues to be no possibility of appeal, where there are no “positive laws,” the State of War “*once begun, continues*, with a right to the innocent Party, to destroy the other whenever he can, until the aggressor offers Peace” (§20). The State of War, triggered by a crime and continued in the punishment, does not come to an end even after the thief has fled. Even though the thief has turned out “only” to be a thief, the relation of force between him and his victim has not ceased. The only way to end this state of war, since there is no appeal to a common judge, is for the aggrieved either to accept an offer of peace or to punish the thief, that is, with death.

The problem, however, is that neither way of ending the State of War is feasible in the State of Nature. The thief, once tracked down and caught, faces a choice between compliance and resistance, but both options are futile. If the thief complies by offering peace, makes amends, and tries to bring a



close to the State of War in hopes that he can accept punishment and potentially be restored to the realm of rational humanity, at least two problems emerge. First, it becomes unclear what an acceptable punishment would be. Because the State of War continues, the Law of Nature means that death is still an acceptable response. But something surely has changed from the moment of the crime itself: the thief has (at least in some common sense) turned out to be less than a murderer, especially since he is, in this case, offering to make amends. Something less than the justified proportional response of death seems called for, since the crime seems to have turned out to be of a different character, and what would be necessary for reparation and restraint is also likely to be lower. Even while being fully aware that the Natural Law requires proportional punishment, determining what would *actually be proportional* is a separate question. Locke seems to realize that there are easily multiple measures of proportion and no naturally given way to fix upon the correct measure. He goes out of his way to avoid articulating what proportionality would require in the State of Nature: “Every Offence that can be committed in the State of Nature, may, in the State of Nature be also punished, equally, and as far forth as it may, in a Common-wealth; for though it would be besides my present purpose, to enter here into the particulars of the Law of Nature, or its *measures of punishment*; yet, it is certain there is such a Law” (§12).

Second, even if a precise measure could be established, there is no reasonable expectation that it would work. If death is the correct measure, then how could we expect the thief to concede? But even if the proportional punishment is less than death, Locke has already conceded that we cannot expect the aggrieved to execute the Law of Nature correctly, as “Ill Nature, Passion and Revenge” will surely “carry [him] too far in punishing others” (§13). Such personal bias is not the sole reason why natural punishment might produce disproportionate responses, since *even proportionate punishment* is unlikely to bring the State of War to a close. For either reason, the State of War is expected to continue indefinitely, and the boundary between aggrieved and aggressor becomes increasingly indistinct. The thief is thus probably wise not to relent at all but openly to resist punishment.

What happens when we fail to punish because the aggressor refuses to make amends? In this case, the outcome turns on who is stronger. If the thief is able to overpower me, then it becomes likely that before we even have a chance to punish, the State of War will end in death, and the thief will become a murderer, free to be killed by anybody else, beginning the punishment cycle again. If I am stronger, and am able to prevail, the situation becomes even more complicated with the possibility that death and disorder might give way

to a perpetual continuance of the State of War through institutionalized slavery. If I am justified in killing a person and demonstrate my ability to do so by bringing that person to the point of death, I am at liberty, Locke tells us, to delay the actual execution of sentence and leave the transgressor under my absolute power (§23). In this way, the state of war continues indefinitely. While spared a physical death (for at least the time being) such a slave is rendered radically unfree and completely subject to his conqueror under despotic power (§§23-24).

As explained by James Farr, Locke's commitment to equality is visible in this account of slavery, and as such strongly departs from naturalistic accounts of slavery.<sup>24</sup> Locke's "just-war" theory of slavery, by having an "emphasis on unjust *action*," is consistent with his account of natural rights, because a justly enslaved aggressor has violated the Law of Nature in a way that deserves death.<sup>25</sup> Slavery is Locke's other "strange doctrine" (§180), and is directly linked—structurally, rhetorically, and logically—to the natural right to punish. The difficulties in executing this right in the State of Nature lead persons to the threshold of not only death but into a living death of absolute and arbitrary power.

Because "life is essentially freedom," Andrew Norris notes, slavery is a form of living death, without the "rights and powers of the living."<sup>26</sup> Norris is careful to note that the slave is in fact "biologically alive," but by Locke's account is no longer characterized by the essential "right and powers" of humanity established in the opening pages of the *Second Treatise*: equality and freedom. This description echoes Rousseau's gloss on slavery: "In taking an equivalent of his life, the victor did not spare it: instead of killing him unprofitably, he killed him usefully."<sup>27</sup> While Norris's account relies heavily on Agamben's distinction between bare life and human life,<sup>28</sup> the figuration of the slave as "living dead" can also be read through Orlando Patterson's language of slavery as a form of "social death."<sup>29</sup> The living death of slavery can be the direct product of the execution of the right of punishment.<sup>30</sup> Because the use of force against one's freedom can justify the death penalty as well as slavery, slavery is rightly figured as a kind of death itself, serving as fundamental antithesis of freedom.

The mere fact of slavery, even if justified, is an essentially destabilizing force in the State of Nature. First, slaves are the only persons to possess a right to commit suicide by "resisting the Will of his Master" and "draw on himself the Death he desires" (§23). This paradoxical right of resistance is permitted to no other persons, and it is a right that ensures that the condition of slavery (as a continuation of the State of War) is anything but a stalemate or stable condition, but a continued conflict. In a now justified right of

“resistance” though, even an original aggressor gains the right to fight back. Second, justified slavery is, as an extension of the right to punish, likewise subject to a series of limitations outlined in chapter 16 on conquest. But the specific danger Locke highlights in these passages (especially in §182) is the ease with which a lawful conqueror becomes an unlawful one, when a punishment would in fact “be Robbery on my side” (§182).

Once we grasp this connection between punishment and the perpetual continuation of the State of War in slavery, it should be no wonder how the State of Nature spirals into “Confusion and Disorder.” The relationship between the guilty and innocent is easily reversed or at least increasingly hard to distinguish because of human passions, the nearly unlimited scope of proportionality, or as a perpetual State of War in slavery. In any case, what is crucial to note is that failure to end the State of War in this case is not solely or even primarily based in the original crime itself, *but in its punishment as well*. The problem, in the State of Nature at least, is less an existential fear of crime, but a fear that punishment, even rightly carried out, is nothing more than the continuation of the State of War, where the crime persists, where proportionality is at best unclear and at worst potentially infinite, and the only certain outcomes are death itself or a living death of slavery.

The key failure is that at the single moment when it would be possible to end the State of War peacefully, the Natural Law’s requirement of proportionality does not actually limit punishment. Killing the highwayman, something that *seems* like an excessive punishment for robbery, is entirely consistent with the binding requirement that punishment be constrained in proportion to the severity of the crime on Locke’s terms. In a sense, it allows the excessive to also be the proportional.<sup>31</sup> In the State of Nature, acts of theft and attempts at murder are indistinguishable, making the proportional response to *any crime of force* unlimited. The distinction, if one can be made at all, turns only on a nascent distinction between innocent and guilty, itself a distinction that will be fraught by the difficulty of judging in our own cases. A logic of justice focused on the transgressor rather than transgression typically emerges and produces a violent and seemingly illiberal response that is legally permissible if not guaranteed. *Proportional* punishment, on these terms, has no boundaries, and generates the disorder and chaos that characterizes the State of Nature. While the possibility of crime might make the State of Nature unstable and dangerous, the practice of punishment makes it unacceptable.

## Founding and Rebellng

The utility of reading the *Second Treatise* in this way, prioritizing Locke’s account of punishment and the case of the thief, is in understanding the

necessity of civil society and the grounds of a right to rebellion. The instability of punishing in the state of nature is neither an accident nor a slip in Locke's argument, but rather helps reframe the usual question about punishment that we ask of Locke. Rather than ask how to make punishment just or possible, the question is more narrowly how to make the proportionality required by the Law of Nature an effective limit and what work punishment does for a political body. Specifically, proportionality must be given a content that allows it to avoid the "Confusion and Disorder" that it caused in the State of Nature. That we can and must kill the thief is certainly proportional in the State of Nature because the necessary set of background conditions that make proportionality an effective limit have not yet been achieved.

Locke is explicit that the difficulty of *punishing* according to the Law of Nature drives humans towards civil government. The "Confusion and Disorder" following excessive punishment and the spiral into permanent war, death, and slavery is the primary reason for humans to accept the social contract and is the chief reason that "God hath certainly appointed Government to restrain the partiality and violence of Men" (§13). While Locke twice refers to his doctrine of punishment as "strange" (§§9, 13), Von Leyden puts it extremely well in noting that what is truly "strange" about his doctrine is the impossibility of it being a stable practice at all.<sup>32</sup> While the chief reason for the "inconveniences" of nature can be characterized by the lack of a neutral arbiter in cases of dispute, the driving force for government is to restrain the "partiality and violence" of *punishing* in those cases.

War and slavery emerge in the State of Nature not just easily but frequently if the problem stems not only from another (i.e., the thief) but also from within (i.e., our own right to punish). This makes the demand to flee from the State of Nature in favor of civil government even stronger. Locke writes decisively that "to avoid this State of War (wherein there is no appeal but to Heaven, and wherein every the least difference is apt to end, where there is no Authority to decide between the Contenders) is one great *reason of Mens putting themselves into Society*, and quitting the State of Nature" (§21). Understanding slavery as "*the State of War continued*" only secures the imperative for founding Civil Government (§24). To return to Von Leyden, "One could say that the necessity of men's uniting into commonwealths is proportionate to the unacceptability of the doctrine that each man has by nature the power of punishing the transgressions of others."<sup>33</sup> It is not simply that the state is a preferable alternative to the difficulty in executing the law of justice. Rather, recognizing the near certainty that any crime will be met with extreme (but justified) violence and that the only likely resolution is death or slavery lets us see more clearly that civil government is necessary.<sup>34</sup>

It is no wonder then that for Locke the natural right to punish is the basis of political power. The chief characteristic of a commonwealth is that it “comes by a power to set down, what punishment shall belong to the several transgressions which they think worth of it, committed amongst the Members of that Society” (§88). More important, however, it is the transfer of executive power from the “members” to the government that is the only source of power held by the state. This transfer, Locke declares, is the fundamental source of the political power: “Herein we have the original of the *Legislative* and *Executive* Power of Civil Society, which is to judge by standing Laws how far Offences are to be punished . . . and . . . employ all the force of all the Members when there shall be need” (§88). The people become a public, individuals become members, and the commonwealth comes into existence when the individual right to judge and execute the law is invested in the government. The persistent and continual relationship between the people and the government is entirely based on the transfer of the right to punish, and that this transfer becomes necessary or beneficial is because punishment needs to be bounded through the creation of a political order.

The rhetorical work of the thief is not yet finished for Locke. The thief returns to show how the right to punish is not permanently alienated from members, but can be reasserted even after the foundation of a commonwealth and the establishment of a government. Joining together into a political society requires individuals to agree to transfer their right to punish in exchange for a government that can and will protect one’s life, liberty, and property. The power given to that government “*can never be suppos’d to extend farther than the common good*; but is obliged to secure every ones Property by providing against those . . . defects . . . that made the State of Nature so unsafe and uneasy” (§131). If the government violates this condition, it puts itself into a State of War with its subjects both in the immediate moment *and beyond that moment*, because it has ceased to function as a judge upon the earth. The government thus becomes an aggressor itself and is liable to be punished according to the natural right possessed by the public. What characterizes the robbery is that (1) I cannot know the ultimate intent of the person who has placed me under his or her power, and (2) I have nowhere to appeal except to heaven. These are the same conditions that Locke identifies as the characteristics of despotic or tyrannical power.

As both Ashcraft and Dunn explain in their readings of the *Second Treatise*, the right to rebellion is grounded by the natural right to execute the Law of Nature and the figuration of tyranny as the exercise of force without right, as a form of criminal action.<sup>35</sup> For Ashcraft, in particular, Locke’s revolutionary politics are connected to developing a “language” capable of figuring

kings as criminals, and therefore subject to punishment for their crimes. Locke's "phraseology . . . links the concept of tyranny with Locke's definition of a state of war," which in turn allows him to "show under what circumstances a prince becomes a tyrant in order to justify resistance to the latter as an act of self-defense."<sup>36</sup> Self-defense is grounded on the right to use force as an execution of the Law of Nature, that is, of the right to punish forceful thieves for their unjust use of force.<sup>37</sup>

Being able to clearly substitute a king for a criminal is at the heart of Locke's justification for the prosecution and execution of actual English monarchs. Ashcraft plays out this linguistic substitution in Locke's implied case against Charles II:

The "injury" and the "crime" committed by an "aggressor" or one who exercises "despotically power" is a crime chargeable to Charles II in his "illegal" use of power against the people. . . . The "injury" is . . . the loss of the people's "legislative power," a loss that automatically dissolves the government. This loss can only be "recovered" when the legislature has been "reinstated" and the aggressor "punished."<sup>38</sup>

This substitution relies on the equivalence established in the final four chapters of the Second Treatise, between unjust conquest, usurpation, and tyranny. "The Injury [of unlawful Force] and the Crime is equal," Locke insists, "whether committed by the wearer of a Crown, or some petty Villain. The Title of the Offender, and the Number of his Followers make no difference in the Offense" (§176). Such conquerors are figured in sections 181 and 182 as "beasts" and "thieves." The right to oppose a tyrant who lives outside the law *is the same* as that which opposes "a Thief and a Robber" (§202). And finally, the people are justified in rebelling against a tyrannical government because, as when being robbed in the street, they cannot know what the tyrant has in mind for them, nor do they have anywhere to appeal except heaven (§228 and 235, 243). The original political power that "reverts to the Society" (§243) is the very same unstable (and productive) right to execute the Law of Nature, to punish those who use force where there is no right, and to resist despotical power. Even slaves are able to justly resist their masters, after all. In the moment of rebellion, it is from the basis of our foundational right to exercise the Law of Nature, even including its otherwise disproportionate effects, that we can justify not only the new legislative or executive power, but, if necessary, the killing of the King as a thief. In this moment, the people do nothing more than exercise a natural right to punish a criminal.

## Membership and Reason

Punishment is unstable not simply because it produces bad outcomes but because it is tied up with the production of both the civil commonwealth and the possibility of some persons being members. Ashcraft's otherwise illuminating reading assumes that one is a thief, a robber, or even a tyrant merely through one's own actions. Thieves, by this account, have *chosen* to place themselves outside of society.<sup>39</sup> This wrongly assumes, however, that the boundaries of society are fixed prior to punishment, and that the attribution of thief (or tyrant, pirate, robber, or even member) is fixed entirely by one's own actions. Because proportional punishment is also a *temporal* problem, the case is more complicated.

Locke's political order comes into being to give proportionality acceptable limits, and to deflect the temporal problem of knowing who is in fact an aggressor and who is not. This is done by *producing* the criminal as necessarily beyond reason, as animalistic and dangerous, and constitutively defining the obedient subject as rational, innocent, and, above all, free. The founding of the Lockean contract, therefore, is also already about the production of subjects. It is necessary, on Locke's own terms, to figure out a way of knowing who is and who is not a rational agent. This question of judgment is only possible, however, through the very performance of the practice that depends on this distinction, through the punishing itself.

This is to say that the powerfully motivating force to form and join civil society is based not simply upon an anxiety about punishment's instability but also upon an anxiety about *transgressors* and *punishers*. Proportionality finally succeeds in becoming a constraining force through the formation of the twin figures of "thief" and "member."<sup>40</sup> The thief becomes the symbol of irrationality, anger, and unpredictability, importantly distinct from all those who lack reason by virtue of Nature (a partial list appears in §60 including "*Lunaticks and Ideots*," children, "*Innocents*," and "Madmen"). Locke tells us that punishment (especially in its most unlimited moments) is a response to the criminal as a *kind* rather than the crime as an *event*. The transgression is a rejection of God's gift of rational thought as well as a rejection of the Law of Nature's binding quality, leaving themselves dangerous to all of humanity, not just the person whom they have harmed.<sup>41</sup> This character is so deviant that the transgressor "becomes degenerate, and declares himself to quit the Principles of Human Nature, and to be a noxious Creature" (§10). A "noxious creature" is dangerous by nature, predestined to attack us, and expecting it to be tame would be to expect it to be something other than it is. This is nowhere clearer than in Locke's most powerful statement on the matter:

A Criminal, who having renounced Reason, the common Rule and Measure, God hath given to Mankind, hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a *Lyon* or a *Tyger*, one of those wild Savage Beasts, with whom Men can have no Society nor Security. (§11)

The dual effect of the criminal's animal-like nature is captured perfectly in the last part of this passage. There is no possibility of either building a social contract with such animals nor is there any way to handle them other than to destroy them.

The other side of this description, of course, is to reinscribe the qualities that mark the executor of the Law of Nature, the individuals who ultimately join together for safety and security and appoint a civil government. These individuals are defined through their adherence to rationality, their lack of inherent dangerousness, and their demonstrated humanity. Nowhere are these qualities better demonstrated than by the fact that such individuals possess a natural right to execute the Law of Nature independent of the state. Surely, those who punish must be definitively innocent of crime, secure in their humanity, and right in their cause. Locke knows that punishment is foundational to the meaningful existence of Natural Law, but it is also a moment where even rational humans run the nearly certain risk of going too far and becoming criminal aggressors themselves.<sup>42</sup>

Such instability makes the motivation for quitting the State of Nature all the stronger and more pressing: it is not only the physical security of nature that is in question, but also the security of the subject's very identity as rational and fully human, eligible for full membership in civil society. It is within the formation and maintenance of the state, as the political invention that will manage punishment's potentially unlimited character, which ensures that the innocent can remain so. The foundation of the commonwealth, and the possibility of being a rational individual (one with whom there can be "Security and Society") both rest upon determining *who* is rightly punished and *who* is right to execute that punishment.

The act of punishing negotiates the boundary between the member and the criminal by fixing criminals as a distinct kind of dangerous thing. It is the practice by which the question of who is inside and who is outside is definitively determined and enacted. Attention to how the thief is treated during the moment of the crime lets us see that the categories of "the guilty" and "the innocent" come into existence during the moment of punishment as much as



(if not more) than in the act of crime itself. This continues to be the case in the period after the founding of the state in that it provides for the dual justifications Locke offers for punishing. Recall that he establishes that the only purposes that can justify punishment are retributive notions of “reparation and restraint,” bringing forward- and backward-looking perspectives together. Locke can hold these two positions simultaneously because he understands that while the criminal is certainly a radical other, this identity is in flux during the key moment.

Locke is particularly attuned to the way in which crime and punishment are caught between temporal perspectives. In the moment of the robbery, being able to call the transgressor a “thief” is an absolute imperative, as it serves a dual function. The single attribution of “thief” captures the backwards-looking element. A thief has committed a crime against your property and in that capacity is deserving of punishment for that crime. But in the same moment, the identity of “thief” points forward, resolving some part of the future’s uncertainty. We know in this moment that this person, this thief, is a character who will rob us in the future (or, during the moment of the crime, do anything to us while he has us in his power), and must be restrained. The use of a single name (thief) solves two distinct temporal problems, calling for separate reactions (or in the language of contemporary liberal theory, reflects different and possibly incompatible justifications for punishment). The backwards-looking function of the name concerns itself with retributive punishment, while the forward-looking function opens the grounds for the continued handling of *thieves* as types of individuals who, like animals, are known to us *as kinds* of people who will rob from us, who will kill us if they have to, and most importantly, who are by definition threats to our life, liberty, and estate.

Getting punishment “right” through the establishment of civil government is imperative for determining what it means to be rational, to be a true member of civil society. The very foundation of the state and two key categories of subjectivity (criminal and member) are what make proportional punishment (as we would know it) possible. The inability to punish properly is, on these terms, an incredibly productive failure. Killing the thief, the highwayman, and even the king/tyrant become founding (and possibly refunding) moments of sovereignty that secure those who punish politically, epistemologically, and ontologically an identity as full members, innocent subjects, and truly rational humans. Punishment is, as McBride puts it succinctly, “the midwife in the birth of the social contract.”<sup>43</sup> It is the midwife of contracting subjects as well.<sup>44</sup>

## Rethinking the Contract

An attentive reading of the *Second Treatise* through punishment can help us to rethink both Locke's abstractions and those with which we organize, analyze, and understand our own political lives. For instance, while "war" and "slavery" are often thought to mark the boundaries of civil society, Locke reminds us of their longstanding persistence *within* civil society. Subsumed under the idea of force without right, Locke blurs any conceptual distinction between crime and acts of war, making it clear in chapter 16 ("Of Conquest") that they differ only in terms of degree.<sup>45</sup>

While the language of warfare is routinely employed in the present day within a criminal justice context, and likewise, the language of justice and law is readily employed in the discourse about war, it is seldom the case that policy makers or political theorists allow crime and war to occupy such a close proximity without a great deal of discomfort.<sup>46</sup> The recent political and legal debates in the United States over prosecuting "enemy combatants" in criminal courts reflect an insistence that the two spheres are meaningfully separate and call for different procedures and standards of judgment, even as there remains a great amount of disagreement over who is rightfully a "criminal" and a "terrorist."

Moreover, slavery and the slave-like conditions of despotic rule exist not only in the memories of liberal states but continue in practice and in law. The theoretical, historical, and empirical connections between punitive systems and slave systems, especially in the United States, are perhaps more understandable if we read chattel slavery in relationship to practices of punishment. It is worth remembering that slavery was not abolished by the 13th Amendment to the U.S. Constitution, but is reserved as a punishment for crime. A similar exception in the 14th Amendment has allowed forty-eight states to deny prisoners and many ex-convicts the rights to vote, serving as the legal foundation for numerous "collateral consequences" to incarceration.<sup>47</sup> In the nineteenth century, these constitutional exceptions, along with the implementation of Black Codes throughout the United States, sped the transformation from slavery to convict leasing and the distinctively American form of the penitentiary.<sup>48</sup> The homology between slavery and incarceration takes on a new force, helping us to see how prison labor continues to replicate the form and functions of a slave economy.<sup>49</sup>

Such subterranean effects of state punishment are made more clear by taking seriously the fact that punishment always carries with it the possibility of being unconstrained and unstable, and understanding what this instability produces within liberal orders. Locke reminds us that we should understand

punishment not as practice with an intrinsic measure of proportionality dictated by the natural law but rather as practice that, in its continual failure to hit the mark, in its constant ability to renegotiate its limits, in its possibility to be infinitely proportional, produces the social order we live under and the basis of sovereign power that we often seek to claim for ourselves.

Locke reminds us that political foundings are not simply questions of contracts and institutional arrangements, but assertions of subjectivity through acts of internal exclusion that are anything but final or definitive. This is not to justify such violence, but to explicitly question the limits of the conceptual distinctions that emerge in this moment. While there is an important distinction between the limited, proportional ideal of punishment (a system that restores balance on consequentialist grounds) and the possibility of a state of affairs that institutionalizes the imbalance caused by criminal transgression within Locke, he refuses to naively separate these two projects. This connection is the motivating factor for the erection of the commonwealth, foreclosing the possibility of war and slavery, solidifying punishment as the only legitimate response to transgression of right. At the very least, the commonwealth will limit such states of warfare and slavery to the margins of a society. Seemingly secure distinctions between war and crime, and slavery and punishment, might be far closer than we might like to think, and Locke is a paradigmatic thinker of the thresholds between these states.

In the case of the thief, Locke reveals the crucial moment in which the multiple functions of punishment are evident. In the moment of identification as a criminal, an individual simultaneously becomes responsible for a specific transgression and becomes a kind of person who embodies transgression itself. We discover that the thief comes to be marked as such because he is responsible for a particular act, and therefore eligible for retributive punishment for that specific action. But he is also marked as the bad actor that must be handled and managed, not simply for criminal actions but for a way of being.<sup>50</sup> This subjectivization serves as a basis for the conception of constraining proportionality under civil society, and continues to exist as a process long after the foundation of the commonwealth, within the very walls of the city this process helped to build.

As a purely justificatory analysis, punishment theory presumes a straightforward relationship between the identity of the criminal and the punishment that is applied. The “problem” of punishment in this case is to determine if, on one level, punishment can be justified as an institutional response to criminals, and on another level, if an individual punishment can be justified in a particular case. But if we pay attention to the work that punishment does in the very generation, fabrication, or production of the “criminal” or “bandit”

as an order of knowledge concerning criminal actions and identities, if we realize that the foundational “problem” of punishment is determining what work that punishment does in the formation of a political order, we will necessarily see the justificatory question in a new light.

As mass incarceration has spiraled out of control, as the age of the disciplinary penitentiary has given way to actuarial policing and corrections, as a full 1 percent of the American population lives the life of the prisoner, as nearly 5 percent of Americans are permanently marked as felons and stripped of their political rights, the continued operability of these terms has become increasingly suspect. An attentive return to a thinker often read as a “founder” of liberal political thought should remind us that the violent costs of these practices were visible from the start.

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### **Notes**

1. Nathaniel Hawthorne, *The Scarlet Letter* (New York: Penguin Books, 2003), 45.
2. David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990), 287.

3. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995); Michel Foucault, *Les Anormaux*, ed. François Ewald et al. (Paris: Gallimard, 1999).
4. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).
5. Jacques Derrida, *The Beast and the Sovereign: Volume 1*, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 2009), 40.
6. Judith N. Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy L. Rosenblum (Cambridge: Harvard University Press, 1989), 37.
7. Keally McBride, *Punishment and Political Order* (Ann Arbor: University of Michigan Press, 2007), 122.
8. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988). Hereafter, cited by section number.
9. See, for instance, Leo Strauss, "On Locke's Doctrine of Natural Right," *The Philosophical Review* 61, no. 4 (1952); John Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969); Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1965); John W. Yolton, "Locke on the Law of Nature," *The Philosophical Review* 67, no. 4 (1958); Richard Ashcraft, "Locke's State of Nature: Historical Fact or Moral Fiction?," *The American Political Science Review* 62, no. 3 (1968); Robert A. Goldwin, "Locke's State of Nature in Political Society," *The Western Political Quarterly* 29, no. 1 (1976); Patrick Coby, "The Law of Nature in Locke's *Second Treatise*: Is Locke a Hobbesian?," *The Review of Politics* 49, no. 1 (1987); A. John Simmons, "Locke's State of Nature," *Political Theory* 17, no. 3 (1989); James Tully, "Political Freedom," *The Journal of Philosophy* 87, no. 10 (1990); Daniel M. Farrell, "Punishment without the State," *Nous* 22, no. 3 (1988); Eldon J. Eisenach, "Crime, Death and Loyalty in English Liberalism," *Political Theory* 6, no. 2 (1978); Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).
10. For instance, see Jeffrie G. Murphy, "A Paradox in Locke's Theory of Natural Rights," *Dialogue* 8 (1969/70).
11. See also A. John Simmons, "Locke and the Right to Punish," *Philosophy & Public Affairs* 20, no. 4 (1991); A. John Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press, 1992); A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993); Wolfgang Von Leyden, "Locke's Strange Doctrine of Punishment," in *John Locke: Symposium, Wolfenbüttel 1979*, ed. Reinhard Brandt (Berlin: Walter de Gruyter, 1981); Richard Ashcraft, *Locke's Two Treatises of Government* (London: Allen & Unwin, 1987); Richard Ashcraft, *Revolutionary Politics and Locke's "Two Treatises of Government"* (Princeton, NJ: Princeton University Press, 1986).

12. When the thief is invoked, it is usually used as an example of Locke's "confusion" between retributive versus utilitarian bases for the justification of punishment or to question the justification of the death penalty. For instance, see Larry Alexander, "Consent, Punishment, and Proportionality," *Philosophy & Public Affairs* 15, no. 2 (1986); Brian Calvert, "Locke on Punishment and the Death Penalty," *Philosophy* 68, no. 264 (1993); C Nino, "A Consensual Theory of Punishment," *Philosophy & Public Affairs* 12, no. 4 (1983); C Nino, "Does Consent Override Proportionality?," *Philosophy & Public Affairs* 15, no. 2 (1986); John A. Simmons, "Locke on the Death Penalty," *Philosophy* 69, no. 270 (1994). Two notable exceptions are Rebecca Kingston, "Locke, Waldron and the Moral Status of 'Crooks,'" *European Journal of Political Theory* 7, no. 2 (2008); Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (New York: Cambridge University Press, 2002).
13. I borrow the term "degenerates" explicitly from Darrell Moore's account of subject formation at the intersection between the social contract and Locke's account of human reason. See Darrell Moore, "Epidermal Capital: Formations of (Black) Subjectivity in Political Philosophy and Culture" (Ph.D. diss., Northwestern University, 1997).
14. Waldron, *God, Locke, and Equality*, 143.
15. I follow Locke's usage of the masculine-gendered pronoun in describing thieves, despite the fact that, as Terrell Carver has noted, Locke's narrative alternates between "covert" and "overt" gendered language throughout the text. Carver notes that use of "man," "mankind," and the thief used in Chapters 2–5 are seemingly "de-gendered" for Locke, as opposed to the overtly gendered account he uses elsewhere. See Terrell Carver, "Gender and Narrative in Locke's *Two Treatises of Government*," in *Feminist Interpretations of John Locke*, ed. Nancy Hirschmann and Kirstie McClure (University Park, PA: Pennsylvania State University Press, 2007).
16. Waldron echoes this reading, noting that the moral calculus of proportionality requires attending to, "the violator . . . as a focus of concern" (144). Waldron, however, seems overly confident that the status of "violator" is knowable *prior* to the institution of state punishment.
17. In §6 of the *Second Treatise*, Locke seems to conflate reason and the Law of Nature. This articulation seems to be partially at odds with the 4th Essay on the Law of Nature, where he states that through reason mankind "arrives at the knowledge of natural law." John Locke, *Political Essays* (Cambridge: Cambridge University Press, 1997), 101, emphasis added.
18. This right is also stated explicitly in §§182 and 207. In §§172, 186, 202, and 228, further reference is made to thieves, robbers, and pirates, and in each case connects such persons to the exercise of unjust force calling for a response.

19. I agree with both Simmons and Tarcov that the State of Nature and War are not, as Dunn has argued, mutually exclusive. See Simmons, *On the Edge of Anarchy*, 43n; Dunn, *The Political Thought of John Locke*, 96-119; Nathan Tarcov, "Locke's 'Second Treatise' and 'the Best Fence against Rebellion,'" *The Review of Politics* 43, no. 2 (1981).
20. The figure of the highwayman was common in 17th English popular culture. See Michael Billett, *Highwaymen and Outlaws* (London: Arms and Armour, 1997); Christopher Hill, *Liberty against the Law: Some Seventeenth-Century Controversies* (London: Penguin, 1996); Gillian Spraggs, *Outlaws and Highwaymen: The Cult of the Robber in England from the Middle Ages to the Nineteenth Century*, Pimlico (London: Pimlico, 2001).
21. Simmons insists that the States of Nature, War, and civil society are *relational* between persons, meaning that a single person can be in a State of Nature with one person while at the same time in a State of War or peace with another. See Simmons, *On the Edge of Anarchy*, 16-17. Alternately, an individual may be in a State of War with another person while also in a state of civil society. See Ashcraft, *Locke's Two Treatises of Government*, 202-5.
22. Following Locke's own usage, unless otherwise noted, the example of the thief will be presumed to have employed force throughout the rest of the essay.
23. Even when Locke does eventually introduce a distinction between crime and war in chapter 16, his account of just and unjust conquest relies on the continued figuration of the State of War and the rights of the aggrieved as instances of crimes of robbery, burglary, and theft in §§176, 181, and 186.
24. James Farr, "'So Vile and Miserable an Estate': The Problem of Slavery in Locke's Political Thought," *Political Theory* 14, no. 2 (1986); James Farr, "Locke, Natural Law, and New World Slavery," *Political Theory* 36, no. 4 (2008).
25. Farr, "The Problem of Slavery in Locke's Political Thought," 271.
26. Andrew Norris, "The Exemplary Exception: Philosophical and Political Decisions in Giorgio Agamben's *Homo Sacer*," in *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's Homo Sacer*, ed. Andrew Norris (Durham: Duke University Press, 2005), 272-73, emphasis in original.
27. Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), I.4.12, 48. Rousseau rejects the Lockean account of slavery as well as any confusion between what I've described here as "war" and "crime." Although it is telling that the one location in the *Social Contract* where Rousseau troubles this distinction is in his account of the death penalty in II.5.4.
28. In part, Norris argues that the same account of sovereignty that Agamben locates in Hobbes' *Leviathan* can be seen in Locke's work as well. See Norris, "The Exemplary Exception," 273.

29. Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982). The idea of slavery as a condition of living death, or being dead already, was (as Patterson notes) a common understanding of ancient slave systems and an apt characterization of the “experience” of slavery (8).
30. Waldron argues that Locke cannot possibly extend the right of punishment to a right of slavery, as this would be to misunderstand when “actual force” is over. The problem in the State of Nature is that “actual” force cannot cease where there is no common judge. Waldron is right, however, to note that even under Locke’s account, there is no reason to expect slavery in any form to be a “stable or regularized system.” Waldron, *God, Locke, and Equality*, 148-49.
31. My reading plays with the slippage between a commonsense notion of proportionality and excess. In part, my point is that Locke also plays with this slippage in order to demonstrate the distinction between states of war and peace, introducing the requirement of proportionality within a context in which it has no seeming ability to constrain the natural punitive right.
32. Von Leyden, “Locke’s Strange Doctrine of Punishment,” 118. By Locke’s own account in §9 the “strangeness” of his doctrine seems to be that it is “unusual,” but nevertheless one that must already be agreed to by those who think it right that a state can “put to death, or *punish an Alien*.” In §13, the strangeness of the doctrine is more central to my point: to give such a right will surely be to give too much power to persons who are least able to execute that right. The idea of punishment as a natural right of individuals, rather than simply of the state, however, is less novel than Locke thinks. As Tuck shows, Grotius had already articulated nearly the same position. See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 63; Tuck, *The Rights of War and Peace*, 171. See also Strauss, *Natural Right and History*, 214.
33. Von Leyden, “Locke’s Strange Doctrine of Punishment,” 118.
34. McClure specifically identifies Locke’s executive right of punishment as driving the necessity of civil government. See Kirstie McClure, *Judging Rights: Lockean Politics and the Limits of Consent* (Ithaca: Cornell University Press, 1996), 134.
35. Ashcraft, *Revolutionary Politics and Locke’s “Two Treatises of Government,”* esp. 329-336; Ashcraft, *Locke’s Two Treatises of Government*, 196-230; Dunn, *The Political Thought of John Locke*, 165-86.
36. Ashcraft, *Locke’s Two Treatises of Government*, 210.
37. *Ibid.*, 202.
38. Ashcraft, *Revolutionary Politics and Locke’s “Two Treatises of Government,”* 331.
39. Ashcraft, *Locke’s Two Treatises of Government*, 201, 202.



40. I draw here on Moore's argument that Locke develops an account of "subjects-as-individuals" who come into existence through their capacity to internalize the natural law, "defined against the existence of individuals who cannot or refuse to act in accord with the natural law and are, consequently, considered dangerous to a well-ordered society" (14). These other subjects are "degenerate or irrational" and necessarily excluded from membership (20). A similar process is at work with the thief and member, but in a way that generates an even greater instability between transgressors and punishers. Moore, "Epidermal Capital."
41. This understanding of the thief as unable (or unwilling) to consult reason to know the natural law is not limited to Locke's political theory, but figures as a central proof in his epistemology as to why there are not innate principles of truth or justice, but that they must be acquired through reason. See John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Oxford University Press, 1975), 66.
42. See McClure, *Judging Rights*, 208-9.
43. McBride, *Punishment and Political Order*, 104.
44. See also Tully's articulation of the "penalized self" as the ontological Lockean subject, relying on the *Essay*. James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 239-41.
45. I do not mean to imply that such distinctions are impossible, but Locke's depictions of conquest employ criminal figures. In section §176, Locke insists that the difference between an "unjust conquerer" and a "petty villain" is one of size, reputation, and power but not a categorical difference. See Ashcraft on this point in particular: Ashcraft, *Locke's Two Treatises of Government*, 207; Ashcraft, *Revolutionary Politics and Locke's "Two Treatises of Government,"* 399-401. In §181, Locke underscores the centrality of force to the definition of war, again using the image of breaking into a house to make his point, echoing the images of "beasts" used in chapters 2 and 3 to describe thieves and murderers. In §186, Locke specifically uses the example of highway robbery to explain the inability to make binding promises under the threat of force. See also Tuck, *The Rights of War and Peace*, 166-72.
46. For instance, see Bruce Ackerman, "The Emergency Constitution," *The Yale Law Journal* 113, no. 5 (2004); Bruce Ackerman, "This Is Not a War," *The Yale Law Journal* 113, no. 8 (2004).
47. See Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2006). Up-to-date statistics on collateral consequences are kept by the Sentencing Project (<http://www.sentencingproject.org/>). Defenders of felon disenfranchisement have routinely relied on Locke to defend such exclusions. See Michael J. Cholbi, "A Felon's Right to Vote," *Law and Philosophy* 21, no. 4/5

- (2002); Alec C. Ewald, "'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States," *Wisconsin Law Review* 2002, no. 5 (2002).
48. Milfred C. Fierce, *Slavery Revisited: Blacks and the Southern Convict Lease System, 1865-1933* (Brooklyn, NY: Africana Studies Research Center Brooklyn College City University of New York, 1994); Alexander C. Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London: Verso, 1996); Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866-1928* (Columbia, SC: University of South Carolina Press, 1996); Angela Davis, "From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System," in *The Angela Y. Davis Reader*, ed. Joy James (Malden, MA: Blackwell Publishing, 1998).
49. See Barbara Esposito et al., *Prison Slavery* (Washington, DC: Committee to Abolish Prison Slavery, 1982); Loïc Wacquant, "Slavery to Incarceration," *New Left Review*, no. 13 (2002). In particular, see Asatar P. Bair, *Prison Labor in the United States: An Economic Analysis* (New York: Routledge, 2008).
50. Foucault explores discursive subject formation in *Discipline and Punish* and in his lectures at the *Collège de France* in the late 1970s. He demonstrates how the criminological figure of the delinquent is fabricated in order to resolve this tension: subjects must be fully responsible agents to be held responsible for their bad acts, but they must also be deeply criminal objects for whom the penitentiary technique is appropriate. His description of delinquents as having an affinity with crime and being criminal before the crime captures the problem nicely, especially in the early lectures of the 1976 course, *Abnormal*. Foucault traces this tension to the 18th and 19th century liberal accounts of Beccaria and Bentham, but which, as my reading shows, is already visible in Locke's account as well. See Foucault, *Discipline and Punish*; Foucault, *Les Anormaux*.

### About the Author

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