Natural Rights and Criminal Punishment

BY

Atanacio Hernandez
B.A., University of North Texas, 2014
M.A., University of Illinois at Chicago, Chicago, 2017

THESIS

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Defense Committee:

Anthony Laden, Chair and Advisor
Samuel Fleischacker
Stephen Engelmann
David Schmidtz, West Virginia University
Michelle Schwarze, University of Wisconsin-Madison

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SUMMARY

The state not only claims the right to be the exclusive punisher of criminals in society, but also the right to specify the punishments that offenders deserve to suffer. In contemporary political philosophy, these rights have been challenged on A. John Simmons' thesis that citizens have no moral obligation to obey the state's legal authority. Contrary to Simmons, I argue in this dissertation that the state's authority to punish finds moral justification in citizens' natural rights.

In the first of a series of three papers, I examine Simmons' thesis that there is no general moral obligation to obey the law. I argue that, although principles of consent and fairness are unable to justify a general obligation to obey the entirety of the law, those principles may yet justify restricted obligations to obey the law in limited domains (e.g., criminal punishment). In the second paper, I turn towards John Locke's theory of natural rights. I show how Simmons unsuccessfully relies on Lockean principles to maintain the illegitimacy of the state's exclusive right to punish. Although Simmons correctly points out that Locke is wrong in thinking that citizens consensually surrender their natural right to punish to the state, Simmons nonetheless fails to show how Locke can have a plausible account of the natural right to punish; especially in light of Locke's failure to account for the authority to specify punishments. Simmons' claim that the state's exclusive right to punish infringes upon citizens' natural right to punish is, therefore, without basis. Lastly, I show in the third paper how Adam Smith's theory of natural jurisprudence remedies the shortcomings in Locke's account of the state's right to punish. I show how an account of natural right to punish, one that explains the authority to specify punishments, can be reconstructed from Smith's natural jurisprudence; and I show how Smith's critique of social contract theory allows him to think that the natural right to punish is transferred from each individual citizen to the state – all in the absence of a consensual surrender.

I. Introduction

In punishing criminals, the state exercises three basic rights: (1) the right to specify the just and proper punishments that offenders are required to suffer; (2) the right to physically inflict these punishments, and (3) the right to the non-interference of all others in the infliction of these punishments. Obviously, these rights are recognized by the criminal law, but how are they recognized by morality? Which moral principles, if any, justify these rights of the state?

The moral justification of political authority is a classic issue in political philosophy, and, in recent decades, has taken the form of a challenge. Beginning with his *Moral Principles and Political Obligations* in 1979, A. John Simmons has forcefully defended the thesis that citizens have no moral obligation to render obedience to the state's legal authority. Simmons' thesis is sweeping, but for that reason suspect. Granted, citizens will not be morally obligated to do just anything that the state requires – but aren't there regular instances where citizens will be morally obligated to fulfill their legal requirements? The authority of the state ranges over many areas of citizens' lives – e.g., travel infrastructure, regulation of the workplace, policing of criminal activity, adjudication of disputes, etc. – so that Simmons' thesis appears suspect precisely because one expects to find moral reasons justifying obedience in at least *some* of these areas (if not all of them). Upon this suspicion, I investigate in this dissertation whether and how there is a moral justification for the state's authority in the domain of criminal punishment.

My approach is largely historical. I work within the tradition of natural rights theorizing, and, in particular, within the natural rights theories of John Locke and Adam Smith. This is for two main reasons. The first is that the natural rights tradition was preoccupied with explaining the moral legitimacy of the state's right to punish. More so than any other tradition in political philosophy, then, the natural rights tradition provides this dissertation with the best conceptual

framework for thinking about the state's right to punish. The second reason for the historical approach is to evaluate Simmons' thesis on his own terms. Contrary to Locke's own purposes, Simmons has argued that Locke's theory of natural rights has the potential to uphold the illegitimacy of the state's authority. There is not so much sustained discussion of Simmons' arguments for state illegitimacy when cast in these Lockean terms. Most discussions are on the grounds of systematic moral theory. This dissertation thus brings attention to an underdiscussed (and, I believe, fruitful) way of thinking about challenges to legitimate political authority.

The dissertation consists in three papers, each focusing on one of the three theorists that I have mentioned. I will now briefly summarize the central argument of each paper, as well as indicate how the papers may be thought to advance a single, general argument.

The paper entitled "Partial Political Obligations" critically examines Simmons' thesis that there is no moral obligation to obey the law. In this paper, I argue that there may be restricted obligations to obey the law in limited domains, even if there is no general obligation to obey the entirety of the law. I make this argument by relying on the moral principles of consent and fairness. The upshot of this paper, though not explicitly stated, is that there is a conceptual space for thinking about the legitimacy of the state's authority to punish without thereby having to think about legitimacy of the state's authority *in toto*.

The paper entitled "Locke and the Limits on Punishment" focuses on Locke's natural rights theory of punishment. In this paper, I argue that Locke fails to show how a principle of deterrence explains the limits on the natural right to punish. I further argue against the suggestion made by Simmons that Locke may possibly rely on a principle of fairness to explain these limits. These arguments thus reveal a problem. On Locke's social contrary theory, the state comes to have its right to punish as a result of each individual's consensual transfer of the natural right to punish to the state. But without an explanation of the limits on the natural right to punish, Locke

is left without an explanation of the limits on the first of the three rights of the state mentioned above, (1) the state's right to specify the just and proper punishments that offenders are required to suffer. This problem facing Locke's theory of natural rights prompts a turn towards other natural rights theories that may better account for the state's right to punish.

The final (and lengthiest) paper entitled "Smith and the Right to Punish" shows how Smith's theory of natural jurisprudence can offer a plausible account of the state's right to punish. In addition to the first right of the state mentioned above, this chapter deals with the second and third of those rights: (2) the state's right to physically inflict punishments, and (3) the state's right to the non-interference of all others in inflicting punishments. Importantly, the Smithian account of the state's right to punish that is presented in this paper intends to remedy the shortcomings in Locke's account. Hence, I show how Smith explains the just and proper limits on the natural right to punish *via* a principle of the satisfaction of morally appropriate resentment. On this basis, I conclude that Smith can explain (1) the state's right to specify the just and proper punishments that offenders are required to suffer. Additionally, I show how Smith can rely on a principle of the preservation of society to explain how, in the absence of a consensual surrender, the right to punish may be transferred from each individual to the state. So I further conclude that Smith can explain (2) the state's right to physically inflict punishments, as well as (3) the state's right to the non-interference of all others in inflicting punishments – all while avoiding the glaring problem facing Locke's theory of social contract, namely, that citizens have not *in fact* consensually surrendered their natural right to punish to the state.

A general argument may be thought to run through the papers of this dissertation since, throughout my treatments of Locke and Smith, I continue to pay attention to Simmons' thesis that there is no moral obligation to obey the law, though I focus this thesis on the state's punitive authority. Simmons takes issue with (3) the state's right to the non-interference of all others in

inflicting punishments. By seizing on Locke's failure to show how the natural right to punish is consensually transferred to the state, Simmons argues that citizens retain their natural right to punish in political society, and, therefore, that the state has no right to prevent citizens from meting out punishments on offenders. But in showing how neither Locke nor Simmons has a plausible account of the natural right to punish, I thereby show how Simmons lacks the natural-rights-basis from which he intends to argue for the illegitimacy of the state's punitive authority. On his own terms, then, Simmons' thesis is shown to be severely weakened, and that is highlighted by the plausibility of a Smithian account of how a properly limited natural right to punish is non-consensually transferred to the state.

A fuller treatment of these issues includes a defense of my tacit assumption that the legitimacy of the state's right to punish is independent of the legitimacy of the state's authority in general. Such an assumption may need extra support since the state's right to punish is (or can be) exercised in every legal domain. The legitimacy of state's right to punish may therefore be thought to be intrinsically connected to the legitimacy of the state's authority in its entirety. While I am unable to fully address this worry here, I offer the following initial considerations.

I reject what is a commonly assumed view of the state's right to punish as a simple right to threaten and inflict violence for disobedience to the law. This view does not capture (1) the authority that the state claims to specify the just and proper punishments that offenders are required to suffer. Notice that this authority implies a distinct obligation on offenders. It's only after offenders fail to meet their initial obligation to obey some law that they can then acquire the *additional* obligation to suffer a punishment for that failure to obey. For this reason, we may distinguish between the state's authority to enact a law and the state's authority to punish violations of that law. So we might entertain the following assumption: the state's legitimate enactment of a law is neither sufficient nor necessary for the state's right to punish violations of

that law. Consider the denial of the sufficiency claim. It's possible that the state has the right to make binding laws while some other agent, but not the state, has the right to inflict punishments for violations of those laws. So the state's authority to enact a law does not suffice for the state's right to punish violations of that law. Consider now the denial of the necessity claim. If the state never enacted a law forbidding murder, it's conceivable that the state might yet have a right to punish acts of murder. On one line of argument, these acts are already prohibited by *some body of law*, though not a body of law that belongs to the state. Rather, this body of law is the natural law, or the moral law, and so, the argument continues, it may turn out that the state's authority to enact a law is unnecessary for the state's right to punish violations of that law. To be sure, difficulties face this line of argument once we begin to question the extent to which the state can in this case have the three rights discussed here. But even so, we already see why we should not simply take it for granted that the state's right to enact a law is necessary for the state's right to punish violations of that law.

So I hope that these initial considerations indicate how the state's punitive authority may be considered legitimate or illegitimate in its own right so that, if only for the purposes of this dissertation, it may be feasible to treat the legitimacy of the state's right to punish as an independent topic of inquiry.

II. Partial Political Obligations

It's not hard to see how states can enjoy legitimacy in some respects, but not in others. In recent decades, however, debates on the state's moral legitimacy have been fixed upon the question of whether or not states are on the whole morally legitimate, thereby making the question of partial legitimacy a subsidiary issue. Such a focus owes much to the influential arguments for the view that states do not enjoy moral legitimacy, especially as these arguments have been defended by A. J. Simmons.

In this paper, I show how Simmons' arguments for state illegitimacy overlook an important way that states enjoy partial legitimacy. I criticize his well-known argument in *Moral Principles and Political Obligations* that citizens' political obligations are not justified by general moral principles. In short, I reject a tacit assumption running through that work, namely, that a citizen's political obligations must consist in a single, general moral obligation of obedience to all of a state's laws. Instead, I offer an understanding of political obligations as consisting in a citizen's bundle of multiple, independent "partial political obligations" to various domains of the state's authority. I defend the claim that partial political obligations offer a more realistic picture of the moral relation between citizen and state, even if they complicate the question of the state's overall moral legitimacy.

I first lay out Simmons' understanding of legitimacy in Section 1, and then criticize his arguments for state illegitimacy in Section 2. In Section 3, I offer reasons for why traditional understandings of legitimacy have not made room for partial political obligations. I conclude in Section 4 with a revision to Simmons' view.

1. State Illegitimacy

Simmons includes his view of the state's moral illegitimacy under a kind of anarchism called "philosophical anarchism." To better understand this view, and its underlying conception of legitimacy, we may consider three ways in which philosophical anarchism can be understood as a qualified anarchism.

In the first place, philosophical anarchism can be seen as a qualified anarchism since arguments for state illegitimacy on philosophical anarchism may appear "thinner" than expected. Some may reasonably expect anarchist views to recommend action against states, or offer radical ideals of social/(a)political life, but these proposals aren't usually put forward on philosophical anarchism.[1] Philosophical anarchism upholds, rather, a merely "negative" thesis concerning reasons for legal obedience. When Simmons says that illegitimacy entails "simply" the lack of "any strong moral presumption in favor of obedience to… our own or other existing states,"[2] he means that illegitimacy entails merely that citizens have no moral obligation to obey their states, no morally justified "political obligations."[3] Of course, states claim that their citizens have an obligation to obey. The law does not recommend that its subjects act according to it, but commands and expects them to, no matter their reasons for acting otherwise.[4] But if the legal

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[1] The moral illegitimacy of states needn't imply a strong moral obligation to oppose states. See A. John Simmons, "Philosophical Anarchism," in *For and Against the* State*: New Philosophical Readings*, eds. John T. Sanders & Jan Narveson (Lanham: Rowman Littlefield, 1996), 22. But see also Michael Huemer's case for disobedience and for a vision of anarchist social/(a)political life in Michael Huemer, *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey* (New York: Palgrave Macmillan, 2013), 163-169; Part III.

[2] Simmons, "Philosophical Anarchism," 19-20.

[3] "…anarchist judgements of state illegitimacy typically are taken to entail that subjects of those illegitimate states have no political obligations." Simmons, "Philosophical Anarchism," 21-22. See also A. John Simmons, *Moral Principles and Political Obligations*, (Princeton: Princeton University Press, 1979), 16-17.

[4] The law sometimes allows exceptions to obedience as in cases of self-defense and necessity, for example. But these exceptions are set by the law itself. Importantly, even when legal

authority of states places a strong presumption of obedience on citizens, then the *moral* justification of that authority grounds special moral reasons for citizens' action. "Practical authorities," as Simmons says, "are those whose commands or pronouncements give us distinctive kinds of reasons to act in accordance with them…reasons to act…that are both *peremptory* and *content-independent*" [5]; or, with reasons that both exclude at least some kinds of reasons for non-compliance and that count in favor of compliance.[6] Philosophical anarchism holds that there are no moral grounds for treating the state's commands as reasons of this sort, and so states' claims to authority are morally illegitimate.

To be sure, this thesis does not entail that citizens cannot have a moral obligation to perform an action that is legally required. Even if states are illegitimate, citizens will certainly have moral obligations to refrain from violent crimes, and have moral obligations to follow at least some deeply entrenched social and legal conventions (e.g., traffic conventions).[7] The thesis of illegitimacy just holds that these moral obligations will not be ones of *obedience* – they will be justified outside the claims of state authority.

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requirements exceed moral limits the law still purports to bind. See Joseph Raz *The Morality of Freedom*, (New York: Oxford University Press, 1986), 76-77.

[5] A. John Simmons, *Boundaries of Authority*, (New York: Oxford University Press, 2016), 13.

[6] Leslie Green explains: "The core idea [of content-independence] is that the fact that some action is legally required must itself account in the practical reasoning of the citizens, independently of the nature and merits of the action." Leslie Green, *The Authority of the State*, (New York: Oxford University Press, 1988), 225. Peremptory reasons have been understood as "exclusionary reasons." See Green, *Authority*, 36-42. See also Scott Shapiro, "Authority," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds., Jules Coleman, Kenneth Einar Himma, and Scott J. Shapiro (online edn., Oxford Academic, 2012, accessed Oct. 6, 2022), 406.

[7] On "[philosophical] anarchism…persons in existing societies are by no means free to do as they please, but rather… they have a wide range of moral duties [that] will overlap considerably (i.e., require the same conduct as) their nonbinding legal duties." A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), 262.

The second way that philosophical anarchism can be seen as a qualified anarchism is that philosophical anarchism is often interpreted as a skepticism of state legitimacy, as opposed to a strong assertion of state illegitimacy.[8] The case for illegitimacy, Simmons says, establishes a "general skepticism" by showing "the systematic failure of political philosophy" to "provid[e] any argument that shows some or all existing states to be legitimate."[9] Similarly, Leslie Green in his *The Authority of the State* (1988) arrives at "a very strong presumption in favour of the sceptical view that there is no general obligation to obey the law" by "proceed[ing] inductively…assessing and rejecting the popular theories and then inviting us to suppose that no other theory can fare any better."[10]

As one might gather from Green's just mentioned remarks, philosophical anarchism's third qualification rests in the claim that there is no *general* obligation to obey the law. This qualification recognizes that states may be partially legitimate[11] by recognizing that some few citizens have an obligation to obey; notably, government officials and naturalized citizens – citizens who take an oath to abide by a state's constitution.[12] But even with the concession that

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[8] Philosophical anarchism is not usually interpreted as the principled claim that states *cannot* be legitimate. Many have understood R. P. Wolff's seminal *In Defense of Anarchism* (1970) as upholding this view. However, it is not generally accepted as plausible defense of state illegitimacy. For critiques of this view see Green, *Authority*, 29-36; Simmons, *Boundaries of Authority*, 23-24.

[9] Simmons, "Philosophical Anarchism," 20. Although, Simmons himself goes beyond mere skepticism: "I am, in fact, quite prepared to accept the conclusion that governments do not normally have the right to be obeyed by their citizens, or to force them to obey, or to punish them for disobedience." Simmons, *Moral Principles*, 196.

[10] Green, *Authority*, 231.

[11] Simmons says that a judgement of state illegitimacy "mean[s] …[the state] lacks the *general* right to make binding law and policy for its subjects…and…that the state's subjects lack the correlative *general* political obligation to support and comply with it" (emphasis mine). Simmons, "Philosophical Anarchism," 24-25. This judgement forms the "minimum moral content" of state legitimacy (21).

[12] Simmons, *Moral Principles*, 191; Green, *Authority*, 228.

"very few citizens of existing political communities" have political obligations, Simmons believes that the "traditional concern" of finding an account of political obligation "which is suitably 'general' in its application" has not been met.[13] Similarly, Green "allow[s] that some people in a reasonably just state have political obligations, while denying the existence of a general political obligation binding on all."[14] Thus, Green "contend[s] that political authority is sometimes legitimate, although this stops short of what is suggested by the classical doctrine of political obligation."[15]

With these three qualifications to the anarchism defended on the case for illegitimacy, philosophical anarchists offer a picture of the morally responsible citizen living in a morally illegitimate state. In arriving at what they ought to do, responsible citizens cannot "just appeal to a general presumption of governmental legitimacy or political obligation," says Simmons.[16] Rather, they must "confront directly and balance carefully the effects of…laws or policies on the performance of…natural duties and the exercise of…natural rights."[17]

But what this picture overlooks is that citizens may have an obligation to obey certain limited domains of a state's authority, even while not having an obligation to obey the full range of a state's authority. As I make clear below, even in the absence of full-blown political obligations a citizen may have partial political obligations requiring compliance with: certain state regulatory agencies, such as the Federal Aviation Administration (FAA), or the Transportation Security Administration (TSA); or with certain state mandatory insurance

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[13] Simmons, *Moral Principles*, 191-192. See also Simmons' defense of a "generality" condition for a theory of state legitimacy Simmons, *Moral Principles,* 35-37.
[14] Green, *Authority*, 234
[15] Green, *Authority*, vii.
[16] Simmons*, On the Edge of Anarchy*, 269.
[17] *Ibid*.

schemes, such as those required by the Social Security Act. Philosophical anarchists seem to have missed the point that the absence of moral grounds for an obligation of obedience to all laws does not imply the absence of moral grounds for obedience to some laws.

2. Consent and Fairness

In *Moral Principles*, Simmons argues that the four best accounts of political obligation – each based on a different wide moral principle – do not show how most, or a significant number of citizens have political obligations. I will now show where in these arguments Simmons' focus on a citizen's obligation to obey all laws overlooks how a citizen may have partial political obligations to obey some laws. To do this, I consider only two of the four accounts of political obligation that Simmons considers; those based on consent and fairness. I assume with Simmons that accounts based on gratitude and a natural duty of justice do not ground genuine principles of political obligation.[18]

2.1 Consent

By "consent theory," Simmons understands theories maintaining that "political obligations…are grounded in [citizens'] personal performance of a voluntary act which is the deliberate undertaking of an obligation."[19] Clearly, most citizens do not *explicitly* consent to their political obligations, and so consent theories must rely on tacit consent.[20] However, Simmons finds that tacit consent does not help since "most contemporary works in consent theory" problematically

[18] See Chapters VI-VII of *Moral Principles*.
[19] Simmons, *Moral Principles*, 57.
[20] Simmons, *Moral Principles*, 71-73. Throughout, I characterize tacit consent as action to be performed, although, as Simmons says, consent may be "given by remaining silent and inactive," and may be generated by a "failure to do certain things." Simmons, *Moral Principles*, 80.

assume that "'residence constitutes consent'" where such consent is understood to be an "'implicit promise to obey [or 'submit'].'"[21]

Simmons argues that valid acts of consent, either explicit or implicit, must meet an awareness condition. They must be a response "to a clearly presented 'choice situation' allowing for consent or dissent."[22] Otherwise, the point of *deliberately* undertaking an obligation by a consensual act is undermined.[23] Yet the choice to either reside and obey, or emigrate is not one that "is ever made available to most of us," and so "residence," argues Simmons, "cannot reasonably be thought to constitute genuine consent."[24]

Simmons further argues that valid acts of consent must meet a voluntariness condition, and yet Simmons thinks that the choice between residence/obedience and emigration makes the act of residence unable to meet this condition. Only if the costs of expressing dissent can be reasonably borne, and only if these costs are not detrimental to the potential dissenter can consensual acts generate obligations.[25] Yet emigration, the supposed expression of dissent, "cannot be thought of as merely unpleasant or inconvenient for most of us; it may very well constitute a 'disaster,' if only a small one."[26] Additionally, emigration is clearly unreasonably demanding for the mere expression of dissent, since:

> …the most valuable 'possessions' a man has…are often tied necessarily to his country of residence and cannot be taken from it. Most men will treasure home, family, and friends above all things. But these goods are not moveable property

[21] Here, Simmons quotes from Jean-Jacques Rousseau and W. D. Ross' consent theory. Simmons, *Moral Principles*, 95.
[22] *Ibid*.
[23] Simmons, *Moral Principles*, 80-81. Simmons is concerned to show that purported acts of tacit consent do not: "result simply from (1) a failure to grasp the nature of the situation, (2) a lack of understanding of proper procedures, or (3) a misunderstanding about how long one has to decide whether or not to dissent."
[24] Simmons, *Moral Principles*, 95.
[25] Simmons, *Moral Principles*, 81-83.
[26] Simmons, *Moral Principles*, 99-100

> and cannot simply be packed on the boat with one's books and television set. Even…in a tyrannical state, home can still be the most important thing in his life. And this places a very heavy weight on the side of continued residence.[27]

On a traditional understanding of consent theories, Simmons arguments are convincing. But when consent theories take on a non-traditional understanding, one based on partial political obligations, Simmons arguments are less convincing. Lurking in the background of traditional consent theories is the assumption that a citizen is faced with the choice to at once consent to all of the state's authority, or to not consent at all.[28] But this is a false dichotomy. A citizen's political obligations needn't be limited by the commission of a single act of consent, and the obligations generated from such an act needn't require obedience to all laws. Indeed, it's at least *conceptually* possible for consent to bind a citizen to all laws in a piecemeal fashion: a citizen can engage in multiple acts of consent where, though their contents bind to limited domains of the state's authority, the sum of those contents bind to the full extent of the state's authority.

We can come upon partial political obligations based on consent in the following way. First, we can consider candidate actions for the granting of tacit consent to limited domains of state authority. These actions, of course, stand in contrast to the act of continued residence, which is supposed to show the granting of tacit consent to the full extent of state authority. With this contrast in place, we might then ask whether the reasons showing the invalidity of residence as an act of tacit consent also show the invalidity of supposed acts of tacit consent to more limited domains of state authority. Can citizens traveling by commercial flight from Chicago to Dallas, knowing full well that they will be subject to FAA's and the TSA's requirements, be said

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[27] Thus, Simmons claims that even if citizens were clearly presented with such a choice, residence would still not constitute valid consent.

[28] Hence, the voluntary *act* in the doctrine that "political obligations…are grounded in [citizens'] personal performance of a voluntary act which is the deliberate undertaking of an obligation." See pg. 6 above.

to provide valid tacit consent to these domains of state authority? Do Southwesterners visiting Mexico for daytime shopping sprees, or do American vacationers visiting Mexican beaches – each of these groups knowing full well that they will be subject to the U.S. Customs and Border Protection's requirements – provide valid tacit consent to this kind of state authority? It's not obvious that these supposed acts of tacit consent are invalid for the reasons Simmons argues that continued residence is invalid. These acts may be argued to take place under clear choice situations. And, even if they do not, it's not difficult to see how, given the right conventions and contexts, they might – even in the absence of an explicit oath or contract.

Moreover, these sorts of choice situations do not clearly violate Simmons' voluntariness condition. The costs of expressing dissent in these examples needn't be unreasonable, nor a disaster; they could be "merely unpleasant or inconvenient" and "not difficult to perform." For some citizens in some situations, anyway, the options of traveling by car, rather than by plane; shopping for trinkets in domestic discount stores, rather than in Mexico; and vacationing on Florida beaches, rather than Caribbean ones, will not by themselves disqualify as acts of consent those citizens' willing "transactions" with the state, especially if the durations of the supposed obligations are equal to the durations of the "transactions."[29]

In a later work, Simmons suggests an interesting way for citizens to possibly consent to their political obligations. In contrast to current practices, Simmons imagines that states might "offer residents a larger set of options (than simply full citizenship or emigration)" so that "[states'] treatment of residents could more easily be regarded as reasonable and decent."[30] Simmons continues:

[29] Simmons sometimes uses the term "transactions" to denote citizens' interactions with states.
[30] Simmons, *On the Edge of Anarchy*, 242.

> A state might offer citizenship 'grades' or 'packages,' where certain combinations of the possible benefits of citizenship could be purchased at the price of accepting some assortment of the possible associated burdens…[in that case] even a required choice might then bind the resident, if there were less burdensome options lying between citizenship and emigration.

Simmons' concession that even a *required* choice may be binding is meant to apply to consent to full political obligations. However, when this same concession is applied to partial political obligations, it becomes clear how they are easier and therefore more likely to be consented to than full political obligations.

Furthermore, with a consideration of "grades" or "packages" of the burdens and benefits of citizenship, Simmons appears to move away from a "one size fits all" view of political obligations so as to accept a much greater diversity than is currently recognized between individuals' political obligations. Below, I show how such a move leads to a rather plausible view of partial political obligations.

2.2 Fairness

Simmons' treatment of fairness focuses on John Rawls' influential formulation of a principle of fairness.[31] According to Rawls, the acceptance of benefits from a (just) cooperative scheme binds an individual to contribute his part to that scheme so as to not take advantage of those whose contributions made possible the benefits.[32] In applying this principle to political obligations, Simmons follows Rawls (and H.L.A. Hart) in assuming that the cooperative scheme is the general social order. This ensures that the "cooperative scheme [can be] large enough that 'doing our part' will involve all of the things normally thought of as the requirements of political

[31] Simmons also considers H.L.A. Hart's account of the principle of fairness. Simmons, *Moral Principles*, 101-108.
[32] Simmons, *Moral Principles*, 104.

obligation."[33] The benefits of the scheme, the "workings of [citizens'] legal and political institutions," are of the following sort: "the rule of law, protection by armed forces, pollution control, maintenance of highways systems, avenues of political participation, etc."[34] At first glance, all citizens appear to accept these benefits, and so it appears that all citizens have political obligations based on fairness. Contrary to these appearances, however, Simmons says that "at very best, the principle of fair play can hope to account for the political obligations of only a very few citizens in a very few actual states; it is more likely, however, that it accounts for no such obligations at all."[35]

Simmons first takes issue with the notion of the acceptance of benefits. Fairness must bind only "insiders" or participants within a cooperative scheme. Otherwise, Simmons argues, fairness will bind even incidental beneficiaries to a scheme, which, in the case of political obligations, means that citizens may owe political obligations to foreign states merely by benefitting from them.[36] To properly restrict the acceptance clause, then, Simmons subjects it to a voluntariness condition. (Rawls does the same, although not for Simmons' reasons.[37]) The right way to voluntarily accept benefits on a principle of fairness, Simmons says, is that "one must either 1) have tried to get (and succeed in getting) the benefit, or 2) have taken the benefit willingly and knowingly."[38]

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[33] Simmons, *Moral Principles*, 136.
[34] Simmons, *Moral Principles*, 138.
[35] Simmons, *Moral Principles*, 141
[36] Simmons, *Moral Principles*, 121-122. Simmons argues that an account of political obligation cannot allow citizens to owe political obligations to foreign states (137).
[37] Simmons, *Moral Principles*, 115, 146.
[38] Simmons, *Moral Principles*, 129. To be sure, Simmons does not think that the voluntary acceptance of benefits must amount to a deliberate undertaking of an obligation, as required by an act of consent. While consenting persons must be aware of the moral consequences of their consenting actions, persons bound by fairness needn't be so aware. Simmons, *Moral Principles*, 115-117.

But now, there's a problem with the "acceptance" of benefits that appeared to bind all citizens. By their nature, the benefits of the social order are "open," those that citizens cannot avoid receiving, even if they wanted to.[39] How, then, can citizens meet the condition of 1) *trying* to get these benefits, such as, the rule of law, when they are immediately received, regardless of whether one pursues them or not?[40] Moreover, most citizens appear to not meet the condition of 2) receiving these benefits willingly and knowingly. To willingly accept benefits, Simmons argues, a citizen "cannot regard them as having been forced upon [him] against [his] will, or think that the benefits are not worth the price [he] must pay for them."[41] But there *are* citizens who reject the ways states provide benefits (on grounds of self-interest, or justice, for example).[42] And, to knowingly accept benefits, as required on a principle of fairness, a citizen must have "an understanding of the status of those benefits relative to the party providing them…[a citizen] must understand that the benefits are provided by the cooperative scheme to accept them."[43] Yet most citizens are simply unaware of the "open" benefits they receive. And, even among those citizens who are so aware, many of them do not "understand…the benefits [as] flow[ing] from a cooperative scheme."[44] Simmons thus concludes that, at best, fairness can do very little in the way of justifying political obligations.

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[39] "Without significant life-style changes." Simmons, *Moral Principles*, 130. Such benefits correspond to what economists call "non-excludable" and "non-rivalrous" goods, or "public goods."
[40] Simmons, *Moral Principles*, 132
[41] Simmons, *Moral Principles*, 132
[42] These are persons who do not "think that the benefits receive[d] are worth the price…[paid], so that [these persons] would [not] take the benefits [given a] choice between taking them (with the burden involved) or leaving them." Simmons, *Moral Principles*, 138.
[43] Simmons, *Moral Principles*, 132.
[44] Simmons, *Moral Principles*, 138. Some "regard[ing] [the benefits] as 'free' for the taking," and still others "commonly regard" the benefits on the model of purchase, i.e., "purchased (with taxes) from a central authority." Simmons, *Moral Principles*, 139.

Simmons' arguments are formidable insofar as fairness is thought to bind all citizens to all laws. But his arguments are less successful when fairness assumes less ambitious aims. Notice: in taking the entirety of the social/legal order as the only relevant cooperative scheme, and in taking the benefits specific to *that* order as the only ones to be accepted by citizens, Simmons (along with Rawls and Hart) overlooks how limited domains of law may function as relevant cooperative schemes, and overlooks how the acceptance of *these schemes'* benefits may generate partial political obligations. The acceptance of benefits from various state mandated insurance, or specific tax schemes, in health care, or retirement, for example, appear more able to meet Simmons' voluntariness condition than the relatively high degree of "open" benefits discussed by Simmons. This seems especially true given Simmons' apparent move away from the more specific condition that 1) one tries to get the benefits that generate obligations. The mere fact that a benefit is "unavoidable," Simmons says in a later work, does not disqualify it from being voluntarily accepted:

> …for it makes perfectly good sense, in my view, to speak of voluntarily accepting goods that one unavoidably receives. Just as we may freely take those *avoidable* benefits we go out of our way to get, we may freely take *unavoidable* benefits that we knowingly and willing accept (when they fall upon us)…benefits I unavoidably receive can surely be viewed as voluntarily accepted by me."[45]

On Simmons' own terms, then, partial political obligations grounded on fairness seem more easily and therefore more likely to be justified than full political obligations grounded on fairness.

3. Partial Political Obligations

[45] Simmons, *On the Edge of Anarchy*, 254.

Although overlooked on Simmons' arguments, partial political obligations have gained some recognition on both sides of the debate on legitimacy. Joseph Raz, who "denies the existence of a general obligation to obey the law even in a reasonably just society,"[46] argues that, while only few citizens have full political obligations, many, if not most, citizens have partial political obligations.[47] And George Klosko has more recently offered an account of legitimacy that relies on different moral principles – each generating different partial political obligations – to explain how citizens have full political obligations.[48] Still, the recognition of partial political obligations is not widespread since many theorists simply assume that all or most citizens have the same morally justified political obligations. On this point, Raz says: "most common discussions of political authority… beg many questions, and preclude many possibilities," especially since they do not consider that…the government may have more authority over one person than over another."[49]

The failure to see the variety among citizens' political obligations can be explained by the longstanding focus on the universality (or near universality) of citizens being bound to the state's

[46] Raz, *Morality of Freedom*, 70
[47] See Chapter 4 of *The Morality of Freedom* and fn. 49 below.
[48] George Klosko*, Political Obligations,* (New York: Oxford University Press, 2005), Chapter 5.
[49] Raz, *The Morality of Freedom*, 74. The passage continues: "…For every person the question [of authority] has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications. An expert pharmacologist may not be subject to the authority of the government in matters of the safety of drugs, an inhabitant of a little village by the river may not be subject to its authority in matters of navigation and conservation of the river by the banks of which he spent all his life." The uniqueness of each citizen's morally justified political obligations follows from Raz's view of the justification of state authority. When obedience to state authority makes a citizen "more likely to act successfully for…reasons which apply to him than if he does not [obey]," *there*, Raz thinks, state authority is justified. Raz, *The Morality of Freedom*, 71. Raz finds that this view of political authority gives "maximum flexibility in determining the scope of [legitimate] authority" since "it all depends on the person over whom authority is supposed to be exercised: his knowledge, strength of will, his reliability in various aspects of life, and on the government in question." Raz, *The Morality of Freedom*, 73.

authority. This focus has left unnoticed and untouched the assumption that if a citizen is bound, then that citizen is bound to obey all laws. Green illustrates this point when he explains how the traditional theory of political obligation requires that all citizens are bound by all laws:

> According to the [traditional] theory of political obligation, obedience is a virtue for all, not just for some; and its menu of requirements is *table d'hôte* rather than *a la carte*… Like a universal law of nature, the thesis of political obligation cannot withstand a single counterexample. In a just state, there can be no valid laws which are morally inert. To suppose otherwise is just to concede that there is no obligation to obey the law as such.[50]

Green tells us that the problem with such a requirement for legitimacy is that it may tempt the theorist to "stretch or expand the grounds of allegiance," which "is often the motivation for theories of tacit consent and hypothetical contract which aim to show that all are bound."[51] Simmons provides useful context on this point:

> …the consent theorist's position on governmental legitimacy has normally been that legitimacy depends on the consent of the governed. A government has authority only over those citizens who have granted that authority through their consent, and only a government which has authority over all of its citizens is legitimate. Thus, a legitimate government must have the unanimous consent of its citizens…But this, it is easy to see, makes a government's legitimacy or illegitimacy turn implausibly on the possibility of *one* citizen refusing to give his consent…How is the consent theorist to avoid the charge that if unanimous consent is required for legitimacy, no governments will be legitimate? The answer, for Hobbes, Locke, and Rousseau, is found in the notion of 'tacit consent through residence.'"[52]

As consent theorists themselves, Simmons and Green avoid the above mentioned problem facing Hobbes, Locke, and Rousseau since they (Simmons and Green) are perfectly willing to accept a notion of partial legitimacy – "legitimacy with respect to only some citizens."[53] Indeed, some notion of partial legitimacy is needed for the converse of the view that

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[50] Green, *The Authority of the State*, 229.
[51] Green, *The Authority of the State*, 240-241.
[52] Simmons, *Moral Principles*, 70-73.
[53] Simmons, *Moral Principles*, 73.

illegitimacy means that citizens *generally* have no political obligations – for the view that legitimacy means that citizens *generally* have political obligations. At the same time, however, it's clear that a notion of partial legitimacy makes room for a notion of partial political obligations. The ambiguity in "citizens generally" having political obligations refers both to the number of citizens bound, as well as to the extent of those bonds. We ought to think, then, that we can arrive at state legitimacy even where most, or a significant number of citizens are shown to be bound to *most*, or *a significant number* of state laws.

It may be that partial political obligations are overlooked in theory because they are overlooked in common sense.[54] Ordinarily, citizens who view themselves as bound to obey the law appear to believe that they are bound to obey all laws that are not grossly unjust. In the common citizen's practical reasoning, I ought to obey this or that law *because* I am are bound to obey all laws; or, to put the point more properly, because I am a legitimate subject of the state's legal authority. Thus, the self-image of everyday law abiding citizens appears to be that *for them* "there can be no valid laws which are morally inert" since "to suppose otherwise is just to concede that there is no obligation to obey the law as such."[55] Of course, not all citizens who view themselves as bound to obey will share this self-image, but only very few citizens seem to hold the more complex view that I am bound to obey only some *kinds* of laws.[56] The emphasis on kinds of laws is important since we are not here concerned with those also very few citizens

[54] For more on common beliefs about political obligation and what states claim about them see Green, "Who Believes In Political Obligations?" in *For And Against the State*; Klosko, *Political Obligations*, Chapters 7-10.
[55] Recall, Green makes this claim in a different context.
[56] Klosko takes his own empirical studies to show that ordinary people do not believe that they have an obligation to obey "classes of laws [with] little or no moral force." Klosko, *Political Obligations*, 218. Although I am not qualified to assess empirical evidence, I find it difficult to draw any significant conclusions from Klosko's empirical studies on ordinary beliefs on political obligations.

who determine their obedience on a case-by-case basis. Insofar as these citizens consider it necessary to carry out their own evaluations of the merits and demerits of a legally required act, these citizens cannot in consistency view themselves as subjects to authority. This is because a requirement of prior approval precludes a requirement of obedience and *vice versa*.[57] So, common sense appears to assume that full political obligations hold wherever any political obligations hold.

Nevertheless, partial political obligations have relevance for debates on legitimacy in at least one way: it's possible that partial political obligations are *needed* for a successful account of legitimacy. This is true in the event that the full range of the state's authority is justified with respect to each citizen, although no single reason can explain the justification in each citizen's case.[58] Here, a citizen's political obligations bind to a further extent than that shown by any of their justifying reasons since:

(1) multiple reasons justify a citizen's political obligations where

(2) the cumulative result of these justifying reasons shows the legitimacy of the full extent of state authority with respect to that citizen, even though

(3) each justifying reason shows the legitimacy only of a limited extent of state authority.

While I don't believe that such an account explains actually existing political obligations, my aim has been to show that such an account cannot even be countenanced by Simmons' argument in *Moral Principles*. Since that argument overlooks partial political obligations, the best it can do

[57] Such persons could neither view themselves as bound by promises, nor view themselves as conforming to other sorts of committed behavior. By their nature, commitments (as do authorities) categorically rule out of one's practical reasoning certain kinds of reasons for action. On this basis, Wolff argues that the absolute demands of autonomy are incompatible with authority. See fn. 8 above. In a similar way, act-utilitarianism has been argued to be incompatible with authority. See Simmons, *Moral Principles*, 45-54.

[58] As Klosko's multi-principled account illustrates.

is show that there is no *single* justifying reason able to explain the full political obligations of citizens (who have not taken an oath to obey the state).

4. Conclusion

So we've seen why many theorists have tacitly assumed that a citizen has either full political obligations, or none at all.[59] As I've just indicated above, however, I don't believe that by rejecting this tacit assumption to accept partial political obligations we are in a better position to resist philosophical anarchism. Klosko has provided the most sophisticated account of how multiple moral principles explain each citizen's obligation to obey the full extent of the state's authority, but I do not believe that the account is successful.[60] To the contrary, I believe that Raz is correct in his contention that while there is no general obligation to obey the law nearly all have partial political obligations.

So do we do with mere partial political obligations? I believe that they prompt a revision to the philosophical anarchist's picture of the morally responsible citizen living in a morally illegitimate state. That is to say, citizens *will* be bound to some specific laws, perhaps different

[59] To these reasons, we might add the ease with which theories of social contract can in principle account for entirety of the state's claimed authority. For reasons of this sort, consent theory has been called the "gold standard" for political philosophers. Allen Buchanan, "Political Legitimacy and Democracy" *Ethics* 112 (4), 699.

[60] Klosko relies primarily on a principle of fairness, although he believes that the partial political obligations generated by that principle must be supplemented by the partial political obligations generated by a principle of a natural duty of mutual aid and by a principle of the common good. Crucially, Klosko relies on a *non-voluntarist* version of the principle of fairness, but I am not prepared to endorse the Rawlsian original position from which Klosko argues for such a principle. Additionally, Klosko needs fairness to "particularize" the natural duty to support the needy so that citizens may be bound to their *own country's* welfare institutions. However, since one may be do very much to support the needy outside of legal obedience, especially through market and voluntary institutions, I do not believe that Klosko can rely on the natural duty of mutual aid in the way that he needs.

laws at different times. And since the particularities of each citizen's moral relation to the state determines which laws a citizen is bound to, the morally responsible citizen will seek an awareness of when and where political obedience is required. So even if we agree with Simmons that citizens should not "just appeal to a general presumption of governmental legitimacy or political obligation" and "view it as overriding or outweighing more specific questions about the moral merits or defects of the individual laws,"[61] we should add to this that citizens should not just appeal to a general presumption of governmental *illegitimacy* in the assertion of their right to weigh the moral merits and defects of individual laws.

All of this suggests a new approach to the question of state legitimacy. Instead of considering arguments that focus on the overall legitimacy of states, we should rather consider arguments that focus more specifically on the interactions, or lack thereof, between various moral principles, on the one hand, with different domains of law and with different areas of citizens' lives, on the other hand. While not directly addressing the state's overall legitimacy, this shift in focus from the entirety of the state's claimed authority to the state's claimed authority in particular arenas nevertheless moves towards a more realistic picture of how citizens acquire their political obligations. And in that way, the approach improves upon existing theories of legitimacy to acknowledge the complex way in which states enjoy partial legitimacy.[62]

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[61] Simmons, *Edge of Anarchy*, 269.

[62] Simmons' works after *Moral Principles* might be interpreted as following this approach. For instance, guided by the historical problem of states' wrongful subjections of persons, Simmons' *Boundaries of Authority* (2016) focuses on state's territorial rights, rights that "include at least rights to exclusive legal jurisdiction over the territory, rights to exclusive control of movement (of persons and materials) over the boundaries of the territory, and rights to exclusive control over the nonhuman things and beings contained in or (constitutive of) the territory." Simmons, *Boundaries of Authority*, 4. Additionally, in a more modest, though influential, treatment, Simmons considers the legitimacy of the state's right to punish. Simmons, *A Lockean Theory of Rights*, Chapter 3.

III. Locke and the Limits on Punishment

Punishment represents one type of harm that is justified, and, when justified in this way, the infliction of harm must be carefully measured according to punishment's morally sanctioned aims. In the *Second Treatise of Government*, Locke says that these aims are "*Reparation* and *Restraint*"[1] (II, 8) which, for him, are the only legitimate measures of proportionate punishments. However, since Locke is not interested in the specific ways that reparation and restraint guide the infliction of punitive harm, he is left without a substantial account of punishment's just and proper limits: "it would be besides my present purpose, to enter here in to the particulars of the Law of Nature, or its *measures of punishment*" (II, 12). By itself, this shortcoming might not appear too worrisome. As Locke alludes to in the quote just referenced, his theory of government in the *Second Treatise* does not depend on a full-blown account of punishment. Even so, we can appreciate how the theory of government in that work crucially depends on an account of the limits on punishment.

Locke famously claims that in the state of nature, a state without any governmental authority, "*every Man hath a Right to punish…and be Executioner of the Law of Nature*" (II, 8). Locke argues that the regular observation of the law of nature requires the punishment of its offenders, and further argues that the legitimacy of such punishment cannot be explained without a natural right to punish. "As all other Laws that concern Men in this World," the law of nature, too, would "be in vain if there were no body that in the State of Nature, had a *Power to Execute that Law*" (II, 7). But since the state of nature is a state of "*perfect Equality,"* it must be that "if any one in the State of Nature may punish another…every one may do so." Hence, Locke's

[1] My quotations of texts preserve original spellings and punctuations, unless otherwise noted.

claim that in the state of nature "every one has a right to punish the transgressors of [the] Law [of Nature] to such a Degree, as may hinder its Violation."[2]

So, with the natural right to punish, Locke intends to explain the possibility of morally sanctioned punishments in the state of nature. But Locke also intends to use this right to explain the possibility of morally sanctioned punishments in political society. On Locke's social contract theory, it's only after individuals surrender their natural right to punish (along with some other natural rights) that the state comes to legitimately punish offenders of natural law (as well as offenders of the state's own laws) (II, 11; 128-130). But now, Locke's theory of government crucially depends on an account of the limits on punishment. Since Locke is clear that there is no "Absolute and Arbitrary Power" to punish (II, 8), he must be able to account for the limits on the natural right to punish; otherwise, the very existence of this right may be doubted, leaving Locke without a foundation for one of the government's most essential powers.[3]

In this paper, I argue that Locke's shortcoming is not merely a failure to elaborate on an account of the limits on punishment, but a failure to be able to provide any such account at all. My central claim is that since Locke fails to recognize how authoritative judgment is necessary for the specification of just and proper punishments, he is unable to account for the limits on the natural right to punish. Additionally, I show how this failure is especially glaring in light of

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[2] For an account of the natural right to punish that undoubtedly influenced Locke see Book II, Chapter XX of Hugo Grotius' *The Rights of War and Peace*.

[3] The existence of the natural right to punish has long been doubted – most notably, on the conceptual claims that (1) punishment requires a superiority of the punisher to the punished, and that (2) there is no such superiority in the state of nature. See Francisco Suarez *A Defense of the Catholic and Apostolic Faith*, Book VI, Chapter IV, §4; Hobbes, *Leviathan*, Book II, Chapter XXVIII, paragraph 1; Samuel von Pufendorf, *The Two Books of the Elements of Universal Jurisprudence*, Book II, Observation 5, §18. For responses see Grotius, *The Rights of War and Peace*, Chapter XX, Section III, paragraph 1-2; A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 144-145. See also 140-148 for Simmons' discussion of more contemporary debates on the existence of the natural right to punish.

Locke's implicit commitment to a natural duty of offenders to suffer punishment. Locke's account of punishment is clearly implausible if it cannot explain the limits on punishments that offenders are *required* to suffer. However, my reading of Locke's commitment to such a duty is *not* logically necessitated by my claim that he cannot explain the limits on punishment. Even in the absence of a duty to submit to punishment, Locke still lacks an explanation for the limits on punishments that offenders *may* suffer when inflicted by holders of the right to punish. My reasons for drawing out Locke's commitment to a duty to submit to punishment are twofold. The first is to underscore the need for authority in Locke's theory of punishment, and the second is to make clear the reasons why offenders are not subject to gratuitous harms inflicted in the name of punishment.

After drawing out Locke's commitment to a natural duty of offenders to submit to punishment in Section 1, I show how Locke is unable to explain the limits on the natural right to punish in Section 2. In Section 3, I briefly lay out the role of authority in the specification of these limits, and in Section 4 I conclude with a revision to Locke's account of punishment in the state of nature.

1. The Duty to Submit to Punishment

In the philosophy of punishment, the right to punish is of central importance. This is mainly because the defining question of the philosophy of punishment asks for a moral justification of the right to punish *per se*, but also because a central question in both the philosophy of punishment and in political philosophy asks for a moral justification of the state's exclusive right to punish in society.[4] So, although the duties of offenders have garnered attention in recent

[4] For instance, Robert Nozick says that "the fundamental question of political philosophy…is

decades,[5] these duties are not typically the focal points of theories of punishment. This is especially true in the natural rights tradition where the natural rights of citizens are used to explain the state's right to punish.[6]

Whether for reasons of this sort, or others, Locke is not particularly concerned with the duties of offenders. Nevertheless, we may consider how Locke is committed to a duty of offenders to submit to punishment by first understanding that duty as a prohibition on offenders' attempts at forceful resistance and evasions of just and rightfully inflicted punishments. Since such a duty is concerned mainly with the outward actions of offenders, it needn't require offenders' endorsements of their punishments. A prohibition on outward resistance and evasion does not have to entail psychological attitudes of this sort. Especially when construed in this way, then, a duty to submit to punishment can seem implied in Locke's social contract theory. Locke says: "…Every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment…" (II, 119). So the idea is this: if all citizens, including citizen-offenders, consent to obey the state, and if the state's penal laws generate binding legal obligations on offenders, then citizen-offenders are morally required to fulfill their legally binding punitive obligations, which, in the first place, include a duty to submit to state-required punishments. Does this social contract reading move too quickly? Some

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whether there should be a state at all." But given the close connection he draws between the existence of a state and an exclusive right to punish, his fundamental question of political philosophy is a question that essentially concerns punishment. *Anarchy, State, and Utopia* (New York: Basic Books, 2013), 4.

[5] See especially Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (New York: Oxford University Press Inc., 2011). See also R. A., Duff, *Punishment, Communication, and Community* (New York: Oxford University Press Inc., 2001), 106-125.

[6] For this intellectual history see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1998).

might read Locke as thinking that citizens never acquire a duty to suffer harm – including punitive harm inflicted by the state – since they never consent to give up their natural right to self-preservation. This view is one that is explicitly endorsed by Hobbes, and so, following the trend of much scholarship on Locke's political philosophy, we may consider Hobbes' views to get a better grip on Locke's own views.

Hobbes clearly rejects a social contact account of the duty to submit to punishment: "no man is supposed bound by covenant not to resist violence."[7] This rejection stems from Hobbes' premise that the surrender of natural rights logically necessitates some good that comes to the one who surrenders them so that: "a man cannot lay down the right of resisting them, that assault him by force."[8] When applied to punishment, this implies that there can be no consent to the suffering of "Wounds, and Chayns, and Imprisonment" since there is "no benefit consequent to…[the] patience" of such suffering.[9] Hobbes is thus led to the view that offenders have a right to resist state punishments even when the state has a right to inflict to them. "In the making of a Common-wealth," Hobbes says, "every man giveth away the right of defending another, but not of defending himself" so that each "obligeth himselfe to assist…the Soveraignty, in the Punishing of another; but of himselfe not."[10]

Although Hobbes' view of punishment includes many noteworthy features, the one I want to emphasize is that, for Hobbes, a right to war constitutes the grounds for punishment. As

[7] Hobbes, *Leviathan*, Book II, Chapter XXVIII, paragraph 2.
[8] Hobbes, *Leviathan*, Book II, Chapter XIV, paragraph 8.
[9] *Ibid*. Relatedly, Grotius earlier seemed to argue that since a duty to submit to punishment implies an implausible right of the offender *to be punished* there can be no such duty. *The Rights of War and Peace*, Book II, Chapter XX, section II, paragraph 2. But for an argument in favor of a right to be punished see Herbert Morris, "Persons and Punishment" *The Monist* Vol., 52 no. 4 (1968).
[10] Hobbes, *Leviathan*, Book II, Chapter XXVIII, paragraph 2.

a conceptual matter, Hobbes cannot envision the possibility of punishment in the absence of a state.[11] But the state is established, for Hobbes, only when all individuals surrender their natural right to make war, that is, "a right to every thing, and to do whatsoever…necessary to [one's] own preservation."[12] With this surrender, the state comes to have exclusive right to make war, which, in turn, forms the grounds for the state's exclusive right to punish: "…the foundation of that right of Punishing, which is exercised in every Common-wealth" is the right that "every man had…to every thing, and to do whatsoever he thought necessary to his own preservation."[13] On this conception of punishment rooted in a right to make war, then, Hobbes is able to say that, in principle, the right to punish permits the infliction of any punitive harms whatsoever, no matter how harsh.[14]

For Locke, by contrast, the grounds for punishment are independent of a right to make war. We can see this by considering Locke's view of the different ways that the infliction of harm is permitted by the right to punish and the right to make war. While, on the one hand, Locke says that "*Reparation* and *Restraint*" are the "only reasons, why one Man may lawfully do harm to another, which is that we call *punishment*" (II, 8), Locke, on the other hand, says that the right to make war is "a Right to destroy that which threatens me with Destruction" whenever

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[11] Hobbes defines punishment as "*an Evill inflicted by a publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.*" Hobbes, *Leviathan*, Book II, Chapter XXVIII, paragraph 1.

[12] "For the subjects…in laying down [their right to make war], strengthened [the sovereign] to use his own…" Hobbes, *Leviathan*, Book II, Chapter XXVIII, paragraph 2.

[13] Hobbes, *Leviathan*, Book II, Chapter XXVIII, paragraph 2. My reading follows a traditional one, but for a discussion of its accuracy see Arthur Yates, "The Right to Punish in Thomas Hobbes's *Leviathan*," *Journal of the History of Philosophy*, Vol. 52, No. 2 (April 2014).

[14] "…where there is no Punishment at all determined by the Law, there whatsoever is inflicted, hath the nature of Punishment." Hobbes is clear, however, that when the state punishes beyond what the law prescribes, "the excesse is not Punishment, but an act of hostility." *Leviathan*, Book II, Chapter XXVIII, paragraph 10.

there is a "declaring by Word or Action…a sedate setled Design, upon [my] life" (II, 16). For Locke, then, the right to punish can justify "a Power to kill" (II, 11) only because "each Transgression may be *punished to that* degree" (II, 12) that secures the "ground" of "mak[ing] [the offender] repent the doing of [his transgression], and thereby deter him, and by his Example others, from doing the like mischief" (II, 8).[15] But with a right to make war, by contrast, it is "Lawful for me…to kill him if I can" who would merely "take away my Liberty," since "I have no reason to suppose that he…would not when he had me in his Power…take away everything else" (II, 18). So, whereas Hobbes cannot entirely separate punishment from war, Locke can. With two distinct grounds for the infliction of harm, Locke can easily state the conditions under which the right to war ends and the right to punish begins. "The *State of War ceases*," Locke says, "when the actual force is over," either because "the aggressor offers Peace, and desires reconciliation on such Terms, as may repair any wrongs he has already done, and secure the innocent for the future"; or, because "both sides [are equally] Subjected to the fair determination of the Law" where "there lies open the remedy of appeal for the past injury, and to prevent further harm" (II, 20).

Clearly, Locke is not committed to sharing Hobbes' view of punishment. But to see where Locke stands with respect to the duty to submit to punishment, we must further consider how that duty may be acquired in virtue of natural law, not merely in virtue of a social contract.

[15] In II, 11, Locke explains how, in punishing offenders, "every Man in the State of Nature, has a power to kill a Murderer, both to deter others from doing the like Injury…and also *to secure* Men from the attempts of a Criminal…" In II, 12, Locke further explains how "a Man in the State of Nature" may "*punish the lesser breaches* of" the 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 terrifie others from doing the like." It's likely that Locke thinks that, on considerations of deterrence, a capital punishment is too severe for many offenses.

Continuing with the contrast between Hobbes and Locke, we may further notice that the natural right to self-preservation in Locke's theory of natural law is not nearly as strong as that right is in Hobbes' theory of natural law. Because Hobbes does not recognize any natural duties, he cannot see how any natural duty may limit the natural right to self-preservation.[16] Yet, since Locke believes that there are natural duties, he is positioned to think that some of them weaken the natural right to self-preservation. Of central importance is "the fundamental law of nature," by which Locke refers to a natural duty to preserve humankind as much as possible.[17] James Tully and John Simmons have viewed this duty as the basis from which Locke intends to derive all natural rights and duties, including a natural right and duty to self-preservation, as well as a natural right to punish.[18] In this light, we can better see how Locke thinks that the infliction of harm is permitted. In the first place, Locke views the duty to preserve humankind as placing a kind of *prima-facie* prohibition on the infliction of harm: "no one ought to harm another in his Life, Health, Liberty, or Possessions," (II, 6). However, harming others is not absolutely prohibited since, as we've seen, Locke believes that we are permitted to harm others for the sake of self-defense and for the sake of punishment. These permissions can be justified since the duty to preserve humankind requires that much, but *with a prioritization of innocent life*: "when all cannot be preserv'd, the safety of the Innocent is to be preferred" (II, 16).[19] Thus, Locke believes

[16] For discussion of whether Hobbes think that are no duties at all, or only a fundamental duty of self-preservation see Tuck, *Natural Rights Theories*, 130-132.
[17] "For *by the Fundamental Law of Nature, Man being to be preserved*, as much as possible, when all cannot be preserv'd, the safety of the Innocent is to be preferred" (II, 16).
[18] See James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980), 45-50; Simmons, *Lockean Theory of Rights*, 48; 60-63; 160-161 fn. 72; 337.
[19] Consider how Locke applies this principle in war: "…in the State of Nature…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 [to, among other things] secure the innocent for the future…" (II, 20).

that harm falls "within the permission of the *Law of Nature*" (II, 128) only when: either (1) one's (or someone else's) life is in immediate danger by another's *wrongdoing*;[20] or else (2) one is meting out a punishment on a *wrongdoer*.[21]

So a natural duty to submit to punishment follows in this way: when an offender is punished by a holder of the natural right to punish, the offender's life is not endangered by another's *wrongdoing*. For this reason, the offender has no justification to overcome the *prima-facie* prohibition on harm. And the appeal to his own preservation is of no use. By the loss of his innocence, he is danger to all: "in Transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of *reason* and common equity…and so he becomes dangerous to Mankind" (II, 8). But since the offender remains bound to preserve humankind, he must suffer a punishment if it is required for the preservation of innocent lives since their safety now has priority over his own well-being. In this way, the natural duty to submit to punishment can be thought of as justified to ensure that "the Law of Nature be observed" and that "all Men may be restrained from invading others Rights, and from doing hurt to one another (II, 7).

Although Locke does not himself draw out these implications, I believe that we are justified in viewing Locke's theory of natural law as implying that a natural duty to preserve humankind precludes offenders' natural right to self-preservation. On such a view, Locke is still

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[20] "But force, or a declared design of force upon the Person of another, where there is no common Superior on Earth to appeal to for relief, *is the State of War*: And 'tis the want of such an appeal gives a Man the Right of War even against an *aggressor,* though he in Society and a Fellow Subject…the Law, which was made for my Preservation, where it cannot interpose to secure my Life from present force…permits me my own Defense, and the Right of War, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common Judge" (II, 19).

[21] "Every one…[ought] as much as he can, to *preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another" (II, 6).

able to account for what he believes are the just limits on punishment. He may assume that offenders do not lose their right to self-preservation wholesale, but only up to the point required by, and for the duration of, a just and rightfully inflicted punishment. However, as we will see below, Locke takes on additional assumptions that prevent such an account of the limits on punishment.

Outside the context of Locke's theory of natural law, the existence of a moral duty to submit to punishment has plausible motivations. Admittedly, convictions likely range on the existence of this duty since, like Hobbes, some will find it difficult to see how anyone can have a moral duty to endure suffering. Yet it's certainly not true that because suffering attends an action there can be no duty to perform that action. With respect to other duties that offenders are more easily thought to acquire, we can recognize that offenders will sometimes have a duty to suffer when, for example, they have a duty to apologize to victims, a duty to make amends to the community, and a duty to compensate injured persons. These actions must be performed, though it is distressing to express feelings of guilt and remorse, and though it is burdensome to lose goods, time, and energy for ends one prefers not to purse. And, while the degrees and kinds of sufferings involved in these sorts of duties will not usually be thought to be equal to the degrees and kinds of suffering involved in punishment, we can recognize that whenever there is a duty to perform an action in the face of suffering, it is the moral value of the goods achieved by that action that justifies any required enduring of suffering. In the case of punishment, the relevant goods are what are commonly referred to as the moral aims of punishment, which, for Locke, are mainly deterrence-type considerations,[22] but, for others, may be considerations of retribution,

[22] In this paper, I do not consider reparation, i.e., restitution, as a ground for Locke's theory of punishment. For discussion of Locke's view of reparation see Alex Tuckness, "Retribution and Restitution in Locke's Theory of Punishment" *The Journal of Politics* Vol. 72, No. 3 (July,

rehabilitation, communication of society's values, or some combination of these. The moral aims of punishment are usually discussed in contexts of the justification of the right to punish where the task is most often to identify *which* of these aims justifies that right, not *whether* any of these aims justify it.[23] That is because most people believe that the high moral importance of punishment allows it to overcome the *prima-facie* wrongness of intentionally causing harm. On this common sense view towards punishment, it is difficult to see how offenders *cannot* have a duty to submit to punishment. In the absence of this duty, offenders may perform actions that grossly undermine the achievement of moral aims of punishment, which, on common sense views, have already been assumed to justify the infliction of punitive harm on offenders. But in assuming a justification strong enough to defeat the *prima-facie* wrongfulness of *inflicting* punitive harm, it appears that one assumes a justification strong enough for the required *suffering* of punitive harm. Otherwise, the assumed high moral importance of punishment appears not so high, after all.[24]

This line of argument is supported by the fact that people generally have an aversion to suffering and are willing to go to great lengths to avoid it. In the case of punitive suffering, the aversion is more pronounced, probably due to the feelings of remorse that accompany punishment, and probably due to a higher than normal willingness of offenders to cause harm to others to avoid undesirable situations. In any case, the moral aims of punishment simply have no chance of being achieved unless offenders are prohibited from resisting and evading

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2010), 728-729.

[23] But for a view that "den[ies] that a single act of punishment must produce (or even be expected to produce) any good in order for it to be permissible" see Christopher Heath Wellman, *Rights Forfeiture and Punishment* (New York: Oxford University Press, 2017), 13

[24] Locke's claim in II, 7 that the "the *Law of Nature* would…be in vain, if there were no body that…had a *Power to Execute* that Law" might be thought to similarly to apply to a duty of offenders to suffer their punishments.

punishments. For this reason, the role that offenders must play in society's pursuit of these aims can be thought to be the abiding by this prohibition. To be sure, a moral duty to submit to punishment does not guarantee offender compliance. But the duty can still have potency. The conscience of most offenders will at various points force them to answer the question of what they will do in the face of their wrongdoing, and, with a duty to submit to punishment, these reflective moments can provide the occasion for offenders to see that their required punitive suffering is for a good that is greater than their own present good.

2. The Limits on Punishment

Locke benefits from an account of the natural duty to submit to punishment since he now has a basis for offenders' *legal* duty to submit to punishment. Notice that the law requires that offenders suffer their punishments – attempts to resist and evade them are additional legal wrongs to the ones for which offenders are initially punished. But what remains to be explained by Locke is the state's authority to specify the duty to submit to punishment. In addition to physically inflicting punishments, the state requires the suffering of punishments that *the state* deems appropriate.[25] This is most clear in the state's normative imposition of a punitive sentence, which can be thought to determine exactly which punishments offenders are bound to suffer. Importantly, Locke cannot account for this authority by simply assuming that individuals surrender their natural right to punish to the state. By itself, that surrender explains only why the state is the exclusive holder of the right to punish in society. The surrender does not yet explain why the state should have an authority to specify offenders' required punishments.

[25] The state also uses its legal authority to remove offenders' immunity to punishment by the finding of a guilty verdict.

So we might ask whether holders of the natural right to punish thereby have any such authority. If they do, then Locke can explain the specification of offenders' required punishments both by individuals in the state of nature and by the state in political society. However, Locke stands in need of two explanations if he does not believe the natural right to punish includes an authority to specify offenders' required punishments. In this case, Locke must explain, first, how holders of the natural right to punish are able to know which punishments offenders are required to suffer; and, second, how individuals' non-authoritative right to punish can give rise to the state's authoritative right to punish.

To better think through these issues, we can rely on a distinction between two sorts of "Hohfeldian" rights that the right to punish may take the form of.[26] On the one hand, the right to punish may take form of a power right, which is a right that authorities are usually thought to wield.[27] A power grants to its holder a normative capacity to either lay new duties on, or remove the existing duties of, other persons. As we've just considered, such a right to punish may be seen in the state's authority to issue binding punitive sentences on offenders. On the other hand, the right to punish may take the form of a liberty right, which is a right that is typically viewed as weaker than a power. This is because the exercise of a liberty does not in itself effect a change in the rights and duties of others. Rather, since a liberty does no more than to permit one to act in certain ways, a liberty right to punish might be seen in Hobbes' view that the state has merely the right to threaten and inflict punishments, but not the right to require their suffering.

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[26] In what follows, I rely on the discussion of Hohfeldian rights in John Finnis, *Natural Law and Natural Rights* (Second Edition) (New York: Oxford University Press, 2011), 199-200

[27] For an account of authority as a species of normative power see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Second Edition) (New York: Oxford University Press, 2009), 16-19.

It's unclear whether Locke's natural right to punish takes the form of a power, or of a liberty. The lack of clarity stems from Locke's more general problem of not employing precise meanings for his terms "right," "power," "duty," and the like.[28] But even with Locke's lack of clarity on this issue, commentators explicitly considering it in these Hohfeldian terms have assumed that Locke's natural right to punish functions along the lines of a liberty; as a right that permits the infliction of punishments only according to the conditions set down by the law of nature. This reading ensures that Locke's natural right to punish is one that can be equally held by all. For instance, Nozick worries that with right to punish stronger than a liberty it may seem that only those with a "special authority" to punish – victims – can hold this right where they might even be thought to be "owed" their offenders' punishments.[29] Nozick recognizes, however, that "the liberty to punish would give Locke much of what he needs, perhaps all if we add the duty of the wrongdoer not to resist his punishment" (although, Nozick says nothing more about this duty). Simmons agrees, adding that the forfeiture of offenders' rights that makes possible the liberty to punish cannot be merely with respect *to* victims, but with respect to all persons in the state of nature.[30]

An additional consideration for reading the natural right to punish as a liberty is that Locke can easily avoid any unreasonable requirements that may come with a *duty* to punish, e.g., that of taking on the risks and costs associated with punishing unruly offenders. There is no

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[28] As early as 1798, Thomas Elrington complained that Locke confused the notions of duty and right. See Peter Laslett's comments in John Locke, *Two Treatises of Government: Student Edition*, ed., Peter Laslett (New York: Cambridge University Press, 2009), 273. See also Simmons' discussion on Locke's uses of concept of right in Simmons, *Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 70-75.
[29] Nozick, *Anarchy, State, and Utopia*, 137-138.
[30] Simmons, *Lockean Theory of Rights*, 150-151, 155. Additionally, Simmons points out that Locke can account for victims' special rights by reparation (i.e., restitution), which is a ground of punishment in addition to restraint, for Locke.

mention of a duty to punish in Locke's discussions of punishment in the state of nature, and that may be due to Locke's concern for the fact that, in the state of nature, "[offenders'] resistance many times makes the punishment dangerous, and frequently destructive, to those who attempt it" (II, 126).[31] So Locke probably views individuals in state of nature as free to decide whether they will fulfill their fundamental duty to preserve humankind by taking on the risks and costs associated with punishing, or by refraining from punishing: "Every one as he is bound to preserve himself…by the 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 an Offender…" (II, 6, emphasis mine).

Sometimes, however, Locke associates the natural right to punish with what may look like authoritative judgement, as when Locke says that each person has "by Nature a Power…[to] judge of, and punish breaches of [the Law of Nature]…as he is perswaded the Offense deserves" (II, 87). In these sorts of passages, the natural right to punish might be construed as a power right that gives its holder an authority to declare a person to be a wrongdoer, and therefore liable to punishment, as well an authority to declare which punishment an offender may or must suffer by natural law. But this reading cannot be easily accepted since there is a further interpretative issue with Locke's use of the word "judge." Remember: the state of nature is, for Locke, "a State of perfect Freedom" (II, 4), a state where "naturally there is no superiority or jurisdiction of one, over another" (II, 7). It is thus unclear how, not one, but all (innocent) persons in the state of nature can each have an authority to issue binding judgements on offenders that, presumably, require duties of non-interference on all others, i.e., no one may interfere with the infliction of a

[31] See also Simmons, *Lockean Theory of Rights*, 160-161, fn. 72.

punishment on a person who has been judged to be an offender. In this vein, Jeffery Murphy[32] and Gerald Postema[33] argue that it is incoherent to think that Locke's natural right to punish is an authority. If both you and I hold the authority to specify an offender's punishment, for example, and if you and I specify this punishment differently, then which of these two different punishments may, or must the offender suffer? Obviously, Locke avoids all such problems of conflicts of authority with a liberty to punish. Moreover, that right fits within the more consistent and faithful reading whereby each person is a judge in the state of nature primarily in the theoretical sense (as opposed to practical sense) that there is no epistemic obligation to believe moral truths as they are propounded by other persons.[34] This interpretation of each person being a judge in the state of nature holds that Lockean natural equality consists in each person's right to know the law of nature for themselves and to act according to that perceived knowledge. Here, the natural right to punish is best understood as a right that merely permits the infliction of punishments according to conditions set down by the law of nature.

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[32] "If we say that each man in a state of nature is an authority with respect to punishment, then when Jones says 'Martin deserves punishment' and Smith says 'Martin does not deserve punishment' they are *both…*issuing binding judgments. But this is incoherent. Where everyone is said to be an authority, the concept of authority operates without sense." Jeffery G. Murphy, "A Paradox in Locke's Theory of Natural Rights," *Dialogue* (September 1967), 263.

[33] "The notion of a right to punish" must include "a claim to special title or authorization to inflict punishment," but: "except in very special cases, the idea of authorization presupposes a system of roles or positions in some institution or practice such that in virtue of that role one is authorized or has title to act…This is especially true of the right to punish, which cannot rightly be said to exist prior to the establishment of an institutional arrangement for punishment. This is because is conceptually linked to the notion of a public or community response to wrong-doing." Gerald Postema, "Nozick on Liberty, Compensation, and the Individual's Right to Punish," *Social Theory and Practice* (Fall 1980), 325-326.

[34] For an insightful discussion of the rise of early modern natural rights theory from Protestant individualism see Chapter 1 of David G. Richie, *Natural Rights: A Criticism of Some Political and Ethical Conceptions* (London: Swan Sonnenschein & CO, 1895). "But the theory of natural rights was not Locke's invention…The theory of natural rights is simply the logical outgrowth of the Protestant revolt against the authority of tradition, the logical outgrowth of the Protestant appeal to private judgment, *i.e.,* to the reason and conscience of the individual" (6).

But now, Locke must explain how holders of the natural right to punish are able to know which punishments may and may not be permissibly inflicted on offenders.[35] Importantly, Locke remains in need of this explanation even if (contrary to my arguments above) he recognizes no commitment to a natural duty to submit to punishment. As we've seen, the natural right to punish is, for Locke, not a right to punish "according to the passionate heats, or boundless extravagancy of [one's] own Will," but a right "*only* to retribute to [the offender], so far as calm reason and conscience dictates, what is proportionate to his Transgression" (II, 8, emphasis mine). Independently of any duty to suffer punishment, then, a holder of the natural right to punish must know whether the punishment that he is prepared to inflict is a proportionate one according to natural law. He must know the limits of his natural right to punish.

The problem of specifying the permissible circumstances of a punishment is an important one, though not often taken up by philosophers.[36] To some extent, this may be due to the fact that in political society the state is assumed to have the authority to make these specifications. Of course, even in this context we may still ask what the limits are to this authority, since Locke is surely correct in thinking that it is not an unlimited "Power" that "the Commonwealth comes by…to set down, what punishment shall belong to the several transgressions…committed amongst the Members of…Society" (II, 88). But it's clear that the problem of knowing the permissible circumstances of a punishment is even more pronounced in the state of nature where there is no such power. We might ask, then: in all cases where I've committed a wrong and am to

[35] I set aside problems of knowing when a person in the state of nature has violated natural law and is therefore liable to punishment. This problem can be understood as one of Nozick's main concerns in Part 1 of *Anarchy, State, and Utopia*.

[36] But for an example of a procedure for how to arrive at proportionate punishments on a retributivist theory see Michael Davis, "How to Make the Punishment Fit the Crime" *Ethics* Vol. 93, No. 4 (July, 1983), 736-742.

be punished, which of all the possible kinds of punishments that I may face are the ones that I may permissibly face? May I be incarcerated? Monitored while on probation? Forced to labor? Suffer bodily harm? And if I may suffer only some of these kinds of punishments, then how am I to suffer them? In the case that I am to be incarcerated, what may be the duration of my incarceration? During that time, may I be incarcerated for 24 hours a day, or for 12 hours a day? Is the former too harsh, the latter too lenient? May I be in solitary confinement? May I be put to work? May I earn wages? And so on, and so on. I suspect that the practical need for answers to these questions motivates – at least, in part – theories of the morally justifying aim of punishment. Since there is a general sense that grossly severe punishments must be avoided, such theories may be though to rest on the hope that in knowing the aims of punishment we can know its proper measures. I will however suggest in the next section that, though necessary, knowledge of the moral aims of punishment is not yet sufficient to know the permissible circumstances of a punishment.

In the *Second Treatise*, however, knowledge of the precise limits on the natural right to punish seems to rest entirely on the aims of punishment as dictated by natural law. To be sure, Locke needs a position of this sort since he cannot rely on any human authority to specify offenders' punishments in the state of nature. Recall that, for Locke, punishments are to be meted out according to rules of general deterrence: "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 other from doing the like" (II, 12). The problem is that, though these rules point in the general direction of the punishments permitted by natural law, they are not yet identified. And, while Locke repeatedly makes these kinds of deterrence-based claims, he never takes up the task of showing how exactly rules of deterrence work to reveal the nature,

conditions, and limits of offenders' just punitive treatments. To the contrary, after this quoted passage, Locke immediately dismisses such a task by saying that it is "besides my present purpose, to enter here in to the particulars of the Law of Nature, or its *measures of punishment*"; though he assures us that he is "yet…certain that there is such a Law, and that too, as intelligible and plain to a rational Creature, and a Studier of that Law, as the positive Laws of the Common-wealths, nay possibly plainer…" So we seem forced to read Locke as thinking that the "particulars of the Law of Nature" themselves specify punishments, though it's unclear how this specification is supposed to work.

It's easy to state the problems with this view. First, Locke does not acknowledge the highly contentious nature of deterrence-based rules of punishment; rules whose moral validity have been disputed across eras, cultures, and even courts within a single legal system. (Locke might want to say that such disputes rests on bias or ignorance of the law of nature, but charity forces us to reject any such argument.) Second, it's doubtful that moral rules in themselves embody a procedure or schedule where the inputs of offences yield outputs of just punishments. Third, and most importantly, we cannot even form a conception of such a procedure until we know a host of things, which, on a deterrence-based theory of punishment, include: the acceptable rates of crimes that punishments may aim at; how those rates differ (if at all) with social circumstance; and how our degrees of certainty that a punishment achieves such rates affects its permissible infliction. Are these the "particulars" of natural law that lead to the "measures of punishment?" Even those sympathetic to Locke's natural law theory may be embarrassed to think so – and yet, without even a conception of a deterrence-based procedure by which we can know offenders' just punishments (not to mention the plausibility of such a

conception), Locke's theory of natural law cannot tell us whether a punishment in the state of nature is just or unjust.

These problems undermine the basis upon which Locke's believes that there are moral limits on punishment in the state of nature. To help Locke on this front, Simmons attempts to reconstruct Locke's account of the natural right to punish. Simmons takes seriously Locke's commitment to the view that "wrongful punishment…is itself a violation of natural law,"[37] and tries to show how, for Locke, there are "objective standards…for what constitutes a just punishment." Interestingly, Simmons reads Locke as a retributivist on punishment, and so can avoid the problems that I've raised for (what I believe is) Locke deterrence-based theory. On Simmons' reading, fairness is the central moral concept in Locke's theory of punishment. The general idea is that when offenders violate natural law innocent persons are unfairly taken advantage of. They are taken advantage of in the sense that they have voluntarily restricted their own liberty to obey moral rules, which, in turn, has made possible the illegitimate benefits that offenders have received in breaking those rules. Fairness therefore requires that offenders forfeit some of their own liberties, some of their own natural rights, which, in turn, makes for the possibility of morally permissible punishment: "…only another's forfeiture of rights can give one (in Locke's language) a 'commission' [i.e., right] to punish."[38]

[37] Simmons, *Lockean Theory of Rights*, 145.
[38] Simmons, *Lockean Theory of Rights*, 152. Additionally, Simmons says: "Locke occasionally uses language that suggests an account of forfeiture based in natural fairness, as when he speaks of punishment as 'the abridgement of anyone's *share* of the good things of the world'…Rights-forfeiture can thus be seen as what secures the possibility of natural fairness and what renders impossible ongoing but morally protected patterns of (ab)use of others" Simmons, *Lockean Theory of Rights*, 154. My own view is that Simmons gives far too much weight to fairness in Locke's account of punishment.

To be sure, Simmons views this forfeiture of rights as proportionate to the offense committed. "A proportionate forfeiture of moral rights," Simmons says, "may be a necessary consequence of infringing the moral rights of others," since "of course, considerations of fairness also seem to dictate that a minor violation of the rules results in only a minor loss of status under the rules, and so on; so that the protection we enjoy under the rules will be proportionate to our own conformity to them."[39] Moreover, Simmons believes that considerations of moral desert and respect for personhood can do the work of determining the extent of rights forfeiture. Simmons says that "desert determine[s]…the extent of forfeiture, by determining what constitutes an appropriate response to wrongdoing,"[40] and says that "respectful punishment" secures a just proportionality.[41] In this way, Simmons takes himself to provide Locke with a way to explain the moral limits on punishment.

Yet the problem facing Simmons' reconstruction is no different than the main problem facing Locke's original account. We still need an explanation of the procedure or method by which holders of the natural right to punish can know which punishments are permitted and forbidden by natural law. The most we get from Simmons on this point is that an offender is justly subject to either (1) the harshest punishment warranted by his offense, or (2) any and all punishments with a harshness "below" (1), so long as their total harshness does not exceed the harshness of (1).[42] Simmons assumes that we are able to know the contents of (1) and (2), but

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[39] Simmons, *Lockean Theory of Rights*, 153.
[40] Simmons, *Lockean Theory of Rights*, 152.
[41] "Since the possession of rights is premised on autonomy and moral agency, forfeiture of rights is similarly restricted — we forfeit rights by our misconduct only to the extent that makes possible *respectful* punishment." Simmons, *Lockean Theory of Rights*, 159.
[42] "[The offender] commits crime (moral wrong) C, for which punishment P is appropriate (according to natural law). [The offender] forfeits certain of his rights, making it morally permissible for me, or any other person to impose P upon him (subject to the limit that no more than a total punishment of P may be imposed). Simmons, *Lockean Theory of Rights*, 155.

it's obvious that we cannot simply accept this assumption since what we are now asking for are the specific ways that we can know these contents. (Rather than focusing on the limits on punishments, Simmons focuses on the legitimate reasons that persons may have for exercising their right to punish.[43]) To help Locke explain the limits on the natural right to punish, then, Simmons needs to indicate how exactly the rules of desert contained in natural law, for instance, allow us to both identify the harshest punishment warranted by an offence and compare the severities of different kinds of punishments. To do this, however, natural law would have to provide us with a scheme of concrete desert claims, e.g., an aggravated assault is deserving of up to either a maximum of three years incarcerated, or a maximum of 150 lashings where the severity of one year incarcerated is equivalent to the severity of 50 lashings. But the possibility of this kind of scheme of punishments is doubtful. However, the real problem with Simmons' reconstruction is that any such scheme appears limited in scope to particular societies, but yet Simmons needs the scheme to have universal validity for all persons *qua* persons – the scheme is supposed to be operative in the state of nature.

To better see this problem, consider that no punishment can be said to be deserved independently of the social context within which the punishment is to be inflicted. This is because the ways in which sufferings can be deserved depend in part on social norms. For example, the severity of a punishment of lashings by whip, or of a punishment of working on a "chain gang," depends in part on social practices of and attitudes towards bodily pain and labor.[44] Consequently, knowing whether and how the severities of these kinds of punishments

[43] Simmons, *Lockean Theory of Rights*, 156-158.
[44] For the related argument that "harm is an essentially *social* category, not a physical one, even in the case of harm to one's body" see Samuel Fleischacker, *On Adam Smith's Wealth of Nations*: *A Philosophical Companion* (Princeton: Princeton University Press, 2004), 155-156.

are deserved requires a consideration of the particular social structures that give form to these treatments as punitive harms. For this reason, it's hard to see how there can be a desert-based scheme of punishments that is valid for all persons in the state of nature – especially, since social structures might now be viewed as taking on a kind of authority to specify morally appropriate punishments. Simmons is, of course, in no position to recognize any such authority. In the state of nature, Simmons says that the "just[ness]" "appropriate[ness]," and "fitting[ness]" of a "certain punishment" is a matter of "objective (moral) fact…There is no right to make authoritative pronouncements or punish authoritatively (in the sense in which this involves the power to make declarations)."[45] Although Simmons is here intending to claim that no *individual* has an authority to declare the appropriateness of a punishment, he obviously cannot rely on *society* having this authority over and above any individual.[46]

There is the further problem that Simmons' reconstruction has no way to rule out morally worrisome punishments, such as a punishment of rape for a rapist. This punishment seems to come closest to the purported "objective moral fact" of what such an offender deserves, though Simmons would likely counter by saying that this punishment does not respect the offender as a person. But if this is the offender's deserved punishment, then why shouldn't it be permissible to inflict?[47] The problem here concerns the ways that desert and respect for personhood are supposed to work together in the determination of an appropriate punishment. Does respect for personhood merely rule out certain kinds of worrisome punishments while desert positively

[45] Simmons, *Lockean Theory of Rights*, 146.
[46] In this case, society has a natural right that no individual has. Elsewhere, Simmons argues against a similar view suggested by Nozick. See A. John Simmons, "Consent Theory for Libertarians" *Social Philosophy and Policy* Vol. 22, Issue 1 (2005), 338.
[47] Wellman accepts that there is no way to conclusively rule out such punishments. Wellman, *Rights Forfeiture*, 32.

identifies punishments? Or, does respect for personhood also positively identify punishments? If so, how? And do desert and respect for personhood pick out the exact same punishments in every case? If not, how do we decide between them? Because we get no answers from Simmons to these questions, we may doubt his claim that desert and respect for personhood are able to do the work of specifying the just and proper limits of Locke's natural right to punish.

So an account of these limits does not appear to be forthcoming. We have not yet seen good reason to think that holders of Locke's natural right to punish are able to know its limits, and may therefore conclude that Locke lacks a basis from which to uphold the possibility of morally sanctioned punishments in the state of nature.

But this problem applies also to the possibility of morally sanctioned punishment in political society. On Locke's social contract theory, citizens surrender two general natural rights to the state. The first is a right to do "whatsoever [one] thinks fit for the preservation of himself and others within the permission of the *Law of Nature*" (II, 128). The second is a right "*to punish the Crimes* committed against that Law." The latter right is the one that we've been considering and, insofar its exercise comes to be the exercise of the state's right to punish, the problems just discussed will apply to the state. The state cannot know the limits of its right to punish violations of the law of nature. Moreover, the state will not have any authority to specify punishments for these violations. But insofar as this state's right to punish is grounded on a surrender of the right to do whatsoever one thinks fit for the preservation of self and others, the above mentioned problems with knowing the limits on punishments may be avoided. Locke says that in surrendering this natural right each person "*gives* [it] *up* to be regulated by Laws made by Society…which Laws…in many things confine the liberty [each] had by the Law of Nature" (II, 129). Because legal confinements can be understood to include punishments, the surrender of

this natural right can be thought to ground the state's authority not only to make laws, but also to specify the punishments for violations of those laws – all for the "the good, prosperity, and safety of the Society" (II, 130). But, even so, this explanation of how the state comes to have an authority to specify punishments for violations of *its own laws* still leaves Locke without an explanation for the state's authority to specify punishments for violations of the law of nature.

3. The Authority to Punish

I want to now briefly consider authoritative judgement in the specification of punishments. In a recent work, Simmons has described the "the concept of practical authority" as centrally involving "the right to specify the content of…already-created, but unspecific, obligations."[48] If, as I've argued above, a moral duty to submit to punishment is "created" from the moral aims of punishment, then I believe that Simmons' notion of practical authority can work to explain how we can arrive at specific punishments from the general moral aims of punishment.

Here, legal practice is instructive. The role of punitive authorities in legal sentencing is in the first place to specify an offender's legal duty to suffer punishment – and, by implication, to specify the permissible circumstances of the infliction of lawful punishments by agents of the state. In addition to the exercise of this authority by sentencing courts, such an authority is exercised also by other powers, e.g., legislatures, prison wardens, and disciplinary committees inside of prisons, etc. The point I want to stress is that while legal practice tends to emphasize its reliance on certain kinds of considerations in the determination of an offender's punishment, it's obvious that no such determinations are made solely on the basis of those considerations, e.g., an offender's history; his motives in the commission of an offense; the seriousness of the harms that

[48] A. John Simmons, *Boundaries of Authority* (Princeton: Princeton University Press, 2016), 15.

his offense caused to victims and the community; his character, including his prospects for rehabilitation; and the deterrent effects that his punishment has on other potential offenders. For one, these considerations still require further specification. To take just one example (alluded to earlier), penal codes and sentencing guidelines explicitly aiming at deterrence implicitly aim at rates at which (certain) crimes may permissibly be deterred. Unless those rates are specified, the general aim of deterrence cannot guide the infliction of punishments. Secondly, it is not to be expected that each one of these considerations leads to a convergence of them all on a single punishment, and so they must be assigned relative priorities with respect to each other. Thus, sentencing judges may in some cases place more weight on the fact that an offender acted out of passion and, except for his offense, otherwise demonstrates a good character; or, in some cases place more weight on the fact that victims have chosen to express the impact of the harms that they have suffered.

Of course, it is by no means a new insight that general principles or aims are insufficient in themselves to specify punishments.[49] Many can recognize that, though the aims of punishment make clear *why* offenders are required to suffer punishments, those aims do not yet make clear *how* offenders are required to suffer them. The latter requires the exercise of authoritative judgment.[50] This is because there is a need for discretion in deciding how to best meet the aims of punishment in various circumstances. For instance, a society without resources to inflict relatively more effective and more costly punishments can require the suffering of less effective

[49] Wellman suggests that the issue of proportionate punishments illustrates the broader point that, though general moral rules may themselves be clear, it is often unclear how to apply them in particular cases. Wellman, *Rights Forfeiture*, 34-35.

[50] Jeffery Murphy notes similar considerations in his critique of Locke's theory of punishment. "Punishment demands, at a minimum, three conditions: a system of rules, authorities to apply these rules, and authorities to enforce sanctions for breaches of these rules." Murphy, "Paradox," 261.

and less costly punishments to better secure punishment's aims overall. The same applies more broadly to a society's balancing of the pursuit of the aims of punishment alongside the pursuit of all other aims, e.g., of promoting the general welfare.

So, if I'm correct that the moral aims of punishment ground a duty to submit to punishment, then the duty can at this point be only very general. Authoritative judgement remains necessary to specify the content of this duty. But the above reflections on legal punitive authority suggest that the law itself is indispensable for a specification of the content of this moral duty. That is, without the authoritative mechanism of the law, it may be impossible to consistently and coherently specify offenders' moral duty to submit to punishment in relation to the circumstances of offenders, victims, and the community. (Again, the need for this sort of authority remains even if there is no moral duty to submit to punishment.) Locke certaintly views the law as indispensable for the workings of any stable system of punishment, even though he views the state of nature as allowing for the possibility of morally sanctioned punishments. It's the "inconveniences" of punishment in that state that, for Locke, motivates individuals to establish of the state's exclusive right to punish *via* the surrender natural rights (II, 127). In the next section, I will indicate how Lockean theory might be able to make room for the authority to specify punishments in the state of nature, but I want to now make the point that on any such Lockean theory, as well as on the account of the authority to punish outlined here, there must be limits to this authority. These limits should be thought to rest on the moral aims of punishment, and, ultimately, on the general aims of morality, which, in Locke's case, are deterrence and the preservation of humankind, respectively. Moreover, we should not expect an easy account of these limits. The difficulties of accounting for the limits on the authority to punish are ones that should be expected to face any theory of punishment. And I want to be clear that this issue is

distinct from the one that we've been considering with respect to Locke's account of punishment. The problem that we saw facing Locke's account is a failure to provide any mechanism at all for explaining how punishments are specified, *not* a failure to explain the limits of such a mechanism.

Importantly, the limits on the authority to specify punishments on the Lockean account that I will outline in the next section cannot rest ultimately on social custom or practice. In this case, the injustice of society may permit the authoritative imposition of grossly harsh punishments. This cultural relativist worry is probably not one that Locke has in mind in the *Second Treatise*, though a similar worry may underpin his claim that the limits on punishment rest entirely on natural law. Locke was writing at a time when many believed that whichever punishments the king requires are just (since the king rules by divine right). Obviously, no such authority is allowed on Locke's theory of punishment. My contention has been, however, that Locke goes too far in those moments where he appears to believe that human agents have no moral authority whatsoever to determine the justice of punishments.

4. Conclusion

In showing how Locke cannot explain the limits on the natural right to punish, I have shown how Locke has no defensible account of punishment in the state of nature. This problem is especially glaring in light of what I've argued is Locke's implicit commitment to a natural duty of offenders to suffer punishment – Locke gives us no way to know the content of that duty.

Furthermore, I have argued that Locke's theory of punishment cannot explain the limits on the *state's* right to punish violations of natural law. Since these violations include the most serious crimes that can be committed – murder, assault, rape, and theft – Locke appears left with

the feeble aim of accounting only for the state's punishments of violations of its own laws.[51] But Locke cannot even meet this aim. On Locke's social contract theory, citizens are bound to the state's laws only if they have consensually surrendered their natural rights. However, it's been clear since at least David Hume's "Of the Original Contract" that citizens cannot be thought to have met the basic conditions for the giving of voluntary consent.[52] So, Locke can neither argue that offenders' punitive obligations follow from an all-encompassing duty to obey the state (as I've sketched this argument above), nor argue that such a duty explains why private citizens must refrain from punishing in competition with the state.[53] Moreover, since the state's punitive authority is very wide in scope, Locke is no position to argue that citizens have at least "partial political obligations" to obey the state's punitive authority (as I've argued for the possibility of such obligations in "Partial Political Obligations.") Consider: Locke believes that citizens are liable to "engage[s] [their] natural force…to assist the Executive Power of the Society, as the law thereof shall require" (II, 130), and yet it's clear that consent cannot uphold this liability of citizens. Citizens cannot be thought have consented to the risks and costs associated with aiding the government in physically inflicting punishments on criminals.[54] But because Locke assumes

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[51] The distinction between violations of laws of nature and violations of the state's own laws can be understood as the distinction between crimes *mala in se* and crimes *mala prohibita* – between crimes whose wrongness rests in the nature of the acts themselves and crimes whose wrongness originates in the state declaration of those acts as wrong. See Simmons, *Lockean Theory of Rights*, 161-162 for one way to make this distinction in Locke's theory of punishment.

[52] For discussion of what I take to be Hume's decisive critiques of consent theory see A. John Simmons, *On The Edge of Anarchy* (Princeton: Princeton University Press, 1993) 226-227; 233.

[53] Sometimes, Locke appears to argue that citizens' general obligation to the state's authority to preserve "property" — understood as the lives, liberties, and estates of citizens (II, 123) — implies a more limited obligation to the state's authority to punish, as when he says: "for the preservation of the property of all the Members of…Society, as far as is possible" the "Commonwealth comes by a Power to set down, what punishment shall belong to the several transgressions which they think worthy of it…" (II, 87-88).

[54] It's likely that most citizens today do not view themselves as either morally or legally liable to the state's right to require their aid in the physical infliction of punishments – not in the least

that governments characteristically, if not essentially, possess an authority to punish with this kind of scope, he fails to explain what he takes to be the government's right to punish. In sum, then, Locke has no workable theory of punishment.

It goes without saying that without a workable theory of punishment Locke cannot meet his broader aim of providing a theory of government. Simmons' broader aims face a similar fate. In reconstructing Locke's account of the natural right to punish, Simmons hopes to provide Locke with a more plausible basis for his social contract theory.[55] Yet another aim of Simmons' reconstruction is to provide a plausible basis for his own view of the *illegitimacy* of the state's right to punish. Although Simmons follows Locke in endorsing the existence of the natural right to punish, and in endorsing the principles of consent theory, Simmons departs from Locke in believing that citizens have *not* consensually surrendered their natural right to punish to the state.[56] Hence, Simmons says that "it may be true that punishment in many or most civil societies is *not* legitimate," since the state's forceful prevention of private punishment infringes on citizens' natural right to punish – "private citizens in these societies *are* entitled to punish

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because of the harms that may be faced at the hands of unruly offenders (but compare to common views on conscription). Yet Locke thinks that we have no basis from which to object to such a requirement. We "wholly" give up our right to punish since we judge that we are better off in a punitive system where only the state determines how punishments will be meted out than in a system where we are left to punish ourselves (II, 88; 126-130). Today, the state uses taxes to employ persons who are willing to inflict punishments, which is a more efficient way of punishing than "conscripting" citizens to punish.

[55] "I agree [with Locke] that if there is a natural executive right (and if it is possible to defend the theories of natural rights and desert upon which the executive right depends), then this Lockean transaction between government and citizens [i.e., the surrender of natural rights] is necessary for the moral legitimacy of the common practice of punishment within political communities." Simmons, *Lockean Theory of Rights* 165.

[56] "Skepticism" of "Locke's claims that we have in fact given up our natural right to punish to our government…may be well warranted." Simmons, *Lockean Theory of Rights*, 165. To support this skepticism, Simmons relies on the intuition that it is not wrong to punish criminals that the state has not punished. See also Chapter 8 of *On The Edge of Anarchy*.

wrongdoers."[57] As we've seen, however, Simmons' own theory of "desert upon which the natural executive right depends"[58] does not withstand critical scrutiny. Simmons therefore lacks a plausible basis on which to uphold the view that the state's right to punish infringes on citizens' own natural right to punish, for they may not even have such a right in the first place.

In conclusion, I want to suggest one way that Locke's theory of natural law can make room for a natural authority to punish. As I've discussed above, I understand Locke's view natural right to punish to function more or less along the lines of a liberty right. However, if Locke can possibly view the natural right to punish as a power, one that includes an authority to specify punishments, then Locke might be able to overcome the problems that we have seen face his account of punishment in the state of nature. Resolving problems of punishment in the state of nature is the most that a Lockean theory of punishment can hope for. This is because the abject failure of Locke's consent theory simply makes it impossible to account for the state's exclusive right to punish in society.

We saw that the desire to avoid two problems motivates a view of the natural right to punish as a liberty right. The first problem is the unreasonable duty of taking on the risks and costs of punishing, and the second problem is the incoherence stemming from inevitable conflicts of authority arising from all holding an authority to punish. But these problems can be avoided even when the natural right to punish is understood as an authority. Along the lines outlined above, holders of the authority to punish can have discretion in deciding when they will mete out punishments and when they will not. There needn't be any requirement to mete out "dangerous" punishments. Additionally, Lockean theory might avoid conflicts of authority in the

[57] Simmons, *Lockean Theory of Rights*, 165.
[58] See fn. 55 above.

same way that similar ones are avoided in states' overlapping, "concurrent" criminal jurisdictions.[59] International law deals with conflicts of authority arising from criminal jurisdictions that are not exclusive to one state. These conflicts may arise from: (1) one state treating an act as punishable while another state does not; (2) lack of clarity concerning which state may prosecute a crime without interference from other states; and (3) a crime's liability to be successively punished by different states.[60] In Locke's state of nature, no major problems arise with (1) since there is no authority to "make" an action liable to punishment. In the clearest cases, punishable acts are gross violations of natural law, such as, murder, rape, assault, and theft. With respect to (2), a "first-come, first-served" principle can determine who may punish an offender without interference from others; although, this principle would have to require that potential punishers lose their right to punish an offense if that offense is already being punished.[61] Finally, with respect to (3), the successful infliction of a binding punishment can be thought to end an offense's liability to punishment. This rule reduces the risk of over punishing by categorically ruling out successive punishments.[62]

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[59] See Julia Hörnle and Elif Medos Kuskonmaz, "Criminal Jurisdiction – Concurrent Jurisdiction, Sovereignty, and the Urgent Requirement for Coordination" in Julia Hörnle *Internet Jurisdictional Law and Practice* (Oxford 2021; online edn, Oxford Academic, 20 May 2021), https://doi.org/10.1093/oso/9780198806929.001.0001, accessed June 21, 2023.

[60] *Ibid*, 83.

[61] Although this represents a non-consensual loss of natural right, it poses no problem for Locke's consent theory. By way of parallel, consider the right to appropriate from the commons. I lose the right to appropriate *this* apple when you first appropriate it, though I have not consented to this loss of right. Yet my general right to appropriate from the commons remains unaffected (assuming all provisos are satisfied.) The same can be said my loss of the right to punish some particular offender when you punish him.

[62] There remains a worry about under punishing, but that worry doesn't appear to concern Locke, especially when compared to his concern for over punishing. Again, this may be because Locke believes that persons in the state of nature have the freedom to choose whether or not they will punish, given the harms they may face in punishing unruly offenders. Thus, Locke might even think that there will be little punishment in the state of nature, even though all have a right to punish. Insufficient attempts at punishing may, of course, be one of the reasons for why

A system of punishment where all have a natural authority to punish is far from ideal. I suggest merely that such a system may be coherent, and, for this reason, may work to remedy Locke's problem of the specification of punishments in the state of nature. This revision to Locke's views also has the benefit of allowing Locke to continue to rely on the undesirability of punishment in the state of nature to explain individuals' motivations to establish the state.

Lastly, a natural authority to punish preserves what I referred to above as Lockean natural equality. The view of the state of nature as a "State of perfect Equality" (II, 7), a state "wherein all the Power and Jurisdiction is reciprocal, no one having more than another" (II, 4), is a view that expresses Locke's deeply held conviction that in a world without established governments there is no authority on Earth to settle disputes between persons' differing judgements of the law of nature. That is why Locke believes that each person in the state of nature is justified in thinking that "I my self can only be Judge [of Controversies] in my own Conscience, as I will answer it at the great Day, to the Supream Judge of all Men" (II, 21). So, although disputes over the legitimate exercise of a natural authority to punish will certainly be commonplace in the state of nature, there will yet be no one in that state with an authority to issuing binding resolutions. All have an equal authority, and so there is still no "common judge with authority," still no "common Superior on Earth, with Authority to judge between them" (II, 19). Of course, Locke must give up his belief that the specification of punishments rests entirely with natural law if were to accept this view of the state of nature. But that is a belief that Locke would do well to give up.

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individuals are motivated to leave the state of nature.

IV. Smith and The Right to Punish

While Hobbes thought that legitimate political authority may be founded on a coerced transfer of rights, Locke thought that all such authority must be founded on consensual transfer of rights. But neither provides a convincing story. Hobbes' view implies the legitimacy of governments founded on brutal conquests while it follows from Locke's view that no governments are legitimate – brutal conquest or not, governments are simply not established by individuals' voluntary consent.

Despite these failures, we can recognize the plausible starting point of Hobbes' and Locke's theories of social contract, namely, the assumption that the state finds its legitimacy in citizens' natural rights. Above all, these theories tried to show the legitimacy of the state's right to punish. However, even looking past the problems in both Hobbes' and Locke's accounts of the *nature* of that transfer of rights that establishes the state's right to punish, further problems arise. Essential to the state's punishment of offenders is the exercise of an authority to require the suffering of punishments that the state deems just and proper. Yet Hobbes cannot explain this authority of the state. Because Hobbes believes that citizens always possess a natural right to self-preservation, he rejects *any* requirement of offenders to suffer punishments.[1] For Hobbes, then, the state has a mere permission to inflict punishments, but no authority to require them. Locke fails to explain the state's authority to specify punishments since he provides us with no way of knowing when state-required punishments are properly guided by the aim of the public good, which, for Locke, is the only true measure of such punishments (II, 130). This failure of

[1] "No man is supposed bound by covenant not to resist violence; and consequently it cannot be intended that he gave any right to another to lay violent hands upon his persons" Thomas Hobbes, *Leviathan*, Book II, Chapter XXVIII, paragraph 2.

Locke's stems from his prior failure to make clear how natural law limits the exercise of the natural right to punish[2] – the foundation of the state's right to punish, for Locke.

In this paper, I present an account of the state's right to punish that avoids these problems. I show how such an account can be constructed from Adam Smith's theory of natural jurisprudence. Although Smith himself does not provide this account, I argue that Smith is able to offer a plausible picture of how the state's right to punish finds legitimacy in the natural rights of individuals. In contrast to more familiar natural rights theories, the account presented here does not rely on any intentional surrender of rights, whether consensual or coerced (Smith makes clear that "government takes place where it was never thought of" (LJ, 402)). Instead, the account relies on the preservation of society to ground a non-intentional transfer of rights. Moreover, I show how what Smith calls "the right to exact the punishment" (LJ, 134) implies the existence of the natural rights to require, forgive, and specify punishments, as well as the natural right to inflict them. Because Smith is able to think that all of these rights are transferred to the state, I argue that he can have a plausible natural-rights-explanation for the essential ways in which the state exercises its authority to punish.

To offer this Smithian account, I rely on three principles in Smith's theory of punishment: a principle of dignity, a principle of the preservation of society, and a principle of agential representation. I rely mainly on the principles of the preservation of society and of representation in my reconstruction of Smith's account of the transfer of rights that establishes

[2] Although Locke "is certain" that there are "particulars of the Law of Nature" that include the "*measures of punishment*," he says that "it would be besides [his] present purpose to enter here into" them. John Locke, *Two Treatises of Government* (II, 12).

the state's authority to punish. And I rely on a principle of dignity mainly in my reconstruction of Smith's moral justification for punishment in general.

Throughout, I make use of Smith's theory of punishment running through both *The Theory of Moral Sentiments* and *Lectures on Jurisprudence*, paying special attention to Smith's claim that a concern for victims forms the foundation for systems of punishment. In this way, I intend to show how Smith's natural rights theory can uphold his thesis that "the whole of criminal law is founded on the…resentment of the injured" (LJ, 277).

I lay out Smith's approach to natural jurisprudence in Section 1. In Section 2, I show how a principle of dignity underlies Smith's view that punishment is justified by the satisfaction of victims' resentment. In Section 3, I make clear the explanatory tasks for a Smithian natural rights account of the state's right to punish, and in Sections 4-5, I show how such an account can rely on the principles of the preservation of society and of agential representation to explain, respectively: (1) the loss of individuals' natural right to punish in the absence of an intentional surrender; and (2) the sense in which the state's right to punish is reducible to individuals' natural rights. I conclude in Section 6.

1. Natural Jurisprudence

Smith's natural jurisprudence is a normative science. It is "that science which inquires into the general principles which ought to be the foundation of the laws of all nations" (LJ, 397).[3] And that science is a moral one. Smith refers to "natural jurisprudence" as "an enumeration of the

[3] Similarly, Smith says: "Jurisprudence is the theory of the rules by which civil governments ought to be directed. It attempts to shew the foundation of the different systems of government in different countries and to shew how far they are founded in reason" (LJ, 5).

particular rules of *justice*," which, for Smith, is a moral virtue (TMS, 340, emphasis mine).[4] Since Smith believes that knowledge of natural jurisprudence comes by way of the impartial spectator, the central theoretical device of his moral theory, we may begin by briefly considering the basic way in which Smith employs this device.

To morally evaluate motives, actions, or laws we need to view them from a neutral standpoint, one free from bias and interest. In particular, we need an impartial view of the "persons principally concerned" in any given situation.[5] Smith believes that we reach this view *via* a certain kind of sympathy. For Smith, sympathy is presupposed in all approving or disapproving attitudes. "We either approve or disapprove of the conduct of another man according as we feel that…we either can or cannot entirely sympathize with the sentiments and motives which directed it" (TMS, 109).[6] Importantly, Smith believes that we have a desire and an ability to see "what are, or…what, upon a certain condition, would be…the judgment of others," as well as a desire and an ability to see what that judgment "ought to be." It's really the last of these that is most important. Because we can and want to make judgments that *ought* to be made, we are impelled to construct in our imagination a "fair and impartial spectator" who sympathetically approves or disapproves of others' conduct (as well as our own conduct) free from bias and interest. Smith believes that this sympathetic approval or disproval of the impartial spectator is the essential constituent of impartial evaluations. So, since we can access the

[4] Additionally, Smith refers to jurisprudence as "the useful part of moral philosophy," along with ethics (TMS, 340). For Smith's discussion of justice see TMS 78-91.
[5] Smith uses the term "persons principally concerned" to refer to those affected either positively, or negatively by some situational event. They are the primary subjects of spectators. For a discussion of sympathy between persons principally concerned and spectators see TMS 21-23.
[6] With respect to our own conduct, Smith says that "we either approve or disapprove of our own conduct [as well as our own sentiments and motives] in no other way than by endeavoring to view them with the eyes of other people" (TMS, 110).

impartial spectator's viewpoint by sympathy with "this supposed equitable judge," we are thus able to see what his approving and disapproving attitudes are, and are thus able to issue what are fundamentally moral evaluations of motives, actions, or laws.[7]

When it comes to natural jurisprudence, this impartial spectator procedure constitutes Smith's method of knowing our natural rights and duties, and so constitutes Smith's method of legal criticism.[8] But because this method is highly contextualist in nature, it is somewhat unique in that it does not depend on the concept of the state of nature (although, I will discuss a rare instance where Smith alludes to the state of nature). More familiar "state-of-nature" theories, as Nozick calls them, evaluate laws by considering how, in a hypothetical world without any government, individuals can or cannot use their natural rights and duties to create those laws. Nozick captures this familiar approach by describing such theories as attempting to "show…how a political situation would arise out of a nonpolitical one" (for the purposes of this discussion, we may simply substitute "legal" for "political").[9] Yet that way of coming to know what the law ought to be is simply too abstract for Smith.[10] As Smith's impartial spectator procedure suggests, moral knowledge begins with reflection upon actually existing situations so that knowledge of

[7] I say "fundamentally" because, while Smith's impartial spectator procedure provides the basis for moral evaluations, Smith yet allows utility, a lesser important consideration, to also determine them. For discussion see Samuel Fleischacker, *Adam Smith* (Abingdon: Routledge, 2021), 118-122.

[8] For a discussion of Smith's use of the impartial spectator procedure in legal criticism see Chapter 6 of Knud Haakonssen, *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge University Press, 1981).

[9] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 2013), 7.

[10] "…in Smith's view men can never start morally from scratch: they are always living in a society and thus in a context of aims, values, and ideals […] Each of these…values, aims, etc., may be itself be questioned but never the whole system, for that would be equivalent to a state of nature. It would, in other words, be impossible." Haakonssen, *Science of a Legislator*, 62.

general moral rules, including those of natural jurisprudence, are founded upon those prior, contextualized reflections.[11]

It's interesting to consider the extent to which Smith's method of natural rights theorizing follows Nozick's outline of what is to him an alternative, "exciting" kind of state of nature theory. Nozick is intrigued by how such an alternative theory can show how "a political situation…described nonpolitically…derives its political features from its nonpolitical description."[12] Especially suggestive is Nozick's indication that such a theory may "use scientific laws to connect distinct features…discovering that political features and relations were reducible to, or identical with, ostensibly very different non-political ones." As I discuss in the next section, Smith's moral theory is rooted in general principles of human psychology, especially in the capacity for sympathy. Thus, the "non-political" features doing the explanatory work in Smith's natural jurisprudence appear intended to be "fundamental," if not "inescapable features of the human situation," in Nozick's terms. So I suggest that Smith's natural jurisprudence may be thought to have the epistemological structure of this alternative kind of state of nature theory that Nozick describes, even if Nozick is right that we are "so far…from [the] major theoretical advance" that is presented by this kind of state of nature theory (Nozick would probably view the scientific details as remaining to be filled in). In any case, Smith's epistemological commitments will lead us to consider various situational contexts so that we may come to have a general picture of his natural rights theory of punishment.

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[11] For discussion of Smith's moral particularism see Samuel Fleischacker, *Adam Smith* 70-71; see also the discussion of moral rules in 116-117. On the distinction between contextual knowledge and system knowledge in Smith's moral theory see Haakonssen, *Science of a Legislator*, 79-82.

[12] Nozick, *Anarchy, State, and Utopia*, 7-8.

Yet the basic elements of that theory appear intended to have (near) universal application. Smith assumes that we always resent those who have caused us injury ("evil"), and assumes that such resentment "most immediately and directly prompts us to…punish."[13] Moreover, Smith assumes that all spectators sympathetically approve of such a resentment – at least, to some extent.[14] As we will see, these basic psychological facts give rise to what Smith believes are the central natural rights and duties involved in punishment. The point now is just that these psychological grounds are meant to apply across humanity generally, and, for that reason, the natural rights and duties they give rise to are similarly meant to apply.[15] The role of situational contexts is to specify the different ways that such rights and duties take their form.

In what follows, I will consider only Smith's view of punishments for offences to individual victims. I will not provide a sustained treatment of Smith's view of punishments for offences to the public good (this a topic for another paper). The former view suffices for a general Smithian account of the state's right to punish. But the first thing to make clear on any

[13] "The sentiment which most immediately and directly prompts us to…punish, is resentment. To punish…is to return evil for evil that has been done" (TMS, 68).

[14] "When we see one man oppressed or injured by another, the sympathy which we feel with the distress of the sufferer seems to serve only to animate our fellow-feeling with his resentment against the offender. We are rejoiced to see him attack his adversary in his turn, and eager and ready to assist him whenever he exerts himself for defense, or even for vengeance within a certain degree" (TMS, 70-71).

[15] For instance, Smith says that because "the resentment of the injured persons can not be satisfied by a mere simple punishment, unless there be an equality at least betwixt the sufferings of the injur'd person and the offender" it must be that "the only proper punishment" for "willfull murder" is "the death of the offender" (LJ, 106). Below, I make clear how "the proper punishment" is the one that victims have a natural right to demand. Haakonssen argues that, for Smith, the "'pungent' feeling" of sympathetic resentment is "unusually 'universal' and 'distinct'" Haakonssen, *Science of a Legislator*, 86. But see Samuel Fleischacker, *On Adam Smith's Wealth of Nations*: *A Philosophical Companion* (Princeton: Princeton University Press, 2004), 155-156 for criticisms of this reading.

such account is the moral justification for punishment. So I turn now towards what Smith believes is the foundational moral principle of punishment.

2. Dignity

The psychology of victims and their spectators is the entry point into Smith's theory of punishment. Not only do victims "desire" their offender to be "punished," but desire that he be punished "upon account of that particular injury which he had done" (TMS, 69). This is because victims feel a resentment that "cannot be fully gratified unless the offender is… made to grieve in his turn." To everyone else, however, this resentment can "seem proper" and be "approved of" only by way of the impartial spectator's sympathy. Smith says that "when the heart of every impartial spectator," of "every indifferent by-stander," is such as to "entirely sympathize with" and to "entirely enter into and go along with" the resentment of victims, then, and only then, can the offender be "the object of that… resentment, which naturally seems proper" and therefore "be approved of." So in this way "that action must…surely appear to deserve punishment, which every body who hears of it is angry with, and upon that account rejoices to see punished" (TMS, 70).[16]

One issue with this impartial spectator account is that it can seem intended to explain *merely* the generally held belief that it is moral appropriate to punish offenders. This is incorrect, however. Although not emphasized by Smith, the account *does* assume the truth of such a belief. Smith's initial premise states that "to be *the* proper and approved object…of…resentment, can

[16] Similarly, Smith says that the "whole sense and feeling…of the propriety and fitness of inflicting evil upon the person who is guilty of it, and of making him grieve in his turn" arises "from the sympathetic indignation which naturally boils up in the breast of the spectator" (TMS, 76).

mean nothing but to be the object of that…resentment, which naturally *seems* proper, and is approved of" (TMS, 69, emphasis mine). So, since by the impartial spectator's sympathy offenders naturally seem to be the proper objects of resentment, it's by that sympathy that offenders really are the proper objects of resentment.[17]

Even so, Smith's account may leave us wondering. As an intentional infliction of harm, punishment calls for justification – especially when motivated by resentment since it is "so odious…[perhaps] the most odious" of passions (TMS, 76). Which specific moral principles, then, are doing the work of justifying punishment? This question raises the general problem of how to understand Smith's grounding of moral claims in descriptive ones. In addressing this problem, some commentators have relied on Smith's account of sympathetic moral judgments. Samuel Fleischacker, for instance, reads Smith as assuming that our sympathetic facilities make possible not only our normative practices, but also our issuing of genuine moral judgments of those practices – judgements that "track a real fittedness of feelings to situations."[18] Fleischacker argues that, for Smith:

> …the *fact* that we constantly make judgments in the course of carrying out normative practices entails that we constantly present ourselves as meeting the…conditions for rendering a moral judgment…It is central to Smith's views that we can…be too partial or too poorly informed to render a *proper* moral judgement, and can be corrected…if we render an *improper* one."[19]

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[17] Additionally, Smith's assertion that punishment *is* morally appropriate makes clear that he is not concerned with merely descriptions of beliefs about punishment. Smith says, for example: "There can be no proper motive for hurting our neighbour, there can be no incitement to do evil to another, which mankind can go along with, except just indignation for evil which that other has done to us…no impartial spectator can go along with" disturbing another's happiness from other motives (TMS, 82). In this passage, the phrase "mankind going along with" the infliction of harm does not restrict the scope of Smith's claim to a mere description of mankind's beliefs. Rather, that phrase simply makes Smith's *additional* point that when the infliction of harm is prompted by the "proper motive" of "just indignation" then all mankind can endorse "the incitement to" the infliction of that harm.

[18] Fleischacker, *Adam Smith*, 153.

[19] Fleischacker, *Adam Smith*, 150-151 (emphasis mine).

With a focus on Smith's account of sympathy with victims, Stephen Darwall finds what he calls a "second personal reason" to hold offenders "accountable in some way."[20] On Darwall's reading, sympathy "recognizes a second-personal authority to address the demands of justice" because sympathy "involves, according to Smith, not simply a sharing of [victims'] sense of having been wronged," but "also involves recognition of [victims'] authority to challenge the wrong by resisting it…or…to demand some form of…punishment." Remy Debes expands Darwall's reading, arguing that "human dignity for Smith…[is] a matter of practical deliberation generally."[21] As Debes reads Smith, the "capacity for moral judgment" not only requires that *I* take up the viewpoint of spectator when I issue a judgment of you, but also "essentially…demand[s] that you adopt my perspective through sympathy." And since this demand further requires me to "recognize that you are a spectator yourself – a spectator like me…imbued with all the power and authority…I assume for myself...*as spectator*," I therefore come to have "a normative reason to recognize your…perspective "within my deliberations as spectator of you."[22] For Debes, Smith is thus able to think that we are "committed to respecting the status of those [we] sit in judgement on," and thus able to think that this commitment is inevitable, since by "the ineliminable fact of sympathy…we *are* spectators, whether we like it not."[23]

The general contour of these readings seems correct when applied to Smith's impartial spectator theory of punishment. For Smith, sympathy appears essential to how beliefs

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[20] Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge: Harvard University Press, 2006), 179.
[21] Remy Debes, "Adam Smith on Dignity and Equality" *British Journal for the History of Philosophy* Vol. 20, No. 1, 131.
[22] Debes, "Dignity and Equality," 138.
[23] Debes, "Dignity and Equality," 137.

surrounding the commission of an offense can work in a moral justification for punishment. But it remains unclear which moral principles are appealed to in this justification, and even more so in light of Smith's rejection of other purported justifications for punishment. For instance, Smith indicates that the mere presence of anxious suffering does not suffice for a justification of resentment satisfaction: "…nor is there anything more despicable than that…humour which takes fire upon every slight occasion of quarrel. We should resent more from a sense of the propriety of resentment…than because we feel in ourselves the furies of that disagreeable passion" (TMS, 38). Additionally, Smith rejects consequentialist-style justifications. "We enter into the resentment even of an odious person when he is injured" since "we demand the punishment of the wrong …not so much from a concern for the general interest of society, as from a concern for that very individual who has been injured" (TMS, 90).[24]

In a chapter entitled "Of the unsocial Passions," Smith briefly indicates how a moral principle of dignity underlies his theory of punishment. Smith says that "the only motive which can ennoble the expressions of this disagreeable passion [resentment]" is "magnanimity, or a regard to maintain our own rank and dignity in society" (TMS, 38). In this appeal to victims' equality with their social fellows, Smith makes clearer the nature of proper resentment. Acts of victimization lead to contemptibility – or, at least, to a sense of contemptibility.[25] (Notice: even a sense of contemptibility has moral import, since that sense just is a feeling of being worth less than others.) Yet resentment works against this contemptibility: "if we did not, in some measure, resent" the "provocation," we would be "contemptible…and…exposed to perpetual insults." So

[24] However, Smith does say that "upon some occasions…we both punish and approve of punishment, merely from a view to the general interest of society." Yet, for Smith, these punishments are exceptional in that they do not represent the general way in which we believe that punishments are morally justified.
[25] I'm grateful to Zac Harmon for pointing out this distinction to me.

acting on resentment can be justified, for Smith, since such action is necessary for securing a sense of dignity. Indeed, Smith goes so far as to say that, when justified in this way, resentment can be "even generous and noble."[26]

Unfortunately, Smith neither explains how victims come to believe that they are worth less than others after acts of victimization, nor explains how the satisfaction of their resentment is necessary for the removal or prevention of this belief. For this reason, it's unclear how exactly we should understand Smith's claim that resentment satisfaction is necessary for securing a sense of dignity. However, if Smiths' theory of sympathy can provide this understanding, then Smith might be able to more clearly rest the moral appropriateness of punishment on a description of beliefs or judgements acquired by sympathy. Smith's moral claims on punishment might then find a firmer grounding in descriptive claims, as suggested by the general contour of the readings referenced above, especially Debes'. To help Smith on this front, then, I will now offer a Smithian account of victims' feelings of lesser worth, as well as offer a way for thinking that the removal or prevention of these feelings requires the satisfaction of victims' resentment. To do this, I rely mainly on Smith's theory of sympathy, although I add considerations external to that theory at various points. By making clearer the basis upon which Smith rests his moral justification for punishment, I provide the groundwork for what I will argue in the next sections is Smith's natural rights theory of punishment.

Begin with the following observation. After an injury, victims may feel a strong drive to make sense of their victimization. The "why me?" question can seem to consume all of their

[26] Smith is relying on Grotius in articulating this line of argument. Grotius had already traced its history and described it as holding that: "the Offender is to be punished for the Preservation of the Dignity and Authority of the person offended, lest an Omission of such Punishment should injure his Honour, and expose him to Contempt" *The Rights of War and Peace*, Book II, Chapter XX, section VI, paragraph 1, fn. 1.

mental energies. This drive can be explained by how Smith believes that we seek sympathy with others. For Smith, we naturally desire sympathy,[27] and this desire is most pronounced in matters relating to our own interests, such as in the case of "the injury that has been done me" (TMS, 21). In these matters, we view a "harmony and correspondence" of sentiments as "vastly more important" than a view of the same in matters that are "indifferent" to us, such as in the case of "that picture, or that poem, or even that system of philosophy" (TMS, 20-21). The point in Smith's example of an injury is that victims seek sympathy with their spectators, although the same point might be made with respect to victims' sympathy with their offender, since victims may want to see if there is any harmony between his sentiments and their own. This attempt at sympathy can be viewed as victims' attempt to make sense of why their offender chose to harm them. That is, in attempting to sympathize with their offender, victims might be trying to answer the "why me?" question by way of sympathetic understanding. For Smith, this kind of sympathy can prove especially revealing. It's at least possible that, with such a sympathy, victims recognize their error in viewing their treatment as an injury. As Smith says, victims may see that, "in [their enemy's] situation," they "should have done the same thing," and thus come to see "that he acted quite properly" (TMS, 96). However, this outcome is probably not the likely one. After a perceived injury, we are likely to feel "shocked" and "exasperated" at our perception of the "glaring impropriety" of our alleged offender's conduct. Even more than the harm ("mischief") we suffer, we are enraged at the insulting nature of perceived offense. Smith explains:

> What chiefly enrages us against the man who injures or insults us, is the little account which he seems to make of us, the unreasonable preference which he

[27] "As the person who is principally interested in any event is pleased with our sympathy, and hurt by the want of it, so we, too, seem to be pleased when we are able to sympathize with him, and to be hurt when we are unable to do so" (TMS, 15).

> gives to himself above us, and that absurd self-love, by which he seems to imagine, that other people may be sacrificed at any time, to his conveniency or his humour.

So, even if victims have initial motivation to sympathize with their offender, we can expect this motivation to be, if not entirely removed, then significantly weakened by feelings of rage. But these feelings of rage may engender frustration. Victims may still have the drive to make sense of their injury, though their rage prevents them from sympathetically understanding why their offender was moved to injure them. Moreover, with a view of the offender as giving an "unreasonable preference…to himself above" themselves, victims may recognize that the offender did not sympathize *with them* in committing his injurious action. Victims may then become aware of a breakdown in mutual sympathy. Recently, Michelle Schwarze has emphasized Smith's belief that our fundamental "desire for mutual sympathy" is "crucial to our happiness and to the quelling of anxiety."[28] On this emphasis, we might view victims' often felt experience of psychic disorder as at least partially rooted in a failure to achieve mutual sympathy with their offender. I'm inclined to think that, for Smith, a view of harmonious social order, one that presupposes moral equality, underlies his belief that mutual sympathy brings a tranquility of mind. In outline, the idea is this: to extent that I can identify my conscious experience with yours, and to the extent that you can identify your conscious experience with mine, and to the extent that we are each aware of this, we will view each other, as well as live together, as moral equals.[29] On this view, we may understand Smith as thinking that our longing for equality with

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[28] Michelle Schwarze, *Recognizing Resentment: Sympathy, Injustice, and Liberal Political Thought* (Cambridge: Cambridge University Press, 2020), 122. Schwarze understands Smith's account of mutual sympathy in the following way: "Smith's account of mutual sympathy addressed why individuals might have wanted to moderate their emotional responses despite the difficultly in doing so: he thought that doing so could alleviate suffering by providing the psychological calm and emotional attachment that largely constituted happiness" (100).

[29] Darwall reads Smith along these lines when he describes sympathetic moral judgement as "an

others is one of the main reasons for why we "strive to render as perfect as possible that imaginary change of situation upon which [our] sympathy is founded" (TMS, 21). In mutual sympathy, neither of will have "that absurd self-love" which allows us to think that the other "may be scarified…at any time" to either of our own "conveniencies or humours" (TMS, 96). And so neither of us will feel demeaned, ignored, or overlooked with respect to each other. However, victims may have these feelings when they recognize that they are not able to share a "correspondence" or "concord" between their own sentiments and those of their offender. For this reason, a crisis may ensue. After losing a sense of equality with their offender – and perhaps, even with those who are not the offender – victims' attempt to answer the "why me?" question may quickly turn into victims' questioning their own significance in relation to all of their social fellows.

Of course, the offender is not the only one with whom victims may share mutual sympathy – there are spectators, as well. Schwarze has insightfully discussed issues surrounding spectators' sympathy with victims, but I want to consider issues surrounding victims' sympathy with spectators. Consider the following worry. If victims are not able to take up the standpoint of a spectator, and if it is impossible for victims to sympathetically understand why they were victimized, then victims may experience a sense of estrangement from the social world that is at the same time a descent into the world of mere objects: victims may experience a sense of dehumanization. Similarly, if victims are not able to take up the standpoint of a spectator, but can to some extent sympathetically understand their why their offender chose to harm them, then

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engine driving identification with the agents we evaluate." In making such judgments, "we implicitly enter a moral community, including us and [the agents we judge], which accords them equal authority with us" in making these judgements. Stephen Darwall, "Sympathetic Liberalism: Recent Work on Adam Smith" *Philosophy and Public Affairs* Vol. 28, No. 2 (Spring, 1999), 162.

victims may view themselves in the way that their offender viewed them; as having a lesser worth than himself. Since in fact victims often feel these two senses of a lack of equality with others, we might consider whether the drive to understand one's own victimization plays any part in preventing victims from taking up the standpoint of a spectator.

It's obvious why spectators, like victims, will find it difficult to sympathize with an offender. Both victims and spectators vehemently disapprove of the offender's actions. As in the case of victims, Smith explains how "the offender becomes the object of [spectators'] hatred and indignation" (TMS, 83). Smith says that, "in the race for wealth, and honours, and preferments," spectators "will readily go along with" each competitor who "may run as hard as he can, and strain every nerve and muscle, in order to outstrip his competitors." But when an "excessive and extravagant" preference for one's own happiness leads to "a violation of fair play," as when a competitor "justles, or throws down" another competitor, the "indulgence of the spectators" is at an end. The spectators "cannot go along with the motive from which [the offender] hurt [the victim]," and so they see that the offender neither "humbled the arrogance of his self-love," nor "brought it down to something which other men can go along with." We might say that spectators arrive at this view of the offender by a degree of sympathetic understanding with him. That is, insofar as the offender plays by the rules, spectators sympathetically understand him. But insofar as the offender does not play by the rules, spectators do not sympathetically understand him: "They do not enter into that self-love by which [the offender] prefers himself so much to this other." Spectators' sympathetic understanding of the offender is thus limited by a concern for victims, who are the persons principally concerned in these situations; just as victims' concern for themselves limits their sympathetic understanding of the offender. But while this limitation may not bother spectators too much, we cannot simply assume that the same is true for

victims. Though unnoticed by Smith, we may notice that, more so than spectators, victims are likely to feel an intense dissatisfaction in not being able to see their offender's reasons and motives in perpetrating harm – in not being able to see what lies at the bottom of his presumed superiority. For this reason, victims might develop a bias. To the exclusion of taking up the spectator's point-of-view, victims may insist on trying to access their offender's point-of-view, which is the view presenting the most vivid understanding of the offender's decision to harm them. But now, victims' drive to understand their victimization may go into overdrive. Victims may engage in repeated attempts at sympathetic understanding until, at last, victims succeed. But with this success comes sympathetic approval, which, for Smith, is the inevitable consequence of sympathy: "To approve of the passions of another…is the same thing as to observe that we entirely sympathize with them; and not to approve of them…is the same thing as to observe that we do not entirely sympathize with them (TMS, 16). It's here where victims may adopt their offender's warped view of themselves, and here where they may come to have a sense of lesser worth than him (and possibly others, as well). Tragically, victims may even find a measure of consolation in sharing this view of themselves with their offender. A psychological mechanism of this sort may explain why victims of domestic abuse often endorse the attitudes of their offenders.[30]

Can acting on resentment remove or prevent victims' feelings of lesser worth? Recall: Smith's general idea is that, in "resenting" the "provocation," victims reject a view of themselves

[30] Alternatively, a feeling of dehumanization may follow if no sympathetic understanding of the offender is possible. To be sure, victims do not have to completely share mutual sympathy with what they perceive is the offender's view of themselves. They may share that sympathy to some extent, or other. In this case, victims will feel conflicted. A part of them will *not* go along with the offender's view of themselves while another part of them *will* along with the offender's view of themselves, further contributing to their psychic disorder.

as "contemptible, and…exposed to [read: deserving of] perpetual insults" (TMS, 38). One way that acting on resentment might do this is on the basis of resentment being the strongest opposing force to sympathy. In acting (or demanding action) on their resentment, victims can be understood to be making the declaration that they have categorically ruled out sympathetic approval with their offender. For Smith, such a declaration would entail a categorical rejection of their offender's presumed superiority. In this way, acting on resentment might be a way for victims to secure a sense of equality with others, especially since such action allows victims to more easily achieve sympathy with their spectators[31] – most importantly, with the impartial spectator. Since spectators clearly see victims' equal status with everyone else, victims' sympathy with spectators reinforces victims' sense of equality. Indeed, after the shock felt from the insulting nature of an offense, victims may *need* sympathy with spectators to maintain their sense of equality.

So, given some additional considerations, the descriptive machinery of Smith's theory of sympathy does much work to support his claim that "the only motive which can ennoble the expressions of this disagreeable passion [resentment]" is "magnanimity, or a regard to maintain our own rank and dignity in society." This is because that theory seems able to explain how victims acquire feelings of lesser worth, and seems able to explain how the satisfaction of resentment is necessary to remove or prevent these feelings. But while this use of Smith's theory of sympathy offers a firmer basis for his moral justification for punishment, there remains a further issue. Smith must assume that the achievement of resentment's proper aim requires

[31] "A person become contemptible who tamely sits still, and submits to insults, without attempting to either repel or to revenge them…Even the mob…desire to see this insolence resented, and resented by the person who suffers from it. They cry to him with fury, to defend, or to revenge himself" (TMS, 34-35).

inflicting the kinds of harms on offenders that are characteristic of punishments. Is it really necessary for offenders to suffer punishments so that victims can maintain their dignity? To defend this assumption, Smith might continue to rely on the semantic nature of harms. Similar to Smith's idea that the harm perpetrated by an offender is an insult to victims, Smith appears to rely on the idea that the punitive harm inflicted on offenders is dignifying for victims. Why should the latter be true? Smith might argue that nothing other than punishments can provide the semantic force needed to give any real meaning to victims' assertion of equality (it won't do for victims to simply say "I am an equal among my social fellows," or to symbolize this assertion through artwork, for example). Smith can think that the force of victims' assertion of equality may require great strength since, along the lines argued above, victims may have a strong inclination to adopt their offender's presumption of superiority. For this reason, the offender might need to be damaged by victims' demand for a punishment in order for victims to see the illusory nature of his presumption of superiority. Only then might victims be able to make a meaningful assertation of equality. Alternatively, the damage that an offender suffers by victims' demand for a punishment may be necessary to bring *him* to see the illusory nature of his presumption of superiority so that, upon seeing this, victims may be less inclined to adopt his formerly held presumption of superiority. This latter argument might be read into Smith's claim that the perfect end of "revenge" is "to bring [the offender] back to a more just sense of what is due to other people, to make him sensible of what he owes us, and of the wrong that he has done to us" (TMS, 97). In any case, it's likely that Smith's retributivist justification for punishment will be a hard sell for those inclined to accept deterrence justifications. But insofar as one is

committed to a liberal notion of equality, Smith's justification will find a plausibility that is founded on the dignity of individuals.[32]

3. The Right to Punish

With a view of the justification for punishment in place, we may now consider what Smith believes are the central rights involved in punishment. Smith assumes two dimensions along which the appropriateness of a punishment is determined. The first is the source of victims' resentment. Resentment is appropriate to act upon only when it is caused by "actions of a hurtful tendency" (TMS, 78). As "violations of justice," these actions "alone…excite the sympathetic resentment of the spectator," and are "therefore, the proper object of punishment." (TMS, 78-79). The second dimension concerns the extent of victims' resentment. All spectators are "rejoiced" in victims' "vengeance," but only "within a certain degree" (TMS, 70-71); when we "heartily and entirely sympathize with the resentment of the sufferer," the "[hurtful] actions seem…to deserve, and, if I may say so, call aloud for, a *proportionable* punishment" (TMS, 74, emphasis mine). In LJ, Smith clarifies how the impartial spectator is essential to determining a proportionate punishment: "In all cases the measure of the punishment to be inflicted on the delinquent is the concurrence of the impartial spectator with the resentment of the injured" (LJ, 104). Smith continues:

> If…the spectator can go along with the injured person in revenging himself by the death of the offender, this is the proper punishment…If the spectator could not concur with the injured if his revenge led him to the death of the offender, but could go along with him if he revenged the injury by a small corporall punishment, or a pecuniary fine, this is the punishment that ought here to be inflicted.[33]

[32] For a fuller account of a liberal notion of dignity in Smith see Debes' "Dignity and Equality."
[33] See also LJ 475.

On this understanding of appropriate punishments, Smith assumes that victims have a natural right to demand that such a punishment be inflicted on their offenders. Smith's entire discussion of punishment in LJ 104-140 centers on the "right one has to be repaid the damage he has sustained ex delicito, from the delinquency of an other" (LJ, 103).[34] Although this right is not explicitly identified with a right of victims to demand punishment, Smith assumes this much. Smith speaks of "the obligation [the offender] is under to the offended person" to "submit…to the punishment which is to be inflicted on the crime whether it be required *by the law of nature* and *equity* or by the civil law of the country" (LJ, 134, emphasis mine). The term "law of nature and equity" indicates, for Smith, that this obligation of offenders is one that may be required by natural jurisprudence, as well as by positive law. Moreover, this obligation is the correlate of the right of the "offended person," a right that Smith refers to as: "the right of those to whom this punishment is due"; "the right of the party to demand [the punishment]"; and "the right to exact the punishment."[35] In this way, the right to be repaid the damage from delinquency can be understood as a natural right of victims to demand the proper punishment of their offenders.

How exactly are victims empowered by this natural right? As we've just seen, offenders' obligation to submit to punishment is an obligation that is *owed to* victims. For Smith, then, victims can be understood as having a *claim* to the fulfillment of this obligation when demanded (the claim is to the offender's "submission to punishment," which may be viewed as a claim to the offender's non-performance of resisting and evading the infliction of a proper punishment).

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[34] Smith is mainly concerned with the kind of delinquency that is "a willfull and designed injury done to another," i.e., not crimes of negligence (LJ, 104). For discussion of this right see Haakonssen, *Science of a Legislator*, 114-123

[35] The right of the injured to exact a punishment is a "personal right," which, for Smith, is a species of right that "one has to demand the performance of some sort of service from an other…all personall rights must take their origin from some obligation" (LJ, 86). In this case, the obligation is the offender's obligation to submit to punishment.

Importantly, Smith does not believe that victims are required to demand a punishment. Smith says that the offender "will be altogether freed from [the liability to suffer a punishment] if the party who has a right to exact it agrees voluntarily that he should be so" (LJ, 134). In this way, Smith believes that the right to exact the punishment "gives the foundation to the right of pardoning."[36]

In addition to the rights to demand and forgive their offenders' punishment, victims may also be thought to have a limited right to specify that punishment. Consider again victims' role in determining "the proper punishment…to be exacted" (LJ, 104). Such a punishment is meant to be the one that is picked out by "the concurrence of the impartial spectator with the resentment of the injured." So, if "the [impartial] spectator can go along with the injured person in revenging himself by the death of the offender," and if the resentment of the injured prompts the death of the offender, then the death of the offender "is the proper punishment" – it represents the concurrence of the impartial spectator with the resentment of the injured. But if in this same case the resentment of the injured prompts a lesser punishment than what may approved of by the impartial spectator – incarceration for life, say – then this lesser punishment now represents the proper punishment; the death of the offender is no longer a punishment in the concurrence of the impartial spectator with the resentment of the injured. (Note: Smith says that if a punishment prompted by the resentment of the injured exceeds what is approved of by the impartial spectator, then a "smaller" punishment, one that the impartial spectator could go along with *if* the injured was prompted to it, "is the punishment that ought here to be inflicted.") For this reason,

[36] Smith's recognition of victims' right to forgive a punishment is in tension with his claim that we "sometimes complain" about a person with a resentment that is "too weak" and "has too little sense of the injuries that have been done to him" (TMS, 77). The tension may be resolved by recognizing that a person's exercise of a moral right does not imply that that person is immune to moral criticism.

Smith may be said to hold the view that victims have a limited right to specify "the measure of…punishment to be inflicted on the delinquent," which, for Smith, amounts to no less than a limited right to specify the content of their offenders' obligation to submit to punishment.

The bundle of rights to demand, forgive, and specify a punishment is often associated with an authority to punish. However, the concept of authority is not well-suited for Smith's view of victims' right to demand a punishment. Especially in the domain of punishment, the concept of authority has a long history of implying a hierarchy between punisher and punished – between superior and inferior – and yet, Smith has no need for this kind of relation between victims and their offenders.[37] In this context, Smith views the relation between victims and their offenders as one between creditor and debtor: "The pardon frees the criminall from the punishment, in the same manner as an acquittance frees the debtor from the debt" (LJ, 134); punishment "is realy and truly a debt as any other due from contract" (LJ, 109).[38] For Smith, then, victims' right to demand the punishment of their offender can be thought to take the form of a Hohfeldian claim right, that is, a right to an action that is logically correlative with another's duty to perform that action.[39]

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[37] In particular, victims' right to specify their offender's duty to suffer a punishment may be thought to imply their authority over the offender. But a right to specify duties does not imply authority. If you make a promise to me to buy any book of my choosing, then I have a normative power to specify your duty to buy a book. But in this case, it is awkward to say that I have authority over you. For discussion of authority as a species of normative power see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Second Edition) (New York: Oxford University Press, 2009), 16-19.

[38] These remarks are a slap at Grotius who earlier had said that some "don't explain themselves much better" when they hold that "Punishment [is] due to a delinquent in the same manner that a Debt is due upon a Contract" *The Rights of War and Peace*, Book II, Chapter XX, section II, paragraph 2. Recall that Smith's defines the central right of punishment as the "right one has to be repaid the damage he has sustained ex delicito, from the delinquency of an other."

[39] Specifically, an "optional claim-right," which is a claim "whose exercise is protected by duties of noninterference on others, but whose exercise is optional for the rightholder." A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), 73-74.

In discussing the rights to demand, forgive, and specify a punishment, I have not yet mentioned the most often discussed right in matters of punishment – the right to physically inflict punishments on offenders. Without this right, there can be no way to permissibly realize victims' demand for punishment. So, do victims have a permission to punish their offenders by natural right? Do victims have a natural right to punish? Although Smith does not give this question much attention, he very briefly indicates his belief that victims *do* have such a right. In a rare allusion to the state of nature – a state "among equals" and "antecedent to the institution of civil government" – Smith says that "each individual is naturally…regarded as having a right…to exact a certain degree of punishment for those [injuries] which have been done to him" (TMS, 80). This "conduct" of "exacting" punishment is approved of by "every generous spectator" in the state of nature. Indeed, any such spectator "enters so far into [the victims'] sentiments as often to be willing to assist him…all the neighbors…think they do right when they…revenge the person who has been injured" (TMS, 81).[40]

This brief recognition of a natural right to punish raises a familiar problem in political philosophy. How do individuals lose their natural right to punish so that the state comes to have the exclusive right to punish in society? Smith does not explicitly address this problem. At one point, however, Smith makes the suggestive remark that the reason for why "the magistrate …undertakes to do justice to all" is to prevent the "scene of bloodshed and disorder" that follows "every man revenging himself at his own hand whenever he fancies he is injured" (TMS, 340).

On Smith's account, at least one of the "protective" duties of non-interference is an offender's duty to submit to punishment. For a summary of Hohfeldian rights theory see John Finnis, *Natural Law and Natural Rights* (Second Edition) (New York: Oxford University Press, 2011), 199-200.

[40] Additionally, Smith says that "the proper punishment…is to be exacted by the offended person or the magistrate in place," possibly indicating his belief that individual victims *can* have a natural right to punish (LJ, 104).

But even if Smith is here alluding to the reason for why individuals do not have a natural right to punish in society, he does not indicate the conditions under which that right come to an end. So, for instance, if a voluntary surrender is necessary for the loss of the natural right to punish, as some social contract theorists believe, then the fact that the exercise of this right leads to bloodshed and disorder does not yet explain how that right is lost. Below, I will expand on these this suggestive remark from Smith, but, for now, I want to simply point out that Smith's (albeit, brief) recognition of a natural right to punish calls for an account of how individuals lose this right, though he does not provide such an account.[41]

Due in large part to the influence of Hugo Grotius' social contract theory, natural rights theories have sought to explain the state's authority *via* some kind of surrender or renunciation of natural rights.[42] However, Richard Tuck has shown how, not long after Grotius, some members of the English "Tew Circle" departed with him in arguing for what they saw as the unique explanatory grounds for the state's right to punish. These theorists argued that, although all other rights of the state have explanatory grounds in a surrender of natural rights, the state's right to punish has explanatory grounds in a direct grant from God: "'being a *Ruler*, to him belongs (derived from God, not from *them*), that *power of life, and death*, which God's forementioned decree hath enstated on the *Supreme power*, or Ruler.'"[43] Similarly, Tuck has shown how some

[41] Smith's general account of political authority relies on a "principle of [perceived] authority" and a "principle of utility." Smith explains how these principles gives rise to the widely held conviction that it is just and proper to obey the government. See LJ 318-321; 401-402.
[42] For an overview of Grotius' natural rights theory see Chapter 3 of Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1998).
[43] Henry Hammond in 1649, quoted in Tuck, *Natural Rights Theories*, 108.

contemporaries of the Tew Circle held the view that the state's right to punish uniquely rests on securing the public good, not on a renunciation of natural rights.[44]

These theorists were led to explain the state's right to punish outside of a surrender of the natural right to punish because they were skeptical of the existence of that natural right (this skepticism represents a further departure from Grotius and, more immediately, from England's first major natural rights theorist, John Selden[45]). But in explaining the state's right to punish by relying exclusively on either a divine grant, or the securing of the public good, these theorists raise a problem. At least as we know them today, theories of natural rights work within an explanatory framework whereby the state's rights are viewed as "artificial," that is, as non-basic entities that require an explanation in terms of more basic entities, i.e., individuals' natural rights.[46] So, since a surrender of natural rights is usually thought to be the way to achieve this reduction, the surrender of the natural right to punish (or of some similar natural right to inflict violence) comes to serve two explanatory purposes at once. The surrender explains how individuals lose their natural right to punish while at the same time explaining how the state's

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[44] Describing the views of Jeremy Taylor in 1676, Tuck says: "It was…via contract that the civil magistrate was set up…Taylor gives an account of this in just the same terms as the Tew Circle writers, except over the question of the origin of the magistrate's right to punish his subjects. Instead of basing it on God's direct grant, he argued that it was founded at least in part simply on the necessity for securing the common good" Tuck, *Natural Rights Theories*, 112.

[45] Some members of the Tew Circle argued against Selden's reliance on the Israelite idea of the *ius zelotarum*. Selden used this right to follow Grotius in arguing for the existence of a natural right to punish. See Tuck, *Natural Rights Theories*, 107-109.

[46] As Simmons explains: "Locke (and other philosophers in the natural rights tradition) wanted to claim that all political authority…is artificial, and so must be explained in terms of more basic, natural forms of authority…Governmental rights…are simply composed of the natural rights of those who become citizens, transferred to government by some voluntary undertaking…This transfer of rights…must take place if government is to have any *de jure* power…The same story can be told about a government's right to punish criminals" Simmons, *Lockean Theory of Rights*, 124.

right to punish rests on the proper ontological grounds of individuals' natural rights.[47] Now, the above mentioned views of the Tew Circle and their contemporaries do not need a surrender of the natural right to punish to explain why individuals do not possess that right. Since these views reject the existence of the natural right to punish they will not have to deal with any potential conflicts between that right and the state's right to punish. However, in explaining the state's right to punish by relying exclusively on a divine grant, or the securing of the public good, these views face the problem of not even attempting to explain how the state's right to punish is derived from individuals' natural rights. From the point of view of modern natural rights theory, then, the state's right to punish is on these views *creatio ex nihilo* – a right with the wrong kind of explanation.[48]

This *ex nihilo* worry faces a Smithian natural rights theory that attempts to explain the state's right to punish. That is because Smith's rejection of consent theory rules out a surrender of natural rights in any general explanation of the state's authority. Following Hume, Smith says:

> Every subject of the state…came into the world without having the place of their birth of their own choosing…nor is it in the power of the greater part to leave the country without the greatest inconveniences. So that there is here no tacit consent of the subjects. They have no idea of it, so that it can not be the foundation of their obedience (LJ, 317).

[47] Additionally, an identification of the state's right to punish with the natural right to punish held by those individuals comprising the government may also constitute the right kind of reduction to individuals' rights. This is the general way in which Hobbes explains the state's right to punish, though he relies on a natural right to make war instead of a natural right to punish. See *Leviathan*, Book II, Chapter XXVIII, paragraph 2.

[48] The extent to which this same problem faces Nozick's account of the state's right to punish is unclear. Nozick suggests that the natural right to punish is the only natural right "possessed jointly rather individually." However, Nozick "specifies" this jointly held right as "everyone's having a right to a say in the ultimate determination of punishment." See Nozick, *Anarchy, State and Utopia*, 139.

To be sure, this rejection of consent theory further rules out an explanation of the state's right to punish on the basis of a *coerced* surrender of rights *à la* Hobbes. Smith's general premise is that "every morall duty must arise from some thing which mankind are conscious of" (LJ, 321). So, the "principle [of allegiance and obedience to the sovereign] must certaintly be that from which the generality of the world think themselves bound," and yet "no one has any conception of a previous contract either tacit or express." The same goes just as well for a coerced contract.[49]

And there is another way in which a Smithian natural rights theory cannot avoid the *ex nihilo* worry. In further contrast to Hobbes, Smith is unable to assume that the state's right to punish is identical to the natural right to punish retained by those individuals who comprise the government. Since Hobbes believes that all individuals *equally* hold a natural right to inflict violence on others, he can explain how the individuals comprising the government have a right to punish all offenders in society. By contrast, Smith appears committed to thinking that victims are the principal holders of the natural right to punish. For Smith, the exercise of the right to punish would appear to be subject to the bundle of rights that victims have to demand, forgive, and specify a punishment. For this reason, it's hard to see how non-victims can hold a natural right to punish independently victims' natural rights since, in this case, non-victims may inflict a punishment that victims do not demand. (Remember, Smith says that in the state of nature spectators are "often…willing to *assist*" victims (TMS, 81; emphasis mine)). So it seems that, for

[49] Smith's argument might be understood in this way. At least one required sense of having a "notion" or "conception" of a "previous" contract is having a memory of intentionally engaging in the alleged consensual or promissory act of surrender. The memory proves the principle of allegiance. However, (nearly) all have no such memory ("yet government takes place where it was never thought of" (LJ, 402)), even though "all have a notion of the duty of allegiance to the sovereign." Smith is aware that there are some exceptional persons who take an oath of allegiance, such as resident aliens (LJ, 317-318).

Smith, any natural right to punish held by those individuals who comprise the government will not by itself explain the government's punishment of *all* offenders in society. Moreover, as we've just considered, Hobbes needs to rely on a surrender of rights to explain how all individuals who *do not* comprise the government come to lose their natural right to inflict violence on others, but Smith is unable to rely any sort of surrender in this explanation.

So, in light of Smith's apparent commitment to a natural right to punish, there comes into focus a twofold task for any Smithian natural rights theory that attempts to explain the state's exclusive right to punish in society. Without recourse to a surrender of natural rights, a Smithian theory must explain: (1) the termination of individuals' natural right to punish, and (2) the sense in which the state's right to punish is reducible in explanation to individuals' natural rights. But in separating these two explanations, we can better see how a surrender of rights may not be necessary for either. With respect to (1), for instance, constitutional law assumes that rights can be lost in the absence of a surrender, as when civil rights are lost during periods of a social emergency. And, with respect to (2), medical law assumes that an administer, or next of kin can acquire another's rights in substitute when that person is not able to exercise their own rights. Might the principles underlying these sorts of rights losses and acquisitions help Smith to explain how, in the absence of a surrender, individuals lose their natural right to punish and the state acquires its right to punish from them? I will now show how Smith can receive such help in these ways. I will first rely on a principle of the preservation of society to show how individuals may lose their natural right to punish in the absence of a surrender, and then rely on a principle of agential representation to show how the state's right to punish may be founded on individuals' natural rights in the absence of a surrender.

4. Preservation of Society

Return now to Smith's suggestive remarks for why individuals have no natural right to punish in political society. Smith says that because "men will never submit to" the "violation of justice" from "one another, the public magistrate is under a necessity…to enforce the practice of [justice]" (TMS, 340). "Without [the] precaution" of the magistrate's enforcement of justice, "every man" would "revenge himself at his own hand whenever he fancied he was injured," leading "civil society…[into] a scene of bloodshed and disorder." So, "to prevent the confusion which would attend upon every man's doing justice to himself, the magistrate…undertakes to do justice to all, and promises to hear and to redress every complaint of injury."

Smith clearly has punishment in mind with his use of the terms "enforcement" and "doing" of justice," as well as with his use of the terms "redressing" and "revenging" of injuries. So we can remain faithful to the spirit of the above passage, I think, while reading into it an argument for the loss of individuals' natural right to punish. Such an argument might run along the following lines. The chief aim of society is to preserve peaceful relations between its members. For this reason, no individual in society can possess a natural right the exercise of which threatens the existence of society. But the exercise of the natural right to punish threatens the existence of society by creating "confusion," "bloodshed," and "disorder." Such threats can be prevented, however, by the establishment and exercise of the state's exclusive right to punish; indeed, they cannot be prevented in any other way. So, when the state establishes and exercises its exclusive right to punish in society, and thereby prevents the confusion, bloodshed, and disorder that attends the exercise of the natural right to punish, it follows that no individual in society can have any such right.

This reconstructed argument appeals to considerations of a utilitarian sort, and therefore has no need for the impartial spectator. For this reason, we might wonder whether such an argument is compatible with Smith's moral theory? It would yet seem so. Although Smith believes that we arrive at moral judgements mainly by way of sympathy *via* the impartial spectator, Smith recognizes that we also legitimately form moral judgements on the basis of considerations of utility, or that "which tends to promote the happiness either of the individual or of the society" (TMS, 326).[50] To be sure, Smith believes that the importance of utility as a constituent of moral judgement is limited: "…I affirm, that it is not the view of…utility or hurtfulness which is either the first or principal source of our appropriation or disapprobation" (TMS, 188). Even so, Smith acknowledges that in some exceptional cases utility may be the sole constituent of moral approval. Smith uses the example of a punishment to illustrate. The capital punishment of a military guard who falls asleep on watch duty "always appears to be excessively severe," although that punishment sometimes "appears necessary" to protect "the whole army," and, presumably, all of society (TMS, 90). "For that reason," the punishment may be "just and proper," despite its severity. In this general way, Smith believes that an entire category of punishments are justified "merely from a view to the general interest of society," which is a view that is not "founded upon the same principles" in "the spectator[s'] view" of the punishment of a murderer, i.e., a principle of resentment satisfaction (TMS, 90-91; see also LJ, 104-105). So, with this recognition of utility as a legitimate constituent of moral judgment, Smith appears to

[50] In this context, Smith identifies four sources of approval: "sympathy with the motives of the agent"; "the gratitude of those who receive the benefit of his actions"; the "agreeableness" of "his conduct" to "general rules by which those two sympathies generally act"; and how "such actions make a part of a system of behavior which tends to promote happiness." For discussion of these four sources of moral judgement see chapter five of Fleischacker, *Adam Smith*.

have enough room for an appeal to social utility – more precisely, to the preservation of society[51]– in an account of how individuals lose their natural right to punish.

The more familiar social contract accounts mentioned above, however, do not recognize social utility as a justification for the loss of the natural right to punish. On such accounts, considerations of utility are relevant only insofar as they *motivate* the surrender of the natural right to punish – yet the surrender does of all of the explanatory work. Locke's version of such an account takes the most familiar and plausible form. "Without his own Consent," Locke says, "no one can be…subjected to the Political Power of another" (II, 95), and so it's only when each individual "wholly gives up" the "*Power of punishing*" (II, 130) that "we have the original *right and rise*" of the government's "*Executive Power*" (II, 127).[52] A. John Simmons is the best defender of this view of "free consent" as "necessary for legitimate political authority."[53] He identifies the view's three main sources of appeal in the following way. First, consent is a "clear and uncontroversial ground of…rights transfer," one that "makes society possible on Locke's views."[54] Second, "free consent" is a "ground [of political authority] most clearly opposed to force," and, as such, represents "an emphatic denial of the legitimacy of force and conquest." Third, "the deepest and most important" reason for the necessity of consent is that it is "the only ground of political…authority…consistent with…the natural moral freedom to which we are committed."[55] (Simmons is explaining the appeal of Locke's consent theory to contemporary

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[51] Smith is usually aware of this distinction, as when he says that once the end of "internall peace" is secured, "the government will next be desirous of promoting the opulence of the state" (LJ, 5).
[52] Locke defines political power as "*a right* of making Laws with Penalties of Death, and consequently all less Penalties" (I, 3).
[53] A. John Simmons, *On The Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), 72.
[54] Simmons, *Edge of Anarchy*, 73.
[55] Simmons, *Edge of Anarchy*, 74.

readers.) It's because of the importance of "the individual's right of self-government or autonomy…[that] attempts by others to govern us…require…special justification" For this reason, political authority is "consistent with the natural right of self-government" only when the "free choices of those subject to political authority are necessary to legitimate it."

The view that consent is necessary for the loss of the natural right to punish is an attractive one. How might the alternative Smithian view that I've presented here be able to respond? Can the Smithian view provide a response that shows the promise of a plausible and defensible account of how individuals lose their natural right to punish in the absence of consent? I think so, and to show this I will consider some initial lines of response to Lockean consent theory that can be made on the above Smithian account.

In the first place, Smith would deny any claim that consent makes society possible. For Smith, no such claim can explain why consent is *necessary* for political authority. This is so even if Smith recognizes the clear and widely accepted nature of consent as ground of obligation, since that shows the mere *sufficiency* of consent for political authority. Consider that Smith believes that governments first and foremost secure "internall peace": the "first and chief design of every system of government is to maintain justice…to give each one the secure and peaceable possession of his own property" (LJ, 5). But, as we saw above, Smith does not believe that consent is given to governments. For Smith, then, peaceful society exists in the absence of consent. Indeed, Smith likely believes that the existence of peaceful society depends on the existence of governments, especially since, for Smith, some form of government always exists with society ("government…grows up with society" (LJ, 107)).[56]

[56] Smith says that in earliest stages of society, the age of hunters, "there can be very little government of any sort…but what there is will be of the democraitcall kind" (LJ, 201). In the next stage of society, the "age of shepherds is…where government [strictly speaking] first

Secondly, Smith may point out that consent is not the only ground for political authority to be able to deny the legitimacy of force and conquest. If the state's prevention of confusion, bloodshed, and disorder grounds the loss of the natural right to punish, then, when those grounds are absent, as they are when governments are tyrannical (or even terribly inefficient), Smith can believe that individuals retain their natural right to punish.[57] At minimum, this belief allows Smith to deny the legitimacy of the most unjust governments. More generally, the idea at work here is that individual victims may sometimes need the natural right to punish in exceptional circumstances where no government fulfills their natural right to demand a punishment. Hence, Smith's view that individuals have a natural right to punish in the state of nature, a state where no governments exist to punish offenders. Of course, Smith may still recognize the dire consequences that follow from the exercise of the natural right to punish: it's simply that, in those exceptional circumstances where individuals are permitted to take punishment into their own hands, nothing better might be hoped for.

Finally, Smith can acknowledge the significance of individual autonomy without accepting consent as a necessary condition for the loss of the natural right to punish. To the contrary, Smith may argue that such a condition renders autonomy meaningless. Obviously, there can be no meaningful exercise of autonomy in the absence of peaceful society. The reconstructed account holds, however, that peaceful society necessitates the state's exclusive right to punish, and therefore necessitates the loss of each individuals' natural right to punish.

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commences" (LJ, 202).

[57] In this light, consider Smith's claim that "when the law do not give satisfaction somewhat adequate to the injury, men will think themselves intitled to take it at their own hand" (LJ, 124). Smith uses this claim to explain the origins of the practice of dueling. It arose as a response to a "defecientia juris," a deficiency in the law's imposition of "small punishment[s]." It's not clear that Smith gives a moral endorsement of this (initially) extra-legal response to wrongdoing. Haakonssen uses the impartial spectator to suggest that Smith does. *Science of a Legislator*, 143.

The question, then, is whether such a right of the state can be legitimately established if consent is necessary for the loss of the natural right to punish. Inevitably, there will be "hold-out problems" since some will refuse to consensually surrender this right. A requirement of consent thus makes it impossible to legitimately establish the state's exclusive right to punish, and, on the Smithian reconstruction, makes it impossible to legitimately preserve society. On this basis, Smith is free to argue that appeals to autonomy are in vain when used to justify consent as a requirement for the loss of the natural right to punish. Autonomy perishes with that requirement. Smith could then aruge that any setbacks to autonomy in the non-consensual loss of the natural right to punish are justified by the very preservation of autonomy.

These initial responses to Lockean consent theory show the potential of the above Smithian reconstruction to be a defensible account of the state's right to punish. However, one might object to this account by questioning its central assumption that the preservation of society necessitates an exclusive right to punish wielded by the state. Consider: even granting that there will be no end to the cycles of bloody revenge following from "*every man* revenging himself at his own hand whenever he fancies he is injured" (emphasis mine), it's not clear that the same is true when only a few "independents," as Nozick calls them, exercise their right to punish.[58] Assuming these independents form private protection agencies that *try* to punish impartially on behalf of their individual clients, then, whatever other problems may attend such punishment, society might yet enjoy at least a basic level of stability. Smith may be sympathetic to this objection. Smith tells us that in the earliest societies governments were too weak to "intermeddle in those [criminal] affairs," leaving individuals to sometimes take punishment into their own

[58] Independents are those who do not consent to give up their natural right to punish to "the dominant protective agency," a proto-state. Nozick, *Anarchy, State, and Utopia*, 54.

hands (LJ, 108). Here, Smith references a scene in the *Odyssey* where the "stranger who comes on board the ship to Telemachus tells us he fled from friends of a man whom he had slain, and not from the officers of justice." Historical examples of these sorts give reason to think that the preservation of society does not require the state's exclusive punishment of offenders. But if that's right, then the above reconstruction cannot rely on *the preservation of society* to explain how individuals lose their natural right to punish.

The appropriate line of response, I think, is to notice that Smith is keen to point out that there is no simple "free for all" in historical instances of punishment meted out by private individuals. In almost all cases, Smith points to established legal rules overseeing the meting out of such punishment. Undoubtedly, these rules prevent escalating violent conflicts between immediately interested parties, as when, for instance Smith tells us that, by Salick law, a murderer "was delivered up to the friends of the slain to be put to the death or treated as they had a mind" – but only after a lengthy process of attempting to get compensation, first, from the murderer; second, from each of his friends individually; and third, from all of his friends collectively (LJ, 107). Similarly, Smith says that in, the earliest societies where "there can be very little government of any sort," the right to punish "very heinous crime[s]" rests with "the whole body of the people," though they sometimes invest that right in "some 3 or 4 persons appointed beforehand" who will "put to death" the person who committed that crime (LJ, 201). Smith's keenness for showing how, historically, the legal rules of particular societies have regulated the infliction of punishments by private individuals might therefore provide him with a useful explanation for why such punishment did not threaten social stability. Smith may then take the view that there has always been some legal order that possesses an ultimate authority to regulate the inflictions of punishments in society. On this view, then, historical instances of

private punishment are not best thought of as exercises of a natural right to punish, as that right would be exercised in the state of nature, but rather as exercises of a legal right to punish, one that is subject to the laws of a particular society (whether or not these societies have clearly established institutions or individuals constituting the government). In this way, Smith may argue that the preservation of society has always depended on the wielding of an exclusive right to punish by the state, the society, or the community in the sense that a social entity of this sort always wields an ultimate authority to determine how punishments are to be meted out on offenders.

With respect to Nozick's private protection agencies, it's clear that Smith's conceptual space does not make room for them. For the most part, Smith sees governmental entities, or the communal body as a whole, as the only kinds of punishers that can be said to be neutral third parties.[59] Quite simply, Smith sees private punishers as immediately interested individuals – they are victims, along with their friends and family (mostly in historical contexts where the government is too weak to punish). On Smith's own terms, then, it's hard to see how private persons may be free to punish as they see fit without the ensuing confusion, bloodshed, and disorder. In any event, Smith can argue that the long-term feasibility of an arrangement with multiple private protection agencies is doubtful. The problems of feasibility would, for Smith,

[59] However, Smith says that in the earliest stage of society, where there is "very little" government, "the affairs of private families…are left to the determination of *the members of that family*" (LJ, 201). Perhaps, Smith imagines that a *pater familias* is a sort of neutral third party punisher in intrafamily disputes. Additionally, Smith says that "some individuall of eminent worth and consequently of authority" leads measures of reconciliation between conflicting parties of different families (LJ, 106). Smith believes that there are not too many disputes between families in this stage of society, but, when there are, the community "never dares to inflict what is properly called punishment" (LJ, 201). Rather, the "design" of the community's "intermeddling is to preserve the public quiet and the safety of the individualls" by "bring[ing] about a reconcilement betwixt the parties at variance."

likely be ones that pose existential threats to society (although, Smith can rely on less, though still very serious problems that threaten feasibility, as well [60]).

I now want to suggest one way in which the above Smithian account might find adherents among those inclined to accept consent theory. In saying that "the public magistrate is *under a necessity* of employing the power of the commonwealth to enforce the practice of [justice]" (emphasis mine), Smith might be thought to rely on a kind of doctrine of necessity as that doctrine is employed in constitutional and international law. The doctrine of necessity makes legitimate what are normally extra-legal acquisitions and losses of right when those acquisitions and losses are necessary to prevent, or end grave and imminent threats to society. This kind of justification is associated with exceptional circumstances, such as emergency powers claimed by the executive during periods of social unrest, or the erection of extra-legal courts to try treasonous, or war crimes. Though often problematic in substance and procedure, the holdings of rights that are justified by the doctrine of necessity are assumed necessary for the preservation of the legal order itself. Thus, in a civil war, for example, the executive may come to have extraordinary powers to censor the press so as to prevent incitements leading to a general disregard for the law. So, if one views the loss of the natural right to punish as justified by a kind of doctrine of necessity, as Smith suggests, then one is in a position to acknowledge the reasons for thinking that consent is normally required for the loss of natural rights, e.g., those that Simmons mentions, while yet thinking that those reasons are outweighed by even stronger ones

[60] As Nozick does. Even if the problems of "confusion," "bloodshed," and "disorder" that come with private punishment don't rise to the level of existential threat to society, they are problems that are yet urgent and grave, e.g., over punishing, the punishing of innocents, and a general mishandling of criminal procedure. Insofar as these problems are lessened by the absence of private punishment, the loss of the natural right to punish finds justification, even without a surrender of that right.

in the case of the natural right to punish. On this sort of view, one may even think that there is a presumption of consent for the loss of natural rights while thinking that this presumption is defeated by the preservation of society. If this view is accepted by those inclined towards consent theory, then they may accept an account of the non-consensual loss of the natural right to punish without completely abandoning their commitments to consent theory.[61]

5. Representation

We've just seen how, with a principle of the preservation of society, a Smithian natural rights theory may plausibly explain the termination of individuals' natural right to punish. But an account of the state's right to punish further requires an explanation of how that right is reducible to individuals' natural rights. By itself, a principle of the preservation of society does not accomplish this second explanatory task. It requires showing the sense in which the state's right to punish is derived from individuals' natural rights (whether from a natural right to punish, or from some other natural right). I will now show how, in the absence of a surrender of rights, a principle of agential representation can help Smith accomplish this second explanatory task.

At a first glance, Smith appears to think that the state acts on behalf of victims in punishing their offenders. For instance, when discussing proportionate punishments, Smith says that they are to be "exacted by the offended person or the magistrate *in his place*" (LJ, 104, emphasis mine). Additionally, Smith makes the historical claim that "the publickk now comes *in place* of these relations [of the deceased]" that were "at firsst always the executioners"(LJ, 107, emphasis mine). And, in addition to this textual evidence, what I've argued is Smith's view of

[61] The use of the doctrine of necessity on the above Smithian account is meant to explain why individuals *normally* do not possess the right to punish. By contrast, the doctrine of necessity is typically used in contexts of exceptional circumstances, as I've mentioned above.

the bundle of victims' natural rights to demand, forgive, and specify punishments suggests that the state's legal authority must respect these rights by punishing in accordance with them. I'll provide more explanation below, but I want to first consider the notion of substitution as it works in the principal-agent relationship. This notion can help to explain how the rights of agents are reducible to the rights of their principals.

In acting on behalf of their principals, agents act as a kind of substitute. Generally, substitutes act on the hypothetical supposition that they are the persons in absence in order to accomplish what these absent persons are not able to accomplish. Thus, a substitute teacher acts *as if* he were the teacher so that he (the substitute) can accomplish all that the absent teacher is not able to accomplish. Moreover, in acting on such a hypothetical pretense, agents will normally have to take on a new set of a rights and duties to accomplish the task at hand. The substitute teacher takes on the right to direct classroom activities, as well as the duty to ensure order in the classroom. For this reason, the rights and duties of agents acting in substitute can be understood as copies of the original rights and duties that are, or were, held by the persons in absence. (For simplicity's sake, we may just say that the rights and duties of principals are transferred to their agents.) So, if Smith thinks that the state acts *as if* it were victims in its punishment of their offenders, then Smith may be able to think that the right to punish is transferred from victims to the state.

It's precisely because Smith views the state acting *as if* it were victims in punishing their offenders that he appears able to rely on this kind of reductive account of the state's right to punish. Smith says that, in punishing, the "magistrate" not only acts "in [the offended person's] place," but also "acts in the character of the impartial spectator" (LJ, 104). The essence of the impartial spectator is to engage in the imaginative act of putting himself in the place of others so

as to views matters *as if* he were those others. In this way, the impartial spectator can then sympathetically approve or disapprove of their conduct. But if the state is to act in the character of the impartial spectator, then the state must imaginatively project itself into the viewpoint of victims to see how it (the state) would act *as if* it were victims. Yet it's the state – and not the impartial spectator – that carries out such acts of the imagination in real life! So, in light of the fact that victims in political society do not punish their offenders, there *is* a sense in which Smith views the state as acting in substitute for victims when punishing their offenders. This means that Smith can rely on the above outline of how the notion of substitution may explain the transfer of victims' right to punish to the state.

Yet those inclined to accept consent theory may harbor a worry. They may worry that the state is not able to rightfully punish on behalf of victims when those victims have not authorized the state to do so. Can rights be transferred by substitution when substitutes have not received prior authorization from the persons in absence? In large part, the arguments of the previous section address this worry. The point to make now is that once there are overriding reasons for a rights transfer by substitution there is no need for an authorization of that transfer. On the Smithian reconstruction offered here, the dignity of victims constitutes such a reason. So, if it is virtually impossible to respect such a dignity unless the state punishes in substitute for victims, then there is already a sufficient explanation for why the state may rightfully do so. Since it's for the very sake of victims that their natural right to punish is transferred to the state by substitution, it is of no real consequence that they have not authorized this transfer.

Yet there may be a sense in which Smith endorses a requirement of authorization by victims. I suggested above that, for Smith, the exercise of the state's right to punish may be subject to the bundle of victim's natural rights to demand, forgive, and specify the punishments

of their offenders. This suggestion finds plausibility in the fact that the rights to demand, forgive, and specify punishments are, in the final act, exercised by *the state's* legal authority, even if they are possessed as natural rights by victims, as Smith believes. So, given that the exercise of the state's legal authority ought to accord with the natural rights of victims, then the exercise of this bundle of rights by the state might, for Smith, be thought to follow on the model of an agent (the state) who exercises them on behalf of their principal holders (victims).

This principal-agent model is brought into focus during one period in Smith's history of punishment. Recall Smith's historical claim that governments in the earliest societies were so "very weak" that "no crimes were punished" (LJ, 129). These societies could hope for no more than "reconciliation" and "compensation" from "offender to the offended" (LJ, 130). Eventually, governments grew strong enough to punish "injuries done to particular persons," yet these injuries were at first viewed "rather as injuries to the state than as injuries to the indivdualls." Only after "still greater progress" could these injuries could be properly viewed as injuries to the harmed individuals, rather than as injuries to the community as a whole. But in a sort of transitionary period before the more advanced stages of society, Smith says that in England and Scotland "the sovereigns [had, by degrees,] came to consider…themselves as the persons chiefly injured" by the commission of crimes (LJ, 108). During this time, punishment was "carried on in the name of the king, so he claims also the power of pardonning, and forgiving the capitall punishment [for the murder of a private individual] as due to him alone" (LJ, 109).[62]

[62] The historical origins of the king's legal right to demand and forgive a punishment stemmed from a policy of the crown to take compensation from offenders. This compensation was owed to the crown since it spared offenders the vengeance of their victims' families (LJ, 108; LJ, 477). "From this [policy]," Smith says, "the sovereign acquired the [legal] right of pardoning criminals," although "naturaly he has no more right to pardon a crime than to discharge an unpaid debt" (LJ, 477).

Interestingly, Smith adds that "the relations" of the deceased victim had "the power of prosecuting independent of the crown." So, by the legal doctrine of the "appeal of blood" in England, as well as by the legal doctrine of the "assythment" in Scotland, "capital punishment followed on this prosecution as well as that derived from the kings authority."[63]

All the same, whether the murderer was punished for the sake of the king, or for the sake of private individuals, the offender's punishment followed from an exercise of a legal right to demand punishment, a right that both the king and individuals held independently of each other (LJ, 134-135).[64] Since Smith gives no indication that private individuals held the right to *inflict* punishments during this period, we can safely assume that only the king held such a right. But it follows from this assignment of legal rights that the king's right to inflict punishments is subject to victims' right to demand a punishment. That is, if "the king could not pardon" the "capitiall punishment which follwd on [the appeal of blood]," then the king must inflict that punishment when victims demand it (LJ, 109). This is true even when the king forgives the punishment. The king has a right to forgive *only* the punishment that is owed to him. He has no right to forgive the punishment that is owed to private individuals. "Tho the king could pardon the capitall punishment due to himself, as any other man can forgive debts to himself, yet he could not pardon that satisfaction due to the friends of the deceased, any more than he can excuse them from any other debt due to them."

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[63] Smith tells us that prosecution on assythment and the appeal of blood were exceptional, however (LJ, 109-110; 477).

[64] "Thus in England, where the relations of the deceased can prosecute the murder on an appeal, as well as the king on information and indictment, these parties can free the person from the capitall punishment as due to them, but not acquit him also from it as due to the other. The private prosecutor can not stop the prosecution in the name of the crown, nor grant him acquittance from the sentence; nor does the kings pardon free him from the captiall punishment on the appeal of the relations" (LJ, 134).

This episode in the history of punishment raises the question of how Smith is thinking about natural rights in this context of the *legal* workings of the rights to demand and forgive punishments. Smith is not explicit on this point, though we may remember his claim that by "the law of nature and equity" individual victims are the holders of the right to demand and forgive punishments for crimes committed against them (LJ, 134). This is true even when the "civill law of the country" recognizes the king as the holder of these rights, as can be seen when at one point Smith says that "the soverign acquired the right of pardoning criminals," though "*naturaly* he has no more right to pardon a crime than to discharge an unpaid debt" (LJ, 477, emphasis mine). So Smith would appear to believe that the king's *legal* rights to demand and forgive punishments are beholden to victims' natural rights to demand and forgive punishments. As a matter of natural jurisprudence, that is, the king ought to punish as an agent of victims.

So, if this sort of principal-agent account is meant to apply across political contexts, then Smith can rely on the notion of substitution, as I've considered the notion above, to serve as a general explanation for how the bundle of the state's legal rights to demand, forgive, and specify punishments is reducible to the bundle of victims' natural rights to demand, forgive, and specify punishments. In this way, Smith can derive the essential powers of the state's right to punish from the natural rights of individuals.

On this reconstruction of Smith's natural rights theory of punishment, the state ought to punish in accordance with the demands of victims. So there is a sense in which Smith believes that the exercise of the state's authority to punish must have authorization from victims. But under what circumstances, if any, does Smith believe that the state may punish *against* victims' demands? It's not clear. Intuitively, considerations of the public good are candidate justifications for this kind of state action, but, as we've seen, Smith denies that the public good is the principle

by which victims' offenders should be punished (TMS, 91). And yet, as we've also seen, the public good has a limited role to play in Smith's theory of punishment. Moreover, there are times when Smith seems to think that it is right for the state to use considerations of the public good to determine the severity of punishments, even in cases of crimes with clearly identifiable victims.[65] For these reasons, I suggest that the most plausible view available to Smith is one where victims' demand for a punishment *must* set the starting point for sentencing, though the state may rely considerations of the public good to slightly modify these sentences. But even on this view, Smith must remain committed to victims' natural right to forgive their offenders. This is because Smith appears unable to view the public good as a sufficient justification for the punishment of offenders who have been forgiven by their victims – unless, however, such punishment is necessary to prevent a genuine threat to the preservation of society.

Additionally, Smith can view the state's reliance on standardized punishments to be an indirect way of acting on behalf of victims' demands. In this way, the state needn't be burdened with the task of consulting victims in each and every case of a punishment. On this view, rather, standardized punishments can be thought to adhere to general rules of resentment satisfaction, e.g., assaults of a serious nature prompt a resentment that minimally requires incarceration for some prolong period time. Smith seems able to take such a view. For instance, Smith believes that a capital punishment for murder is "to be sure, the only proper punishment" on his impartial spectator theory (LJ, 106),[66] and so Smith may endorse a rule of capital punishment as a *prima*

[65] See LJ 127-129, for example. Here, Smith discusses how considerations of the public good determined the punishment of theft. "Theft was in this [earlier] state of government very easily and securely committed and therefore was punished in a very severe manner…But tho a capitall punishment might be in some respects proper in those times, yet it is by no means a suitable one at this time."
[66] See also fn. 15 above.

facie sentence for murder, one that may be revised in accordance with victims' demands. The same might even apply to rules of resentment satisfaction that are more grounded in the customs of particular societies. Certainty, there are many cases in which different cultures harbor different attitudes towards the same injuries. In a society that places a high value on honor, for example, the injuries of affronts and defamation will prompt a stronger resentment than in a society that does not value honor in this same way. So, assuming the resentment prompted in each of these societies remains within moral bounds, the punishments that ought to be meted out will differ in either case. This is because, as we've seen, the actual resentment felt by the injured has a limited role to play in determining proper punishments.

6. Conclusion

I've shown how Smith can use his theory of natural jurisprudence to offer a natural rights account of the state's right to punish. Such an account may be summarized as follows: To secure their sense of dignity, victims have a natural right to demand the punishment of their offenders. In the state of nature, victims are the persons principally empowered to fulfill this demand *via* a natural right to punish. However, where governments exist and punish offenders, victims no longer possess a right to punish. In this case, the preservation of peaceful society necessitates the transfer of this right from victims to the state so that, in political society, only the exercise of the state's right to punish can fulfill victims' demand for punishment. Importantly, this transfer does not require any surrender of rights. Such a requirement would undermine the state's attempt to punish offenders while ensuring the preservation of peaceful society. In the establishment and exercise of the state right to punish, then, the state undertakes the role of an agent acting on

behalf of victims, and, for this reason, remains beholden to the powers implied in victims' natural right to demand the punishment of their offenders.

I've also shown how this Smithian account avoids the shortcomings in Hobbes' and Locke's social contract theories of the state's right to punish. Smith neither is forced to recognize the legitimacy of governments founded on brutal conquest, nor forced to recognize the illegitimacy of all governments (on the grounds that they are not established by individuals' voluntary consent). Furthermore, I shown how Smith's impartial spectator theory can explain the just and proper limits on punishments. Smith can therefore have an explanatory basis for the moral limits on the exercise of the state's authority to require the suffering of punishments.

A main reason for the attractiveness of this picture of the state's right to punish is that the picture recognizes the vulnerability of victims. Such a recognition is shared by all, of course, and yet there are a variety of reasons for why the fellow citizens of victims do not act upon this recognition. However, we can view the legal authority of the state as dedicated to protecting the interests of victims, which, for Smith, is a dedication to protecting their interests in the satisfaction of morally appropriate resentment. Yet the state is not on this view a *mere* agent of victims. In standing up for victims, the state aims to be a neutral third party, an impartial arbiter of justice. For this reason, the legal authority of the state can be thought to serve as an appropriate channel for the resentment that leads to victims' calls for punishment.

Victims must have significant discretionary powers on this picture. As matter of fact, contemporary practices of criminal punishment do empower victims in this way. Many states today allow victims to have a weighty say in both prosecuting and sentencing. Nevertheless, Smith would certainty condemn the high priority that the public good appears to have in contemporary practices of punishment. When the public good is the main reason for why we

punish offences perpetrated on victims, we do not fully recognize victims' moral importance. In this case, we do not give due recognition to wrongful nature of the harms that victims have suffered, which, for Smith, represents a failure to acknowledge their equal standing among their social fellows. And this is true even when the punishments that we mete out for the public good are the same punishments that satisfy the resentment of victims.[67] The point is that we are punishing for the wrong reason. In all cases of this sort, Smith would see a moral deficiency in the exercise of the state's greatest power, which, for Smith, reveals a state that is at odds with the fundamental importance that a liberal society ought to place on the dignity of the individual.

[67] Smith appears to think the aims of deterrence and resentment satisfaction are secured by the same punishments:"…the punishment which resentment dictates we should inflict on the offender tends sufficiently to deter either him or any other person from injuring us or any other person in that manner" (LJ, 105).

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VITA

AOS

Political philosophy; philosophy of law; ethics

AOC

Philosophy of science; philosophy of action

Education

University of Illinois at Chicago
PhD Candidate of Philosophy
University of North Texas
B.A. Philosophy – Fall 2014
South Texas College
Associate of Interdisciplinary Studies – Spring 2012
Berklee College of Music – 2010-2011

Awards

2020-2021	University of Illinois at Chicago: Access to Excellence Fellowship
Spring 2020	Finalist for the Kenneth Garschina Graduate Student Prize, Austrian Economics Research Conference: "Authority and the Natural Right to Punish"
2017-2020	Institute for Humane Studies: Humane Studies Fellowship
2016-2017	Institute for Humane Studies: PhD Scholarship Thomas W. Smith Scholar

Selected Presentations

November 2020	"Smith's Account of the State's Right to Punish" University of Minnesota at Duluth Philosophy Colloquium. University of Illinois at Chicago.
July 2020	"The Dilemma of the Public Good: A Problem in Smith's Philosophy of Punishment" Institute for Humane Studies Graduate Conference.
June 2019	"Two Problems of Criminal Punishment For a Natural Rights Anarchist" Institute for Humane Studies Summer Research Colloquium**.**
April 2019	"Why We Should Look to the Natural Rights Tradition to Inform Our Thinking About Criminal Punishment." Long Island Philosophical Society Conference**.**
October 2018	"Political Authority and Philosophical Anarchism." The Libertarian Scholars Conference.
March/April 2018	"Empathy as Imagining Another's Perspective." University of Illinois at Urbana Champaign Graduate Philosophy Conference. North Texas Philosophical Association.

July 2017 "Protection in Mill's Theory of Society and Power Relations"
Institute for Humane Studies Summer Research Colloquium**.**

Associations

American Philosophical Association (Central Division)
Society of Locke Scholars

Teaching

Loyola University at Chicago

Fall 2022	Introduction to Philosophy (two sections)
Fall 2021	Introduction to Philosophy (two sections)

University of Illinois at Chicago

Spring 2022	Ethics and Political Philosophy
Spring 2020	Introduction to Philosophy
Summer 2019	Medical Ethics
Fall 2018	Morality and the Law
Summer 2018	Introduction to Philosophy

Teaching Assistant

Spring 2018	Introduction to Logic (Success TA)
Spring 2017	Philosophy of Psychology
Fall 2016	Introduction to Philosophy
Spring 2016	Introduction to Logic
Fall 2015	Introduction to Logic