

1-1-2006

# Three-Strikes Legislation and the Evolution of the Liberal Conception of Justice

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Three-Strikes Legislation and the Evolution of the Liberal Conception of Justice

Thesis submitted to  
the Graduate College of  
Marshall University

In partial fulfillment of  
the requirements for the degree of  
Master of Arts in Political Science

by

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May 2006

## ABSTRACT

### Three-Strikes Legislation and the Evolution of the Liberal Conception of Justice

By Lisa Dillon

The purpose of this paper is to examine the changing nature of the liberal conception of justice using three-strikes legislation as a basis for comparison. It includes a brief examination of the legal debate surrounding three-strikes legislation, as well as comprehensive tables comparing the content of the laws in several states. The preponderance of the paper explores the evolution of the liberal concept of justice in the works of John Locke, Jeremy Bentham, and John Stuart Mill. It concludes with a discussion of contemporary liberal thought on justice, and more specifically, with an examination of the work of John Rawls as it applies to three-strikes legislation.

## ACKNOWLEDGEMENTS

My most profound gratitude is due my chairperson, Dr. Jamie Warner, for the hours of hard work she spent gently prodding this project into existence. Without her guidance this paper would likely have been far too unwieldy to be effectual. I also wish to thank my committee members, Dr. George Davis and Dr. Robert Behrman, both of whom gladly volunteered their time and energy to make this work a success. Additionally, I would be remiss in overlooking the dedicated work of my advisor, Dr. Cheryl Brown, who is perhaps the most devoted advisor at Marshall University. She truly has the student's best interest at heart. A very special thank you goes to Dr. Simon Perry, who ignited my interest in politics, in justice, and in the work of John Rawls. Without his influence, I doubt very much that I would have developed my interest in political science. I would also like to thank administrative secretary, Sherrie Knapp, for making my time in the Department of Political Science so enjoyable. Her understanding and support (as well as her printer) have been instrumental in this process. Finally, I wish to thank my mother and my husband, both of whom have read every single word of this thesis at least three times—each with a minimal amount of complaining.

## DEDICATION

For Jesus Christ, the ultimate source of justice—and forgiveness.

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## Introduction

*Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice. –Henry David Thoreau*

On April 16, 1963, a thirty-four year old African-American man sat in jail in Birmingham, Alabama composing his thoughts on justice. Scribbling his manifesto on the edge of a day-old newspaper, he finally arrived at one succinct declaration: “Injustice anywhere is a threat to justice everywhere” (King, 94). These words, written by Martin Luther King, Jr. in his *Letter from Birmingham Jail*, offer but a small window into a centuries-old debate concerning the fairness and equity of humankind. In fact, the virtues of a just society were being considered by great Greek philosophers like Plato and Aristotle hundreds of years before the time of Christ. Why, then, has the concept of justice intrigued mankind for so long? Why has the notion of justice so confounded those who have attempted to define it? Perhaps most importantly, why does the question, “What is justice?” continue to inspire such passion in those who would answer? These important questions prove especially profound in the United States, where “liberty and justice for all” has become the mantra of the masses.

Because the subject of justice has proven so vast and complex, continuing to regard the concept abstractly seems both impractical and without purpose. Instead, this paper seeks to consider justice from the standpoint of a contemporary issue—three-strikes legislation. Because the meaning of the word “justice” is in large part subjective, it is likely impossible to develop an all-encompassing definition of the term. More specifically, it is not enough to view justice in ethical, moral, or even legal terms. Rather, the spectrum of theoretical arguments concerning justice drives at the heart of a much deeper debate regarding the

inherent rights of man, liberty, and human nature itself. Fortunately, however, the various ways in which the concept of justice has been defined over time can be used to shed some light on the reality of justice in the twenty-first century. While a variety of theoretical formulations could be drawn upon for such an examination<sup>1</sup>, this paper uses a concentrated approach in exploring the evolution of the concept of justice only from the point of view of liberalism. Though one could argue the merits of such an approach based on liberalism's body of literature alone, perhaps the most obvious reason for focusing on liberal thought is the United States' liberal founding<sup>2</sup>. Thus, since the founding legal document of the United States espouses a liberal viewpoint, it seems only fitting to examine the laws of its states through the same lens.

In order to develop an appropriate foundation for analysis, the first chapter briefly examines the history of three-strikes legislation. From its 1993 inception in Washington state to its eventual spread into half of the American states, the issue of three-strikes is examined from the perspectives of both its proponents and its critics. While its supporters argue that the law reduces recidivism, its detractors adamantly insist that the law plays on societal fears concerning race, sex, age, and class. Whether or not the legislation embodies such ulterior

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<sup>1</sup> In fact, each ideology has its own major definer of justice. Robert Nozick's *Anarchy, State, and Utopia*, for example, deals heavily with the libertarian conception of justice. Karl Marx's famous examination deals with justice in terms of equality (classlessness), while anarchists like Emma Goldman argue that a truly justice society cannot exist under the rule of government (See Love, Nancy. *Dogmas and Dreams: A Reader in Modern Political Ideologies*. 1998. New York: Chatham House).

<sup>2</sup> "Liberalism," in the classical sense, could be defined as the belief that all men have an inherent right to life, liberty, and property. Classical liberalism envisioned an extremely limited role for government in ensuring that these rights were protected. Over time, however, the definitions of the terms "life, liberty, and property" became much more broadly defined, and an expansive system of rights eventually came to rest under the umbrella of liberalism. A "liberal" in the modern American sense, while still advocating the protection of life, liberty, and property, places a much greater burden on government in ensuring that the needs of citizens are being met (welfare state liberalism).

motives, there seems to be no denying that lawmakers simply do not have the statistics to support claims of success—a fact making the issue of justice all the more potent.

While Chapter One deals mostly with factual elements pertaining to the legislation itself, Chapter Two focuses on setting up an analytical framework for the liberal conception of justice. Using the works of John Locke, Jeremy Bentham, and John Stuart Mill, this chapter first charts a changing liberal notion concerning the meaning of justice before using the established framework to analyze three-strikes legislation. Overall, however, the chapter sets the stage for a discussion of the theories of John Rawls, a contemporary philosopher whose hallmark work deals exclusively with the concept of social justice. As such, the final chapter outlines Rawls' *A Theory of Justice* and the debate surrounding his work before concluding with a discussion of the just or unjust nature of three-strikes legislation according to Rawls' conception.

Though finding an answer to the question “What is justice?” is indeed much too great a task for this examination, it is important to take note that any exploration of the concept over time may bring us one step closer to determining what may, in the future, be conceived of as either just or unjust. This work, therefore, will make a contribution in its attempt to keep the yet unsettled debate alive. For it is when we stop questioning what is just that we must truly fear for the vitality of our liberty.

## Chapter One: The Three strikes Controversy

From the time of its inception more than two centuries ago, the United States has been idealized as the most free and just society in the world. The average American citizen has little fear of unjust punishment, and there seems to be a general confidence among the people in the ability of the law to oversee justice<sup>1</sup>. The early 1990's, however, witnessed a change in the tendency of our justice system to focus on rehabilitation<sup>2</sup>. Since that time, as a country, we have largely moved toward viewing repeat criminal offenders as "lost causes" who should be restricted from society indefinitely. This sweeping change in the laws of twenty-five states, commonly known as "three strikes legislation," has ignited a firestorm of controversy and is responsible for rekindling a debate that inevitably arises repeatedly throughout history. This debate, which concerns the true meaning of justice, naturally follows from actions like those we have witnessed over the past decade. Before considering the just or unjust nature of this legislation, however, it is first necessary to develop a solid understanding of the legislation's stated and tacit purposes and its outcomes. As such, this chapter focuses specifically on the legal debate surrounding three strikes legislation.

While much of the controversy over three strikes laws has arisen in the years following 1994, initiatives similar to that of three strikes have existed much longer. Traditionally called "three time loser laws" or "persistent offender statutes" in states like New

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<sup>1</sup> During George W. Bush's 2000 presidential campaign, for example, he proclaimed, "America has never been an empire. We may be the only great power in history that had the chance, and refused, preferring greatness to power and justice to glory" (*International Herald Tribune*, 1999). Additionally, the 2006 edition of Sabato and O'Connor's *American Government: Continuity and Change* opens with this statement, "It is part of the American creed that each generation should hand down to the next not only a better America, but an improved economic, educational, and social status. In general, Americans have long been optimistic about our nation, its institutions, and its future" (4).

<sup>2</sup> See LaFree, Gary. 2002. "Too Much Democracy or Too Much Crime? Lessons from California's Three-Strikes Law." *Law and Social Inquiry* 27(4): 875-903. ; Kovandzic, Tomislav, et al. 2004. "Striking Out As Crime Reduction Policy: The Impact of Three Strikes Laws on Crime Rates in U.S. Cities." *Justice Quarterly* 21(2): 207-245. Both discuss the change in U.S. focus from rehabilitation to punishment-oriented practices.

York, Virginia, and Delaware, these measures were applied in only the most severe cases and were often ignored altogether. In 1993, however, amid rising murder, rape, and burglary rates, Washington state began applying the rule in order to send a message to its most heinous criminal element. One year later, the idea was given both a full rebirth and its baseballlesque title in California (LaFree, 2002: 876; Kovandzic, et al, 2004: 209). Over the next three years more than twenty other states followed suit, officially enacting the laws for the stated purpose of reducing recidivism and as a means of discouraging first time offenders (Kovandzic, et al, 2004: 208). Still, the multitude of laws passed in these states have focused on a myriad of issues that seemingly accomplish ends outside of these goals—a factor contributing to the exceedingly perplexing face of the three strikes rule.

Because the content of those measures has varied so greatly, determining what three strikes legislation actually entails is a much more arduous task than might first be imagined. While these laws have tended to focus on defining eligibility in terms of violent crimes, many states have applied the rule in cases involving everything from firearms and drug violations to embezzlement and burglary convictions. Additionally, five states, Arkansas, Georgia, Montana, South Carolina, and Tennessee, have “two-strikes” provisions, which enhance the penalty for felony offenses after only two instances. The length of such penalties in both second and third strike states varies as well. Whereas some states hand down sentences of twenty-five years to life with the possibility of parole, others require mandatory life sentences on the third offense, no matter what the felony involved; still others enforce a life term only if the third offense is violent (Kovandzic, et al., 2004: 209-210). Thus, it is easy to see how navigating the maze of these laws could become rather tricky.

One of the major problems with formulating a general description of three strikes laws comes from these varying state definitions. State statutes involving habitual offenders range from vague definitions of “serious crimes” to narrowly defined specifics and elaborate combinations of felonies. The Louisiana and Virginia formulations, for instance, vary greatly in their definitions of eligible crimes, especially where sexual offenses are concerned. Whereas the Louisiana statute defines violent sexual crime in more than eight different ways, the Virginia statute simply calls for the rule to apply in cases of “criminal sexual assault” (Vitiello, 1997: 469, 478). As shown in Table 1 (at the conclusion of this chapter), only half of three strikes states require that all three offenses be violent felonies in order to be sentenced under the rule. As such, in states where judges are given no discretion (such as Virginia, Washington, and Colorado) a defendant convicted of three non-violent felonies must be sentenced to life imprisonment, with the possibility of parole varying in each state (Vitiello, 1997: 464, 477-478).

Texas is a notable exception to this rule, however. In this state, the first two strikes against a convicted party may involve either violent or non-violent felonies. However, in order for the law to be applied, the third strike or “triggering offense” must be violent in nature. For example, a person could complete his or her sentence for murder and then commit two additional non-violent felonies without being sentenced under the rule. However, if that same individual commits the non-violent felonies prior to the murder, then the rule must be applied (Vitiello, 1997: 477).

Perhaps no state has garnered more attention for its adoption of the rule than California, where more than 90% of the nation’s three strikes convictions have occurred (Lyons, 2004: 20). Enacting the rule only months after the infamous murder of a twelve-

year-old resident named Polly Klaas, California has far surpassed other states in its use of the law. More than 7,000 inmates have been sentenced under three strikes since 1995, with nearly 60% of third offenses being non-violent (LaFree, 2002: 876; Freedberg, 2004: 7). Moreover, California's rule has been criticized as being the most unforgiving. As Louis Freedberg writes, in California:

Unlike any other state the third strike can be any of 500 felonies, even so-called "wobblers," which can be prosecuted as misdemeanors. Regardless of whether the third strike is stealing a \$199 VCR or a brutal rape, offenders receive a mandatory 25-year-to-life sentence (2004: 7).

Reacting to criticism such as this, California District Attorney Grover D. Merritt writes, "Three Strikers have earned their long sentences because they are the most thick-skulled and predictably wicked of felons. They hurt people, they hurt communities, and they hurt our economy" (2002: 285).

Regardless of these conflicting opinions, California's ever-expanding "strike zone," has been the topic of much debate in academic circles over the past decade. Close analysis of the statute reveals that, because of the specificity of the law, the state casts its "strike net" over about two and half times more residents than Pennsylvania's rule. Moreover, while thousands have been convicted under the California provision, there have been fewer than ten convictions in each of the eighteen three strikes states that followed California in adopting the law in 1994 and 1995 (Caulkins, 2001: 228). Figures like these not only indicate that the California justice system is more willing to apply the rule, but also hint at the possibility that the law has become a "catch-all" for repeat offenders regardless of their status as violent or non-violent criminals.

In response to such charges, California lawmakers placed Proposition 66 on the ballot in November 2004. If passed, the California penal code would have been amended to include several changes in the three strikes provision. First, third strike offenses would be restricted to those specifically involving violence. Second, sections of the statute defining sexual crimes would be re-written in order to address the multitude of sexual offenders escaping punishment under the law. Third, it would allow for the re-evaluation of previously tried cases that might be sentenced differently under the new amendments (Lyons, 2004: 21). One month before the election, it appeared that voters would give their discerning stamp of approval to Proposition 66. When the results were in, however, the measure was defeated 53% to 47%. Political scholars and pundits alike have speculated that it was the combined efforts of Republican Governor Arnold Schwarzenegger and the Fraternal Order of Police that helped to quash the proposition. Citing the mandatory release of hundreds of criminals under the new amendment, their opposition campaign successfully convinced voters that they would be hurting the community by voting “yes” (Bailey, 2005: 6).

California’s statute has also been at the center of the larger legal and theoretical debate over three strikes laws. Only two cases have managed to garner the consideration of the U.S. Supreme Court, both cases deriving from incidents in California. These cases helped to underscore the problems inherent to the three strikes measure and, for its detractors, have served as quintessential examples of the misuse of the law. Taken into joint-consideration, *Lockyer v. Andrade* and *Ewing v. California* were both decided in March of 2003.

Leandro Andrade has become a poster child of sorts for organizations like the American Civil Liberties Union (ACLU), who point to the case as the quintessential example

of the injustice that can arise from the three strikes measure<sup>3</sup>. In and out of prisons since 1982, Andrade had committed a number of crimes that qualified for “wobbler” status in California, leading some to be declared misdemeanors while others were classified as felonies. Finally, in November of 1995, Andrade entered a K-Mart store in Ontario, California and proceeded to steal videotapes totaling \$84.70. Then, two weeks later, he revisited the same store and once again committed theft, this time totaling \$68.84 in videotapes. Upon arrest Andrade was charged with two felony counts of theft and was subsequently sentenced to two twenty-five years to life terms when his previous felony convictions were taken into account. A longtime heroin addict, Andrade had a history of petty thefts which he committed in order to fund his drug habit. None of his convictions, however, were violent in nature (*Lockyer v. Andrade, 2003*).

After a series of failed appeals, Andrade’s sentence was overturned in the Ninth Circuit on the reasoning that the sentence was proportionally extreme. California Attorney General Bill Lockyer subsequently petitioned the Supreme Court to uphold the sentence in 2002 with oral arguments being made by state attorney Douglas Danzig. The court upheld Andrade’s sentence in a 5-4 decision written by Justice Sandra Day O’Connor. In the decision, Justice O’Connor concluded that the California Court of Appeals was initially correct in upholding the sentence and additionally found that the Ninth Circuit “erred” in its assessment that the sentence was “unreasonable” (*Lockyer v. Andrade, 2003*).

A dissenting opinion was drafted by Justice Souter with the support of Justices Ginsburg, Stevens, and Breyer. This minority opinion held that the decision in Andrade’s case was not only a violation of the Eighth Amendment’s prohibition of cruel and unusual

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<sup>3</sup> See the ACLU’s defense of Andrade’s case at: <http://www.aclu.org/crimjustice/gen/10306prs20021105.html>

punishment, but also argued that Andrade’s second and third offenses actually only constituted one felony strike since the instances involved one victim and occurred during a short period of time. Moreover, in the words of Justice Souter, “Andrade did not somehow become twice as dangerous when he stole the second handful of videotapes; his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation” (*Lockyer v. Andrade*, 2003).

While Andrade’s case may, to some experts<sup>4</sup>, seem a cut-and-dry case of injustice, Gary Ewing’s case proves much more complicated. Ewing was convicted of “grand theft in excess of \$400” in California after stealing three golf clubs from a sports shop in 2000. Ewing’s record detailed a laundry list of convictions dating back to 1988, many involving violence, drugs, and firearms. After being convicted and sentenced to twenty-five years to life, Ewing filed an appeal with the California Court of Appeals, which was subsequently denied. In a final appeal to the U.S. Supreme Court, Ewing’s attorney asked the court to not only consider that the sentence violated the Eighth Amendment, but also claimed that Ewing’s case should have special consideration as a “wobbler” (*Ewing v. California*, 2003).

In a decision very much resembling the Andrade case, “Justice O’Connor, joined by the Chief Justice and Justice Kennedy, concluded that Ewing’s sentence [was] not grossly disproportionate and therefore [did] not violate the Eighth Amendment’s prohibition on cruel and unusual punishments” (*Ewing v. California*, 2003). Moreover, the fact “that grand theft is a ‘wobbler’ under California law is of no moment. Though California courts have

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<sup>4</sup> Observers at the American Civil Liberties Union, for example, argue that the law acts as a “racial control mechanism,” while studies conducted by the Justice Policy Institute (see footnote page 12) show that minorities are indeed disproportionately sentenced under the rule.

discretion to reduce a felony grand theft charge to a misdemeanor, it remains a felony for all purposes.” The dissenting opinion was once again written by Justice Souter with Justices Ginsburg, Stevens, and Breyer concurring. Very much echoing the sentiment expressed in the Andrade case, Justice Souter concluded that Ewing’s sentence had been “grossly disproportionate.” Nonetheless, as before, the decision of the appellate court to uphold the sentence was sustained 5-4 (*Ewing v. California*, 2003).

Though Andrade and Ewing have become the public faces of third strike offenders, it is nonetheless important to ask how well these men really represent their criminal counterparts. Both men are racial minorities, (Latino and black, respectively) and both were in their late thirties at the time of their third strike arrests. Importantly, these men are strikingly similar to other three strikes prisoners in California. First, like ninety-five percent of the state’s three strikes prisoners, they are male. Second, they help make up the eighty-one percent of three- strikes convicts who are between the ages of twenty-one and forty. Third, they are among the seventy percent of “third-strikers” who are either black or Latino. Finally, much like Andrade and Ewing, over seventy-percent of third strike offenders are sentenced based on a non-violent third offense (Vitiello, 1997: 428-434; Bailey, 2005: 6).

Based on these figures, it is easy to see why three strikes has been criticized as a mass removal program for young, male minorities. However, discerning whether there is any merit to these claims is an extremely difficult task, as three strikes prison population figures nearly mirror those of the general prison population. As such, racial criticisms of the justice system must necessarily be aimed at the entire justice system, not just the legislation—an arduous task at best. Still, minorities are imprisoned under the law so disproportionately as to merit a deeper understanding of the issues behind the question.

A study conducted by the Justice Policy Institute<sup>5</sup> found that African American offenders are thirteen times more likely to receive life imprisonment upon their third strike than white offenders, while Latinos are about one-and-one-half times more likely than whites to receive life (JPI, 2004: 7). In Los Angeles alone, African Americans are about fourteen times more likely to have their non-violent third strike offense classified as a felony than their white counterparts (JPI, 2004: 17). Moreover, there is some evidence that three strikes is being disproportionately applied in areas where the black population is most concentrated. As the study of California contends,

Los Angeles County confines six times as many people per 100,000 as San Francisco County. Thus, the Three Strikes law did not deliver the simple uniformity that initial promoters promised. Rather, the power to determine sentences shifted from the judge in the context of a sentencing decision to the prosecutor in the context of charging decisions or plea negotiations. Those decisions have been applied at dramatically different rates throughout the state (JPI, 2004: 19).

Regardless of whether or not white San Franciscans are receiving more lenient treatment, the fact remains that, in terms of statistics, whites are far from being proportionately represented in either the general prison population or among third-strikers.

A study conducted by the State of Washington Sentencing Guidelines Commission, a state-funded research body, found similar results in that state. Accordingly, a report requested by and prepared for the governor suggests that

People of color are over-represented at every stage of Washington's criminal justice system, from arrest through sentencing and incarceration. In 2002, African Americans made up 21.3% of the state prison population, but just 3%

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<sup>5</sup> The Justice Policy Institute (JPI) is a non-profit organization (think tank) that works to reduce the need for incarceration through youth and adult outreach programs. It has commissioned several studies of the Three-Strikes program and other programs of its kind to determine whether or not lengthened incarcerations are effective in reducing crime rates. Though its mission statement does not necessarily hint at either a liberal or conservative bent, it works in concert with a myriad of liberal organizations including the NAACP in opposing policies that are often favored by conservatives (such as three-strikes).

of the state's adult population. Hispanics accounted for 11% of the prison population, but just 7% of the state population (SGC, 2003: 3).

Moreover, Washington's Native American population was also found to be disproportionately sentenced under the rule. As in California, however, whites are excessively *underrepresented* in Washington's prison system (SGC, 2003: 4).

Having outlined many of the problems with three strikes legislation in practice, it is important to examine whether or not the measure is meeting its suggested aims. That is, has three strikes reduced crime? Is the law producing a deterrent effect?

According to a study conducted by crime researchers at the University of Alabama at Birmingham, there is "no credible statistical evidence that passage of three strikes laws reduces crime by deterring potential criminals or incapacitating repeat offenders" in any state that has enacted the law (Kovandzic, et Al, 2004: 234). The findings of the study suggest that, even if criminals had a strong fear of being caught, there are no substantive data to show that they are informed enough about the law for it to have the effect of deterrence.

Additionally, the authors argue that, in order for three strikes to be effective, it must target criminals in their youth. Thus, the task of discerning which juvenile offenders are "high-risk" can be nearly impossible. Finally, they argue that a high percentage of third strike offenders are addicted to either drugs or alcohol. As such, the kind of reasoning skills necessary to produce a deterrent effect may be temporarily retarded by addiction in these cases (Kovandzic, et al, 2004: 235-236).

Criminologist Jonathan Caulkins agrees that three strikes is not producing its desired aim. Using a mathematical cost-benefit model, Caulkins determined that states employing the measure would benefit much more by increasing sentences for first time offenders and by

capping second and third offense sentences between six and ten years for non-violent offenses. Moreover, the author not only finds that the law is not effective at reducing crime, but also concludes that the law is extremely costly to taxpayers who will be faced with funding a growing prison population that will never “age-out” (Caulkins, 2001: 244-245).

Observers with the *Harvard Law Review* suggest that states like California are approaching crime reduction from the wrong angle. Instead of focusing on punishing citizens, they suggest that states should “confront the twin problems of poverty and racism that make individuals more likely to commit crime” (*Harvard Law Review*, 1994: 2126). As such, rather than sinking exorbitant amounts of money into prison systems, states should focus on improving the lives of citizens by providing greater access to education and healthcare in the most affected communities. Additionally, long term goals should include “eliminating discrimination in the workplace and increasing legitimate employment opportunities for young men of color” (*Harvard Law Review*, 1994: 2127). Conversely, the current three strikes solution merely “maintains the boundaries of economic and racial segregation” and funds the continued punishment of those who have lived their entire lives in dire situations (*Harvard Law Review*, 1994: 2128).

The issue of three strikes, as discussed above, has been considered from a pragmatic, factual standpoint. The law has twice been ruled Constitutional, and it is unlikely that this will change in the near future. However, while we are often tempted to view law, morality, and justice as interchangeable in definition, in reality they often prove strange bedfellows. The question of the meaning of justice has itself been debated for thousands of years and holds as much salience now as in the world’s first societies. Thus, in the United States where liberty is purported to be held in the highest regard, it seems a strange irony to be debating the

limits of cruel and unusual punishment. Ultimately, the problem of the just or unjust nature of three strikes sentencing merely scratches the surface of a much larger, much more infinite question. What, then, is justice? Why has the concept so intrigued mankind for so long, and why has the notion of justice so confounded those who have attempted to define it?

Justice, as we generally conceive of the term today, has traditionally been defined using an ever-evolving liberal conception. As early as the seventeenth century, the liberal notion of a just society was already taking shape. Since that time, justice has been defined and redefined continually under an expanding umbrella of liberal thought. Chapter two attempts to chart a brief history of the changing liberal ideal as it relates to justice, in hopes of creating a better understanding of the point at which we having currently arrived.

Table 1  
States with Three-Strikes Provisions\*\*

State	State Code/Statute	Year Enacted	Previous Convictions (Felonies)	Third Strike Conviction	Mandatory Sentence	Parole Option
Arkansas	§5-4-501	1995	Violent	Violent	Life Imprisonment	No
California	§667	1994	Violent or Non-violent	Violent or Non-violent	25 Years to Life	Yes (Dependent on third offense)
Colorado	§16-13-101	1994	Violent	Violent	Life Imprisonment	Yes (After 40 years)
Connecticut	§53a-40	1994	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	No
Delaware	Title 11 §4214	1994	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	No
Florida	§775.084	1995	Violent or Non-violent	Violent or Non-violent	Dependent on severity of 3 <sup>rd</sup> conviction	Yes
Georgia	§17-10-7	1995	Violent	Violent	Life Imprisonment	No
Illinois	Chapter 20 §5/33B-1	1994	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	No
Indiana	§35-50-2-8.5	1994	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	No
Louisiana	§15:529.1	1995	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	No
Maryland	Article 27 §643B	1994	Violent	Violent	25 Years Minimum	Yes (Must be age 65, served 15 years)
Montana	§46-18-219	1997	Violent	Violent	Life Imprisonment	No
Nevada	§207.010		Violent or Non-violent	Violent or Non-violent	25 Years Minimum	Yes (After 10 years)

Table 1 (Continued)  
States with Three Strikes Provisions

State	State Code/Statute	Year Enacted	Previous Convictions (Felonies)	Third Strike Conviction	Mandatory Sentence	Parole Option
New Jersey	§2C:43-7.1	1995	Violent	Violent	Life Imprisonment	Yes (Must be age 70 and served 35 years)
New Mexico	§31-18-23	1994	Violent	Violent	Life Imprisonment plus time for 3 <sup>rd</sup> conviction	Yes (After 30 years of life term)
North Carolina	§14-7.7	1994	Violent	Violent	Life Imprisonment	No
Pennsylvania	§97114	1995	Violent	Violent	25 Years to Life Imprisonment	No
South Carolina	§17-25-45	1996	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	Yes (Under special circumstances)
Tennessee	§40-35-120	1994	Violent	Violent	Life Imprisonment	No
Texas	§12.42	1996	Violent or Non-violent	Violent	Life Imprisonment	Undefined in statute
Vermont	Title 13 §11	1995	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	Undefined in statute
Virginia	§19.2-297.1	1994	Violent	Violent	Life Imprisonment	Yes (Under special circumstances)
Washington	§9.94A.392	1993	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	No
West Virginia	§61-11-18	1994	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	Yes (Exceptions—murder, first degree sexual assault)
Wisconsin	§939.62	1994	Violent or Non-violent	Violent or Non-violent	Life Imprisonment	No

\*\*Information on three-strikes statutes was obtained at each states' legislative website

## Chapter Two: Charting the Growth of the Liberal View of Justice

Literally taking a page from John Locke's *Two Treatises of Civil Government*, Thomas Jefferson declared in the Declaration of Independence that "all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." It was with these words that the American conception of a just nation was born, and as that nation grew, so too did the scope of citizens' rights and their expectations of just treatment. While Jefferson and his classical liberal predecessors saw only a limited role for government in the lives of citizens, over time, the protection of "life, liberty, and the pursuit of happiness" came to include the development of an expansive welfare state and the "unalienable" right to housing, food, and basic healthcare. Yet, in some sense, if only nostalgically, America still clings tightly to the liberal principles espoused in our founding documents. Consequently, it seems both logical and necessary to examine how our current conception of justice compares with those espoused during our liberal founding. The purpose of this chapter, then, is to locate the origin of the liberal conception and to begin charting its evolutionary path toward an expanded definition of justice.

### ***Locating the Origin with the "Father"***

Determining a point of origin in the long history of liberal thought is indeed a monumental, if not impossible, task. In fact, while we can sometimes be assured that much of a particular thinker's ideas have been heavily influenced by the works of another great mind<sup>1</sup>, we must be careful in assuming that we are correct in placing the birthplace of these

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<sup>1</sup> John Locke, for instance, is thought to have built heavily on Thomas Aquinas's idea of "natural law" in his *Second Treatise on Civil Government*. Subsequently, Lockean ideals were used in drafting both the Declaration of Independence and the U.S. Constitution.

ideas with this predecessor, as he must also have been inspired by those who came before him. Consequently, deciding which liberal thinkers represent true benchmarks in the progression of liberal thought appears to require somewhat of an arbitrary selection process. Fortunately, however, this problem should not affect one's ability to make a careful selection of thinkers whose thoughts are most *representative* of (though not the most original among) the whole. Following this line of thought, then, it seems logical that any discussion of liberalism should begin with John Locke, the "father of liberalism." While Locke's ideas do not necessarily represent the absolute origin of the liberal conception, his writings represent the point at which liberal ideas became politically and socially salient<sup>2</sup>. As such, for the purposes of examining justice in historical perspective, Locke's *Second Treatise of Civil Government* is a more than satisfactory starting point.

### ***Justice According to the Law of Nature***

Any attempt to successfully examine the Lockean view of social, moral, and legal justice, must first consider how Locke envisioned man in his original or "natural" state. That is, most of Locke's ideas about justice in society arise from his views on governmental or political power. The origins of political power, according to Locke, can only properly be conceived of in the "state of nature." Thus, in order to understand political power and subsequently justice, we must first understand this state of nature (Locke, 25). Moreover, while many of Locke's contemporaries conceived of the origin of man as fundamentally evil<sup>3</sup>, Locke's state of nature is representative of the enduring liberal notion of man as principally virtuous. This aspect of liberalism, that man has a fundamental inclination toward virtue

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<sup>2</sup> See pages one and two of Love, Nancy. *Dogmas and Dreams: A Reader in Modern Political Ideologies*. 1998. New York: Chatham House.

<sup>3</sup> Thomas Hobbes, for example, argued that a single, strong ruler ("Leviathan") would be necessary in order to protect the weak from the strong.

rather than vice, proves important to generations of liberal thinkers when it comes to conceptualizing what justice truly entails.

In Locke's conception of the state of nature, all men are in "a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man" (Locke, 25). As theorist Steven Forde explains, Locke never outwardly expresses what this "law of Nature" specifically entails, "though many individual principles are said by him to belong to the natural law" (Forde, 2001: 397). Among these principles exists Locke's most fundamental assertion that natural law calls for the "peace and preservation of all mankind," accomplished when human beings respect the rights of others and refrain from injuring themselves and their fellow man (Locke, 26). Thus, as this condition would seem to imply, Locke's law of nature is a normative rather than a practical code of behavior, suggesting how the affairs of men *should be* ordered (Forde, 2001: 398). Locke's own explanation of this principle of preservation alludes to its somewhat utopian quality:

Every one as he is bound to preserve himself, and not to quit his station willfully, so by the like reason, when his own preservation comes not in competition, ought as much as he can to preserve the rest of mankind, and 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 (Locke, 26).

The use of the phrase "ought to" in Locke's analysis seems an inherent admission that the actual actions of man will not always, in practice, be ordered according to the law of nature. As such, of necessity, Locke must also provide a theoretical method of dealing with those who continually choose to subvert the law of nature and the closely related "law of reason,"

which holds that all individuals should be treated equitably (Locke, 30). Before taking up this issue, however, a brief explanation of Locke's view on property is warranted.

In order for man to transgress the law of nature, he must in some way steal or otherwise harm the property of another man. While the definition of "property" in the contemporary sense knows little boundaries, for Locke, there exist only two ways of possessing property. The first type of property is inherent to each person. That is, all men have property in their own lives, which is absolute and can never, within the law of nature, be obtained by others<sup>4</sup>. Second, Locke believes that all men hold the bounty of the earth in common, with each man being entitled to no more and no less than his neighbor. Therefore, the only way for a man to possess a piece of the earth, whether it be an apple, a cow, or a tract of land, is through the mixing of his labor with the object he desires to possess. As Locke asserts,

The "labour" of his body and the "work" of his hands, we may say are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others (Locke, 30).

The assertion that there must be "enough and as good" remaining for others anticipates the problem of the accumulation of large amounts of wealth into the hands of the few. Addressing this problem at length, Locke claims that "as much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in.

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<sup>4</sup> In chapter four of the *Second Treatise*, for example, Locke describes the state of being subject to the will or authority of another as "slavery" (29-30).

Whatever is beyond this is more than his share, and belongs to others<sup>5</sup>” (Locke, 31). As interpreted by Forde, “This restriction is rooted in the general good of mankind, inasmuch as waste robs others of their share” (2001: 401). Those who labor to consume without wasting, then, have acted properly and within the bounds of nature<sup>6</sup>. Consequently, “He that had as good left for his improvement as was already taken up needed not complain, ought not to meddle with what was already improved by another’s labour; if he did it is plain he desired the benefit of another’s labour” (Locke, 32).

### ***Just Punishment within the State of Nature***

Having explored Locke’s explanation of the acquisition of property, an examination of the state of war (essentially an account of justice and injustice within the state of nature) can now be undertaken. Just as Locke’s rules for acquiring property are clearly delineated, so too are his conditions for crime and punishment in the state of nature. His definition focuses heavily on both threat and action:

The state of war is a state of enmity and destruction; and therefore declaring by word or action, not a passionate and hasty, but sedate, settled design upon another man’s life puts him in a state of war with him against whom he has declared such an intention, and so has exposed his life to the other’s power to be taken away by him, for anyone that joins with him in his defence, and espouses his quarrel; it being reasonable and just I should have a right to destroy that which threatens me with destruction; for by the fundamental law of Nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred, and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion because they are not under the ties of the common law of reason, have no other rule but that of force and violence, and so may be treated as a beast of prey, those dangerous and

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<sup>5</sup> John C. Winfrey refers to this as a “satisficing” model of wealth, which Locke views as being the only type of wealth ordained by God (1981: 435). “Charity Versus Justice in Locke’s Theory of Property.” 1981. *Journal of the History of Ideas* 42(3): 423-438.

<sup>6</sup> As will be discussed later and in more detail, these restrictions on property are no longer an issue, according to Locke, after the advent of money.

noxious creatures that will be sure to destroy him whenever he falls into their power (Locke, 28).

As shown, then, Locke maintains that those who go against the laws of nature and reason automatically forfeit their rights to their own lives and place themselves in a state of war with their victims. Just as an animal of prey cannot be trusted, neither can a member of a community who threatens the very existence of the other members.

Locke's definition of just punishment goes further, however. While modern-day codes of law stress varying degrees of punishment for varying degrees of offense, the state of nature as conceived by Locke permits but one punishment for all transgressions, no matter how slight or heinous their nature. That is, the infringement of one man on the rights or property of another man should be taken just as seriously as an attempt on that man's life. Thus, by stealing the fruits of another's labor, a man places himself in a state of war with his victim. As Locke contends,

He that in the state of Nature would take away the freedom that belongs to anyone in that state must necessarily be supposed to have a design to take away everything else, that freedom being the foundation of all the rest; as he that in the state of society would take away the freedom belonging to those of that society or commonwealth must be supposed to design to take away from them everything else, and so be looked on as in a state of war (Locke, 29).

By trespassing upon the liberty or property of another, the aggressor has indicated to society that his greed, contempt, and disregard for the law of reason and nature know no bounds.

Accordingly, Locke argues that such a man should be punished in the gravest of ways:

This makes it lawful for a man to kill a thief who has not in the least hurt him, nor declared any design upon his life, any farther than by the use of force, so to get him in his power as to take away his money, or what he pleases, from him; because using force, where he has no right to get me into his power, let his pretence be what it will, I have no reason to suppose that he who would take away my liberty would not, when he had me in his power, take away everything else (Locke, 29).

In carrying out this punishment, however, “the state of war ceases” and society is restored to its prewar state (Locke, 29).

Locke does not relegate the beginnings of mankind entirely to the realm of the theoretical and ahistorical. After all, Locke’s own intentions for his *Second Treatise* included exposing the dangers of the tyrannical monarchies of seventeenth century England. In fact, Locke’s explanation of the state of nature mostly serves to provide a setting for the creation of the first “social contract” and subsequently the first form of governmental authority. Why, then, does man leave the state of nature in favor of society and government?

### ***The Social Contract and Just Punishment in a State of Government***

Though man has, in the state of nature, a perfect freedom to live and labor as he chooses, according to Locke, man also fears the looming possibility that he may be robbed of his property. The fear of losing the totality of his freedom, therefore, drives man to enter into society—to join with others who have fears not unlike his own. This union of men, otherwise known as a “social contract,” gives rise to government. This new government’s charge is restricted to protecting life, liberty, and the fruits of man’s labor—collectively termed “property” by Locke (53).

Moreover, government as it now exists satisfies three separate problems previously left unchecked in the state of nature. First, the rights and wrongs of society will now be codified into law. Second, society will witness the creation of an impartial judge who will be responsible for discerning where transgressions against the law have and have not occurred. Finally, an unbiased authority will oversee and administer punishments to those who have been sentenced by the judge. Since the aforementioned conditions can never be met within

the state of nature, Locke believes that man's time in this original state is ephemeral at best (54).

In maximizing the preservation of property, man inherently sacrifices many of the rights previously afforded him in the state of nature. Specifically, the social contract comes to restrict the freedom of man in two important ways. First, man no longer has an unlimited power to act in his own best interest or for the preservation of his fellow man. Rather, man must now act within the boundaries of the law. Second, where he once acted as victim, judge, and executioner, man is now prohibited from punishing aggressors and is bound to abide by the decisions of legal authorities. Consequently, not only does man lose a measure of liberty, but also of equality, as he must now submit to the law-making and decision-making powers of others. This social pact does not, however, require a complete abdication of power. As Locke clarifies:

And so, whosoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by upright and indifferent judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people (Locke, 54).

Man, therefore, makes the difficult decision to exit the state of nature in order that a government might oversee the realm of justice and provide for a more evenhanded method of administering punishment than was previously available.

### ***From Lockean Liberty to Benthamite Utility***

Moving forward from John Locke's *Second Treatise of Civil Government*, it seems a logical progression to turn attention toward the theories of Jeremy Bentham. Writing more

than a half-century after Locke's death, Bentham, like his predecessor, was also uniquely interested in criticizing British society. While Locke's writings are a reaction to the rigid hierarchy of the English monarchy, Bentham's work reflects his personal contempt for Sir William Blackstone's *Commentaries on the Laws of England*, a work which had achieved legendary status in England when Bentham was still just a child. Two of Bentham's most famous works, *A Fragment on Government* and *An Introduction to the Principles of Morals and Legislation*, critique Blackstone's volume while also expanding upon Locke's writings. Though it may be, as economist Jacob Viner once argued, that "Bentham was perhaps the least original in his stock of general ideas, but clearly the most original in finding means and devices for putting his philosophy to practical use," his essays nonetheless deeply question the reality behind the state of nature, and his detailed explication of government and punishment remains unique among theorists in the liberal tradition (1949: 360).

Bentham's work represents a logical next step in the progression of the liberal conception for several reasons. First, unlike Locke, Bentham views the subject of just punishment as one of complexity. Consequently, his theory provides a stepping stone from Locke's broader view of acceptable sanctions to a more narrowed account based on individual circumstances. Second, Bentham distinguishes himself from other liberals by combining liberalism's focus on liberty with the idea of societal utility. Finally, the vital theory of John Stuart Mill, who will be discussed later, found its roots in Benthamite utilitarianism and is in part a reformulation and an expansion of Bentham's conception.

### ***Bentham, the State of Nature, and Justice in the Practical Realm***

Much as Locke began his inquiry into civil government with a discussion of the origins of society, Bentham's *A Fragment on Government* also explores government's

primary foundations. The phrase “state of nature,” according to Bentham, proves rather difficult to define because of the varying ways in which writers use the term “society.” In some instances, argues Bentham, society exists within the state of nature. In others, society is only formed in concert with the rise of government. Bentham, seeking to rescue “society” from such vague definitions, redefines the term to include two specific interpretations. The phrase “natural society” is subsequently used to describe society before government, while “political society” refers to post-government societies (Bentham, 56-57). The supposed difference between the two is what Bentham terms “a habit of obedience”—implying that, in the state of nature, obedience is not required of man, while obedience is essential to society once the formation of government has been witnessed. In Bentham’s view, however, this logic is fallacious, as obedience in either case is neither wholly present nor wholly absent. For example, in political society, most men will be forced to obey at one point in time. Those same men, however, will also sometimes command the obedience of others, allowing them the freedom to order their own actions vis-à-vis their subordinates—a partial state of nature. Following this logic, Bentham deduces that the state of nature is not necessarily limited to a pre-government existence, but may instead exist simultaneously with government. As a result, the only true way of defining society in terms of obedience is via continuum. That is, man approaches political society as obedience increases and moves further toward natural society as obedience decreases (Bentham, 58-59).

Though Bentham’s proposed clarification of the state of nature may, in some ways, seem hyper-specific and inconsequential, the definition ultimately suits his purpose of designing a proper role for government. By removing the actions of man from the realm of the theoretical, Bentham gains the advantage of forcing the abstract to serve a practical

purpose. More precisely, whereas a just society had previously only been conceptually attainable, Bentham brings portions of the theoretical into the actual and is subsequently able to frame government (where it is willing) as a capable arbiter of just laws and just punishments. Accordingly, this reformulation of the state of nature served the social reformer in Bentham quite well (Viner, 1949: 362).

### *Justice as Utility*

Bentham's most famous pursuit of government that is both practical and just can be found within the pages of *An Introduction to the Principles of Morals and Legislation*. In this essay, perhaps his most famous work, Bentham argues that man is at the mercy of his "two sovereign masters"—the competing forces of pleasure and pain. These contradictory powers underscore the importance of recognizing the "principle of utility." Bentham explains:

By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness (all this in the present case comes to the same thing), or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual then the happiness of that individual (86).

Since man is beholden to the forces of both pleasure and pain, Bentham believes that man is happiest when the interests of the community are maximized. The interests of the community, being the sum total of the interests of the "several members who compose it" cannot be met, however, without first fulfilling the interests of individuals. Therefore, the utility of individuals and subsequently of the community is maximized when the sum of individuals' pleasure is increased, or the total of man's pain is decreased (86). Bentham clarifies the relation of the principle to government:

A measure of government (which is but a particular kind of action, performed by a particular person or persons) may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it (87).

The law, then, should be based around this principle of utility. Moreover, “right” and “wrong” would thus be the perceived outcomes of either the maximized or diminished utility of the community, respectively (Bentham, 89).

Since a maximized level of community utility is the ultimate goal of government, it follows that legislators would be charged with ensuring an optimal level of “pleasure and security” within the community (Bentham, 90). Before such protection can be assured, however, Bentham argues that it is important for legislators to come to understand the various sources of both pleasure and pain. The first of these sources, the physical sanction<sup>7</sup>, flows from the “ordinary course of nature” and is therefore outside the purposeful control of man. The political sanction, conversely, results from the actions of a community’s authorities or ruling powers. That is, in this instance, pleasure or pain results from the actions or decisions of government. A third type, the moral sanction, arises from the “dispositions of particular men” rather than any particular law or government action. The religious sanction, lastly, issues from “an invisible superior being,” or in other words, from God (94). An informed government will be capable of using these sources of pleasure and pain for both reward and punishment. Moreover, when government gains a greater understanding of pleasure, it is more adept in ensuring that its punishments are proportional to the level of the general disturbance of the individual or community happiness (106).

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<sup>7</sup> Bentham uses the term “sanction” to denote that either pleasure or pain can result from this source.

### ***Motive, Disposition, and Just Punishment as Maximized Utility***

Although knowing the sources of pleasure and pain can make government more just with regard to punishment, difficulties in determining the depth of disturbance in community happiness persist. On this point, Bentham answers:

In every transaction, therefore, which is examined with a view to punishment, there are four articles to be considered. 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, unconsciousness, or false consciousness, that may have accompanied it.

Seeing that these conditions may be combined, Bentham argues that the just or unjust nature of a punishment can be decided based on two narrow factors. The first is motive. The second is disposition (Bentham 107).

A motive, being “anything that can give birth to an action,” always involves the fulfillment of either pleasure or pain (or both). No single motive, however, is ever intrinsically good or evil. Rather, as Bentham contends, a particular motive can only be deemed good or evil inasmuch as it is seen to either add to or take away from pleasure or cause pain. Thus, when individuals refer to an “evil motive,” they are not speaking of the quality of the motive itself, but of the effects of the motive (Bentham, 110). Defending one’s honor, for example, could be identified as a motive for murder. Honor as a motive, however, is not inherently good or evil. Rather, it is the effect of the motive (murder or pain) that produces a qualitative outcome (111). As a consequence, in punishing an individual, governments must not only take into account motives, but the outcomes of those motives.

While a man’s motives cannot be defined as either good or bad, Bentham asserts that a man’s disposition can be so labeled (113). Disposition, Bentham admits, is abstract in concept, yet important in determining the intended outcomes of a man’s motives. He posits:

A man's disposition may accordingly be considered in two points of view: according to the influence it has, either, 1. On his own happiness: or, 2. On the happiness of others. Viewed in both these lights together, or in either of them indiscriminately, it may be termed, on the one hand, good; on the other, bad; or, in flagrant cases, depraved (Bentham, 113).

In more succinct terms, then, disposition can be thought of as "the sum of a man's intentions" (Bentham, 114).

The subject of disposition is made still more complicated when one considers how a man's true disposition might be determined. From Bentham's point of view, however, there are several methods of deciphering an individual's intentions, the first of which involves comparing the level of temptation influencing the individual to the "degree of mischief" or seriousness of the crime he or she is willing to commit. As he explains:

It would show a more depraved disposition, to murder a man for a reward of a guinea, or falsely to charge him with a robbery for the same reward, than to obtain the same sum from him by simple theft: the trouble he would have to take, and the risk he would have to run, being supposed to stand on the same footing in the one case as in the other (Bentham, 116).

Secondly, a man's depravity level is said to increase when his level of mischief bears an inverse relationship to his level of temptation. That is, a man is seen to be more depraved when he commits a greater crime in the presence of less temptation. For example:

It shows a more depraved and dangerous disposition, if a man kill another out of mere sport, as the Emperor of Morocco, Muley Mahomet, is said to have done in great numbers; than out of revenge, as Sulla and Marius did in thousands; or in the view of self-preservation, as Augustus killed many; or even for lucre, as the same Emperor is said to have killed some (Bentham, 116).

Conversely, it also follows that the level of a man's depravity becomes increasingly difficult to discern when his level of temptation rises. Without regard to the level of temptation, however, the "degree of deliberation" must be considered. Therefore, where the level of

mischief is high (meaning that the crime committed is serious in nature), the level of depravity will be considered excessive if the man is shown to have used forethought in committing the act. From Bentham's viewpoint, "It thus shows a worse disposition, where a man lays a deliberate plan for beating his antagonist, and beats him accordingly, than if he were to beat him upon the spot, in consequence of a sudden quarrel" (117).

As the above seems to suggest, from Bentham's perspective, the "general object" of government is to "exclude mischief" (120). The exclusion of mischief, however, requires the institution of punishment, which Bentham believes can only be carried out under certain circumstances. Primarily, he argues that punishment is without merit where a law "prevents no mischief," or in other words, where an act prohibited by law does not harm the community. Moreover, punishments that have proven ineffective in preventing future mischief or that have costs exceeding the expense of the mischief itself are, for Bentham, unjustifiable. Finally, he asserts that the government should never hand down a punishment for an act that would likely cease on its own, without reprimand (Bentham, 121).

Of course governments will eventually be forced to punish those who choose to engage in criminal activity. Recognizing this, Bentham devises a set of rules that will ensure that a given punishment is proportional to its related offense. The punishment, in other terms, should be made to fit the crime. As such, Bentham supposes that adherence to three central tenets will suffice. First, the chosen sentence must be substantial enough to conceivably outweigh the reward obtained by committing the offense. Second, the greater the reward of the offense, the more reasonable it is to expend greater resources on the punishment. Finally, when a man is set to commit one of two offenses, no matter the costs, the consequences of

committing the greater offense must be set high enough to that he is compelled to choose the lesser crime (Bentham, 122-123).

One final aspect of Bentham's theory of just punishment has yet to be delineated. Though Bentham places much less emphasis on the classification of offenses, he nonetheless considers such classes important in the determination of both disposition and punishment. Comprising five different categories, Bentham's "mischief" classification scheme emphasizes a methodology that is designed to test the effect of a crime on overall utility. "Offenses against individuals" (private offenses) are thus contrasted with "offenses against neighborhoods" (offenses affecting small groups). Likewise, self-regarding or "intransitive offenses," which occur when an offender harms only himself, are considered less heinous than public offenses that affect the community at large. Finally, "offenses by falsehood" and "offenses against truth" may fall into any one of these categories, and as such, vary in seriousness (Bentham, 127-128).

The complexity of Bentham's theory illuminates the importance of two necessary observations. First, when it comes to punishment, there is much to be considered. Specifically, making certain that a punishment is not either too lenient or too harsh in relation to the crime committed requires contemplation of a vast array of factors. Second, Bentham's formulation of government requires the existence of both officials and citizens who possess the knowledge of their options and a desire to maximize them. As such, it may properly be suggested that Bentham's attempts to bring the theoretical into the realm of the actual, in this way, faces some difficulty in doing so.

### ***John Stuart Mill's Reformulation***

Much like Bentham, John Stuart Mill also subscribed to a utilitarian view of liberty and justice. In fact, Mill was first exposed to the utilitarian philosophy at age two by Bentham himself, who had befriended Mill's father, James. Though James Mill had hoped that his son would be the greatest among Benthamite philosophers, John Stuart Mill actually came to see some of the tenets of Benthamism as unsound, and he therefore reworked utilitarianism to his own liking (Warnock, 1962: 1-9). Particularly, Mill was more willing to extend his definition of justice into the realm of personal liberty, circumventing the inevitable effects of societal pressure on the individual. As such, Mill's work signals yet another benchmark in the evolution of the liberal conception of justice. Moreover, though Mill indicates in his *Essay on Bentham* that he has a great deal of respect and admiration for his predecessor, he also hints at a belief that Bentham focuses too much on jurisprudence and too little on the individual and morality. Mill's essays, consequently, deal almost exclusively with these topics, leaving what he calls the "political" realm (the dominion of law) mostly aside.

### ***The Injustice of Social Tyranny***

In the introduction to *On Liberty*, Mill argues that "the struggle between Liberty and Authority is the most conspicuous feature in the portions of history with which we are earliest familiar" (126). The earliest days of man, claims Mill, were marked by man's struggle against the political tyranny of single rulers. Once men became actors in democratic governments, however, a new problem presented itself. Though it had not been previously recognizable, Mill says that a "tyranny of the majority" accompanied representative government. He argues,

The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein (Mill, 129).

Thus, though democratic government is indeed desirable, it also has effects that are not immediately obvious. The tyranny of the majority can lead to a profound restriction of personal freedom, especially where the majority is able to use government to impose its will. Herein, then, lies a major flaw in utilitarian philosophy. That is, what if the greatest amount of happiness is found in the oppression of the minority? According to Mill, such actions by the majority group are not justifiable.

As previously stated, however, Mill's main concern is not with the governmental influence of the majority, but with the societal influence of the majority. Particularly, Mill believes that the public will exercise the greatest amount of oppression not within the confines of the law, but via "social tyranny"—tyranny of opinion and feeling. As he posits, "There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism" (Mill, 130). For Mill, then, societal justice and injustice lie, respectively, in the protection of and restrictions on liberty. He further defines this restrictive function in very narrow terms: "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection" (Mill, 135). As the term "self-protection" would seem to indicate, Mill leaves room for justification only through the

“harm principle.” Only where a member of society is harming others may he be justly sanctioned either legally or socially. Beyond those boundaries, he may exercise perfect freedom to harm himself in any way he chooses<sup>8</sup>.

Mill is not so naïve as to believe that there will be no social retribution for those who act outside the bounds of “socially acceptable” behavior. Rather, he realizes that such ostracism will take place, and he argues that it is justified so long as it is done “spontaneously” and not for purposes of punishment. In fact, in a case where a man intentionally stands outside conventionality,

We may give others a preference over him in optional good offices, except those which tend to his improvement. In these various modes a person may suffer very severe penalties at the hand of others for faults which directly concern only himself...A person who shows rashness, obstinacy, self-conceit—who cannot restrain himself from hurtful indulgences—must expect to be lowered in the opinion of others (Mill, 208).

Going beyond this sort of “natural” criticism, however, to encroach upon the rights of an individual or to cause him loss in any way is morally reprehensible (Mill, 209).

### ***Just Punishment Based on “Harm”***

Though Mill does not concern himself at length with the proper role of government in punishment, he does attempt to delineate what he considers an acceptable “preventive form of government.” As in other instances, Mill believes that the issue of appropriate penalty requires devolution to the individual level (Mill, 228). Stated simply, he argues that the level of punishment should increase as the severity and regularity of harm increases, with no punishment being levied for harm committed against oneself. A “drunk”, for instance, should receive no punishment for the harm he is doing to himself by continuing to drink. If his

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<sup>8</sup> On this point, Mill excludes children and “those of unsound mind,” as they are technically the wards of society (or the state) and therefore under societal control (135).

consumption of alcohol does not affect anyone else, he is perfectly free to maintain his drunkenness. If he is to injure someone while intoxicated, however, he has transferred harm to an innocent party, and his act therefore warrants punishment, which may include a restriction on his drinking. Moreover, “if he were afterwards found drunk, he should be liable to penalty, and that if when in that state he committed another offence, the punishment to which he would be liable for that other offence should be increased in severity” (Mill, 230). Thus, for Mill, the differentiation between innocent drunkenness and harmful drunkenness is important.

### ***Five Circumstances of Injustice***

While *On Liberty* is certainly one of Mill’s most famous works and otherwise deserves an extensive recounting, no discussion of Mill’s views on justice would be complete without an examination of chapter five of *Utilitarianism*. Titled, “On the Connection between Justice and Utility,” the section begins by “throwing light” on the “distinguishing character of justice, or of injustice” (Mill, 297). In all, Mill describes what he believes to be the five most important circumstances of injustice, with the parallel distinctions representing just actions.

First, Mill argues that each man has a unique set of legal rights. Whether it be his property or his own personal liberty, every individual is endowed with certain possessions belonging to him by law. As such, it is unjust for any man to violate the legal rights of another man. Yet Mill’s second circumstance of injustice offers a reasonable exception to this rule. In some cases, he argues, laws will necessarily be unjust and will therefore restrict

the liberty of one or more individuals<sup>9</sup>. Since in these cases individuals cannot be said to have a legal right to certain possessions (with liberty or freedom of action being counted among possessions), it may still be said that their moral rights are being violated by an unjust law (Mill, 299).

In the third instance, he states quite simply that an individual should reasonably expect to receive a return in like proportion to his giving. That is, a person who “does right deserves good.” Thus, a return of evil in exchange for good is tantamount to an unjust exchange. Fourth, Mill posits that it is unjust for a person to “break faith” with another person, meaning that a man has treated his fellow man unjustly if he breaks a contract, an agreement, or “an engagement” knowingly. Finally, and perhaps most importantly<sup>10</sup>, Mill locates a major source of injustice in the practice of partiality. Those who administer punishment *and* rewards must be impartial in order for a just transaction to take place (Mill, 300). He succinctly defines this point stating, “Impartiality, in short, as an obligation of justice, may be said to mean, being exclusively influenced by the considerations which it is supposed ought to influence the particular case in hand; and resisting the solicitation of any motives which prompt to conduct different from what those considerations would dictate” (Mill, 301).

In concluding this examination of Mill, then, it is perhaps crucial to note that, though his is regarded as one of the greatest philosophical minds, Mill himself was never able to reach a definitive definition of justice. In fact, his description lies almost wholly in the sphere

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<sup>9</sup> Mill argues that the only criterion for considering a law unjust is if it fulfills the same requirements of trespassing against a law. That is, laws are unjust if rights or liberties are restricted.

<sup>10</sup> Though it is impossible to argue that Mill intended this point to be given more weight than the previous four, he gives much greater attention to this topic, discussing it for the better part of four pages, while giving only a maximum of two paragraphs to the previous conditions.

of the subjective, perhaps leaving us just where we began in determining what justice truly means. Mill writes, “Justice implies something which is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right” (305). Yet this examination has been illuminating on other fronts, with a clear evolution in the liberal conception taking shape in the writings of these three men. Having charted this change, discussion and analysis, including an examination of the liberal notion through the lens of three-strikes legislation, is now merited.

### ***Three-Strikes, Locke, and the “Safety of the Innocent”***

As the previous assessment has already revealed, any analysis of John Locke’s theory as it pertains to three-strikes legislation necessitates a two-pronged approach. Presenting it in two distinct settings allows Locke to define justice both as it *should be* and as it *must be*. That is, the justice of the state of nature is unadulterated by entitlement and edict; it is justice based solely on natural law and natural order. The justice of the social contract, on the other hand, is tainted by unequal distribution and the broad hand of the law—both imperfect in their measurement of justice, yet necessary for a functional society and legitimate government. To fully understand the picture of justice that Locke intends to paint, then, an exploration of each in its own setting is crucial.

The concept of justice in Locke’s state of nature appears both brutal and unforgiving. Property in one’s labor and in one’s life is not only seen as sacred, but as the sole end for man’s existence. Protection of that property, consequently, proves highly subject to the whims of man’s passions and his fears of physical and moral subjugation. Thievery, assault, encroachment, and most certainly murder are all seen as cowardly attempts by one man to rob another of his sole possessions in life and are therefore punishable by death. How else, other

than “lenient,” could a policy of increased punishment with escalated offenses be viewed in such a state? According to Locke, those who steal, kill, and cheat others out of their belongings and their very lives place themselves in a state of war with their victims. Whether they are violent offenders or petty thieves, left to their own devices in the state of nature, these criminals represent a significant threat to the continued survival of those around them. Harsh punishment is not only necessary, but is also just in the purest sense.

Focusing solely on retribution, punishment, and prevention, Locke’s state of nature leaves little room for rehabilitation. Rather, the protection of society<sup>11</sup> is preferred to the security of individuals who have already proven aggressive. As Forde writes, the *Second Treatise of Civil Government*,

shows eloquently and at length how the social good is most effectively advanced by self-interested action, in the acquisition of property, the defense of individual rights, and the like. In making this argument, the *Second Treatise* takes the perspective of society rather than the individual citizen almost exclusively (2001: 400).

Thus, from Locke’s perspective, a policy of giving an offender an additional chance (let alone three) to make good on his trespasses within the state of nature<sup>12</sup> is not only reckless, but also an injustice to the individual he victimized and to society. It would therefore not be unwise to conclude that, within the state of nature, Locke would indeed view a policy of “three-strikes-and-you’re-out” as unjust, but not due to its lack of focus on rehabilitation. Rather, a policy such as three-strikes prevents crime from being properly redressed and therefore invites chaos.

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<sup>11</sup> In these sense, the term “society” does not refer to the state of man in a post-social contract world. Rather, it refers to the collective state of humanity as it is organized before the rise of government. Thus, it does not refer to mankind as a cohesive, law-abiding unit.

<sup>12</sup> This point necessarily suffers from a flaw in logic since no such “policy” could ever be mandated in the absence of law. Rather, it would be up to the individual to decide how he should deal with his transgressor. It is, however, important to note that any such leniency would necessarily “bleed-over” into the rest of society.

Still, proponents of a theory which charges that class-based inequities exist in the use of three-strikes sentencing might argue that a central tenet of Locke's theory is being violated in today's society, and as such, society has placed itself in a state of war with the exact same individuals it seeks to punish. The "enough and as good left for others" clause of Locke's doctrine holds that individuals should not excessively appropriate goods such that there is not "enough and as good left for others" to acquire (Locke, 32). For those who believe that three-strikes targets poor, male minorities, it seems only logical to conclude that society, with its narrow focus on private goods, conspicuous consumption, and unlimited accumulation has placed itself at odds with thieves and violent criminals who act out in both desperation and frustration.

In some sense, this argument seems plausible when one considers that a majority of the prisoners sentenced under the law are of low socioeconomic status and can scarcely afford private legal representation (Kovandzic, et al, 2004: 238). Yet this analysis suffers from several fatal flaws. The first, of course, is that the over-accumulation of property by collective individuals (society) can in no way be construed to be the sole responsibility of one individual, whether or not he or she is viewed as representing the whole. Thus, the robbery of a convenience store is in no way a legitimate redress of the "enough and as good" grievance, as neither the cashier nor the owner (not to mention any bystanders) have placed themselves in a state of war with the perpetrator. Second, Locke himself might be critical as to the reasons why such individuals are not in possession of "enough or as good." Is over-accumulation truly the problem, or as Locke might suspect, can the criminal's lack of property be attributed to a deficiency in "industriousness" and "rationality" (Locke, 32)? Finally, and perhaps most importantly, it is vital that the true intention of Locke's words be

examined. Did he intend this clause as an unending restriction on accumulation, or did he believe that such a condition would eventually fade away? According to philosopher Jeremy Waldron, the latter seems more plausible. He postulates,

The ‘enough and as good’ clause is not intended by Locke as a restriction on acquisition and so does not have to be removed in the course of Locke’s justification of contemporary inequality. Locke argues, in the first part of chapter 5, that “in the first Ages of the World” the natural limitations on property ensured that there was, after every appropriation, enough and as good left for others to appropriate. But, he argues, once men found legitimate ways of getting around these limitations, the situation changed drastically and there was no longer enough and as good left for others. Since that consequence flowed naturally, however, from acts of men that were not in themselves (after the invention of money) violations of natural law, it simply has to be accepted. It is not the removal of a restriction or the overthrow of a necessary condition—it is just the way things (now) are (1979: 324).

Following this line of reasoning, then, there need not be “enough and as good” left in society for the authority of law to hold weight. While this had previously been a condition of the state of nature, it naturally evolved and vanished without perverting the tenets of natural law. Any claim of just cause based on this principle is therefore seen as illegitimate.

While it is not clear whether Locke foresaw the impossibility of sustaining the “enough and as good” principle even within the state of nature, it is clear that he believed that the state of war was no longer justifiable once men entered into the social contract. This compact among men gave both rise and authority to government and was predicated on the necessary condition that men would no longer have the power to remedy their own personal grievances. Those who have broken the social contract are to be dealt with through the legal mechanisms of government, an institution charged solely with promoting the good of society as a whole. As criminologist Bill Lawson argues, “In general, executive prerogatives can be justified by their tendency to promote a benefit or prevent a harm that would not have been

promoted or prevented had the power of government been limited to the strict letter of the law” (1990: 17). Thus, Locke fully realized that ensuring the good of the whole might entail the restriction of individual liberties in some cases, yet such actions were justifiable if necessary to satisfying the end of government. Moreover, Locke emphatically stated that “when all cannot be preserved, the safety of the innocent is to be preferred” (28). Consequently, it seems that such a philosophy would rule Locke’s view of three-strikes legislation. If the good of the whole of society is being preserved and the safety of the innocent protected, there is no reason to believe that such a law is unsound or unjust.

### ***Three-Strikes in the Utilitarian Framework***

While it is not difficult to estimate Locke’s probable view on three-strikes legislation, Jeremy Bentham’s take on the law would likely prove much more complex. Though at its heart Bentham’s theory emphasizes the importance of maximizing utility, it also contains subtle nuances which might call into question the legitimacy of the three-strikes formulation. Thus, while one could conceivably argue that three strikes should be examined with a view toward community happiness, it is also important to explore whether or not the law falls in line with Bentham’s views on punishment.

When analyzed at its most basic level, Bentham’s theory does indeed have much to do with the maximization of community happiness. In fact, he expressly states that man is happiest when the sum of the interests of the whole of man is optimized. Moreover, he argues that what is both right and just in law depends upon what will bring happiness to the greatest number of individuals. As Rodman writes, “Ultimately, in Bentham’s view, benevolence directed toward the community at large is produced or strengthened mainly by a government which acts in a wise, efficient, benevolent fashion” (1968: 203). Thus, from the

standpoint of utility, three-strikes legislation is just insofar as it tends toward the protection and happiness of the greatest number of individuals. While it may involve a certain level of dissatisfaction and even pain on the part of those subjected to punishment under the law, if the preponderance of individuals find it necessary to their protection, then it is not unjust.

Still, Bentham was not content to allow the boundaries of legal punishment to go unchecked. In fact, as shown above, he devotes a vast amount of attention to defining the proper realm and reach of punishment. Taking this fact into consideration, it seems prudent to conclude that Bentham would be wary of a blanket rule like the one required in three-strikes legislation. Since he advocated punishments that duly considered the act itself, its circumstances, and its intentions, Bentham might be troubled with three-strikes' tendency to deal with varying degrees of crime with an identical level of punishment. On this point Rodman argues, "For Bentham, the criminal act creates an unjust situation which has to be rectified by the imposition of a punishment roughly equivalent to the pain or suffering caused by the offense" (1968: 197). Thus, without consideration of motive or intent in third-strike sentencing, the two most important factors in deciding punishment, it is difficult to argue that Bentham would be entirely comfortable with such a measure.

Classes of offenses are also important to Bentham's explanation of the need for varying degrees of punishment. Crimes against individuals, against society, against oneself, or against one's neighborhood, therefore, naturally require different levels of punishment, as different levels of dissatisfaction are imposed on transgressors in each case. Philosopher Michael Clarke thus argues that "the moral gradation of punishment" was important for Bentham because it was the only mechanism of ensuring that "a sentence accomplishes the aim of punishment" (1971: 134). The "aim of punishment" under three-strikes laws may

also be called into question, as punishment that is seen to be ineffectual in preventing future crime is considered unjust and unnecessary. Thus, if experts are correct in assuming that three-strikes legislation has produced no deterrent effect, its existence as a form of punishment is not easily justified (Kovandzic, et Al, 2004: 234-235).

It seems, then, that Bentham's view of three-strikes legislation is simply not reducible to a line in the sand. Rather, judging the law from the standpoint of his theories on both utility and punishment requires in-depth analysis of the ways in which he defined each. In the end, it seems fair to say that Bentham would not completely dismiss the law as an unjust travesty, but would also not embrace such a policy due to its inability to accomplish the aims of punishment.

In the words of economist Jacob Viner, "That Bentham frequently fell into language which pictured human behavior as if it consisted almost solely of action based on calculations of personal gain and that his imagination was deficient with respect to the possible range of human emotions is beyond dispute" (1949: 374). For his part, John Stuart Mill attempts to avoid such a mistake. Realizing that individuals do not always act, as Bentham believed, for the sole purpose of experiencing pleasure, Mill is willing to recognize a more flawed version of human behavior.

### ***Three-Strikes and the Priority of Liberty***

For Mill, punishment is only justifiable insofar as it tends toward the improvement of the offending individual. As he argues, "Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by the end" (Mill, 136). Following this line of thought, it seems that the punishment involved in third-strike sentencing cannot be thought to accomplish the goal of improving the individual.

Rather, the goal is the protection of society and restraint of the offender. This, of course, is not to say that all individuals are conducive to improvement. It is nearly inevitable that some portion of the criminal population, particularly that segment which tends toward violence, will not be open to alterations in behavior. In cases involving theft or drug use, however, where individuals would seemingly be of little threat to society were they to undergo such an improvement, using Mill's explanation, it would not be justifiable to level any sort of punishment that did not seek to accomplish this end.

As previously discussed, Mill's main concern in defining a "tyranny of the majority" is not the possible corruption arising from political or legal authority. Instead, Mill believes that social sanctions are far more common and of more importance. He argues in *On Liberty*,

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant—society collectively over the separate individuals who compose it—its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries (Mill 130).

Mill's point in this regard is well taken. Social pressure can be one of the greatest forces of injustice, tacitly punishing those who do not succumb to the social will. Yet, as this statement implies, Mill recognized that, in some cases, the social aspect of the "tyranny of the majority" can become entangled with the political aspect. What is then the outcome of such an instance? Could fear of crime and hatred toward repeat offenders in society, "bleed-over" into our legal system and produce policies like three-strikes? The answer to such a question is certainly not within the scope of this study, though the import of asking such questions remains. That is to say, if three-strikes has, in any way, accomplished this sort of legal restriction of socially feared minorities, Mill would doubtlessly consider such a law unjust

and unacceptable. Philosopher Daniel Jacobson agrees writing, “Were enough people attracted to a deadly form of pleasure, society would be imperiled and could claim self-protection as justification for admittedly unjust legislation. But this would be anathema to Mill” (2000: 288).

Some still might argue that Mill would approve of the law in some instances based on his belief that different circumstances produced crimes with varying degrees of severity. On this point, there is much to be debated. In essence, however, such an argument does bear considerable weight. Mill’s aforementioned example of drunkenness, for instance, clearly indicates a willingness on his part to increase the severity of punishment for repeat offenders. When paralleling this vignette with three-strikes cases, however, two clarifications are necessary. First, Mill in no way advocates punishment for the sole purpose of punishment in his example of the drunkard. Thus, one might infer that in this instance as in others, Mill intends that the increased sentence of the drunken offender will still tend toward his improvement rather than simple restraint. Second, it is important to note that if Mill were to find some merit in using three-strikes, he would likely be unhappy with the inclusion of individuals such as drug users who may not have violated anyone’s rights according to the harm principle. Consequently, if an argument could be made for Mill’s acceptance of such a policy, it would be necessary to note that Mill would advocate that the types and degrees of severity of crimes be taken into account such that those perceived “wrongs” that did not violate the harm principle could not be subject to legal interference.

While Bentham holds steadfastly to the utilitarian principles of pleasure and pain, Mill is not convinced that utility should triumph in all situations. He recognizes that what would bring the greatest amount of happiness to the most individuals might not always coincide with

what is just, and in such cases, he argues that justice should take precedence. Mill concludes, “It appears from what has been said, that justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation than any others” (320). Thus, as the previous indicates, Mill would not be willing to sacrifice personal liberty on the basis of utility. As Jacobson argues, “Yet, despite this renunciation of natural rights and his commitment to some form of utilitarianism, Mill frequently appeals to both legal and moral rights” (2000: 291). The three-strikes law, from Mill’s point of view, then, cannot be defended based on simple utility in cases where it proves detrimental to liberty.

At the close of this chapter, it is clear that the liberal notion of justice underwent an intense evolution in a relatively short period of time. Moving from a view of three-strikes as too lenient to a theory that would renounce three-strikes’ inability to promote progress, the liberal conception witnessed a complete transformation in just under one-hundred years time. While these classic writings are indeed important in understanding the path that liberalism has taken over time, it is also crucial that three-strikes be examined from the standpoint of modern liberal theory. Subsequently, the final chapter will examine John Rawls’ *A Theory of Justice*, in order to further explore the liberal notion of justice in its contemporary setting.

### Chapter Three: Justice in Rawlsian Perspective

John Rawls is perhaps the most famous liberal philosopher of the twentieth century, and his eminent work *A Theory of Justice* remains one of the mostly passionately debated theories of its time, more than thirty years after its initial publication. Rawls' theory is both profound and enlightening, with its optimistically cautious view of human nature representing yet another benchmark in liberalism's evolutionary scale. While Rawls' work does deal primarily with the liberal notion of justice, some readers may still be puzzled by its inclusion in a discussion of just punishment. Though *A Theory of Justice* focuses most heavily on social and economic liberty, it also proves well-suited to a discussion such as this one for a variety of reasons.

First, and most importantly, Rawls' conception of an "original position" lends itself to a variety of discussions concerning the just or unjust nature of laws and institutions. The full scope of this reasoning will be undertaken later. For now, however, it will suffice to say that the "original position" not only presents the perfect context for considering how economic and social life should be ordered, but also allows for a just conception of punishment. UCLA law professor Sharon Dolovich agrees as she argues,

Rawls' framework is promising for our purposes [discussing legitimate punishment in liberal democracy] precisely because it demands that we consider with some measure of dispassion even the interests of potential criminal offenders. That we might be inclined to resist applying this framework because it demands this limited measure of emotional detachment only goes to show how necessary it is to impose such dispassion, artificially if necessary, if we are to hope to end up with principles that all members of society may freely affirm as just and fair (2004: 317).

Thus, Rawls' theory is not merely "suitable" for such a discussion, but instead represents a vital component in any examination of liberalism and justice.

Yet there is a second reason for including Rawls in a discussion such as this one. At the end of Chapter Two, liberal theory had evolved to include a modified version of Benthamite utilitarianism. By Rawls' own admission, his work represents liberalism's final departure from the utilitarian conception, moving instead toward what can only be described as "welfare state liberalism." He argues, "My aim is to work out a theory of justice that represents an alternative to utilitarian thought generally and so to all of these different versions of it" (Rawls, 20). Moreover, in Rawls' view, not only does utility sometimes prove directly contradictory to justice, but any statement directly linking the two proves to be a non sequitur. He posits,

Laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others (Rawls, 3).

As such, it is easy to see how Rawls' conception brings this discussion of the liberal notion of just punishment full circle. In sharpest contrast to our starting place with Locke who believed that government need only protect the property rights of the innocent, Rawls argues that government is responsible for ensuring that all citizens are treated justly, no matter if they are innocent or guilty, good or evil. These factors, combined with the fact that *A Theory of Justice* was written in the context of contemporary society, shall serve to show why Rawls should have the final say on the just or unjust nature of three-strikes legislation.

### ***The Original Position***

As with the previous thinkers, establishing the Rawlsian view of three-strikes first necessitates an exploration of Rawls' theory, the cornerstone of which is his conception of an "original position." Resembling what has otherwise been described as the state of nature, the

original position is Rawls' recounting of the initial situation and serves much the same purpose as the state of nature in theories like Locke's. Additionally, much as Locke envisioned the social contract as arising from the state of nature, Rawls likewise conceives of a contract of sorts which he loosely refers to as the "first principles of justice," or more precisely, as "justice as fairness" (102). In general, the original position is just as its name implies—a place where man exists before government and law have been established, a place of perfect equality. Moreover, "The original position is defined in such a way that it is a status quo in which any agreements reached are fair. It is a state of affairs in which the parties are equally represented as moral persons and the outcome is not conditioned by arbitrary contingencies or the relative balance of social forces" (Rawls, 104).

Many of Rawls' assumptions about the conditions of the initial situation mirror those described by Locke in his *Second Treatise of Civil Government*. Actors, for example, are presumed to be self-interested, but they are also viewed as generally good-natured and lacking in malicious intent. Rationality is also assumed, as actors realize that it will be impossible to order the world to every individual's satisfaction. Thus, cooperation will be viewed as mutually beneficial and therefore necessary to self-preservation. Moreover, within the context of the original position, as in the state of nature, all actors are equal vis-à-vis other actors, making it impossible for one actor to have leverage over the others (Rawls, 117-118).

Yet, there is one aspect of Rawls' theory that stands in sharp contrast with classical descriptions of the state of nature generally and with Locke's description specifically. That is, while Locke focuses on justice from the point of view of individuals, with individual rights and property being taken into account, Rawls removes any possibility of taking such things into account. By placing the actors in the original position behind a "veil of ignorance,"

Rawls prevents them from formulating justice based on individual perception. Those occupying this station, consequently, have no knowledge of their particular social or economic class, their specific talents, skills, intelligence, or abilities, the type of society in which they will live, or even the generation to which they will belong. Rather, they may know only “the general facts about human society.” More precisely, “They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice” (Rawls, 119).

### ***Constraints of the Concept of Right***

Even after applying the veil of ignorance, Rawls finds that there are several “formal constraints of the concept of right” (Rawls 112). In other words, within the original position there are certain rules which the parties must agree to in choosing the first principles of a just society. His first contention is that all chosen principles must be general in nature. This is necessary because actors behind the veil of ignorance do not have the capacity to make specific formulations. Thus, even assuming a person could attempt to mold the principles to his own personal advantage, he would be unable to, as he does not know any specifics of his situation. Second, the principles chosen in the situation must be universally applicable or must “hold for everyone in virtue of their being moral persons” (Rawls 114). Third, the principles must be publicly acceptable and publicly known. Fourth, “a conception of right must impose an ordering on conflicting claims” (Rawls 115). That is, claims which are more just than others must be taken first. Last, the total set of principles is to be the “final court of appeal” in deciding standards. As such, neither society nor law is seen as an acceptable competitor (Rawls 116).

While Rawls' theory has often been criticized because of the utopian nature of its foundations<sup>1</sup>, Rawls himself recognizes that the original position is a wholly theoretical and therefore unattainable construct. As he acknowledges, "So while the conception of the original position is part of the theory of conduct, it does not follow at all that there are actual situations that resemble it. What is necessary is that the principles that would be accepted play the requisite part in our moral reasoning and conduct" (Rawls, 104).

### ***Basic Principles of Justice***

Since the original position actually represents a vehicle for choosing just principles, it is important to understand which principles Rawls believes we would select in such a state. In general, he believes that, given all other alternatives, there are two basic principles of justice that would prevail in the context of the original position. In Rawls' description,

First, each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (53).

The delineation of these principles into two separate realms proves rather important to Rawls' theory as a whole. The first principle deals with the "priority of liberty," or what he considers to be the primacy of political liberty, liberty of conscience, and "freedom of the person." In the second instance, Rawls is concerned mainly with what he calls "distributive justice" or justice in the distribution of wealth and income. It is from this second principle that the preponderance of *A Theory of Justice* flows, but this is mostly due to the fact that the second principle informs many of the outcomes of the first principle. That is, much of how we come

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<sup>1</sup> "State of nature" theories, oddly enough, do not often suffer the same criticism, though the basic foundations of such constructs are also entirely theoretical. In my view, Rawls' theory has been subject to such scrutiny partially because of its restriction on knowledge, but also due to its focus on the just ordering of society before the just ordering of individuals—concepts which are reversely ordered in most classical liberal theory.

to define political liberty has to do with how we view economic arrangements. Moreover, the second principle also proves important because of principles that arise subsequent to its acceptance.

To understand the exchange between the second principle and succeeding principles, it is first crucial to become familiar with Rawls' conception of natural conditions. Specifically, he argues that no condition of moral desert exists within society. People do not come to have more than others because of an overarching hierarchy that logically favors those with better parentage, skill, or virtue. Instead, "The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts" (Rawls, 87). Such conditions do become unjust, however, when they are left unchecked by social and political institutions, such that those who are the worst situated remain so even as the better situated make gains in wealth or status. Consequently, Rawls calls for a "principle of redress" to correct these conditions. He writes,

This is the principle that underserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for. Thus the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions (Rawls, 86).

Overall, however, this principle of redress satisfies the conditions of a much larger conception arising from the second rule. Referred to as the "difference principle," this rule holds that inequalities are acceptable insofar as they benefit the least advantaged or when attempting to correct for such a disparity would cause an even greater inequality (Rawls, 72). Thus, it becomes clear that, in Rawls' view, a well-ordered society is one that would not only *allow* for the advancement of all classes of people, but would *require* such a condition, even

where creating such a situation would cause some amount of inequality in the upper classes. Such inequality is not seen as unjust, however. On the contrary, inequalities favoring the least advantaged are seen as leveling mechanisms correcting natural inequalities that are neither inherently just nor unjust (Rawls, 73).

Still, some may look upon such an arrangement with skepticism, charging that Rawls' conception requires an unattainable level of societal altruism. However, Rawls argues that this is not the case. Rather, actors in the original position need not be altruistic to recognize that, not yet knowing their own station in life, they will be best served by creating a society in which everyone will be equally likely to thrive and succeed. To this end, Rawls assumes that the actors in the original position would be presented with a list of alternative principles of justice. Among them are the earlier incarnations of the liberal conception of justice discussed in the previous chapter. Choosing among alternatives that include the "general conception," or the notion that everyone is permitted to advance their own interests as they so please, and the various concepts of utility, Rawls argues that rational, self-interested individuals would always select the two basic principles delineated above, as they can be most reasonably expected to be to the benefit of everyone, considering that no one knows who he or she will be (107).

### ***The Four Stage Sequence***

While the original position remains the most crucial step in ensuring the selection of just principles, it is important to understand that it is but one stage in the execution of a complete system of just arrangements. Hence, once the principles of justice have been discerned within the original position by actors cloaked in a veil of ignorance, Rawls

imagines that individuals begin moving through a four stage sequence in which the veil becomes progressively less restrictive.

At the start of the first stage in the sequence, actors become somewhat aware of how their particular society is ordered, but they remain ignorant to their own personal stations in life. This condition is important because the actors are moving from the initial situation into a constitutional convention and thus are able to make informed decisions about a specific society without personal agendas tainting the process. During this time, the actors “are to decide upon the justice of political forms and choose a constitution; they are delegates, so to speak, to such a convention. Subject to the constraints of the principles of justice already chosen, they are to design a system for the constitutional powers of government and the basic rights of citizens” (Rawls, 172). Then, after having chosen the most appropriate constitution, the delegates enter the second stage in the sequence, becoming legislators who introduce bills and pass laws based upon the just principles developed in the original position. Here, Rawls is careful to note that the actors may need to “move back and forth between the stages of the constitutional convention and the legislature” in order to provide for the most just set of conditions (173-174).

Having made attempts to frame the most just situation possible, the actors enter stage three of the sequence. “A division of labor between stages” is created such that the parties will be able to evaluate the political and procedural processes as a whole to ensure that they are just. At the completion of this stage, full knowledge becomes available to all participants. Finally, the fourth stage entails “the application of rules to particular cases by judges and administrators, and the following of rules by citizens generally” (Rawls, 175).

### *Institutions and the Rule of Law*

While participating in the four stage sequence, actors concern themselves with how to best order justice among both individuals and institutions. Even so, Rawls makes clear that the principles of justice applied to institutions are entirely separate from those which govern individuals. As Rawls asserts,

By an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur (47-48).

Furthermore, “A person taking part in an institution knows what the rules demand of him and of the others. He also knows that the others know this and that they know that he knows this, and so on” (Rawls, 48). Thus, while Rawls describes justice among individuals as “substantive justice,” he refers to the institutional form as “formal justice” (Rawls, 51). The formal justice of institutions makes up what Rawls calls “the rule of law” and subsequently governs the realm of just and unjust action.

Because Rawls is mostly concerned with social equality and societal justice, he remains mostly silent on the subject of the rule of law. He does, however, choose to explicate two important points. First, Rawls argues for a condition that he terms “justice as regularity,” which holds that similar cases of transgression against society should be treated with similar punishment in all cases. Moreover, “One kind of unjust action is the failure of judges and others in authority to apply the appropriate rule or to interpret it correctly” (Rawls, 206-207). The phrase “apply the appropriate rule” seems to imply that, much like Bentham, Rawls believes that punishment should be decided based on individual circumstances. Also, the condition that similar cases should be punished similarly necessarily negates the idea of a

blanket rule for punishment. For example, then, it would be unjust for a petty thief to receive the same punishment as a person convicted of grand larceny. Similarly, a person convicted of grand larceny should not be incarcerated for the same length of time as a serial killer.

Second, Rawls admits that, even in a well-ordered, just society, there will still be some persons who refuse to abide by the laws, no matter how just. Therefore,

while a coercive mechanism is necessary, it is obviously essential to define precisely the tendency of its operations. Knowing what things it penalizes and knowing that these are within their power to do or not to do, citizens can draw upon their plans accordingly. One who complies with the announced rules need never fear an infringement of his liberty (Rawls, 212).

Hence, institutions must meet these criteria in order to be considered just. Yet, as will be discussed at length in the next section, these conditions require that citizens know the law and have a reasonable expectation of what their punishment might be for committing a certain offense. Thus, for now it will suffice to say that such conditions are not always easily met.

### ***Three-Strikes and the Rawlsian Conception***

Though analyzing twentieth century legislation from the varied perspectives of classical authors like Locke, Bentham, and Mill presents its own set of unique challenges, in some respects, considering three-strikes through the Rawlsian lens proves an even greater task. Rawls doubtlessly went to great lengths to narrow the two basic principles that he believed would be adopted in the original position; yet much of his theory remains abstract and open to interpretation. Even so, when one leaves aside what Rawls neglects to tell the reader, it seems not only plausible, but also sensible to focus on the principles he did delineate. Those principles have helped drive liberalism's evolution forward from its birthplace in narrow individualism to its focus on balancing utility and liberty to its most recent concentration on social, economic, and political equality. Philosopher David Lyons

writes of this definitive shift away from utilitarian conceptions, “Rawls maintains that liberty may not be restricted save to secure maximum liberty under concrete circumstances. And he stresses that limitations on liberty and inequalities of freedom cannot be justified on the ground that they promote the general interest” (1972: 536). Consequently, *A Theory of Justice* proves to be a more than capable guide when it comes to discerning liberalism’s modern view of the just or unjust nature of three-strikes.

### ***Violation of the Assumption of Knowledge and Justice as Regularity***

Perhaps one of the most potent arguments against three-strikes legislation is also one that might be easily overlooked. Throughout the course of his work, Rawls continually reiterates the idea that, in a perfectly ordered and just society, all citizens would know the law. Interestingly, most proponents of three-strikes also claim that public knowledge of the law produces a deterrent effect. These facts beg the question: To what extent is this aspect of the Rawlsian conception of justice being fulfilled?

As shown in Table 1 (see Chapter One), twenty-five separate states have enacted three-strikes legislation, with each of those states adopting its own unique statute. Even educated legal minds might find memorizing the subtle nuances of these state laws a dizzying task, especially when one considers the marked variation in factors like felony eligibility (violent versus non-violent), the nature of the triggering conviction, the mandatory sentence, and parole options. For example, a person convicted of three felony drug possession offenses in Connecticut would receive a mandatory life sentence without the possibility of parole. In Colorado, however, the same person could commit the same three offenses, but would not be eligible for sentencing under the law. Moreover, this same offender could receive parole for violent crimes in Colorado, but would not be granted the same leniency in Connecticut on

less severe possession charges. Further complicating this issue are “wobbler” cases that blur the line between felony and misdemeanor charges. In this instance, it would be necessary for the thief to know the monetary limits of what he could steal and would require the drug user or dealer to know what quantity of a substance he or she could possess without being charged with a felony.

Thus, it seems less than reasonable to assume that average citizens would have the specialized knowledge necessary to make the law just according to the Rawlsian model. This is not, of course, to say that an offender’s ability to distinguish a right action from a wrong one is tied up in his or her knowledge of the mechanics of the legal system. Rather, the injustice of these laws lies not in the attempt to punish, but in the overly complicated, non-uniform way in which punishment is administered. As such, at the very least, the law violates the “justice as regularity” condition of Rawls’ theory.

### ***Violation of the Second Principle***

Rawls gives more attention to his second principle of justice (of which the difference principle<sup>2</sup> is a part) than any other aspect of his work. Continually advocating a system that would ensure that the least advantaged would not have to suffer the ill-effects of an unequal society, Rawls insists that such a condition is essential to a just society. Though some readers might be tempted to compare this principle to Locke’s “enough and as good left for others” requirement (which becomes unnecessary outside of the state of nature), the two concepts differ in one very important way. Specifically, Locke’s argument holds that all men would be perfectly equal in possessions within the state of nature so long as each man labors equally as hard as his neighbor. Rawls does not make such an assumption. Rather, he realizes that

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<sup>2</sup> As previously stated, the difference principle requires that social and economic arrangements benefit everyone, or in such cases where inequalities do exist, they do so only to the benefit of the least advantaged.

inequalities are inherent to human society and are therefore neither just nor unjust. However, while these inequalities are not unjust in and of themselves, they become unjust once society allows them to continue unchecked. Accordingly, a just society recognizes these inequities and ensures that inequality only exists insofar as it benefits those who are least well situated.

What, then, does this mean for the least advantaged of American society? Since the preponderance of prisoners sentenced under the three-strikes rule are members of the most economically disadvantaged group in the United States (minorities<sup>3</sup>), it would seem to suggest that an injustice created in the violation of the difference principle is being matched with increased punishment for an already disadvantaged group—a second violation of this principle. As Sharon Dolovich explains, “Punishment imposed where it would have no (or no further) deterrent effect would place the offender in a worse-off position than she would otherwise occupy all other things being equal. It would thus be merely gratuitous, serving no legitimate purpose” (2004: 401). Since studies seem to suggest that three-strikes laws are not producing the desired deterrent effect<sup>4</sup>, they cannot be considered just as they often place the least advantaged in a worse position. Accordingly, punishment for the purpose of retribution, according to Rawls, serves no just purpose and would be disallowed in a truly just society.

### ***Three-Strikes and the Original Position***

Though it seems reasonable to assume that Rawls would strongly disagree with three-strikes sentencing based on the legislation’s multiple violations of basic principles, the most

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<sup>3</sup> According to the 2000 U.S. Census, the median household income for blacks and Hispanics was \$8000 and \$10,000 less than for whites, respectively. Moreover, the same statistics show that only 4% of whites live in poverty compared with over 8% of blacks and Hispanics. (This data, along with charts comparing the 1990 and 2000 Census reports are available at: <http://www.census.gov/population/www/cen2000/tablist.html>)

<sup>4</sup> Refer to Chapter One.

important question has yet to be asked. Would the persons occupying the original position, having been cloaked in a veil of ignorance, choose a system of increased penalty for multiple offenders? Would the delegates to a constitutional convention or the members of the most just of legislatures choose to enact a law like three-strikes? If we are to believe Rawls and assume that the parties placed in the original position would adopt his two basic principles, the answer to both of these questions can be none other than a resounding “no.”

On this point, there are several factors which must be considered. First, some readers may object that, in the original position, parties are to assume total compliance with the laws of a well-ordered society, and as such, a just system of punishment would not be discussed in the original position as it would appear to be unnecessary. Yet this criticism seems of less import when one considers Rawls’ explanation of knowledge in the original position. He tells us that the parties have knowledge of the workings of human society and of the concept of justice itself. This being the case, it seems not only reasonable, but also most logical to assume that, if the parties possess the ability to conceptualize justice, they must also possess knowledge of what constitutes injustice. As a result, would they not be forced to develop some fair mechanism for punishing unjust actions? Dolovich agrees and argues that those persons placed in the original position would, in considering the ordering of human society, have to recognize a condition of partial compliance, as total compliance eliminates the need for just action. Recognizing this as an unchanging condition, the actors would make a fair assessment of punishment based on the two basic principles already adopted (Dolovich, 2004: 400).

A second objection might be raised with regard to violations of the social contract. From this viewpoint, it may be charged that any violation of the social contract in the most

just situation possible negates a person's right to just treatment. Should not criminals who have broken the social contract be punished to the fullest extent? Have they not been given sufficient opportunity to become law-abiding citizens? The point of this argument is well-taken, but seemingly overstated.

First, Rawls saw "punishment as an extension of liberty springing from the first principle," meaning that a system of legal sanctions would need to be in place in the most perfect of societies as a means of keeping order from breaking down. Still, these legal sanctions, if ever used, need not be so severe as to infringe upon the liberties still afforded the accused by the remainder of the first principle (Brubaker, 1988: 829). That is, the first principle would seemingly afford a criminal the right to "basic liberties compatible with a similar scheme of liberties for others" who have also committed crimes. In short, this means that prisoners are entitled to fair, non-retributive punishment that is administered in proportion to the offense. Severe penalties cannot justly be imposed for the simple purpose of reprisal.

Second, it is important to remember that the actors in the original position make decisions based on self-interest. Thus, knowing what they know of human society and of justice, but having no understanding of who they may become individually, it seems likely that they would want to develop the most fair system of punishment possible, as they may become criminals themselves. It follows, then, that the rational, self-interested actor would not want a blanket rule like three-strikes to govern punishment.

Within the context of the original position, in absence of personal, moral, and social biases, moreover, the actors are afforded the unique opportunity to truly discern how individual crimes should be punished. Considering that these actors would still be bound by

the first and second principles, it seems unlikely that they would adopt a system which disproportionately punishes the least advantaged and make no effort to “punish similar cases similarly.”

## Conclusion

In concluding this examination of three-strikes and the liberal conception of justice, we should evaluate what has been brought to light throughout the course of the discussion. To begin, let us consider the issue of three-strikes from a factual standpoint. Though much of what makes the legislation a controversial issue remains open for debate, a few generalizations can be made. First, it has been shown that young, male minorities are far more likely to be sentenced under the rule than their white counterparts. Second, the content of the law varies significantly from state to state, making comprehension of each version's specific guidelines a nearly impossible task for the average citizen. Third, while many have understandably charged that the law is a vehicle for the promotion of underlying prejudices, in truth, we may never know the true intentions of the legislation in the states in which it is passed. What is clear, however, is that the evidence overwhelmingly suggests that three-strikes has not proven itself to be an effective crime deterrent.

Using three-strikes as a lens for observation, a distinct evolution in the liberal notion of justice has been charted. In the case of John Locke, the issue was examined from two very different perspectives. First, it was shown that, in the context of Locke's state of nature, the idea of "three-strikes-and-you're-out" proves exceedingly lenient and would therefore not be acceptable according to Locke's formulation. Once men leave the state of nature and enter into the social contract, however, it becomes necessary to re-examine the issue in a second setting. On this point, it has been shown that Locke would not object to the restriction of the rights of criminals, so long as the "safety of the innocent" is preserved. Furthermore, if the law is meeting the end of government—the protection of property—then there is no reason to

consider it unjust. In Locke's own words, "The great end of men's entering into society" is "the enjoyment of their properties in peace and safety" (Locke, 55).

Jeremy Bentham's conception of just punishment is more complicated. While it was found that Bentham advocates the maximization of community happiness, it was also shown that he has an interest in defining punishment in very specific terms. Among those definitions is one that regards "punishment for the sake of punishment" as useless. He writes,

The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil (Bentham, 120).

Moreover, Bentham is not satisfied with a blanket rule governing punishment. Rather, punishment must be considered based on the motive (the intended effects of the action) and disposition (the sum of intentions) of the individual. Closely coinciding with these factors are the classes of crimes arising from illegal actions, which Bentham ranks according to the level of malice present in the person's motive and disposition.

In sum, then, Bentham believes that punishment should accomplish the goal of preventing future criminal action, and as such, if a given sanction does not produce a deterrent effect, it cannot be considered just. Consequently, it has been shown that Bentham would not disapprove of the law insofar as it promotes the general happiness of society, but he would also not advocate such an action given that it does not consider crimes in their specific settings and produces no ascertainable deterrent effect.

Our examination of John Stuart Mill helped move the discussion beyond utility to the realm of the protection of liberty. Though Mill certainly believed in maximizing community

happiness, he was not willing to do so at the expense of personal liberty. Punishment, he argues, should not be a restraint mechanism, but should instead tend toward the improvement of the offending individual. Interestingly, Mill overtly discusses what may and may not qualify as an offense and concludes that the government has no standing to punish an individual for acts which cause no harm to outside parties. Mill explains, "People must be allowed in whatever concerns only themselves, to act as seems best to themselves" (231). Furthermore, if three-strikes is accomplishing a tacit restriction of socially feared minorities, then the law can be seen as none other than a legally sanctioned tyranny of the majority. For justice to truly be served, Mill argues that a tyranny of the majority should not be allowed to fester in the social arena:

Protection against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them (130).

John Rawls advocates a complete rejection of utilitarian conceptions of justice. Instead, he argues that the concept of justice cannot be fairly explored within the confines of our own unique selves. Consequently, we must debate the tenets of justice in the context of the original position behind a veil of ignorance in order to ensure complete objectivity. Using this framework, a few important findings were realized. First, the "assumption of knowledge" aspect of Rawls' theory, which holds that all members of society know the laws and have a reasonable expectation of their punishment for breaking those laws, is not being met with respect to current three-strikes sentencing. Second, the variation in the law from state to state represents a blatant violation of the "justice as regularity" principle, as similar cases are not being tried or sentenced similarly under three-strikes. Third, the possibility that

three-strikes violates the conditions of the second principle by placing an already disadvantaged minority in a more dire position has been explored and seems plausible given the proportion of minorities sentenced under the rule. The combination of these factors, finally, led to the conclusion that a law such as three-strikes would not be adopted in the original position, as it is illogical from the standpoint of self-interest.

Clearly, then, the preceding discussion merits two important conclusions. First, the answer to the question, “Is three-strikes just according to the liberal notion?” varies greatly based on which version of liberalism you choose to explore. While early liberal theorists might have considered the law just, it is clear that liberalism’s current formulation advocates an unequivocal rejection of such legislation. Second, throughout the course of this examination, it has become exceedingly clear that the concept of just punishment has evolved in concert with the idea of liberty. As such, the more a theorist focuses on personal liberty, the less willing he becomes to accept the idea of harsh punishment. On this point, more discussion is needed.

The pattern of change in the liberal notion of justice has proceeded along a remarkably linear path toward the point at which we have currently arrived. Yet, it is not only the concept of justice that has changed, but also the concept of liberty. Beginning with Locke, liberty was defined as the right of men to freely order their own actions so long as they did not interfere with the life, liberty, or property of others. By the time of Bentham’s writings, however, liberty was defined in terms of utility or community happiness. Thus, the liberty of man came to include the rational maximization of pleasure. Bentham’s protégé, John Stuart Mill, sought to reverse this trend and not only argued for the priority of liberty over utility, but also expanded the definition of liberty to include social responsibility.

Rawls, finally, brought the evolution full circle by denying the importance of utility and instead advocating a concept of justice which views liberty as inherently necessary to justice. Furthermore, whereas Locke argued for the protection of liberty through limited government, Rawls argues that expanded governmental and social responsibility is the only viable safeguard to personal liberty.

Though this discussion has surely not determined the meaning of “justice” in the largest sense (if indeed that task can be accomplished), it has managed to define both what justice is and is not in the context of a changing liberal conception. Moreover, it has shone a spotlight on the possibility that the laws governing mankind may never fully intersect with the principles governing justice. On this point, it is perhaps best to reflect on the immortal words of John Stuart Mill. He writes, “Among the diversities of opinion, it seems to be universally admitted that there may be unjust laws, and that law, consequently, is not the ultimate criterion of justice, but may give to one person a benefit or impose on another an evil, which justice condemns” (Mill, 299). It seems that he could not have been more correct.

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