PUNISHMENT IN THE STATE OF NATURE: JOHN LOCKE AND CRIMINAL PUNISHMENT IN THE UNITED STATES OF AMERICA

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INTRODUCTION

The criminal justice system in the United States of America has been widely criticized for having the highest rate of incarceration in the world. Compounding this problem is a high rate of recidivism across both state and federal jurisdictions. There is, then, a fundamental flaw in the nature of criminal punishment in the United States; namely that the criminal justice system lacks an adequate mechanism for discouraging future criminal activity. This is unacceptable for the bastion of modern democracy. American policymakers must begin to think critically about the nature and purpose of punishment in order to realize a more efficient criminal justice system.

One possible starting point for a substantive discussion regarding the nature and purpose of punishment is the political philosophy of John Locke. In his seminal work, *Two Treatises of Government*, Locke outlined a detailed state of human interaction prior to the invention of formal government. Within his theory of the "state of nature," Locke contemplated the manner in which individuals, completely lacking sociopolitical constructs, might punish malfeasors. By deconstructing the ingrained system of punishment, Locke was able to sketch a system based on individual freedom and equality.

This Note will proceed in three parts. In Part I, this Article will present the theory of punishment outlined in John Locke's major work on political philosophy, *Two Treatises of Government*. Part I will focus on the theoretical justification for punishment among perfectly free and equal individuals. Part II, will analyze the shortcomings of the criminal justice system in the United States. Special attention will be paid to the current percentage of inmates convicted of victimless crimes. Finally, Part III of this Note will apply the Lockean theory of punishment enumerated in Part I to the problems facing the American criminal justice system outlined in

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Part II. This part of the Note will propose substantive—though not exhaustive—changes that could help reverse the high rate of incarceration in the United States and the social problems stemming therefrom.

I. JOHN LOCKE AND PUNISHMENT IN THE STATE OF NATURE

The political philosophy of John Locke provides a legitimate starting place for substantive discussion of criminal punishment in the United States. Legislators would be justified in looking to Locke because of the significant tie between his political philosophy and the American revolutionaries' conception of the relationship between the individual and government.[1] Importantly, this influence was not limited to a single political group.[2] This shows not only that Enlightenment political philosophy had reached the thirteen North American colonies, but also that such ideas were widely disseminated and accepted.[3] Among Enlightenment philosophers, John Locke was particularly instrumental in forming the animus of American political theory.[4]

A. Locke and the English Civil War

The upheaval following the English Civil War was a formative experience in the life and philosophy of John Locke.[5] England, during the period immediately preceding the outbreak of war, experienced a pronounced shift toward a continental-style royal absolutism.[6] "Such

1. "Lockean theory was actually understood in considerable detail, at least by certain important revolutionary figures." Joshua Foa Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. POL. 985, 986 (1996).

2. Their political differences notwithstanding, "Jefferson and Adams both regularly used [Lockean theories] in their political papers from early in their careers." *Id.* at 993.

3. "A survey of American resistance pamphlets reveals that Lockean themes were very common and that for a number of reasons writers were able to see Lockean arguments as complementary to [other arguments in favor of independence]." Alex Tuckness, *Discourses of Resistance in the American Revolution*, 64 J. HIST. IDEAS 547 (2003). Further, "[e]ven as a lawyer in colonial Virginia, Jefferson appealed to such positions, assuming, no doubt, that they were the prevailing views of the day." Dienstag, *supra* note 1, at 993.

4. "Many go so far as to suggest his influence upon the American Founding Fathers was so great that the United States may be termed a Lockean nation." GEORGE MACE, LOCKE, HOBBES, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE 9 (1979).

5. "Born in 1632, ten years before the Civil War broke out, a young man during the Commonwealth, exiled in Holland during the reign of the restored King Charles II—returning to England with William III—John Locke lived through a turbulent period of history." M.V.C. Jeffreys, *John Locke*, 4 BRIT. MED. J. 34 (1974).

6. "The Anglican canons of 1640, summarizing the trend toward royal absolutism in Stuart England, declared that monarchical power was 'the ordinance of God himself, founded in the prime

claims of irresistible authority provoked anxiety in a public already alarmed by the erosion of safeguards against arbitrary government and the inroads of a power not only despotic but plausibly demonic in character . . . ."[7] England dissolved into civil war in the 1640s, then, to protect constitutional rights against royal aggression.[8] However, this concern for rights was not limited to individual liberties, but also related to a societal need to reinforce the relationship between a limited monarchy and free men.[9]

As an internal conflict of an ideological and religious nature, the English Civil War brought widespread violence.[10] During this conflict, the "borderline between the legitimate and illegitimate was often unclear."[11] Contemporaries understood the possibility of English society unraveling in chaos.[12] Indeed, "[s]oldiers and civilians alike sought to contain the forces of social disruption and chaos that seemed always to menace the thin skin of ordered society and in war threatened to burst free."[13]

The English Civil War ended with the trial of Charles I for charges of tyranny.[14] The trial contained "arguments about law, authority, and

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Laws of nature, and clearly established by expresse texts both of the old and new Testaments.' It followed that such power, divine in both institution and function, was not to be defied." Robert Zaller, *The Figure of the Tyrant in English Revolutionary Thought*, 54 J. HIST. IDEAS 585 (1993).

7. *Id.* at 585−86.

8. Johann P. Sommerville, *English and European Political Ideas in the Early Seventeenth Century: Revisionism and the Case of Absolutism*, 35 J. BRIT. STUD. 168 (1996).

9. "When critics of the crown in the early 1640s stress the need to restore and uphold the freedom of their fellow subjects, they are not speaking merely or even mainly about the need to prevent their individual rights and liberties from being oppressed and curtailed. They are speaking about the need to rescue the free-born people of England from the loss of their standing as free-men. They are speaking, as they liked to proclaim, about the need to free the entire nation from its unjust condition of bondage and servitude." Quentin Skinner, *Rethinking Political Liberty*, 61 HIST. WORKSHOP J. 156, 160 (2006).

10. "England did not lack atrocities—Abbotsbury, Barthonley, Hopton Castle and Naseby are random examples that exhibited greater ferocity than Lostwithiel . . . with victims number in the tens and hundreds." Barbara Donagan, *Codes of Conduct in the English Civil War*, 118 PAST & PRESENT 65, 94 (1988).

11. *Id.* at 80.

12. "[T]he father sending his bullet at a venture, may kill his sonne, or the sonne his father; this is probable enough: but it is impossible, that brothers, kindred and friends should not mingle in one anothers blood, (and, perhaps, purposely) wee see such an eager division in all Families. And it is so universall, that no Countie, scarce any Citie or Corporation is so unanimous, but they have division enough to undoe themselves. And it is evident enough, that . . . wee shall be quite torne in pieces." *Id.* at 65 (quoting *The Moderator Expecting Sudden Peace or Certain Ruine* (London: 1642), at 11).

13. Barbara Donagan, *Atrocity, War Crime, and Treason in the English Civil War*, 99 AM. HIST. REV. 1137, 1138 (1994).

14. "[T]he King was arraigned at his trial in the secular garb of the tyrant. 'Tyranny' was indeed the essence of the charge against him; for of the four counts of the indictment, that he was 'a tyrant, traitor, murderer, and a public and implacable enemy to the Commonwealth of England,' the latter three were comprehended in the first." Zaller, *supra* note 6, at 600.

political right [that] seemed . . . to have defined the very nature of the struggle between the king and his subjects, perhaps even to have marked a crucial turning point in the history of democracy and freedom."[15] A reclusive personality, Charles I bore a great deal of blame for allowing the nation to spiral into conflict.[16] The trial itself, however, proceeded according to the rule of law.[17] There is little evidence that the trial of Charles I was mere formality.[18] In fact, it appeared that the tribunal desperately attempted to avoid regicide.[19] However, the result of the trial

15. Sean Kelsey, *Politics and Procedure in the Trial of Charles I*, 22 LAW & HIST. REV. 1, 2 (2004).

16. "Charles I was not a 'great and glorious king.' He failed in all his primary responsibilities, and some part of those failures must be attributed to conscious decisions he made and personality traits he possessed. He inherited a monarchy filled with challenges and he failed to meet them." Mark Kishlansky, *Charles I: A Case of Mistaken Identity*, 189 PAST & PRESENT 41, 48 (2005).

Among his critics, there were those "who wanted to dredge the record of the king's reign to the very depths, accusing him of complicity in his own father's murder, dragging up the mismanagement of the expedition to La Rochelle, before even broaching the subject of the Irish rebellion and the subsequent civil wars in England." Kelsey, *supra* note 15, at 14.

17. "[R]ecent studies have shown that the commissioners responsible for conducting the most remarkable show-trial in English history made every effort to give an impression of following due process in the execution of their commission. In spite of the crescendo of demands for vengeance and the expiation of blood guilt during the autumn and winter of 1648–49, 'the desire that Charles should be brought to *justice* meant that there was an attempt to judge him within a legal framework.'" Kelsey, *supra* note 15, at 2 (citing Patricia Crawford, *Charles Stuart, That Man of Blood*, 16 J. BRIT. STUD. 58 (1977).

After the conclusion of the trial, it became apparent that "it was adherence to the conventions of English legal process that had enabled many of the commissioners for the trial of Charles I to see out their awful responsibilities right to the bitter end." Kelsey, *supra* note 15, at 25.

18. "Firm evidence that the trial was envisaged simply as a means to the end of regicide is extremely thin. Conversely, there are substantial grounds for believing that a trial need not have ended in king-killing at all." *Id.* at 4.

Further, if "the king could demonstrate that he himself was not guilty of prosecuting war for selfish ends, or else 'that Parliament or any particular party in the Kindome have raysed or continued the warre for private interests of their owne . . . let him then be acquitted in Judgment, and the Guilt and Blame be laid where else it is due.' Far from simply presenting an indictment of the king's actions, the charges against him were virtually an invitation to Charles to point the finger at the real guilty parties." *Id.* at 15.

19. "Members of that tribunal did everything possible to restrict the terrible dangers inherent in placing the king on trial for treason, tyranny, and murder. A majority among the trial commissioners ensured that the charge against him was drawn as narrowly as absolutely possible, tailoring it to fit the weakest imaginable evidence for his 'crimes.' They thus tied the hands of the prosecution counsel in an effort to restrain those more inclined to exact the highest price from Charles for the suffering of the 1640s. But there was really only so much they could do. Their eventual failure lay in failing to persuade Charles to take the last chances he was repeatedly offered in what would turn out to be the last few days of his life. In the course of four separate sessions of the High Court of Justice, the king had been offered at least nine distinct opportunities to plead to the charges against him—a clear indication of just how desperate most of his judges were to avoid king-killing, the action most likely to wreck England's ancient constitution. But the king's obstinate refusal to cooperate with his judges robbed the moderates of the initiative." *Id.* at 24–25.

was unprecedented: the "execution of a reigning monarch, Charles I, and the abolition of monarchy in England."[20]

This episode of English history has been called "perhaps the most daring action any Body of Men to be met with in History ever, with clear consciousness, deliberately set themselves to do."[21] In any event, the civil war "gave shape to two decades of exhausting ferment that fundamentally altered the politics and culture of the English-speaking world."[22] It was this period that shaped the political philosophy of John Locke.[23] The American revolutionaries found Locke's experience and analysis particularly informative as they engaged in what began as another civil war among Englishmen for the protection of constitutional rights.[24] In fact, many American revolutionaries thought of themselves as the ideological heirs to the anti-royalist forces of the English Civil War.[25] Therefore, Locke's influence in colonial America stemmed, in part, from his similar experience of government. It was this experience that resulted in his justification for the right of resistance found in *Two Treatises of Government.*[26]

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20. Zaller, *supra* note 6, at 586.

21. Robert Zaller, *What Does the English Revolution Mean? Recent Historigraphical Interpretations of Mid-Seventeenth Century England*, 18 ALBION: A Q. J. CONCERNED WITH BRIT. STUD. 617, 631 (1986).

22. David Cressy, *Revolutionary England 1640–1642*, 181 PAST & PRESENT 35, 37 (2003).

23. "Locke's writings and activities are firmly enmeshed in the anti-feudal character of the English Civil War and its aftermath." John F. Henry, *John Locke, Property Rights, and Economic Theory*, 33 J. ECON. ISSUES 609, 613 (1999).

24. The American colonists viewed themselves as British with the rights under the British constitution. "At the same time that the English began expanding beyond the realm to create what became known as an empire, they also innovated upon old scripts of fundamental law to define their national constitution—to define the English nation. Constitutional ideas and imperial expansion developed simultaneously and reciprocally." Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 L. & HIST. REV. 439, 443 (2003).

25. "Patriots at the beginning of the American Revolution were conscious of participating in a tradition of liberty derived from their Puritan forefathers. Not only did they refer back to the crossing of the sea by their ancestors who 'bravely threw themselves upon the bosom of the ocean, determined to find a place in which they might enjoy their freedom, or perish in the glorious attempt,' but they also spoke of themselves as 'the descendants of Oliver Cromwell's army,' 'the descendants of Cromwell's *elect*.'" James C. Spalding, *Loyalist as Royalist, Patriot as Puritan: The American Revolution as a Repetition of the English Civil Wars*, 45 CHURCH HIST. 329 (1976).

26. "As an authority for the American Founders [Locke] stands at the source of [their] tradition. But he was an authority for those revolutionaries because his political teaching culminates in the last chapter of the *Second Treatise*, a defense of the right of resistance." Nathan Tarcov, *Locke's* Second Treatise *and 'The Best Fence against Rebellion,'* 43 REV. POL. 198 (1981).

B. The Lockean State of Nature

It was in *Two Treatises of Government* that Locke described his state of nature.[27] The state of nature was a philosophical construct frequently used by Enlightenment political philosophers, including Thomas Hobbes, John Locke, and Jean-Jacques Rousseau.[28] In essence, the state of nature hypothesized social interaction before the advent of government. The term "state of nature" appears to "derive from late scholasticism, where it [was] a name for the human condition prior to the Fall."[29] However, the notion did not gain notoriety until its popular use in Enlightenment political philosophy.[30]

The state of nature is "not so much a historical condition that men dwelt in at some time in the past as it is—to use Hobbes's helpful expression—an 'Inference, made from the Passions.'"[31] Instead of an anthropological reality, the state of nature was conceived of through the recognition that communal government was a manmade innovation.[32]

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27. "The state of nature is, of course, that state in which prepolitical man existed, but it is also the state into which each of us is born today, and in which we remain until we consent to join some commonwealth. It is the state to which we return when our political society dissolves (as in times of civil war), and perhaps also when our political leaders overstep the bounds of their rightful authority (i.e., cases of tyranny). It is the state in which all political rulers stand with respect to one another, and in which all citizens of one state stand with respect to citizens of another state." A. John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 311, 319 (1991).

28. Jean-Jacques Rousseau first published *Discourse on the Origin and Basis of Inequality Among Men* in 1754. *Leviathan*, by Thomas Hobbes, was published in 1651. And the major work discussed in this paper, *Two Treatises of Government*, by Locke, was published in 1689. All three works, containing substantial discussions of the state of nature and the relationship between citizen and government, were available to the colonists in North America prior to the American Revolutionary War.

In addition, the state of nature has appeared in the works of other influential thinkers such as Thomas Aquinas, Montesquieu, and David Hume. The state of nature has also appeared more recently in the work John Rawls and Robert Nozick.

29. THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE 131 (1988).

30. "The notion suddenly skyrocketed to importance through the impact of Thomas Hobbes, who took the term over and radically transformed its meaning so as to make it the core of an unprecedented doctrine of natural rights . . . [b]ut it took Locke's ameliorations to create . . . something acceptable to the great body of decent opinion—and something not only acceptable but overwhelming it its appeal." *Id.*

31. *Id.* at 246.

32. "[T]he idea [of the state of nature] reveals a latent reality, a set of diverse possibilities, that lies just beneath the surface of all civil existence." *Id.* Though there is no concrete evidence of how the state of nature actually functioned, human reason can conclude that there was necessarily a moment in time, after man developed self-awareness, and before men settled into societies, that there was an actual state of nature.

However, the fact that the state of nature was, at least in part, a fiction, did not minimize its utility as a philosophical construct.[33]

John Locke outlined his conception of the state of nature in Book II of *Two Treatises of Government*.[34] The major distinguishing feature of Locke's state of nature is almost uninhibited personal freedom.[35] Because of this freedom, the state of nature is a "state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another."[36]

This freedom and equality distinguished Locke from his contemporaries, especially Thomas Hobbes. Rather than focusing on individual liberty, Hobbes believed that nothing was more capable of safeguarding civil peace than an absolute power.[37] Unlike Hobbes, Locke believed that "the state of nature need not be warlike, and that, in following the command of natural law which urges [men] to preserve [themselves] and to do 'all reasonable things' [they] can to preserve mankind, [men] are not *automatically* brought into conflict with others."[38]

The fundamental difference between these two Englishmen stemmed from starkly divergent experience.[39] To Hobbes, government is justifiable

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33. "'[T]is utterly impossible for men to remain any considerable time in that savage condition, which precedes society; but that his very first state and situation may justly be esteem'd social. This, however, hinders not, but that philosophers may, if they please, extend their reasoning to the suppos'd *state of nature*; provided they allow it to be a mere philosophical fiction, which never had, and never cou'd have any reality." DAVID HUME, A TREATISE OF HUMAN NATURE 493 (L.A. Selby-Bigge ed., 2d ed., Oxford University Press) (1888).

34. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Ian Shapiro ed., Yale University Press 2003) (1689).

35. "To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." *Id.* at 101.

36. *Id.* Further, "[t]here being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection; unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him by an evident and clear appointment an undoubted right to dominion and sovereignty." *Id.*

37. Patrick Coby, *The Law of Nature in Locke's Second Treatise: Is Locke a Hobbesian?*, 49 REV. POL. 3, 5 (1987).

38. Richard Ashcraft, *Locke's State of Nature: Historical Fact or Moral Fiction*?, 62 AM. POL. SCI. REV. 898, 903 (1968) (emphasis in original).

39. The conflicting opinions of Hobbes and Locke can be loosely tied to the state of contemporary English politics during the lifetimes of these two philosophers. Separated by a mere generation, Hobbes witnessed firsthand the execution of a divinely-appointed monarch and the devastation of England in civil war. In particular, Hobbes believed that man was competitive and afraid in the state of nature and required the institution of government, and its intervention, to provide protection and structure to an otherwise difficult, even miserable, existence.

John Locke, on the other hand, witnessed the sovereign people of England select their own monarch and religion during the Glorious Revolution. He believed much more in self-determination

because it better preserves human life than people themselves can attain in the state of nature.[40] The paramount difference between the theories of Locke and Hobbes is that "Hobbes asks mainly that civil society be the strong guardian of men's lives; Locke asks also that civil society be the fountainhead of justice."[41]

In Locke's view, the main purpose of government is to protect the inherent rights of individuals. Every man has, by birth, certain inherent and inalienable rights: life, health, liberty, and property.[42] Freedom, therefore, goes beyond an individual's right to act according to his own volition, and likewise, includes the right to acquire, and dispose of, property.

In Locke's view, "the right to property is natural, or precontractual; it antedates not only civil society but also other types of social arrangements."[43] There were two ways in which man could exert ownership over property. The first is tied directly to the right to life: a man can make use of objects in nature necessary for self-preservation.[44] In other words, "[o]ne may appropriate as much property as one can use before it spoils."[45]

The second way in which an individual could exert ownership over an object is through labor. In Locke's view, objects exist only for mankind's use.[46] "However, in their natural state most things are not particularly useful or valuable, and they must be improved by man before they can be an object of use."[47] Men were allowed, then, to exert ownership over

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and positive political choice. These drastically different experiences undoubtedly had a significant effect on the political philosophies of Thomas Hobbes and John Locke and, in particular, their divergent conceptions of the state of nature.

40. Corey Brettschneider, *The Rights of the Guilty: Punishment and Political Legitimacy*, 35 POL. THEORY 175, 180 (2007).

41. Coby, *supra* note 37, at 16.

42. The first three rights—to life, health and liberty—can be traced directly to Locke's belief in the absolute right to self-preservation. The fourth right, to property, is also founded on the theory of preservation, as men have a right to "meat and drink, and such other things, as nature affords for their subsistence." LOCKE, *supra* note 34, at 111.

43. David C. Snyder, *Locke on Natural Law and Property Rights*, 16 CANADIAN J. PHIL. 723, 726 (1986).

44. "[P]reservation demands that persons use objects, but to use them they must first appropriate them, must own them." *Id*. at 735.

45. E. Clinton Gardner, *John Locke: Justice and the Social Compact*, 9 J.L. & RELIGION 347, 355 (1992).

46. "Locke argued that everything on earth is put here for man's use. Things do not exist for themselves but are always and only for man." Snyder, *supra* note 43, at 737.

47. *Id.*

property in Locke's state of nature because labor changes the very nature of a good, transforming it into something useful.[48]

C. The Law of Nature

The only limitation on individual prerogative in the state of nature, whether concerning an individual's person or possessions, was the law of nature.[49] This, too, is an area of stark contrast between Hobbes and Locke.[50] Locke gives no systematic description of the law of nature in *Two Treatises of Government*.[51] Even without such a description, Locke outlined at least six laws functioning in the state of nature.[52] These six laws correspond to three relationships: the individual to the community, the individual to property, and the parents to children.[53]

Each of these laws, then, concerned the life, health, liberty, or property of equally free individuals within the state of nature. In Locke's own language, "[t]he state of nature has a law of nature to govern it, which obliges every one . . . that being all equal and independent, no one ought to

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48. "Locke's . . . response to the question of why one's labor marks off an object as one's own is found in several passages. In one he says that a man owns his labor, and whatever he mixes that labor with is properly his. In another he claims that labor adds value to a thing . . . . And in yet another he tells us that if anyone other than the laborer desires to 'meddle with' an object improved by that labor, he desires, 'the benefit of another's Pains, which he had no right to.'" *Id.* at 736 (internal citations omitted).

49. "Locke's theory of natural law is basically a continuation of the traditional conceptions of natural law deriving from the classics and continuing through medieval scholasticism and the Reformation. . . . Essentially, the law of nature for Locke is the same universal law of reason valid for all men because of their human nature, which can be traced from the Stoics, through the Roman lawyers, the Christian era, the school of *Naturrecht*, and ultimately through 'the judicious' Hooker." James O. Hancey, *John Locke and the Law of Nature*, 4 POL. THEORY 439−40 (1976) (internal citations omitted).

50. "Hobbes does not differentiate, as does Locke, between natural laws appropriate to a state of nature and natural laws appropriate to civil society. He does not because he denies that the state of nature is actually governed by natural law. For Hobbes, natural law has the sole function of effecting man's progress from nature to society, which progress is accomplished by socializing an otherwise unsocial creature and by establishing elemental rules of fair treatment." Coby, *supra* note 37, at 5. "Hobbes and Locke are evidently at opposite poles, with Hobbes using natural law to defend absolutism and Locke using natural law to promote limited government." *Id.*

51. "It is a much remarked fact about Locke that he gives no systematic account of natural law in the *Second Treatise*." *Id.* at 4.

52. "[O]ne discovers at least thirteen natural laws in total and as many as six functioning in the state of nature." *Id.*

53. "Those which exist prior to and independent of civil society are: (1) self-preservation; (2) the preservation of mankind; (3) private property; (4) restrictions on private acquisition, namely the requirements that nothing appropriated be allowed to spoil and that there be 'enough, and as good left' for others; (5) parents' care of children; and (6) children's care, defense, comfort, and honor of parents." *Id.* (internal citations omitted).

harm another in his life, health, liberty, or possessions."[54] For Locke, natural law was an inherent part of human existence in the state of nature.[55]

Some commentators have argued that the entire notion of law is contradictory to the very premise of the state of nature.[56] However, this contention is misplaced, for while Locke did not invent the law of nature, his conception of the law differed from tradition in one major way: the means by which it came to be known.[57] Locke believed "the law of nature . . . is not known through inscription or handed down by tradition but is known by reason through sense experience."[58] Rather, "[s]elf-evident truths are self-evident not because they are innately impressed upon the mind but because it is impossible to believe to the contrary."[59]

It is not inconsistent, either, for Locke to contend that innate knowledge is a fiction while maintaining that there are certain self-evident principles.[60] It is not the truths themselves, but the ability to discover them, through the use of human reason, that is innate.[61] Locke contended "something can be known by the light of nature . . . that there is some sort of truth to the knowledge of which a man can attain by himself and without the help of another, if he makes proper use of the faculties he is endowed with by nature."[62] In other words, "if man makes use properly of his reason and of the inborn faculties with which nature has equipped him,

54. LOCKE, *supra* note 34, at 102.

55. "[L]aw exists within the framework of nature. It exists because man exists. As soon as there is man, there is law, that which orders and restricts and that which, through such ordering, brings about societal institutions that will allow and enable man to attain his 'true' end, his right or best life." MACE, *supra* note 4, at 4.

56. The commentators raise an interesting concern. Law is, generally, handed down from one generation to the next. This understanding relegates law to the status of a social construct, a sort of communal contract to act in accordance with the general will. This is the very construct that the state of nature attempts to dismiss. As such, some, including Rousseau, believe that law is outside of the state of nature.

57. "Locke's most innovative deviation from the traditional conception of the law of nature was his assertion that the tenets of natural law were capable of demonstration, and that all who would use their God-given faculties of sense-perception and reason could attain a knowledge of that law." Hancey, *supra* note 49, at 441.

58. John W. Yolton, *Locke on the Law of Nature*, 67 PHIL. REV. 477, 482 (1958).

59. Snyder, *supra* note 43, at 727.

60. "Although Locke argues that we do not have truths imprinted upon our minds from birth—indeed, he rejects the claim that we do as not merely false, but nonsensical—he never says that we have no innate capacity of reason or that there are no principles discoverable by the understanding alone." *Id.*

61. "It is not inconsistent for Locke to hold on the one hand that the notion of innate knowledge is a myth and on the other that there are self-evident principles to which the rational man will readily assent, for it is the ability to discover these truths, not the truths themselves, that is innate." *Id.* at 728.

62. JOHN LOCKE, ESSAYS ON THE LAW OF NATURE 123 (W. von Leyden ed., Oxford University Press 1954) (1676).

he can attain to the knowledge of this law without any teacher instructing him in his duties."[63] Instead of a social construct, the law of nature is, then, "an objective moral rule . . . it is both eternal and universal."[64]

Reason obliges men, therefore, to adhere to the law of nature.[65] Were all men perfectly rational—that is, entirely obedient to the law of nature—there would be no need to discuss punishment.[66] Locke's contention that man is endowed with free will means, however, that the law of nature, though known by reason, is not necessarily universally obeyed. "In the state of nature, a state of freedom, it is possible for men to behave both well and badly."[67] The very freedom requisite to a Lockean state of nature implies that there will be individuals who choose to act outside of the boundaries of the law.[68] "But because such individuals do exist, and because Locke seemingly realizes that similar tendencies tempt all men at least occasionally, to uphold natural law . . . the rational man has the right to punish criminals. For if no one had such a right the law of nature would be in vain."[69]

D. Basis for Punishment in the Lockean State of Nature

Punishment, as a term, is understood well enough that an extended discussion is not necessary.[70] The existence of law, coupled with the existence of free will, encourages communities to devise systems of

63. *Id*. at 127.

64. Gardner, *supra* note 45, at 349.

65. "Reason can oblige man, not simply to preserve himself—for this is instinctual—but to preserve himself in a way consistent with reason; and rational self-preservation may commonly entail the preservation of others, since to threaten others needlessly is to introduce into one's surroundings the distrust and ill-will that make abandonment of the state of nature and the surrender of natural rights inevitable." Coby, *supra* note 37, at 8.

66. "Were all men perfectly rational, that is, perfectly obedient to natural law, government would have no cause to exist." *Id.* As the purpose of government, according to Locke, is to enforce the law, if man conformed to the use of reason in all things, there would be no crime and, therefore, no reason for the continuation of government.

67. Ashcraft, *supra* note 38, at 903. Further, "[a]s a state extended over a period of time, the state of nature will be both tranquil and violent, though at any given moment, and always because of specific social circumstances, it will be either one or the other." *Id.*

68. Locke "implies, however, that such a person is the exception to the harmonious rule, describing him as 'degenerate,' and declaring 'himself to quit the Principles of Human Nature, and to be a noxious Creature.'" Snyder, *supra* note 43, 732.

69. *Id.*

70. "For the most part we are reasonably clear as to what a punishment is. We know that someone put into prison is being punished. When a child does something wrong, the spanking it receives is its punishment. As a first approximation it is natural to say 'punishment' means 'infliction of suffering upon wrongdoers.'" Sidney Gendin, *The Meaning of "Punishment,"* 28 PHIL. & PHENOMENOLOGICAL RESEARCH 235 (1967).

punishment.[71] However, the act of punishment "is morally troubling because it almost always causes human suffering."[72] In Locke's opinion, for punishment to be justified, two things are requisite: "[f]irst, that he who does it has commission and power so to do . . . [s]econdly, that it be directly useful for the procuring some greater good."[73] These two concerns form the basis of Locke's discussion on punishment in the state of nature.

Given that governments in civil society are today imbued with the right to punish, it is important to understand where that right initiated. Locke, as a proponent of natural rights, "wanted to claim that all political authority . . . is artificial, and so must be explained it terms of more basic, natural forms of authority."[74] Assuming, as Locke did, that government is invested with authority through a social contract by which individuals are divested of certain individual rights, the government's right to punish in civil society, "like all governmental rights, must be composed of the redistributed natural rights of citizens, rights that the citizens must therefore have been capable of possessing in a nonpolitical state of nature."[75]

Locke, having established that men had a right to punish wrongdoers prior to the foundation of civil society, based the right to punish in each individual's interest in self-preservation.[76] This focus on self-preservation can also be understood as the basis for Locke's conception of natural rights.[77] Locke's argument is, then, that the state's right to punish "stems from the right we possess as individuals in the natural condition to defend ourselves against the assaults of those who transgress the laws of nature."[78]

The theoretical foundation for punishment in the state of nature, and therefore punishment in civil society, is that by transgressing the law of

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71. "The purpose of a system of punishment is to impose unpleasantness on actual offenders by actual authorities." Don E. Scheid, *Note on Defining 'Punishment,'* 10 CANADIAN J. PHIL. 453 (1980).

72. Daniel McDermott, *The Permissibility of Punishment*, 20 L. & PHIL. 403 (2001). However, the "fact that a practice causes suffering is not, of course, enough to conclude that it is morally unjustified, but it is enough to make the practice an appropriate object of moral concern." *Id.*

73. 2 JOHN LOCKE, *A Second Letter Concerning Toleration*, *in* THE WORKS OF JOHN LOCKE 281 (2d ed. 1722).

74. Simmons, *supra* note 27, at 313. Further, "[g]overnments have rights to limit our liberty, for instance, only insofar as they have been granted those rights by us[.]" *Id.*

75. *Id.* at 314.

76. "Any duty to punish in the state of nature can for Locke flow only from the much more comprehensive duty to 'preserve mankind' in oneself and others." A. John Simmons, *Locke on the Death Penalty*, 69 PHIL. 471, 474 (1994).

77. The natural rights espoused by Locke—life, health, liberty, and possessions—all directly relate back to an individual's ability to preserve himself.

78. Brian Calvert, *Locke on Punishment and the Death Penalty*, 68 PHIL. 211, 219 (1993).

nature, the offender has put himself outside the protections of the community.[79] By so doing, the offender has also put himself into direct conflict with those living according to reason under the law.[80] By breaking the law of nature, others "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 . . . and therefore it is lawful for me to treat him as one who has put himself into a state of war with me."[81] The purpose of punishment in the state of nature is, therefore, mutual protection through the deterrence of similar criminal conduct.

E. Implementation of Punishment According to Locke

However, without a civil government capable of effecting such punishment, Locke had to devise the means by which such punishment could be executed.[82] In devising such a system, Locke realized that the threat of continued criminal activity impacted mankind as a whole.[83] Because of this, "every man . . . by the right he hath to preserve mankind in general, may restrain, or, where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that law."[84] And, because all men in the state of nature are equal, "if any

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79. "In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men for their mutual security; and so he becomes dangerous to mankind, the tie, which is to secure them from injury and violence, being slighted and broken by him." LOCKE, *supra* note 34, at 103.

80. "In Locke's view, the one who breaks the law has abandoned the rule of reason and adopted another rule, that of force and violence; and since this is the rule of wild animals, we are perfectly entitled to [punish] those who live by this rule to protect ourselves as well as others." Calvert, *supra* note 78, at 218–19.

81. LOCKE, *supra* note 34, at 108.

82. The lack of a judicial system in the state of nature was one of the driving forces, Locke believed, for the foundation of civil governments. "[O]ne can say that Lockean men in the state of nature are in an 'uneasy' and uncertain condition precisely because of an absent good which they desire—namely an impartial, standing judge who can enforce natural law; that these men are moved by their uneasiness to make an agreement which institutes civil society and does away with the 'inconvenience' of the state of nature." Patrick Riley, *Locke on 'Voluntary Agreement' and Political Power*, 29 W. POL. Q. 136, 140–41 (1976).

83. Crime is "a trespass against the whole species, and the peace and safety of it, provided for by the law of nature." LOCKE, *supra* note 34, at 103.

84. *Id.* Locke also stated, "every man has a power to punish the crime, to prevent its being committed again, 'by the right he has of preserving all mankind,' and doing all reasonable things he can in order to that end.'" *Id.* at 104. Further, "[t]he execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law." *Id.* at 103.

However, "Locke's position is not really that *all* persons in the state of nature with respect to others have the natural right to punish those others for their crimes. Children (those below the 'age of reason') do not possess this executive right in spite of being in the state of nature with respect to all

one in the state of nature may punish another for any evil he has done, every one may do so."[85] In this way, the criminal conduct "leaves the criminal morally vulnerable to punishment and so open to anyone who wishes to administer just punishment."[86]

The marriage of individually enforced punishment with general deterrence has led some critics to suggest that such a system would cause the malfeasor "to be battered again and again for a single dereliction," a mode of punishment which goes "far beyond the wildest fantasies of the most bloodthirsty retributivist."[87] However, the language employed by Locke does not support such a criticism. Locke's use of the phrases "all reasonable things" and "to deter others" suggests that punishment for criminal punishment was not intended to be indefinite.[88] Rather, the text of *Two Treatises of Government* supports the notion that every individual has the right to "punish anyone who does wrong *until that wrongdoer has been punished up to a certain point*."[89]

Instead of limitless authority to punish, each individual in the state of nature "would have a right to do, to any given wrongdoer, whatever [he] reasonably think[s] is necessary in order to keep him from doing wrong again *and to keep other, potential wrongdoers from acting similarly*."[90] Locke outlines a system of achieving both special and general deterrence.[91] One may not punish an individual merely "according to the passionate heats or boundless extravagancy of his own will."[92] Rather, in a Lockean state of nature, punishment can only proceed "so far as calm

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persons. Presumably the same is true of idiots, madmen, warmakers, and any other 'persons' who do not qualify for Locke as full right-holders." Simmons, *supra* note 27, at 319.

85. LOCKE, *supra* note 34, at 103. Locke explained that "for in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law every one must needs have a right to do." *Id.*

86. Simmons, *supra* note 76, at 475.

87. Daniel M. Farrell, *Punishment Without The State*, 22 NOÛS 437, 439 (1988) (quoting David Lyons, *Rights Against Humanity*, 85 PHIL. REV. 208, 210 (1976) (reviewing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974))).

88. The first phrase, "all reasonable things," can be found in LOCKE, *supra* note 34, at 104. "[E]very man has a power to punish the crime, to prevent its being committed again, 'by the right he has of preserving all mankind,' and doing all reasonable things he can do in order to that end." The second phrase, "to deter others," can be found at LOCKE, *supra* note 34, at 104. "Every man, in the state of nature, has a power to [punish a criminal] . . . to deter others from doing the like injury."

89. Farrell, *supra* note 87, at 439. Further, "even in the state of nature, we would have a right to do—to any given wrongdoer—whatever we have to do in order to protect ourselves (and others) from future wrongful actions *of that particular wrongdoer*, and . . . we would also have a right to do—to this same wrongdoer—whatever we have to do in order to protect ourselves *from other individuals* who might be inclined to perpetrate a similar sort of wrong." *Id.* at 441.

90. *Id.* at 439 (emphasis added).

91. *Id.*

92. LOCKE, *supra* note 34, at 103.

reason and conscience dictate" in order to achieve a punishment that "is proportionate to [the] transgression."[93] Therefore, "the point up to which a wrongdoer may thus be punished, on Locke's view, is determined by considerations that have to do with what is arguably necessary for . . . deterrence."[94]

F. Conclusion

The main components of punishment in a Lockean state of nature are: (i) that the offender has negatively impacted another's life, health, liberty, or property; (ii) that, because of this, the offender is dangerous to mankind; (iii) that, because he is dangerous, he has opened himself to punishment; and (iv) that the punishment exacted should efficiently deter similar criminal conduct. By deconstructing the contemporary institutions of government and criminal punishment through the use of a state of nature, Locke outlines a theory of punishment that protects those most basic human rights: the rights to life, health, liberty, and property. Locke accomplishes this by focusing punishment on the deterrence of future conduct that will negatively impact those inherent rights.

II. THE FAILURE OF AMERICAN CRIMINAL PUNISHMENT

The practical purpose of a system of punishment "is to impose unpleasantness on actual offenders by actual authorities."[95] The theoretical basis of instituting a system of punishment, however, is the limitation of criminal conduct.[96] The harbinger of modern democracy, the United States currently boasts the highest rate of incarceration in the world.[97] The criminal justice system in the United States, then, is not serving its foundational purpose.

The failure of the criminal justice system in the United States has been a topic of debate and conversation since the earliest days of the Republic.[98]

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93. *Id*.

94. Farrell, *supra* note 87, at 439.

95. Scheid, *supra* note 71, at 459.

96. There are three generally recognized bases for systems of criminal punishment: retribution, rehabilitation, and deterrence. Each of these is aimed at the limitation of criminal action, though in very different ways.

97. According to 2011 statistics, the United States of America has the highest prison population rate in the world. *See Victimless Crime Constitutes 86% of the Federal Prison Population*, LIBERTARIAN NEWS (Sept. 29, 2011), http://www.libertariannews.org/2011/09/29/victimless-crime-constitutes-86-of-the-american-prison-population/.

98. "The growth of crime in the United States has been viewed as a social problem since the founding of the Republic." Harold E. Pepinsky, *The Growth of Crime in the United States*, 423

It was then that crime statistics were first developed and utilized.[99] Even at the advent of such statistics, commentators in the United States understood that

> [i]f it be true that our criminal records exceed that of Europe by hundreds of per cent, we surely ought to try to do something about it. But we ought first to make an effort to determine whether it *is* true, and what the possible causes are, so as to know just what to do, besides indulging in a hysterical and bloodthirsty clamor for a return to the penological ideals of 18th-century England.[100]

Even now, nearly a century later, the evidence reinforces the theory that the United States far exceeds not only European rates of incarceration, but also far exceeds the rest of the world by hundreds of percent.[101]

This elevated rate is especially important given the high cost of crime on society.[102] The true cost of crime is difficult to quantify in part because any true measure must include both tangible and intangible losses.[103] Beyond the cost to the victim in terms of tangible and intangible losses, crime costs society as a whole through the institutions of prosecution and punishment.[104] The cost of crime on society accounts for the assumption that lower crime rates are desirable.[105]

ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1976).

99. "European concern for and initial development of crime statistics apparently preceded those in America. The earliest call for crime statistics . . . was that made in the seventeenth century by an Englishman, Sir William Petty. Nationwide crime statistics were first collected in France in 1827." *Id.* at 24.

100. I. M. Rubinow, *Suggestions on Crime Statistics*, 125 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 143 (1926).

101. Approximately 756 of every 100,000 residents is incarcerated. In other words, 1 of every 42 Americans is under correctional supervision, over two percent of the entire population. In the rest of the world, the average is only 145 out of 100,000. The United States of America incarcerates its population at over five times the world average. *See supra* note 97.

102. "The costs of crime and the costs of abating crime represent a huge burden on society, although exact estimates of these costs are inherently difficult to pinpoint." Ziggy MacDonald, *Official Crime Statistics: Their Use and Interpretation*, 112 ECON. J. F85 (2002).

103. "Tangible costs of crime refer to the value of lost possessions or of lost work days, for example. Intangible costs are defined so as to embody the monetary value of the pain and suffering of crime amongst victims." Giles Atkinson, Andrew Healey & Susana Mourato, *Valuing the Costs of Violent Crime: A Stated Preference Approach*, 57 OXFORD ECON. PAPERS 559, 561 (2005).

104. For example, the "cost of building a maximum-security cell ranges from $30,000 to $130,000 and averages $58,000. The annual cost for maintaining a prisoner is $10,000 to $30,000." Edward M. Kennedy, *Prison Overcrowding: The Law's Dilemma*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 113, 117 (1985).

105. "The assumption that it is desirable to lower rates of crime implicitly if not explicitly underlies practically all research and planning in the field of criminal justice." Pepinsky, *supra* note 98, at 29.

A. Expansion of Criminal Statutes

In an attempt to lower the prevalence of crime, American criminal law has become exceptionally broad, covering both the heinous and the trivial.[106] The core crimes remain relatively unchanged since the time of Blackstone.[107] However, the number of offenses deemed criminal has risen steadily across state jurisdictions since the middle of the nineteenth-century.[108] The federal system has experienced similar expansion.[109] And because "all change in criminal law seems to push in the same direction—toward more liability—this state of affairs is growing worse: legislatures regularly add to criminal codes, but rarely subtract from them."[110] The culmination of this progression is a comprehensive criminal code that covers all individual conduct.[111]

However, this tendency towards over-criminalization does not account for differences in the nature of crime.[112] Not all crimes have the same capacity for harm.[113] While it is difficult to determine whether one crime is of a more serious nature than another, "comparisons are not out of order, and the overriding attention given to violent crimes as compared, for example, with transport accidents, may be germane to determining the relative importance of different types of events in matters of public safety."[114] Even so, states across the country maintain felony statutes

106. "American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish. The federal code alone has thousands of criminal prohibitions covering an enormous range of behavior, from the heinous to the trivial. State codes are a little narrower, but not much." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

107. "The law that defines core crimes derives from the common law of England. Save for auto theft, everything in the list of FBI index crimes was a crime in Blackstone's day." *Id.* at 512.

108. "Numbers of offenses give some hint of the magnitude of the phenomenon. In 1856, Illinois's criminal code contained 131 separate crimes. In 1874, the number had grown to 220. By 1899 it was 305; it reached 460 in 1951. . . . And Illinois's numbers are fairly representative. In the past century and a half, Virginia's criminal code grew from 170 offenses to 495 . . . Massachusetts went from 214 crimes . . . to 535." *Id.* at 513–14.

109. "The past century and a quarter has seen even greater increases in the number of crimes listed in the relevant title of the federal code. In the version of the Revised Statutes passed in December 1873, the title of federal crimes included 183 separate offenses. By 2000, 643 separate sections of Title 18 of the United States Code defined crimes; since some of those sections defined a number of offenses, the number of distinct crimes in Title 18 is almost certainly over one thousand." *Id.* at 514.

110. *Id.* at 507.

111. "The end point of this progression is clear: criminal codes that cover everything and decide nothing." *Id.* at 509.

112. David E. Sisk, *Police Corruption and Criminal Monopoly: Victimless Crimes*, 11 J. LEGAL STUD. 395, 395–96 (1982).

113. Albert J. Reiss, Jr., *Public Safety: Marshaling Crime Statistics*, 453 ANNALS AM. ACAD. POL. & SOC. SCI. 222, 227 (1981).

114. *Id.* at 224.

criminalizing trivial and private conduct.[115] Thus, some of the conduct criminalized is not only non-injurious, but also based solely on the creation of a risk of future injury.[116]

The evidence is clear that instead of focusing on violent crime or property crime, the expansion of criminal codes in the United States has led to the widespread prosecution of victimless crime.[117] Dissatisfaction with this approach is commonplace.[118] Arguments for the decriminalization of victimless crime "are supported by a philosophical argument, and it is one with a substantial pedigree."[119] Beyond the liberal philosophies of Enlightenment thinkers like Locke, these arguments also found substantial support in nineteenth-century utilitarian philosophers such as John Stuart Mill.[120] In both instances, there is general disapprobation about the use of government agencies of control, such as law enforcement agencies, "to impose constraints on those whose behavior, though distasteful, poses no direct threat to the property or person of others."[121]

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115. "Florida criminalizes selling untested sparklers, or altering tested ones; it also bans the exhibition of deformed animals. . . . California criminalizes knowingly allowing the carcass of a dead animal 'to be put, or to remain, within 100 feet of any street, alley, public highway, or road . . . .' It also criminalizes the sale of alcohol to an 'common drunkard' and cheating at cards. Ohio criminalizes homosexual propositions and 'ethnic intimidation.' Texas criminalizes overworking animals, causing two dogs to fight, and violation of rules concerning recruitment of college athletes. Massachusetts criminally punishes frightening pigeons away from 'beds which have been made for the purpose of taking them in nets.'" Stuntz, *supra* note 106, at 515–16.

116. "A number of states criminalize negligent assault, which amounts to nothing more than an ordinary tort. Some states go farther, criminalizing negligent endangerment, which requires neither injury nor the materialization of risk, but only risk creation. Possession of burglars' tools, which may mean no more than possession of a screwdriver, is routinely criminalized, as is possession of various sorts of 'drug paraphernalia' . . . other than the banned drugs themselves." *Id.* at 516.

117. There is no perfect statistic for measuring crime for a number of reasons. First, "[e]vents that fall within the scope of the criminal law are classified as crimes whether or not they actually are completed. Attempts to commit a crime are considered crimes as well as those completed . . . . It seems misleading, however, to term both attempted and actual crimes as 'crimes' for purposes of public reporting . . . ." Reiss, *supra* note 113, at 226.

Further, not all incidents of crime are reported to the police. "Demographic factors are likely to influence reporting behavior" with "individuals in higher income groups, particularly older people . . . are far more likely to report an incident." MacDonald, *supra* note 102, at F96.

118. "Although it may have been controversial when first advanced, the claim that victimless crimes should be decriminalized now commands widespread support." Alan Wertheimer, *Victimless Crimes*, 87 ETHICS 302 (1977).

119. *Id.*

120. "The arguments generally follow Mill's claim that 'the sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number is self-protection.'" *Id.* at 303 (quoting JOHN STUART MILL, ON LIBERTY 13 (Liberal Arts Press 1956) (1859)).

121. Ronald Bayer, *Heroin Decriminalization and the Ideology of Tolerance: A Critical View*, 12 L. & SOC. REV. 301, 309 (1978).

B. Victimless Crime

There are a number of conceptions of what exactly constitutes a victimless crime.[122] Generally, the term "victimless crime" refers to "a large number of *offenses against morals* in which there are no victims, such as gambling, consumption of liquor or homosexuality whose characteristic feature is that . . . the persons affected are those who take part in the act of their own free will and are responsible for the suffering which is self-inflicted."[123] In the case of a victimless crime, there is no individual seeking reparation from a public authority.[124] Instead of an injured individual, "it is the public authority which is offended against and which must *seek out* the transgressor."[125]

This antagonistic relationship between private citizen and government also raises significant privacy concerns.[126] An individual citizen's constitutional right to privacy has been recognized by the United States Supreme Court.[127] This is an important consideration because, unlike cases involving a complaining witness, it is difficult for the government to acquire evidence or establish guilt of a victimless crime without affecting an individual's privacy.[128] "Any society that seeks to stamp out drugs, or gambling, or alcohol, or any other sort of behavior that involves consensual transactions, requires law enforcement that is proactive."[129]

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122. "One account argues that victimless activities are those in which no one is harmed, or if harm is done, it is 'primarily harm to the participating individuals themselves.' A second account . . . argues that victimless crimes are those which involve 'a willing and private exchange of strongly demanded yet officially proscribed goods and services; this element of consent precludes the existence of a victim.' A third account argues that victimless activities are those that 'do not result in anyone's feeling that he has been injured so as to impel him to bring the offense to the attention of the authorities.'" Wertheimer, *supra* note 118, at 305.

123. S. R. Sankaran, *Police Reforms: Need to Review Power to Arrest*, 35 ECON. & POL. WKLY. 4082, 4083 (2000).

124. Bayer, *supra* note 121, at 312.

125. *Id.* Further, it is this that "has led Edwin Schur to argue that the effort to enforce such norms involves an effort to 'legislate morality for its own sake.'" *Id.*

126. While the United States Constitution does not explicitly recognize a right to privacy, as early as 1890 "Warren and Brandeis identified privacy—which they defined, in overbroad but meaningful terms, as the right 'to be let alone'—as a significant value that deserved, and indeed had to a large extent received, legal protection by the courts." Louis Lusky, *Invasion of Privacy: A Clarification of Concepts*, 87 POL. SCI. Q. 192 (1972).

127. "In 1965, five members of the United States Supreme Court . . . extrapolating from the several Bill of Rights safeguards of *particular* aspects of privacy . . . postulated the existence of a *general* right of privacy which the Constitution itself protects." *Id.*

128. Cark F. Cranor, *Legal Moralism Reconsidered*, 89 ETHICS 147, 161 (1979). "In addition, for those 'crimes' that are necessarily committed in private it is impossible to have evidence of violation without infringing the right to privacy." *Id.*

129. Stuntz, *supra* note 106, at 581–82.

Such a system requires law enforcement agencies to search for crime.[130] And, crucially, "[w]here they look determines what kinds of arrests they make . . . ."[131]

A consideration of the crime of possession is illustrative. The possession of drugs and guns operates as possession *qua* possession—a violation in itself.[132] It is an offense that law enforcement officials actively search out: "[e]very physical or merely visual search, every frisk, every patdown, is always a search for possession."[133] Because of the ease of access, possession "has become the paradigmatic offense in the current campaign to stamp out crime by incapacitating as many criminals as [the criminal system] can get [its] hands on."[134] And possession statutes have allowed the criminal system to get its hands on an enormous number of individuals.[135] As possession is a regulatory offense, in that, like speeding, it includes no *mens rea* requirement, the vast majority of defendants plead guilty.[136] Taken together, this means that possession crimes, which are inherently victimless, have become the most expedient entrance into the criminal justice system in the United States.[137]

C. Recidivism

Instead of minimizing crime, these "'net widening' policies may actually exacerbate the crime problem on a larger scale."[138] Such policies are criminogenic, meaning they are likely to cause further criminal behavior.[139] This is known as the "revolving door" effect, where individuals, once incarcerated, engage in a "never ending cycle of jail, release without treatment, and jail again."[140]

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130. *Id.*
131. *Id.* at 582.
132. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 855 (2001).
133. *Id.* at 857.
134. *Id.* at 859.
135. For instance, in 1998, "possession offenses accounted for 106,565, or 17.9%, of all arrests made in New York State." *Id.*
136. Of 106,565 possession offenses in New York State in 1998, only 295, or 0.27% resulted in a verdict, and only 129, or 0.12%, in an acquittal. *Id.*
137. *Id.* at 856.
138. Robert Apel & Gary Sweeten, *The Impact of Incarceration on Employment during the Transition to Adulthood*, 57 SOC. PROBS. 448 (2010).
139. Sankaran, *supra* note 123, at 4082.
140. Ronald W. Fagan & Armand L. Mauss, *Padding the Revolving Door: An Initial Assessment of the Uniform Alcoholism and Intoxication Treatment Act in Practice*, 26 SOC. PROBS. 232 (1978).

There is evidence that regularly paying employment serves as an enhancement to the deterrent effect of legal punishment.[141] However, incarceration significantly lowers the likelihood of such employment.[142] This issue is exacerbated when populations of similarly situated individuals are concentrated in a specific community.[143] Cumulatively, these policies lead to the concentration of convicted individuals within specific communities and to the deterioration of social constructs likely to prevent further incarceration, which makes the cost of commencing a second criminal action much lower than the first.[144]

A study of state recidivism rates shows the inefficacy of net-widening policies on preventing crime.[145] In 2012, the State of California completed a study on recidivism.[146] The study showed that, of inmates released from the California Department of Corrections and Rehabilitation in the 2007-2008 fiscal year, over sixty-percent were re-incarcerated within three years.[147] Put into more concrete terms, 73,885 individuals released from state correctional facilities were back under state correctional control within three years.[148] Additionally, the data showed that individuals who

141. "Research shows individuals with regularized paying jobs have commitments that enhance the deterrent effect of formal legal sanctions. However . . . a sustained decline in wages for unskilled workers has weakened both attachments to work and incentives to participate." Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1187 (2004).

142. "[I]mprisonment serves as a 'signal' to potential employers about what kind of employee one is likely to be. Such a signal constitutes a social stigma because it is associated with *perceived productivity costs on the part of the employer*. Specifically, incarceration may impose reputational losses on offenders, as well as enact structural barriers that impede successful reintegration into the community. Potential employers may perceive ex-inmates as bad employees who are not worth the risk of hiring for a variety of reasons." Apel & Sweeten, *supra* note 138, at 451.

143. "Specifically, when punishment is heaped on a class of offenders that is not geographically dispersed but that is instead spatially concentrated, as is the class of low-level drug retailers, it is possible that the policy *confounds* its own crime-fighting ends by fueling the precursors to social organization disruption, such as family disruption, unemployment, and low economic status." Meares, Katyal & Kahan, *supra* note 141, at 1191.

144. *Id.* at 1179.

145. "Recidivism, in a criminal justice context, can be defined as the reversion of an individual to criminal behavior after he or she has been convicted of a prior offense, sentenced, and (presumably) corrected." Raymond Ellermann, Pasquale Sullo & James M. Tien, *An Alternative Approach to Modeling Recidivism Using Quantile Residual Life Functions*, 40 OPERATIONS RESEARCH 485 (1992) (quoting M.D. MALTZ, RECIDIVISM 1 (1984)). Many jurisdictions measure recidivism at the one, two, and three-year intervals of release.

146. *See* California Dep't of Corrections and Rehabilitation, 2012 Outcome Evaluation Report (2012), *available at* http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/ARB_FY_0708_Recidivism_Report_10.23.12.pdf (last visited Apr. 30, 2015).

147. *Id.* at 13.

148. *Id.* at 14.

had been incarcerated two or more times were approximately twenty-percent more likely to end up in custody again.[149]

When considered in conjunction with a study of federal prison recidivism, the numbers are particularly instructional. In line with the states, the majority of federal prisoners are convicted of victimless crimes.[150] Among this group, the recidivism rate is roughly twenty percent.[151] However, further analysis "shows that when reason for failure is considered, none of the . . . low-risk drug traffickers who recidivated were charged with serious crimes of violence such as found in the [Federal Bureau of Investigation Uniform Crime Reporting] violent crime index."[152] Half of the individuals were rearrested for drug offenses, twelve-percent for driving while intoxicated, and nearly twenty-percent for parole violations or miscellaneous non-violent offenses.[153] This is substantial, factual data of the revolving door theory in practice, where "the alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment" increases the rate of recidivism among non-violent offenders.[154]

D. Conclusion

The United States is facing a crisis in its criminal justice system. The national trend is to expand both the punishable offenses and the length of punishment. However, by punishing the perpetrators of victimless crimes with significant prison time, the United States is merely perpetuating the problem. These offenders, who pose little or no threat of violence, are entrapped in a system of repeated incarceration and punishment for consensual activities. The United States must begin to take reasonable steps to provide for the reintroduction of these non-violent offenders into society if the revolving door is to finally be stopped.

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149. *Id.* at 13.

150. "[D]rug traffickers . . . compose the largest single federal prison offense group, both among admissions and population on hand—as of June 1, 1993, 61 percent of all federal prisoners were drug traffickers. Of the 27,525 persons sentenced to Federal prison in 1992, 14,293, or 52 percent, were convicted of drug trafficking . . . ." Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 FED. SENT'G REP. 22 (1994).

151. "[A]mong low-risk drug traffickers, 19.1 percent recidivated and 80.9 percent did not." *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 23.

III. LOOKING TO LOCKE FOR SOLUTIONS

Though the United States has undeniable flaws in its system of criminal punishment, a few changes can bring the system in line with the theory of punishment outlined in Locke's state of nature. The high rate of incarceration has put enormous stress on the prison system in the United States. In fact, the "inadequacy of existing prison facilities in the United States is playing an increasingly prominent role in the debate over how to improve law enforcement and reduce crime."[155] With increasing public outcry for stricter punishment, especially in the form of incarceration, the criminal systems of the United States, because of their limited budgets, must look to new means of punishment.[156]

Among the possible changes are: (a) focusing punishment on deterrence theory; (b) the decriminalization of victimless crime; (c) greater individualization in punishment by minimizing plea bargaining, increased victim input, greater judicial discretion, or allowing jury nullification; and (d) focusing on reintegrating convicted individuals into the community after incarceration. Each of these changes is consistent with the philosophy of John Locke and would have a positive impact on the substantial problems facing the American system of criminal punishment as outlined in Part II.

A. Deterrence Theory

The underlying theory of punishment in the Lockean state of nature is the deterrence of future crime.[157] In fact, Locke argued that each crime may only be "punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."[158] The central concept of deterrence is that "the threat that the unpleasant consequences which result from breaking the law will serve to discourage criminal activities . . . ."[159] Deterrence theory suggests the more severe the penalty, the higher the rate of compliance will be with a given statute.[160]

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155. Kennedy, *supra* note 104, at 114.

156. *Id.*

157. "[E]very man has a power to punish the crime, *to prevent its being committed again*, 'by the right he has of preserving all mankind,' and doing all reasonable things he can do in order to that end." LOCKE, *supra* note 34, at 104 (emphasis added).

158. LOCKE, *supra* note 34, at 105.

159. Patricia G. Erickson, *Deterrence and Deviance: The Example of Cannabis Prohibition*, 67 J. CRIM. L. & CRIMINOLOGY 222 (1976).

160. "Deterrence theory suggests that those given the more severe penalties would be least likely

In general, "[s]anctions such as imprisonment impose high personal opportunity costs, and thus potentially represent a greater deterrent . . . ."[161] However, at least in terms of victimless crimes, this does not appear to be accurate.[162] Indeed, there is substantial evidence "that law enforcement will not work to curb demand substantially no matter how many police and judges are hired, or arrests made, or prisons built."[163] The percentage of individuals convicted of victimless crimes, discussed in Part II shows that the fear of incarceration is not substantial enough to deter certain criminal conduct.

Instead of continually increasing prison sentences for victimless crimes, a course of action that has put substantial strain on the criminal justice system, jurisdictions can craft punishments that better deter criminal action. Other possible sanctions include economic sanction—such as a fine—for low-level drug dealers, and medical treatment for drug users. In both cases, these punishments target the reason for continued activity, the economic advantage for drug dealers in operating an underground illicit market, and, for users, the continual need to purchase narcotics.

B. The Decriminalization of Victimless Crime

As outlined in Part I, Locke's conception of crime in the state of nature centers on an individual's right to life, health, liberty, and property.[164] Without these rights, crime is not possible. And, as outlined in Part II, American legislators have grossly over-criminalized individual action.[165] One possible solution to the crisis in criminal punishment is, then, decriminalization.

While there are a number of definitions for the term "decriminalization," each attempts to examine "the appropriate role of the state in regulating the behavior of competent adults . . . ."[166]

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to continue the proscribed behavior." *Id.* at 226.

161. Roger Bowles, Michael Faure & Nuno Garoupa, *The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications*, 35 J. L. & SOC'Y. 389, 398 (2008).

162. "Criminal sanctions neither deter drunkenness nor prevent recidivism." Fagan & Mauss, *supra* note 140, at 234.

163. Morris J. Blachman & Kenneth E. Sharpe, *The War on Drugs: American Democracy under Assault*, 7 WORLD POL'Y J. 135, 137 (1989).

164. LOCKE, *supra* note 34, at 111.

165. Stuntz, *supra* note 106, at 515–16.

166. Ronald Bayer, *Introduction: The Great Drug Policy Debate: What Means This Thing Called Decriminalization?*, 69 MILBANK Q. 341, 360 (1991).

"Although it may have been controversial when first advanced, the claim that victimless crimes should be decriminalized now commands widespread support."[167] Beyond merely academics, this theory has received widespread support among experts in criminology and law enforcement.[168]

Decriminalization is an attractive option. However, the politics of modern America, a two-party system in which each clamors for the "tough-on-crime" moniker, make such a shift in theory unlikely. There are, though, a number of practical limited options for decriminalization. First, the overlap of crime between various levels of government could be eliminated. While this would not effect a decriminalization of activity, it would have a substantial impact on possible sentencing. Second, legislators, both state and federal, could wade through the expanse of criminal statutes and work to decriminalize those that are impractical or rarely utilized. Such an effort would increase the gravity of the criminal system, which could, in turn, reduce the incidence of criminal activity.

C. Individualization of Criminal Sanctions

1. Plea Bargaining

Plea-bargaining occurs when "rational parties forecast the expected trial outcome and strike bargains that leave both sides better off by splitting the saved costs of trial."[169] Plea bargains occur in the majority of cases; the vast majority when it comes to victimless crime.[170] These bargains often skew the allocation of punishment, especially when considered together with the over-criminalization outlined in Part II.[171]

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167. Wertheimer, *supra* note 118, at 302. Further, "With some minor variations, the advocates of decriminalization would generally recommend that the following activities be removed from the province of the criminal law: homosexual relations between consenting adults, adultery, public drunkenness, vagrancy, loitering, gambling, prostitution, abortion, and possession and use of narcotics." *Id.*

168. "It has been considered by seasoned administrators that there is an overreach of criminal laws and criminal penalties have been applied to a wide and varied range of activities from regulation of automobile traffic to anti-terrorist laws. It is strongly felt by many criminologists and law enforcement experts that criminal laws should be reviewed with the object of decriminalising many aspects of human behaviour." Sankaran, *supra* note 123, at 4083.

169. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004).

170. "Of 106,565 possession offenses in New York State in 1998 only 295, or 0.27% resulted in a verdict." Dubber, *supra* note 132, at 859.

171. Bibas, *supra* note 169, at 2467.

Plea-bargaining, then, "adds another layer of distortions that warp the fair allocation of punishment."[172]

There are benefits to plea bargains, notably lowering the cost of trial procedures. However, if this lowering of trial costs results in a higher percentage of incarcerated individuals, that benefit is negated due to the high per-inmate cost of upkeep. Plea-bargaining appears focused on short-term, rather than long-term, system efficiency. A better system would limit plea bargains in a number of significant ways. First, prosecutors should not be allowed to threaten further prosecution in order to achieve a plea. The vast number of criminal statutes, as outlined above, tilts bargaining power too far in favor of the government. Second, bargaining proceedings should be recorded. This would allow interested victims, community or individual, a way to maintain involvement in the process.

2. Victim Input

The victim played an important role in punishment in Lockean theory. Not only was the victim actually injured, but the victim was also allowed to actively participate in punishment of the wrongdoer. This reflected the victim's role at common law.

While victims historically had rights regarding prosecution and punishment, in modern criminal law, victims are almost entirely excluded from the process.[173] People, victimized individuals and communities, "value remorse and apology because they heal psychic wounds, teach lessons, and reconcile damaged relationships."[174] However, the criminal system as currently constructed does not afford a large role to victims.[175] In fact, the "genuinely remorseful offender who wishes to apologize to his victim and make amends usually has no readily available way to do so. . . .

172. *Id.* at 2468. "Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence." *Id.*

173. "[O]ur governments allowed the criminal justice pendulum to swing too far in the direction of the State. Systematically, the victim was silenced. Aside from testifying at trial (assuming that there would be one), victims were often excluded. Victims had no right to consult with prosecutors, no ability to recommend a sentence, and often, no right to be present at trial. Moreover, law students trained in the criminal law were and still are taught that a crime is an offense against the State." Erin Ann O'Hara, *Victims and Prison Release: A Modest Proposal*, 19 FED. SENT'G REP. 130, 130 (2006).

174. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87 (2004).

175. "Surprisingly, however, remorse and apology play little role in criminal procedure." *Id.* at 88. Further, "criminal procedure does little to encourage or even allow meaningful apologies and expressions of remorse from offenders to their victims and the community." *Id.* at 92.

[F]rom the time of arrest until trial (if there is one) and sentencing, victims are almost never in sight of the offender."[176]

However, there is currently a greater trend toward victim involvement, and apology in particular. One interesting recent innovation is victim-offender mediation. Studies have shown that such mediation is surprisingly successful.[177] "[E]mperical studies of restorative justice programs show that they control crime at least as well, if not better than, traditional criminal justice" while also bringing "the added benefits of vindicating victims, healing and reconciling victims and offenders, reaffirming social norms, and morally educating offenders and citizens."[178] These benefits can have a great impact on an offender who is conscious of wrongdoing.[179]

The evidence bears this out. "[P]reliminary evidence involving juveniles indicates that those offenders who participate in [victim-offender mediation] are significantly less likely to recidivate than those who participate in the criminal justice process."[180] This is likely due, at least in part, to the humanizing nature of face-to-face interaction, which breaks down "pride, fear, pain, anxiety, and other barriers to accepting responsibility."[181]

Apology and victim-offender mediation will not always be successful.[182] Targeting specific victims and offenders can raise the level of success. First, the victim must be willing to confront the offender. And, as importantly, the offender must not already be caught in the revolving door of criminal life. A mediation and apology system focused on

176. *Id.* at 97.

177. "One study of mediations at four dispute resolution sites in four different states found that 90 percent of victims and 91 percent of offenders reported being satisfied with the mediation outcome." O'Hara, *supra* note 173, at 131.

178. Bibas & Bierschbach, *supra* note 174, at 117.

179. "A person who is conscious of having done wrong, and who feels genuine remorse for his wrong . . . is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are." *Id.* at 95 (quoting United States v. Beserra, 967 F.2d 254, 256 (7th Cir. 1992) (Posner, J.))

180. O'Hara, *supra* note 173, at 131.

181. Bibas & Bierschbach, *supra* note 174, at 115. Further, a wrongdoer "cannot simply rationalize the crime as being minor or harmless when a real person stands in front of him describing the physical and emotional pain directly flowing from his behavior." *Id.* (quoting Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 300).

182. "[R]emorse and apology will not always work. Some offenders will remain defiant. Some suffer from psychopathy, which impairs the capacity to empathize and so feel remorse. Some victims will be rationally or irrationally fearful of meeting with their offenders and reliving the trauma. And some—although surprisingly few—may care little about such expressions and may want only vengeance." *Id.* at 145.

juveniles and first-time offenders, if implemented, could have a drastic impact on crime in the United States.

3. Judicial Discretion

Another way to affect change would be through the widening of judicial discretion. "Sentencing is the point in the criminal justice system where overcrowding can most effectively be controlled."[183] However, the current sentencing practices in the United States of America are a major contributing factor to the issue of overcrowding.[184] "Different judges use their unfettered discretion to impose widely different sentences on offenders in similar circumstances convicted of similar crimes."[185]

Reforming sentencing laws could establish a uniform policy that would limit incarceration and would reserve imprisonment only for offenders where the incapacitation is worth the high price.[186] This reform could be accomplished through selective incapacitation, "under which incarceration would be reserved primarily for offenders who are a danger to the community."[187] This, too, would limit the applicable punishment of victimless crime.

Such a system would allow for judges to liberally use their sentencing authority to craft punishments that more adequately reflect the danger posed to society by the crime. This would add "a human element to an otherwise mechanical process and also provide[] the flexibility necessary to adapt rigid, formal rules to diverse, concrete situations."[188] This flexibility would allow a sentencing judge to take into account a multitude of factors necessary to determine the degree of culpability, including:

> (a) the extent to which an act is antisocial, (b) how far it was impulsive or premeditated, (c) the degree of intelligent comprehension of its implications and consequences by the delinquent, (d) the extent of his insight into his motives, and (e) the magnitude of his offense on an objective scale of values. If

183. Kennedy, *supra* note 104, at 118.
184. *Id.*
185. *Id.*
186. *Id.* at 114.
187. *Id.* at 115.
188. Victor H. Li, *Law and Penology: Systems of Reform and Correction*, 31 PROC. ACAD. POL. SCI. 144, 147 (1973).

> punishment is to be appropriate to an offense, it must be adjusted in respect to all these points.[189]

Judges should be allowed to exercise discretion in sentencing. A number of alternatives to incarceration exist, such as the victim-offender mediation outlined above. Especially when dealing with first-time offenders, victimless offenders, and juvenile offenders, judges should attempt to avoid incarceration whenever possible. By so doing, judges can avoid placing individuals within the revolving door of state punishment.

4. Jury Nullification

If judicial discretion is not an attractive option, jurisdictions could revert to jury nullification to cause a similar end. A vital aspect of punishment in a Lockean state of nature was the open condemnation of the community. This is evidenced by Locke's belief that every individual had a right, and even a duty, to participate in punishment. Not only did the community judge an individual's guilt or innocence, but the community also determined the extent of punishment.

Trial by jury in criminal cases is one of the important rights guaranteed by the United States Constitution.[190] However, the role the jury plays in trial has changed significantly since the eighteenth century when "it was commonly accepted that a defendant had the right to a jury which both found facts and determined whether the law should apply."[191] Importantly, the jury was, more than a trier of fact, a conscience of the community.[192]

Today, however, most juries only decide guilt and innocence, while a judge doles out punishment. One way to reverse this trend and put punishment back into the control of the community, as represented by the jury, is through jury nullification. Jury nullification allows the jury to find a defendant guilty, but to refuse to impose the statutorily enumerated punishment when it contradicts the community's belief.

Re-implementing some form of jury nullification would allow community members greater discretion in sentencing. In victimless crimes, where it is the community that has allegedly been wronged, this

189. R. W. Pickford, *Psychological Aspects of Punishment*, 58 ETHICS 1, 5 (1947).

190. "Of the rights guaranteed to the people by the Constitution, only one appears in both the original Constitution and the Bill of Rights: the right to a jury trial in criminal cases. While almost all other aspects of the Constitution were heavily debated, the Founders did not question the wisdom of the jury trial." Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959 (2006).

191. *Id.* at 959–60.

192. *Id.* at 992.

system could prove valuable in tailoring punishment. Some commentators have argued that a return to jury nullification would prove too big a shift to be practical, but the evidence suggests otherwise. Jury nullification is rooted in the common law, and lasted into the nineteenth century. In fact, Maryland still explicitly allows jury nullification.[193] An increase in jury control is a practical and achievable means to minimizing the issues facing the American criminal system.

D. Reintegration

Whether criminal sanctions are changed to focus on deterrence, decriminalization, or individualization, the criminal justice system in the United States must also place a greater emphasis on the reintegration of convicted individuals into society. Locke argued as much when he said that individuals could only be punished up to a certain degree of severity.[194] Criminal punishment in the state of nature was not indefinite.

As has been evidenced, after release "the offender carries a social stigma, generally has learned no socially useful skills, and usually returns to the milieu where he first developed his deviant tendencies."[195] Furthermore, in many instances, a convicted individual must pay for his or her crime indefinitely, such as with his or her constitutional rights to vote or to own firearms. Without the opportunity to reintegrate into society, all incentives to reform an individual's actions are of a negative character.[196]

Criminal justice systems could, then, focus attention on the reintegration of released individuals. This could take the form of assistance finding stable housing and jobs, in particular. Less likely, but with a higher upside for positive change, would be trade training for incarcerated individuals. By teaching inmates a craft or skill that is transferrable to life outside of prison, the criminal justice system could set individuals up for a more successful role in society after release. These steps would significantly lower the rate of recidivism by giving released individuals an actual opportunity to start anew.

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193. "Maryland, whose constitution explicitly permits jury nullification, prescribes a jury instruction that states that the law 'is not binding upon you as members of the jury and you may accept or reject it.'" *Id.* at 990 (quoting Wyley v. Warden, 372 F.2d 742, 743 n.1 (4th Cir. 1967)).

194. *See* LOCKE, *supra* note 34, at 105.

195. Li, *supra* note 188, at 149.

196. *Id.* at 156.

CONCLUSION

Whatever method used, whether it be an overall rethinking of the criminal justice system to focus on deterrence, decriminalizing victimless crime, individualizing sentencing, or focusing on reintegration, the criminal justice system in the United States is in desperate need of change. By looking to the philosophy of John Locke, in particular his theories regarding punishment within the state of nature, policy-makers in the United States can begin to think critically about how to solve the enormous problems of an elevated rate of incarceration, high recidivism, and the strain that these two problems put on the finances of local, state, and the federal government.