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Revolving Door and the Recidivist; Commentary on the California Justice System

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Commentary on the California Justice System

A vast number of crimes are committed by a small number of felons known as career criminals. California studies have suggested that 60% of persons arrested for robbery have a prior felony conviction.¹ It has been theorized that Section 667 of the California Penal Code is not in harmony with the generally accepted supposition of punishment under the rehabilitation theory; therefore, California's system of law and order hinders rather than aids the assimilation of the recidivist back into society. California's expansive failure in preventing further criminal activity from repeat offenders can be directly attributed to the system of justice based on the retributive theory currently in place.

Section 667 of the California Penal Code was drafted by the legislature with the intent to ensure longer prison sentences for those who commit felonies and have been previously convicted of serious felonies. What the statute has effectively done is marginalize the percentage of repeat offenders who desire to be legitimate, contributing members of society. Under a portion of California Penal Code Section 1192.7, certain drug-related offenses are considered a "serious felony" and would therefore fall under the austere provisions of Section 667. Section 667(c)(4) of the California Penal Code specifically states that "diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center." The California Rehabilitation Center's mission statement is to successfully treat and return all felon addicts to a useful and productive lifestyle. With an estimated 6.8 million Americans struggling with drug abuse or dependence and approximately one quarter of those held in U.S. prisons for conviction of a drug offense, it is hard to justify the strict language of Cal. P.(c)(4). Moreover, the growth of the prison population continues to be driven largely by incarceration for drug offenses.²

California prisons' failure to rehabilitate grows out of dissatisfaction of a system that doesn't customize a sentence to an individual's needs, but rather applies blanket provisions over classes of criminal offenses regardless of the defendant's background or personal history; however, it is

¹ Petersilia, Joan, and Peter W. Greenwood. "Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations," (1977), 2.

² Justice Policy Institute. "Substance Abuse Treatment and Public Safety," (Washington, DC: January 2008), 1.

interesting that courts elsewhere have had different approaches to the rehabilitation theory with various success. For instance, in *United States v. Bad Marriage*, 392 F.3d 1103, 1108 (9th Cir. 2004),³ the Court found that both the plain language of U.S.S.G. § 4A1.3,⁴ as well as Ninth Circuit precedent, establish a finding that either the seriousness of a defendant's past conduct and the likelihood of future recidivism should be considered in sentencing an offender. In *United States v. Connelly*, 156 F.3d 978, 984 (9th Cir. 1998),⁵ the Court approved a dramatically increased sentence based on the seriousness of the criminal act being tried as well as the upward trend of criminal behavior the defendant had been exhibiting. The Court found that the defendant's past conduct was becoming increasingly serious and held that the departure in sentencing was justified on the basis of the defendant's likelihood of recidivism. Thus, the Court clearly applied the defendant's personal history and individual circumstances to apply the determinate sentence, and therefore, was quite clear in its intention to rehabilitate in a manner or treatment best suited to the offender. Section 667 of the California Penal Code provides for set, mandatory sentence enhancements which are contrary to the maxims of the rehabilitation theory for its lack of consideration for each offender's rehabilitative capacity. A controlled study called Intensive Supervision Programs (ISPs) attempted to rehabilitate offenders by providing more treatment and probation/parole officers, increasing surveillance, and reducing the overcrowding of prison populations.⁶ The studies indicated that certain rehabilitative aspects of the ISP have been proven to be effective in reduction of recidivism rates.⁷ Cognitive behavioral programs have also shown to be successful in reducing criminal behavior. These programs incorporate principles of learning and the ability to focus on the cognitive structure to teach offenders skills such as anger management and moral reasoning. A 2002 review shows that "cognitive behavioral programs can reduce recidivism rates by significant amounts."⁸

³ *United States v. Bad Marriage*, 392 F.3d 1103, 1108 (9th Cir. 2004).

⁴ U.S.S.G. § 4A1.3 (2004)

⁵ *United States v. Connelly*, 156 F.3d 978, 984 (9th Cir. 1998).

⁶ Bennett, Lawrence A. "Practice in Search of Theory; The Case of Intensive Supervision—An Extension of An Old Practice or A New Approach?" *American Journal of Criminal Justice* 12 (1988), 293.

⁷ Byrne, James M., Arthur J. Lurigio, and Christopher Baird. "The Effectiveness of The New Intensive Supervision Programs," *Research In Corrections* 2 (1989), 1–48; Fulton, Betsy, Edward J. Latessa, Amy Stichman, and Lawrence F. Travis. "The State Of Isp: Research and Policing Implications," *Federal Probations* 61 (1997), 65–76.

⁸ Pearson F.S., D.S. Lipton, C.M. Cleland, D.S. Yee. The Effects of Behavioral/Cognitive-Behavioral Programs on Recidivism (2002), 490–491.

Immanuel Kant's retributive theory of justice underscores the punishment rather than the treatment of convicted offenders. Under the retributive theory, the level of punishment meted out for a particular crime may be determined by the amount of harm, injury, or injustice the crime caused. This type of system has roots that are steeped in the tradition of the Biblical Israelites as a rough sense of justice immortalized by the phrase "eye for an eye, tooth for a tooth."⁹ A poetic equity flows easily from the pages of Deuteronomy, which subsequent systems of jurisprudence and modern legislation have attempted to emulate. The Mosaic Law's form of retribution, similar to the classical form [*lex talionis*] often espoused by Kant (1724-1804), is ultimately vindictive in nature and holds the offender morally accountable, regardless of any future good the offender may otherwise be capable of. Likewise, through Eastern conceptualism, karma can be described as an entity to which good and evil are submitted to a cyclic slipstream which redistributes the energy in an ultimately just manner. Delving further into theological teachings, one finds a loose symbiosis of retributive teachings between the various fundamental denominations. Interesting as this phenomenon may be, it is perhaps irrelevant on a superficial level to the relationship between California Penal Code 667 and how it is shaped by the retributive theory.

The retributive theory is also sometimes referred to as proportional punishment where judges impose a penalty for a crime within the range set by the binding authority such as California Penal Code 667. Some argue that judges do not have enough discretion to allow for mitigating factors leading to unjust decisions under certain circumstances. This leads us to various theories on criminology and its relationship to humanity. For instance, classical school theories suggest that human beings are cogent, yet concurrent pleasure-seeking creatures. In 18th Century Europe during the Age of Enlightenment, the pervasive consensus was that human behavior was determined by God or demons. Jean-Jacques Rousseau and John Locke contested the popular belief and asserted that God instilled free will in humans which would thus allow every individual the ability to make their own decisions based on reason. These new theories were used as a platform to argue for legal reform and were also the origin of scientific theory on criminal behavior. Cesare Beccaria devised principles that would dramatically alter the way the justice system operated at the time. One of the tenets of his position was that punishment is desirable only if it helps to prevent crime and does not conflict with the ends of justice. Moreover, Beccaria emphasized that the purpose of punishment is to deter people from the commission of crime, and not to give society an occasion for revenge. Beccaria, as well as

⁹ Deuteronomy 19:21, *New World Translation of the Holy Scriptures* (1981).

Jeremy Bentham, another prominent legal reformer, shared the belief in the notion that the purpose of punishment should be the prevention of crime and that the severity of the crime should be in direct proportion to the punishment so the desired effect is achieved; in sum, deterrence. Thus, we can see how the retributive theory was influenced largely by the classical school of thought in criminology in that punishment should be in harmony with the crime and that certain punishment meted out by a well-defined legal system will deter criminal behavior.¹⁰

Punishment under the retribution theory is not necessarily meant to be vindictive, and in theory, is a means for society to exact an appropriate punishment for the crime committed. German philosopher Georg Wilhelm Hegel (1770-1831) said, “society has both a right and a duty to punish criminal offenders because they deserve to be treated in this manner.” Punishment serves to negate the offense and to affirm the rule of law; however, unlike the rehabilitation theory, retributivism is not particularly interested in any positive outcomes the punishment may produce for society.¹¹

¹⁰ Vito, Gennaro F., Jeffrey R. Maahs, and Ronald M. Holmes. “Criminology Theory,” *Research and Policy* 2nd Edition (Jones and Bartlett Publishers, 2007), 18.

¹¹ Hegel, G.W.F. *The Philosophy of Right*, Trans. T.M. Knox (Oxford: Oxford University Press, 1965), 274.