

2015

A Philosophical Analysis of California Determinate Sentencing, Three Strikes, and Realignment

Madeline Stein

Claremont McKenna College

Recommended Citation

Stein, Madeline, "A Philosophical Analysis of California Determinate Sentencing, Three Strikes, and Realignment" (2015). *CMC Senior Theses*. Paper 1110.
http://scholarship.claremont.edu/cmc_theses/1110

This Open Access Senior Thesis is brought to you by Scholarship@Claremont. It has been accepted for inclusion in this collection by an authorized administrator. For more information, please contact scholarship@cuc.claremont.edu.

CLAREMONT MCKENNA COLLEGE

**A Philosophical Analysis of California Determinate Sentencing, Three Strikes, and
Realignment**

SUBMITTED TO

Professor Giorgi Areshidze

and

Professor Joseph Bessette

and

Dean Nicholas Warner

by

Madeline Stein

for SENIOR THESIS

Fall 2014/Spring 2015

April 27, 2015

ABSTRACT

This thesis explores the relationship between philosophy and policy in the context of three California policies, Determinate Sentencing, Three Strikes, and Realignment. The philosophy portion includes theories of retribution, deterrence, and rehabilitation, focusing on the tensions and conflicts within them.

Table of Contents

Introduction	5
Chapter One: Retribution	11
Chapter Two: Utilitarian Theories	21
Chapter Three: Rehabilitation	31
Chapter Four:	43
Chapter Five:	53
Chapter Six:	65
Conclusion	76
References	80

Acknowledgements

I would like to thank Professor Areshidze for his dedicated mentorship throughout my time at CMC and for providing the inspiration for this thesis during his political philosophy class. Professor Bessette's Crime and Public Policy class provided an excellent foundation for this thesis. I would like to thank Professor Bessette for his amazing attention to detail, commitment to debate, and support throughout the writing process. Finally, thank you to my friends and family for always supporting me.

Introduction

Socrates makes a radical claim in *Plato's Apology* that individuals cannot voluntarily commit wrongdoing so only the irrational are capable of performing a criminal act.¹ During Meletus' cross-examination, Socrates states,

“and if I corrupt involuntarily, the law is not that you bring me here for such involuntary wrongs, but that you take me aside in private to teach and admonish me. For it is clear that if I learn, I will at least stop doing what I do involuntarily. But you avoided associating with me and teaching me, and you were not willing to, but instead you brought me in here, where the law is to bring in those in need of punishment not learning.”²

Socrates distinguishes between punishment and education as two mutually exclusive ends, demonstrating the radical nature of his belief. The element of involuntariness is at odds with most modern theories and institutions of punishment, which are dependent on one making a rational choice. Socrates holds that education is the only plausible response to crime, yet this is seemingly incompatible in the United States, a large nation with thousands of dangerous criminals. Even if Socrates' alternative had the possibility of working, it is easy to imagine citizens and officials rejecting it due to their deep-seated beliefs about the necessity of punishment and fear of violence. Theories of retribution, deterrence, and rehabilitation provide the rationales for current public policy, often in a mixed fashion. Having a deeper understanding of the assumptions behind the theories and their philosophical origins will provide insight into Socrates' dilemma in a modern setting. This thesis will explore the question of how to justify punishment despite the radical observation about the involuntariness of crime in

¹ Thomas G. West and Grace Starry West, *Four Texts on Socrates* (Ithaca: Cornell University Press, 1998), 75

² Ibid

the context of modern California policy. Relying on this Socratic insight will provide a unique perspective on the on-going debate over the varying theories.

Lorraine Smith Pangle, in her article “Moral and Criminal Responsibility in Plato’s *Laws*” discusses Plato’s criminal code in the *Laws*, focusing on the potential for radical and philosophical contributions to theories of modern punishment.³ She highlights Plato’s argument “that no code of legislation, however wise, can instill in the majority of citizens the virtue that in Socrates’ soul sprang from philosophic independence—the self-sufficiency, the strength to face necessity calmly, the humane spirit of moderation.”⁴ Despite the laws’ insufficiency in these respects, they can still serve as a reminder of higher accounts of virtue, attempting to provide moral teaching and to dissuade individuals from criminal life. Pangle discusses the Athenian Stranger’s critique of retribution and deterrence that they are ignoble and turns to the Socratic recommendation of education from *Plato’s Apology*. Education requires a full reformation of the criminal, which in turn depends on the individual’s acceptance of the treatment. Ultimately, this requirement of rehabilitation poses important questions about the theoretical background and effectiveness of the theory.

Pangle’s solution from analyzing Plato and Socrates’ arguments is that there are important applications of their philosophical arguments to modern punishment. Often rehabilitation or education is justified using appeals to pragmatism and compassion, but Plato has a deeper account emphasizing the well-being and soul of the offender and ultimately the community. Additionally, Pangle draws on an important conflict between

³ Lorraine Smith Pangle, “Moral and Criminal Responsibility in Plato’s *Laws*” *American Political Science Review*, Vol. 103, No. 1, 2009

⁴ Pangle, 459

restorative and punitive aims of the criminal justice system. It is impossible to completely remove the punitive element, given the violent nature of crimes and demands of victims. The inconsistency of justifying retributive punishment ought to be accepted, since it is often the only recourse when alternative treatment fails. Finally, she argues that modern restorative justice movements lack a notion of what ought to be restored, and Plato and Socrates can fill that gap through their deep understandings of the virtue and self-sufficiency of individuals. Pangle is promising for dealing with this Socratic dilemma since she does not merely critique punishment, but offers solutions for how the philosophical and sometimes radical criticisms can be integrated with modern punishment and rehabilitation to bolster them. She raises important questions about the compatibility of punishment and treatment, inconsistency of retribution, and goal of rehabilitation which I will discuss in subsequent chapters detailing the respective theories.

Retribution

Retribution connotes the common phrase, “the punishment should fit the crime.” Despite its commonplace nature, determining which punishments “fit” can be incredibly complex. As a chief contributor to the theory of retribution, Immanuel Kant explains the purpose of punishment, “judicial punishment can never be merely a means of furthering some extraneous good for the criminal himself or for civil society, but must always be imposed on the criminal simply because he has committed a crime.”⁵ Kant’s retributive account purports that individuals should be punished based on desert, with the offenders receiving punishments proportional to their crimes. The ideal system respects the choices

⁵ Immanuel Kant, *Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996) 155

of criminals by assigning the appropriate consequences and recognizing their responsibility. The hypothetical balance can be restored for the victims, society, and the criminals. This balance refers to a principled account of a moral order rather than “extraneous good” such as public safety or other consequences. It is generally agreed upon that known serial murderers deserve severe punishments, but the harder cases involve lesser offenders, the mentally ill, and problems with the penal system itself. Further, opponents argue that is difficult to justify punishment solely based on retribution without considering what is best for society as a whole.

Deterrence

Deterrence is premised upon a rational calculation that the harms of punishment outweigh the good derived from a criminal act. According to deterrence theorists, developing law based on that assumption leads to lower crime rates and increased public safety. Cesare Beccaria argues that “the foundation of the sovereign’s right to punish crimes” is “the necessity of defending the repository of the public well-being from the usurpations of individuals.”⁶ Beccaria appeals to the government or “sovereign’s” obligation to protect the “public well-being,” highlighting a chief motivation behind crime policy. Despite deterrence theorists’ admirable goals, influencing criminals’ irrational motivations and actions can be a barrier to using the law to change behavior. Moreover, determining which punishments are sufficient to affect one’s reasoning before a crime can be nearly impossible

Rehabilitation

⁶ Cesare Beccaria, *On Crimes and Punishments* transl. by David Young (Indianapolis: Hackett Publishing Company, 1986), 10

In 1899, Illinois established a separate court for juvenile offenders for rehabilitative purposes. The goal of the new court and its sanctions was to treat offenders through a compulsory program with education and other reformatory components.⁷ The rehabilitative alternative was premised upon the idea that juveniles are not fully rational and therefore malleable to change. The separate juvenile model still contains some of its original treatment methods, but concerns about due process and the danger of violent juveniles has changed the system from its original design. Karl Menninger applies a similar theory to both adult and juvenile offenders, maintaining that crime is an illness, which must be treated rather than punished. If Menninger's theory holds true, prisons would be cruel and ineffective as a response to crime. Already, one can notice flaws and tensions within the theories, making the question of how to adjudicate among them incredibly relevant and complex.

Determinate Sentencing

California's Uniform Determinate Sentencing Act arose as an alternative approach to indeterminate sentencing. Indeterminate sentencing involves more judicial discretion in assigning sentence lengths. It often emphasizes rehabilitation as the goal, meaning that a more indefinite sentence is appropriate. The length of the sentence depends on the judges' assessment of the offender's reformation in prison. Determinate sentencing provides three options for judges, a mitigated, presumptive, and aggravated sentence. The shift from indeterminate sentencing to determinate sentencing represents a transition from a policy partially based on rehabilitation to one based on retributive proportionality. This shift is in part derived from concerns of the effectiveness of

⁷ Kelly M. Angell, "The Regressive Movement: When Juveniles are Tried as Adults Nobody Wins" *Southern California Interdisciplinary Law Journal* Vol. 14:125, 128 2003

punishment, echoing utilitarian philosophies. I selected this case study of determinate sentencing in California because it is a large state often on the forefront of policy changes in the United States, especially in criminal justice.

Three Strikes

Three Strikes and You're Out in California was one of the first state laws enacting more severe penalties for repeat felons. Compared to other states, it applied to a wider range of felons. The statute was adopted by the legislature but also proposed by the California voters through Proposition 184. The populist advocacy of Three Strikes provides an intriguing perspective on the potential philosophical ideas motivating the people. Three Strikes exemplifies a commitment to incapacitation above all other theories. Potentially, there is some sense of retribution in greater penalties for repeat offenders.

Realignment

California's prison Realignment is the diversion of certain non-serious and non-violent felons from state prison to county jails. The shift was motivated by the unconstitutional conditions in California state prisons due to prison overcrowding. Some county jails are experimenting with more treatment-oriented responses for lower-level felons. Proponents of Realignment recognize the worry of shorter sentences and therefore emphasize that Realignment does not alter sentence length. Realignment is unique to California and is an important case study for this thesis because it reflects the compromise of all three theories of punishment. All three case studies highlight tensions and conflicts of the theories in the context of major California policies.

Chapter One: Retribution

In this chapter, I will outline Kant's theory of retribution in order to establish an understanding of retribution for the subsequent criticisms of the theory and application to public policies that this thesis explores. The interaction among retribution, anger, and emotions holds importance in some versions of justifying retributive theory, but also in contributing to criticism. After discussing Kant's arguments, I will present some critiques and discuss Walter Berns' work on anger and retribution, analyzing how the two factors intersect and complement each other's arguments.

Kant opens his theory of laws by focusing on what he calls the Public Right, "a system of laws for a people" which provides "a rightful condition under a will uniting them, a constitution (*constitutio*), so that they may enjoy what is laid down as right."⁸ The rightful condition refers to the two requirements that "people must be able to acquire means through their deeds, and stand up for their rights."⁹ Therefore, the rightful condition refers to the normative purpose of the law premised upon securing individual freedoms and rights. The explicitly normative purpose of the law distinguishes Kant from other theorists who hold that the law is merely necessary because he does not base the need for laws on a natural fact about humans, such as the need to establish order and bring peace to a violently divided and autonomous state of nature. Although Kant does not make the same assumptions about the brutish human nature, he notes the necessity of laws since "before a public lawful condition is established, individual men, peoples, and states can never be secure against violence from one another, since each has its own right

⁸ Immanuel Kant, edited by Mary Gregor, *Metaphysics of Morals*, (Cambridge: Cambridge University Press, 1996), 123

⁹ Arthur Ripstein, "Kant on Law and Justice," in Thomas Hill *The Blackwell Guide to Kant's Ethics*, 2009 <http://onlinelibrary.wiley.com/doi/10.1002/9781444308488.ch7/summary> 13-14

to do what seems right and good to it and not to be dependent upon another's opinion about this."¹⁰ He therefore argues for law's necessity but not because of an inherently brutal human nature like Hobbes and Locke.

After establishing the justification for laws designed to secure the rightful condition, Kant establishes why punishment ought to be retributive rather than utilitarian or fulfilling some end. He argues that punishment must only be inflicted on the guilty because acting otherwise would result in one being used as a means to an end, and persons have an innate nature rendering such treatment unjust. Since punishment involves the use of coercion, clearly some different treatment is permissible against the convicted, as Kant notes that one "can be condemned to lose his civil personality."¹¹ Another restriction against utilitarian purposes of punishment is Kant's opposition to "the Pharisaical saying, 'it is better for one man to die than for an entire people to perish.'"¹² Further, the principle of equality influences the retributive theory, as "whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself."¹³ Thus, by committing a crime an individual takes away his or her own ability to enjoy the benefits of security. Equality represents part of the theory, but a court must decide the quality and quantity of punishment, depending on the specific circumstances of a crime. In addition to equality, Kant bases his theory on respect for persons, particularly treating them as ends in themselves. Such respect is premised upon valuing one's ability to make

¹⁰ Kant, *Metaphysics of Morals*, 123-124

¹¹ Kant, *Metaphysics of Morals*, 141

¹² Ibid

¹³ Kant, *Metaphysics of Morals*, 140

moral choices.¹⁴ Kant's treatment of individuals as ends distinguishes his account from utilitarian theories because individuals deserve punishment because of their actions rather than any threat they may pose to society. The requirement of a court determining the punishment serves to distinguish retribution from vengeance as sanctions stem from a process involving laws, deliberation, and an impartial judiciary.

Under Kant's theory, there is no substitute for punishment by the state, and this becomes especially the case with regard to capital crimes and punishments. Kantian justice therefore holds that "there is no similarity between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer."¹⁵ Kant's requirement for the death penalty stems from a claim about proportionality as "there is no similarity between life and death." Proportionality, in this case, is very clear, since Kant argues that murder demands the use of the death penalty. Determining the standard for other crimes may prove to be more difficult, but Kant would argue that the principle of proportionality should guide the state's response to other crimes. Arthur Ripstein, in his book *Equality, Responsibility, and the Law*, provides a concise justification for proportionality within retributive punishment. He argues,

"punishment is scaled to the seriousness of the wrong rather than the expected advantage of the crime because it treats the denial of the victim's rights as the measure of the wrongdoer's gain. That loss is in the form of a loss of rights; the wrongdoer's putative gain is represented in terms of advantage because the wrongdoer treated the victim's rights in terms of advantage."¹⁶

¹⁴ Pillsbury, Samuel H. "Emotional Justice: Moralizing the Passions of Criminal Punishment" *Cornell Law Review*

74 *Cornell L. Rev.* (1988-1989), 660

¹⁵ Kant, *Metaphysics of Morals*, 140

¹⁶ Arthur Ripstein, *Equality, Responsibility, and the Law*, (Cambridge University Press: Cambridge, UK: 1999), 141

Ripstein characterizes proportionality as reflecting the denial of the victim's rights resulting from the crime, adding an important clarification to Kant's proportionality. He establishes that the expressive component of retributive punishment is important in its theoretical justification. By expressive, he means "making it clear that the criminal did not succeed in treating victim's rights as mere prices."¹⁷

Two common criticisms of Kant's retributive theory of punishment and of retribution more generally focus on its detachment from the social good and its lack of a justification for why criminals deserve such extreme harm of imprisonment or death. The latter objections to imprisonment often contextualized in modern day since Kant did not explicitly refer to imprisonment. The former objection referring to the social good can draw on high rates of recidivism or more empirical negative consequences of modern punishment. On a theoretical level, there is an intuition against maintaining a system of retribution if it harms the majority of the population. The latter objection about why individuals deserve such severe punishments represents a more interesting case. The argument holds that retribution relies on the premise that individuals deserve punishment. However, critics hold that the desert-based premise is insufficient to explain the amount and type of punishment.

In "Morality and the Retributive Emotions," J.L. Mackie articulates the main objections to retribution, elaborating on the latter objection about desert. A central question he discusses echoes the above criticism, as he asks "how are we to make moral sense of a concept which includes this requirement, which envisages suffering or

¹⁷ Ripstein, *Equality, Responsibility, and the Law*, 159

deprivation as being called for by a previous wrong action?"¹⁸ Mackie lays out several common solutions to this conundrum of justifying suffering of a criminal to restore a past wrongdoing and finds none of them adequate, and I will present the main arguments of his discussion. He considers the idea that retributive punishment appeals to the "satisfaction that may be felt by the surviving victims of a crime when the criminal suffers," but ultimately such satisfaction is utilitarian which is inconsistent with a pure retributivism.¹⁹ Similarly, Mackie critiques the notion that punishment allows criminals to restore debts to society because debt implies some good stemming from the punishment. Hegel argues that punishment annuls the wrong of the crime, which Mackie argues applies to Kant's theory. But, the possibility of retroactively annulling the crime is infeasible, which is why Mackie rejects this argument. Finally, Mackie debunks the argument that punishment restores the balance by removing the unfair advantage the criminal has gained from society by arguing that generally punishments are not determined based on the advantage one garners but rather the extent of the moral wrongdoing. Ultimately, retribution cannot be a coherent theory without either relying on utilitarian considerations or providing a justification for why a previous wrong merits suffering. Therefore, Mackie turns to the biological tendency to resent certain antisocial behaviors, which is translated sociologically into a moral system rejecting conduct that is considered harmful to the community. The key part of Mackie's conclusion is that retribution necessarily involves human sentiment.

Mackie begins the discussion of the role of emotions within retribution, and Walter Berns functions as an elaboration on Mackie. Berns, in his book, *For Capital*

¹⁸ J.L. Mackie, "Morality and the Retributive Emotions" 1 *Crim. Just. Ethics* 9 (1982) , 4

¹⁹ Mackie, "Morality and the Retributive Emotions," 4

Punishment, articulates the connection between justice and anger, specifically for the punishment of serious crimes. Berns' argument relates to Mackie's assessment of retribution as he relies in part on emotion to justify the theory. Anger represents a desire to hold individuals accountable for their actions, and "is accompanied not only by the pain caused by him who is the object of anger, but by the pleasure arising from the expectation of exacting revenge on someone who is thought to deserve it."²⁰ Punishment serves as an outlet for the legitimate and natural expression of anger and pleasure by upholding accountability within the moral community. Further, the death of a criminal before punishment or abstaining from the practice, according to Berns, deprives us "of something very valuable."²¹ Such value refers to the connected expression of justice and anger that are in turn required to uphold a moral community. The goal of upholding this community may appear consequentialist in nature, but Berns critiques Beccaria and Hobbes, who are traditionally thought of as consequentialist. The moral community instead refers to a principled account of the responsibilities its members ought to adhere to, similar to Kant's rightful condition as a foundation for the criminal justice system and punishment. The role of anger within the community "is an expression of that caring, and society needs men who care for each other, who share their pleasures and pains, and do so for the sake of others."²²

Berns' connection between anger and justice seems Kantian in his emphasis on responsibility. Responsibility, in the context of punishment, relates to "that respect which is due to [the criminals] as men," and "anger recognizes that only men have the

²⁰ Walter Berns, *For Capital Punishment*, 153

²¹ Berns, *For Capital Punishment*, 155

²² Ibid

capacity to be moral beings.”²³ Thus, anger perpetuates and combines retributivist and natural notions of accountability and personhood. In this sense, anger is a key link in justifying retributivist theory and ultimately criminal punishment in practice. Anger explains why harsh punishments are deserved in the context of serious and violent crimes. These actions warrant the emotional reactions, which Mackie describes as natural sentiments. The inherent moral nature and emotions involved in the punishment process respond to the aforementioned criticism that there is a missing link between desert and harsh punishments.

James Fitzjames Stephen, in *A History of the Criminal Law of England*, takes an even harsher stance than Berns on retribution. He argues that severe criminals ought to be hated, based on an idea of a moral community that resembles the one outlined by Berns. According to Stephen, violent criminals “should be destroyed, partly in order to gratify the indignation which such crimes produce” and “to make the world wholesomer than it would otherwise be by ridding it of people as much misplaced in civilized society as wolves or tigers would be in a populous country.”²⁴ The indignation refers to the anger felt by the victims, families, and broader citizenry. Such an extreme stance appears justified in the case of the worst violent criminals since they have committed the worst moral wrongdoings. In contrast with the more traditional retributivist approach, Stephen particularly emphasizes the negative consequences imposed on the community, in a seemingly more consequentialist manner. Further, Stephen argues that morality shapes punishment in the legal system, since “if murder, theft, and rape were not punished by

²³ Berns, *For Capital Punishment*, 154

²⁴ James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols. (London: Macmillan, 1883). 478

law, the words would still be in use, and would be applied to the same or nearly same actions.”²⁵ This observation points to the natural emotions and tendency towards anger as a reaction to wrongdoing. Anger’s naturalness explains why it is a fundamental justification for retribution and cannot be removed from the justice system.

Taken in conjunction, Mackie, Berns, and Stephen present important contributions to the relationship between anger and retribution. One difficult dilemma arises when anger seemingly overwhelms the proportionate punishment demanded by retribution. This case would arise when people feel as though the punishment is inadequate based on the victim, family, and community’s feelings after a particular crime. The response from Berns and Stephen is premised upon the distinction between legitimate retributive punishment and pure illegitimate vengeance, as particular laws and judicial decisions, preventing anger from solely determining punishment, dictate punishment. The role of anger will be discussed in the creation of laws, in the following chapters on various policies.

Another dilemma arising from the role of anger is whether it is good for policy and theory to be partially emotional rather than purely rational. The appropriate answer to this question hinges on how the anger central to retributive punishment ultimately bolsters the theoretical basis for retribution. Therefore, the question of good when evaluating retributive theory should be based on the strength of the theoretical basis. The good in terms of policy may refer more to the outcomes, but that requires a more empirical assessment including the context of the particular policy. For example, assessing the death penalty in California may include more empirical considerations such

²⁵ Stephen, *A History of the Criminal Law of England*, 75

as budget, public opinion, and composition of the legislature, which are beyond the theoretical focus of this chapter. Ultimately, crimes can be very personal, necessarily involving emotions, so it seems reasonable for emotions to be involved. The question is whether the emotions can be completely separate from the rationally-derived theories and laws. Lawmakers often consider the actual individuals affected by laws, rather than viewing everyone as abstract, purely rational agents. These effects and influence of people in the lawmaking process will be explored in the subsequent policy chapters.

In *The Laws of Plato*, this question of the separation between the rational and emotional elements is explored in the example of private retribution, which is permissible in certain cases, thereby separating the personal issues of victims from the more practical law. For example, “if someone should use violence for sexual purposes against a free woman or boy, he may be killed with impunity by the violently outraged party, or the father, or the brothers or sons.”²⁶ Private vengeance is not limited by the laws, but up to “the violently outraged party.” This permission implies that the laws have a gap in rectifying damage to families. Conversely, Berns and Stephen use notion of the moral community to at least partially remove the separation between public and private since vengeance is only permissible within the law.

The role of the consequences follows from the emotional reaction to crimes. There is a paradox within the theory of retributivism since the ends shape the severity of the anger. For example, the brutal murder of many children will evoke more anger than the attempted murder of one person. This example indicates how the consequences of crime cannot be separated from the anger people experience as a result of crimes. It

²⁶ Thomas Pangle, *The Laws of Plato* (University of Chicago Press: Chicago, 1980), 270

seems impossible to completely discount the consequences, yet retributivism seems to be a purely deontological theory, focusing on means and principles rather than ends. This dilemma can be resolved by arguing that the basis for punishment stems from the moral worth of persons and inherent wrongs of crimes, but some consequentialist judgments can influence how theory is translated into law. This approach of potentially using a mixed theory, including elements from retributive and utilitarian thought, represents a reasonable solution to the dilemma of pure theories.

Finally, I will return to the introduction of the discussion of the Socratic dilemma involving punishment. If crimes are involuntary, then criminals are unable to exercise their capacity for moral choice-making, making punishment unjust based on retributivism's own premise of respecting moral worth. From the standpoint of the natural, moral community, crimes, despite their involuntariness, warrant anger. The question becomes how to channel that anger if the crime is not deserved. Of course, in the United States, there are exceptions for the mentally ill in the criminal justice system, but the claim in *Plato's Apology* applies to all crimes.

Chapter Two: Utilitarian Theory

Utilitarian theories are the traditional counterpart to retribution within the discussion of criminal punishment. Utilitarian refers to deterrence and incapacitation. In this chapter, I will examine Cesare Beccaria's theory of deterrence in *On Crimes and Punishments* since it is one of the first works on the topic, influencing later work and laws. Jeremy Bentham has a similar theory, presented in *The Principles of Morals and Legislation*, which I will compare to Beccaria's. In relation to the previous chapter on retribution, I will discuss contrasts between Kant and Beccaria, as well as a critical observation about Beccaria's work as a mixed theory rather than purely utilitarian. Finally, I will discuss the role of incapacitation and its relation to other utilitarian theories.

Beccaria begins his work with a justification for punishment. He argues that individuals, motivated by the avoidance of the uncertainty of the state of war, sacrifice minimal liberty for the good, which leads to the creation of laws.²⁷ His emphasis on minimal is important in establishing his concept of deterrence since it reinforces a limit on state power. Punishment, therefore, is derived from "the necessity of defending the depository of the public welfare against the usurpations of private individuals."²⁸ "Usurpations" imply that something is removed from the victim. Likely, the offender harms the liberty, thereby negatively impacting the good. Beccaria's concept of the good seems based on liberty, but I will discuss his concepts of the good and justice subsequently in more detail. Based on this justification for punishment, punishments

²⁷ Cesare Beccaria, transl by David Young, *On Crimes and Punishment*, (Indianapolis: Hackett Publishing Company, 1986), 7

²⁸ Beccaria, *On Crimes and Punishments*, 8

should not exceed what is necessary to restrain criminals, underscoring the minimal interference within this theory.²⁹

Bentham justifies punishment in a similar manner to Beccaria. He maintains that the goal of the laws is to increase happiness.³⁰ Happiness therefore constitutes the good. Bentham specifies that punishment is evil but necessary if it minimizes evil. Beccaria holds a similar view but is not as explicit about punishment being evil. The explicitly evil nature of punishment differs from the Kantian perspective. Under Kant's view, punishment, if inflicted by an official on a guilty offender, is just, independent of the consequences. Such punishment has an inherent moral value.

After justifying punishment by the state, Beccaria outlines his theory of proportionality. As a general principle guiding his proportionality, Beccaria writes, "one may discern a scale of misdeeds wherein the highest degree consists of acts that are directly destructive of society and the lowest of the least possible injustice against one of its individual members."³¹ The magnitude of the crime as it affects the nation is an essential principle of Beccaria's proportionality. He recognizes the necessary vagueness of his scale, especially since ideas of morality, citizenship, and crime change over time. Because of these changes, he seeks to establish a standard that is not contingent on his time period. Further, he argues, "if geometry were adaptable to the infinite and obscure arrangements of human activity, there ought to be a corresponding scale of punishments, descending from the most rigorous to the slightest."³² The infinity of human action

²⁹ Beccaria, *On Crimes and Punishments*, 9

³⁰ Jeremy Bentham, *The Principles of Morals and Legislation* (New York, NY: Hafner Publishing Company, 1948), 170

³¹ Beccaria, *On Crimes and Punishments*, 14

explains Beccaria's vagueness and difficulty developing a specific scale of proportionality. He also notes that the state's determination crimes should be purely based on harm rather than sin. Sins refer to the relationship between man and God, and the laws are only concerned with the relationships among humans. In this distinction, Beccaria seeks to limit the power of the state, since biblical sin creates many more categories of crimes. Similarly, Bentham captures his theory of proportionality in the general principle, "the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence."³³

Beyond the general principles, Beccaria and Bentham both develop more specific scales of proportionality. Beccaria lays out two categories of crimes in descending order of severity. The first are crimes to the nation like high treason. Since these have the greatest harm to the society, they merit the most punishment. Second, there are private crimes such as individual physical violence. These crimes harm the nation as well but not as destructively like crimes specifically targeted at the government.³⁴ Bentham has five classes of crimes, offenses against individuals, semi-public offenses against a neighborhood or a class, harm to self, offenses against the state, and offenses relating to falsehood and trust.³⁵ He does not rank these crimes, but shares Beccaria's principle of regarding the crimes with the most harmful effects to the nation as the worst. Bentham provides a more detailed account of the various subdivisions of crimes, but it functions more as a list of possible crimes not a ranking of severity.

³³ Bentham, *The Principles of Morals and Legislation*, 179

³⁴ Beccaria, *On Crimes and Punishments*, 18

³⁵ Bentham, *The Principles of Morals and Legislation*, 205-207

Both deterrence theorists prescribe certain limits to punishment and necessary conditions. The overarching limit is that punishment must increase utility; otherwise, it ought to be altered. Beccaria emphasizes the importance of prompt punishment because it maximizes the deterrent effect. He has a moral reason in favor of promptness, that imprisoning people before they are proven guilty violates rights. Inevitability of punishment, in addition to promptness, is more important than cruelty in terms of deterrence. Beccaria opposes torture because it does not contribute to punishment's effectiveness, especially if it occurs secretly. He believes that the death penalty is justified only in extreme cases in which an individual can severely damage the entire nation such as through revolution. The public laws are important to maintaining deterrence. Beccaria stresses the importance of the printing press to make the general public aware of the laws. The laws should also be easily understood.³⁶ Bentham agrees with the clarity and accessibility of the laws and adds a restriction on ex post facto laws.³⁷ These restrictions preempt the common objections to utilitarian punishment, that an innocent person can be punished if doing so maximizes the good. Beccaria and Bentham both want to avoid that scenario, though it is unclear if their restrictions are motivated in part by a rights-based justice.

The limits that Beccaria establishes are important to examine in contrast with common objections. Anthony Duff, in his book, *Punishment, Communication, and Community*, explores the rights issue as a criticism of deterrence's utilitarian foundation. He presents the objection that deterrence theory allows for punishment of the innocent individual, if doing so will promote the greater good. Since rights are secondary to

³⁶ Beccaria, *On Crimes and Punishments*, 12-13

³⁷ Bentham, *The Principles of Morals and Legislation*, 173

utility, meaning they are not “trumps’ that should protect individuals from being sacrificed to social utility (see R. Dworkin 1978, ch. 4).”³⁸ Even if Beccaria includes these rights-based limits, they are conditional depending on if they promote utility. For example, if the public does not know about someone’s innocence, punishing that innocent individual would not decrease the people’s sense of trust and legitimacy. Punishing the innocent, in that case, would be permissible. Utilitarians respond by arguing that this example would never happen in practice. However, the theoretical possibility of such an example highlights the theory’s disconnect from justice, pointing to a weakness.

Beccaria’s notion of justice is important to examine because it is the underlying principle behind much of his theory. Justice is “the aggregate of these smallest possible portions of individual liberty” which “constitutes the right to punishment.”³⁹ Presumably, justice does not exist outside of a legal context if there is no state holding the right to punish. Beccaria clarifies that justice is merely “the bond necessary to hold private interests together,” which also depends on the existence of a state.⁴⁰ If justice depends on the context of a state, it cannot exist in a natural setting. Impulses towards justice are not natural but rather produced by the state’s impact on its constituents. In this regard, Beccaria drastically differs from Kant, particularly Berns’ interpretation. Berns’ argument rests on the premise that anger, a natural sentiment, reflects individuals’ impulse towards justice. Beccaria would hold that the anger is either a product of artificial justice produced by the state, or a natural human impulse that is not reflective of justice but merely emotion.

³⁸ Antony Duff, *Punishment, Communication, and Community*, (New York : Oxford University Press, 2003), 8

³⁹ Beccaria, *On Crimes and Punishments*, 8

⁴⁰ Beccaria, *On Crimes and Punishment*, 9

Justice establishes the right to punish and the restrictions on individual conduct. It is not a vision for society to attain. Ultimately, the system of punishment is aimed at the good. The good, according to Beccaria, is minimizing harms to the nation and individuals. He argues that crimes constituting harm to society represents “one of those palpable truths which one needs neither quadrants nor telescopes to discover and which are within the reach of every ordinary intellect.”⁴¹ Beccaria implies that people can intuitively reject harm and want to join a state, which achieves that goal. This intuition mirrors Berns’ discussion of instincts towards anger and pleasure, but is not categorized as moral. The good is more of a practical security goal than a moral one. Beccaria discusses the good in the context of the political dogma that each citizen should be able “to do anything that is not against the law without fearing any ill consequences.”⁴² The political dogma refers to freedom, which could be interpreted as an intrinsic moral value. Instead, Beccaria recognizes that individuals want as much liberty as possible so the law should account for that fact. Again, it functions as more of a practical consideration.

Beccaria’s artificial concepts of the good and justice occasionally contain some retributive undertones. David Young, in his article, “Cesare Beccaria: Utilitarian or retributivist” argues that Beccaria’s theory in some respects is mixed rather than purely utilitarian. Young focuses on Beccaria’s right to punish, question of rights, and consideration of social context. In establishing the right to punish, Beccaria relies on a hypothetical social and political contract in which individuals give up liberty for

⁴¹ Beccaria, *On Crimes and Punishment*, 17

⁴² Beccaria, *On Crimes and Punishment*, 18

protection. Young believes that this contract is retributive rather than utilitarian.⁴³ While the contractual model may have some retributive elements, the ultimate goal is still utilitarian. In this sense, it is mixed, but one theoretical influence holds more weight.

The question of rights is more controversial. Young notes that Beccaria establishes certain limits to punishment, particularly related to the death penalty. Beccaria believes that the death penalty is annihilation rather than legitimate coercion and that the finality of death takes away the right to challenge the penalty. Young argues that his rejection of the death penalty and excessive punishment is based on valuing human virtue.⁴⁴ If the virtue account is correct, this consideration of individual rights reflects retributive theory. Kant based his theory on respect for human dignity, which sounds like Young's characterization of Beccaria. However, Kant uses the notion of human dignity to justify the death penalty, while Beccaria potentially uses it as a limitation on that form of punishment. Beccaria makes an observation about dignity which is useful in this discussion. He advocates for a separation of the dignity of the injured party from the public good, since the good is a more practical, security-based construct.⁴⁵ This separation opposes Kant because Kant views that the good consists of respecting both the dignity of the injured party and the offender. Punishment serves as the proper balance between the two. Perhaps dignity is still relevant in considering limitations on punishment under Beccaria's theory. There seems to be an inconsistency in Beccaria's work if Young is correct. When characterizing justice, Beccaria is very explicit in articulating its artificial nature. Dignity and virtue generally refer to inherent moral

⁴³ David Young, "Cesare Beccaria: Utilitarian or retributivist" *Journal of Criminal Justice* Vol. 11 1983, 319

⁴⁴ Young, "Cesare Beccaria: Utilitarian or retributivist," 323

⁴⁵ Beccaria, *On Crimes and Punishment*, 16

ideas, but it is possible that Beccaria used them to refer to artificial constructs. In this sense, Beccaria is slightly retributive, but only if using such language maximizes utility.

Finally, Young argues that Beccaria considers the social context of punishment through his support for equality before the law and “for a society of equals in which rights and obligations would be equitably distributed and the law could indeed be regarded as the will of each and every citizen.”⁴⁶ The rhetoric of rights and obligations could appear retributive, but they are ultimately aimed at a utilitarian end. Beccaria’s intentional vagueness when establishing the proportional punishments allows for individual societies to tailor laws to the particular social situations, as long as doing so is utilitarian. Kant would allow for societal differences and equality before the law, but his theory points to a more inherent system of values, which seems less malleable.

The significance of a mixed theory of punishment is important theoretically and practically. One objection to Kant’s theory concerns why such harsh coercion is used once the damage of a crime has already occurred. Beccaria answers this objection easily by articulating the benefit of deterrence to the public good. The mixed justification, combining some Kantian and Beccarian elements, can also have appeal within a pluralistic society of different interests in which some citizens or lawmakers prefer retribution and others prefer deterrence. Arthur Ripstein offers a mixed theory of punishment, combining retributive and deterrence-based reasoning. He recognizes that retribution provides the necessary condition that punishment only be inflicted upon individuals who have committed a wrongdoing. Under retribution, this punishment of the guilty does not change based on the effects of implementing it. However, Ripstein

⁴⁶ Young, “Cesare Beccaria: Utilitarian or retributivist” 324

recognizes that the deterrence model ensures the effectiveness of punishment and explains its harshness.

Incapacitation is an important variant within the utilitarian school of thought. Incapacitation represents the modern version of utilitarian theory, especially in the United States' reliance on incarceration. William Paley first supported this theory in the late 18th century.⁴⁷ Prior to incapacitation, punishments in the Western world consisted of physical responses such as branding or public execution. The idea holds that locking away the worst criminals achieves utility since they cannot commit crimes while incarcerated (besides crimes committed in prison). Incapacitation differs from Beccarian deterrence since it focuses on preventing future crimes by convicted criminals. Beccaria aims to influence all citizens and dissuade them from committing crimes. He specifies this goal in his argument about the value of public awareness about punishments for lesser crimes rather than the most severe crimes. This awareness will prevent the average citizen from committing crimes they might otherwise consider. Incapacitation and deterrence seem contradictory because incapacitation holds that no one can be deterred. They could be compatible only if the law is premised on deterrence for most offenders and incapacitation for a subset of offenders who cannot be deterred, such as certain serial murderers.

The initial objection about involuntariness of crime in *Plato's Apology* is relevant to utilitarian theory. Deterrence operates on the assumption that the state's laws can influence individual choice to commit crime. If crimes are involuntary, this would not work. Involuntariness is compatible with incapacitation, however. This difference

⁴⁷ Thom Brooks, *Punishment*, (Routledge: Abingdon, Oxon, 2012), 37

highlights the philosophical incompatibility of deterrence and incapacitation since they hold different assumptions about Socrates' statement relates to the previous discussion of justice. The involuntary nature of the crime seems insignificant from a pure utilitarian theory, as long as punishing crime minimizes harm. If there is some concern about justice, such as that unjust punishment decreases utility or is inherently wrong, involuntary crimes could be inconsistent with Beccaria's theory. Extreme instances of compulsory wrongdoing would likely be regarded as not meriting punishment such as the case of the mentally ill or young child. If all crimes were involuntary, Beccaria's theory would not be logically sound because it relies so heavily on individual choice.

In addition to the question of involuntariness, *The Laws of Plato* provides another criticism of utilitarian theories of law. The Athenian Stranger believes that the ideal legal system would apply to virtuous individuals, but that is only possible hypothetically. Instead, "it's necessary to have legislation that anticipates and threatens such a man," but such laws are "in a certain way shameful."⁴⁸ Such a man refers to the non-virtuous individuals that the law must target. Because of the distinction between the virtuous and common people, there is a disconnect between the law and virtue, since the law aims to influence the lowest forms of human behavior.

⁴⁸ Thomas Pangle, *The Laws of Plato* (University of Chicago Press: Chicago, 1980), 245

Chapter Three: Rehabilitation

Rehabilitation as a theory of punishment entails different ideas and theories from the traditional accounts of retribution and deterrence. Some would not even characterize it as theory of punishment at all but rather as an alternative to it. Duff distinguishes rehabilitation from consequentialist punishment because the former explicitly embraces the goal of reforming the perpetrator. He classifies rehabilitation as improving people's skills, capacities, and opportunities with the same goal as the consequentialist reform account.⁴⁹ The main difference lies in the methods of achieving a change in behavior, which is generally treatment instead of punishment. Karl Menninger relies on this distinction between treatment and punishment in *The Crime of Punishment*. His theory and defense of treatment is essential in establishing a theory of rehabilitation. Menninger, unlike Kant and Beccaria, combines theory and practice in establishing his argument for treatment. He relies on more empirical assessments of psychiatry and current penal practice. Those elements are less relevant for this chapter since it aims to evaluate the theoretical foundation of rehabilitation. Menninger's empirical leanings are emblematic of the absence of purely theoretical justifications of rehabilitation. Jean Hampton, in "The Moral Education of Punishment" presents a quasi-rehabilitative theory. She argues that "by reflecting on the educative character of punishment we can provide a full and complete justification for it."⁵⁰ Her analysis is relevant to alternatives to traditional notions of retribution and deterrence. In this chapter, I will present

⁴⁹ Duff, *Punishment, Communication, and Community*, 5

⁵⁰ Jean Hampton, "The Moral Education Theory of Punishment" *Philosophy & Public Affairs* Vol. 13, No., 1984, 209

Menninger's theory, Hampton's theory, a discussion of justice within rehabilitation, and C.S. Lewis's critique of treatment.

Menninger opens his book by stating that punishment is a crime against all criminals, critiquing the traditional distinction between victims and criminals. The state and its proponents are the criminal. More specifically, "the worst crime is our ignorance about crime; our easy satisfaction with headlines and the accounts of lurid cases; and our smug assumption that it is all a matter of some tough 'bad guys' whom the tough 'good guys' will soon capture."⁵¹ Again, Menninger challenges the notions of bad vs. good and criminal vs. victim, as the line is blurrier than traditionally understood. He references empirical assessments through the headlines, but these beliefs can also be applied to individuals' general moral sense. By ignorance, he refers to this simplicity and also the lack of understanding and study of the social danger, social error, and social indifference that leads to crime.

Menninger starts from the premise that punishment is a crime against criminals because of its injustice and ineffectiveness. He believes punishment is a crime in part because it misunderstands what crime is. Instead of the common interpretation of crime as a legal or moral wrongdoing, Menninger believes crime "should be treated" as if it were a disease, but it is not dealt with in this way.⁵² The treatment account holds that individuals can be changed and helped. It also implies a lack of blame, as we typically do not fault individuals for acquiring a disease. Perhaps they could have taken some precautions, but bad luck is often involved. Menninger believes that crime should be viewed as a disease because it is mostly curable and that the bad character traits can be

⁵¹ Karl Menninger, *The Crime of Punishment* (The Viking Press: New York, NY 1999), 3

⁵² Karl Menninger, "Do We Have a Moral Responsibility to Criminals? Yes" *Saturday Review*, 1968, 196

altered through the correct treatment. He argues that many offenders are not “‘fully aware’ of what they are doing,” which complicates the notion of guilt.⁵³ The justification for treatment stems in part from its effectiveness in improving offenders and the lack of responsibility for crimes.

Menninger uses a striking observation about humans’ capacity to commit crimes in his account. He boldly asserts that “crime is everybody’s temptation”, but we usually do not get caught.⁵⁴ People dodge this indictment, according to Menninger, by claiming that “even if it be true that many of us are guilty of committing these petty crimes, they are at least ‘semi-respectable crimes.’”⁵⁵ The examples Menninger gives include stealing from hotels, embezzlement, and filing dishonest insurance claims. He states that there is a false dichotomy between “semi-respectable” crimes and people who are “villains” and “killers.”⁵⁶ In this argument, Menninger portrays human nature negatively, as everyone has the capacity for wrongdoing. The former justification of crime as a disease implies that a select group possesses some involuntary harmful trait. If everyone has these traits, it seems like all people should receive treatment.

Menninger anticipates the question of what a world where treatment replaced punishment would look like. He proposes that each criminal would receive tailored treatment for his or her problematic traits in a medical, scientific environment rather than in a conventional prison, but while maintaining the security of prison.⁵⁷ He objects to punishment, which he classifies as “the deliberate infliction of pain in addition to or in

⁵³ Menninger, “Do We Have a Moral Responsibility to Criminals? Yes,” 198

⁵⁴ Menninger, *The Crime of Punishment*, 6

⁵⁵ Menninger, *The Crime of Punishment*, 7

⁵⁶ Ibid

⁵⁷ Menninger, “Do We Have a Moral Responsibility to Criminals? Yes,” 198

lieu of penalty.”⁵⁸ Menninger implies that treatment requires effectiveness, which he claims modern punishment lacks. The evolution of modern punishment as incarceration for long periods of time to be “more cruel and destructive than beating” also motivates the shift to treatment as an alternative to punishment.⁵⁹ Menninger clarifies that his advocacy of treatment stems from the medical principle to relieve pain, which he contrasts with the status quo in which inmates unjustly endure pain for no purpose.⁶⁰ He insists that his bases are not sentimental but entirely rational, unlike the proponents of punishment, especially on retributive grounds.

Hampton’s theory shares Menninger’s questioning of modern punishment, but has some key differences, namely that her account is not entirely at odds with retributivism. The ultimate goal of moral education theory is to teach ethical knowledge to criminals.⁶¹ This goal is more of an intrinsic good to better the criminal rather than a goal to decrease the harm from punishment.⁶² Punishment provides “moral reasons for our choosing not to perform these actions.”⁶³ She values the premise of treating individuals as ends and therefore not sacrificing them for the public good. However, punishment is only moral if done under certain constraints, which represents the major difference between Hampton and Menninger. Hampton does not support treatment since she views most criminals as having autonomy to understand and learn moral concepts.⁶⁴

Because Hampton’s theory depends on ethical knowledge within punishment, she presupposes the existence of a system of ethics. However, she never specifies the details

⁵⁸ Menninger, *The Crime of Punishment*, 203

⁵⁹ Ibid

⁶⁰ Menninger, *The Crime of Punishment*, 204

⁶¹ Hampton, “The Moral Education Theory of Punishment,” 213

⁶² Hampton, “The Moral Education Theory of Punishment,” 214

⁶³ Hampton, “The Moral Education Theory of Punishment,” 213-214

⁶⁴ Hampton, “The Moral Education Theory of Punishment,” 221

of this ethical system, and implies that it can be relative to the individual societies. She intentionally leaves gaps in terms of the implementation and content of the ethics. Yet there is one principle she would apply everywhere: the value of individual worth and the prohibition on using someone for a greater end. In this sense, her notion of morality mirrors Kant's, but requires more elaboration to be a complete theory.

Unlike Hampton, Menninger critiques most established notions of justice, potentially denying its existence or legitimacy. He describes justice as “a subjective emotional word” when referencing Justice Oliver Wendell Holmes’ argument that litigants manipulate justice to be in their favor.⁶⁵ The “emotional” component mirrors Chapter One’s discussion of anger’s role in retribution. In contrast with Berns and Stephen, Menninger opposes the presence of emotion in justice and desires a more rational approach. Both camps, however, accept that emotions play some role, though they dispute the merits. An important question arises within Menninger’s mention of Holmes about the theoretical and practical uses and interpretations of justice. Holmes is clearly making an observation about attorneys’ arguments and rhetoric within the courtroom. This statement differs from the theoretical accounts of punishment and justice particularly those offered by Kant. Kant would likely agree that ethical concepts can be manipulated, those manipulations do not reflect an accurate representation of justice or morality. Menninger, by frequently citing empirical cases, implies that he believes practical and theoretical concepts of justice are blurred. His definition, therefore, is complicated or potentially nonexistent.

⁶⁵ Menninger, *The Crime of Punishment*, 11

The argument that punishment in the name of justice actually leads to injustice is central to Menninger's advocacy for treatment. This statement assumes that there is some definition of justice in order to identify what counts as injustice in the first place. Justice cannot be nonexistent, despite Menninger's implication that it is a sham. Otherwise, his argument for treatment would be incomprehensible since we would not be able to understand why it the comparatively just option. Menninger focuses more on defining what justice is commonly viewed as, and how his ideal differs, especially in the context of pain and retribution. He defines it as "something terrible which somebody 'sees to it' that somebody else gets, not something good, helpful, or valuable, but something that hurts."⁶⁶ The ideas of hurt and good depend on a normative conception of right and wrong, but again, these are unclear in Menninger's account and seem to appeal to the common retributivist understanding. Specifically, when Menninger discusses how criminals are not fully responsible for their actions, rendering punishment unjust, he bases that claim on some notion of desert. In referring to the damages done by punishment, he makes a utilitarian claim, such as "that all the crimes committed by all the jailed criminals do not equal in total social damage that of the crimes committed against them."⁶⁷ This estimate relates to Beccaria and Bentham's mandate that punishment must promote the greater good rather than cause more harm. Menninger does not critique utility as explicitly as he does retribution. Perhaps his notions of justice and the good stem from utility, but there is still this pervasive idea that individuals deserve treatment rather than punishment. His appeals to justice are striking given that he introduces his

⁶⁶ Menninger, *The Crime of Punishment*, 11

⁶⁷ Menninger, *The Crime of Punishment*, 28

argument by emphasizing the injustice of modern punishment and that crime is a disease for which individuals should not be blamed.

In Chapter 8, Menninger discusses vengeance as a motivation behind punishment and how it has evolved over time. Previously, he believes vengeance was more overt, especially with public crimes. He also partially conflates vengeance and revenge when he states, “behind what we do to the offender is the desire for revenge on someone – the unknown villain proved guilty of wrongdoing is a good scapegoat. We call it a wish to see justice done, i.e., to have him ‘punished.’”⁶⁸ Scapegoat implies a wrongful use of punishment, since the individual would represent some other problem besides the crime committed. This example constitutes a negative portrayal of Berns and Stephen, suggesting that their accounts lead to overly harsh revenge. The naturalness of the emotions within justice, as highlighted by Berns and Mackie, provides an interesting tension for Menninger’s theory. If justice represents a natural sentiment, it may be impossible to eliminate it within the criminal justice system. Since sentencing, lawmaking, and judging will always be human responsibilities, that natural instinct will likely be involved. Even if the system was premised upon Menninger’s plan for treatment, the determination of treatment may not be able to be divorced from justice.

William Godwin’s *Enquiry Concerning Political Justice* first published in 1793 opposes traditional punishment and provides a similar critique of retributivism based on vengeance. He claims that there is no such thing as desert, which is motivated both by

⁶⁸ Menninger, *The Crime of Punishment*, 190

his belief in the wrongness of coercion and of social conditions contributing to crime.⁶⁹ Coercion, in this case, is wrong because it is applied retroactively. In addition to the critique of desert, Godwin opposes punishment that does not promote the good, so coercion must prevent future crimes. If the crime has already been committed, it clearly cannot be prevented by punishment. Godwin focuses largely on how coercion in the case of punishment is divorced from reason and instead based on anger and resentment. The emotions driving punishment make the penalties unnecessarily harsh. Like Menninger, Godwin shifts between the philosophical and empirical. Much of his criticism is directed at the British system of the 18th century, though he often does so on theoretical grounds. Godwin's observation about the danger of vengeance going too far is an important critique of retribution. Retribution is clearly subject to abuses, which will be important in the policy chapters applying these theories.

On the interaction between justice and treatment, C.S. Lewis offers a well-known critique of theory's like Menninger's in "The Humanitarian Theory of Punishment," though he wrote this essay well before Menninger's book appeared. He contends that therapeutic approaches or rehabilitation denies individuals the right of being treated as morally responsible beings. Treatment's denial of rights stems from its removal of desert, which Lewis maintains "is the only connecting link between punishment and justice."⁷⁰ Since desert is the only factor tying punishment to justice, other aims such as reform or deterrence are separate from justice. Again, the notion of personhood appears in Lewis' opposition to non-retributive theories which view criminals as "a mere object, a

⁶⁹ William Goodwin, *Enquiry Concerning Political Justice*, (Kitchener, Ontario, CAN: Batoche Books, 2001) ProQuest ebrary.

⁷⁰ C.S. Lewis "The Humanitarian Theory of Punishment" *AMCAP Journal* Vol. 13, No. 1 1987. 148

patient, a ‘case’” rather than “a person, a subject of rights.”⁷¹ Viewing individuals as patients subjects their treatment to the decisions of scientific experts who are divorced from justice, preventing criticism of these experts’ judgments. Sentencing becomes indefinite because it depends on the effectiveness of treatment, which is arbitrary in terms of justice. For example, a petty thief may require ten years to heal, while a murderer may only need three, which Lewis regards as unjust. Since treatment, according to Lewis, depends on effectiveness, these varying treatment sentences are a necessary component of a rehabilitative theory.

Fundamental questions about the nature of punishment have arisen from these theorists’ responses and modifications of rehabilitation. The issue of responsibility and involuntariness is a key component of Menninger’s argument for treatment and its divergence from Lewis. If crimes are involuntary, the entire understanding of the ideas of crime, wrongdoing, and punishment change. Ultimately, the definition of justice is important in determining what crimes and punishments are. Menninger’s appeal to justice throughout his argument contains implicit references to desert, namely that punishment is unjust to criminals. These references indicate that he was unable to separate his theory from an understanding of justice that in part stems from retributivism. Rehabilitation seems to require individuals to view crime as a problem to be dealt with using science. The instincts and emotions expressing justice would prevent such a scientific understanding. However, if such expression is not natural, but rather learned from the retributive laws, change may be possible.

⁷¹ Ibid

The Laws of Plato tackles these fundamental questions regarding criminal law. The Athenian Stranger starts from the premise that the law targets humans rather than gods, implying that it will not be the ideal or virtuous system. The practical goal of “legislation that anticipates and threatens such a man” is necessary yet “in a certain way shameful.”⁷² Despite advocating for a system of laws based in part on deterrence, the Athenian concedes that crime is involuntary. Crime occurs because of “a certain gadfly that grows naturally in human beings as a result of ancient and unexpiated injustices,” which is emphasized in the prelude to Book IX.⁷³ Therefore, some natural impulse based on past injustices causes certain individuals to commit crimes. Following this concession about the nature of crime, the Athenian notes, “for him who obeys, the law should be left silent; but for him who disobeys, it sings in a loud voice, after the prelude.”⁷⁴ Then the Athenian describes the physical punishment required for temple robberies, which should be instituted regardless of the crime’s voluntariness. The Athenian later distinguishes involuntary and voluntary crimes and their requisite punishments, though he initially maintains that all crime is involuntary. This distinction highlights the compromise between the ideal and practical forms of law. Such compromise is necessary, as Lorraine Smith Pangle writes, “no society is able to deter unhealthy souls from crime without imposing harsh punishments on its most unhealthy citizens, punishments that usually make their souls even worse.”⁷⁵

⁷² Pangle, *The Laws of Plato* 245

⁷³ Pangle, *The Laws of Plato*, 246

⁷⁴ Ibid

⁷⁵ Lorraine Smith Pangle, “Moral and Criminal Responsibility in Plato’s *Laws*,” *American Political Science Review*, Vol. 103, No. 3 August 2009, 461

However, the Athenian maintains that crime should make “the one who receives the judicial punishment either better or less wicked,” implying that punishment aims at some reformatory goal.⁷⁶ At the same time, there is no treatment or education, like what Menninger proposes, but rather violent, physical punishment, exile, or death for the worst cases. It is unclear how such punishment guarantees an improvement in character, especially in the instances of exile or death. Later in Book IX, the Athenian refers to punishment’s goal of purifying individuals, which seems to differ from the traditional violence of punishment.

Further, the Athenian distinguishes educating and legislating, though shifting between which ought to be the purpose of criminal law. He uses the example of two doctors to explain this distinction. One doctor “practices medicine on the basis of experiences rather than reason” and treats patients without explaining their diseases.⁷⁷ The second doctor is the “free doctor” who explains the reasons for diseases in addition to providing treatment, “using arguments that come close to philosophizing, grasping the disease from its source, and going back up to the whole nature of bodies.”⁷⁸ The first doctor would laugh at the second doctor and say, ““you’re not doctoring the sick man, you’re practically educating him, as if what he needed were to become a doctor, rather than healthy!””⁷⁹ In this example, the Athenian implies that traditional ideas of punishment and treatment differ from true reform, in which the criminal understands the wrongness of the crime. This observation is crucial in this chapter, since it could also apply to Menninger’s mode of treatment, since it does not sufficiently address moral

⁷⁶ Ibid

⁷⁷ Pangle, *The Laws of Plato*, 250

⁷⁸ Ibid

⁷⁹ Ibid

understanding. It clearly critiques retribution and deterrence, as those theories do not focus on moral education and understanding.

Chapter Four: Determinate Sentencing

California's legal shift from indeterminate to determinate sentencing during the late 1970's represents a rejection of rehabilitation and endorsement of punishment. Indeterminate sentencing "was part of the process of making criminal justice better suited to the *individual* case."⁸⁰ It was combined with parole and judicial discretion in sentencing and release, as opposed to strict sentencing guidelines for particular crimes. One definition of indeterminate sentencing holds that "it is a continuum of devices designed to tailor punishment, particularly the duration of confinement, to the rehabilitative needs and special dangers of the particular criminal" and that the length is determined while the individual is serving the sentence.⁸¹ The case of determinate sentencing is relevant in applying the theories to practical policy cases because it involves a conflict of rehabilitation, retribution, and utilitarian goals, in conjunction with other implementation issues. California is an important example because it was one of the first states to make the change, setting the stage for other states to do the same. In this chapter, I will explain the background of the shift and provide an analysis of California's law in terms of the theories outlined in the previous chapters.

California adopted an indeterminate sentencing law in 1917 and switched to a determinate sentencing law, the Uniform Determinate Sentencing Act of 1976.⁸² During the 1950's and 1960's, "a wave of conservatism swept the country," in part motivated by

⁸⁰ Lawrence Friedman, *Crime and Punishment in American History*, (Basic Books: New York, NY, 1993), 304

⁸¹ Alan M. Dershowitz, "Indeterminate Confinement: Letting the Therapy Fit the Harm," *University of Pennsylvania Law Review*, Vol. 123, No. 2 December 1974, 298

⁸² Sentencing Practices Advisory Committee, "Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System," Judicial Council of California March 17, 1977 <https://www.ncjrs.gov/pdffiles1/Digitization/39947NCJRS.pdf>,

fear and hatred of crime.⁸³ The intensified fear stemmed from the increased crime rate, and the public pressured politicians to take action. During the increased crime rate, “the American system tends to shift its emphasis from the *offender* to the *offense*.”⁸⁴ Critics alleged that indeterminate sentencing focused on the offender’s well-being rather than public safety or proportionality.

An important contributor among the causes of the enactment of determinate sentencing was internal issues within the California correctional bureaucracy. Specifically, the Director of Corrections held responsibility for prisons and the parole organizations, while the Adult Authority separately had discretion over parole and discharge decisions.⁸⁵ Police and prosecutors, as key players within the Director of Corrections’ office, opposed the Authority’s exercise of discretion. The two parts of the Department of Corrections, the Director of Corrections and the Adult Authority, were in conflict with one another, preventing effective policy-making. The Director of Corrections found the Adult Authority’s “practice of fixing terms late a block to rational planning, its terms unpredictable, its release and parole revocation actions subject to whim and political influence.”⁸⁶ The inability to find effective compromise motivated the need for new legislation to define these irreconcilable conflicts.

Indeterminate sentencing received criticism from the right and left for varying reasons. The left criticized the arbitrary sentence lengths and discrimination against minorities by judges and parole boards, while the right distrusted judges to enforce

⁸³ Friedman, *Crime and Punishment in American History*, 305

⁸⁴ Friedman, *Crime and Punishment in American History*, 305-306

⁸⁵ Phillip E. Johnson and Sheldon L. Messinger, “California’s Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression,” Berkeley Law Scholarship Repository 1978, <http://scholarship.law.berkeley.edu/facpubs/1886>, 21-22

⁸⁶ Johnson and. Messinger, “California’s Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression,” 22

sufficiently harsh sentences, harming public safety.⁸⁷ For example, The American Friends Service Committee emphasized “the failure of individualized treatment and... the use of the medical model to increase coercion and punishment, and called for laws that would fit punishment to the crime rather than to assumed treatment potential.”⁸⁸ Another prevalent criticism was the disregard for victims in the indeterminate laws’ overemphasis on the offender’s rights, which was compounded by the increase in crime.⁸⁹ The California shift to determinate sentencing is regarded as a compromise “aided by a tendency for the objectives of seemingly opposing interests...to overlap at certain points and by conflict within supposedly unified groups.”⁹⁰ In 1972, the US Supreme Court ruled on a California case, *In re Lynch*, involving a man, John Lynch, who had been in prison for five years on a charge of indecent exposure after consistently being denied parole.⁹¹ The justices found “that the punishment not only failed to fit the crime, but failed to ‘fit the criminal.’”⁹² This case elucidated that rehabilitation did not meet its own purpose of “fitting the criminal” and was disproportionate, violating concerns of justice.

Another relevant case in the constitutional challenge of indeterminate sentencing was *In re Stanley* of 1976, which was argued before the Court of Appeals of California in the Second Appellate District. In this case, two individuals challenged the Adult Authority’s right “to postpone their parole dates on the basis of concurrent sentences

⁸⁷ Friedman, *Crime and Punishment in American History*, 306

⁸⁸ David Brewer, Gerald E. Beckett, and Norman Holt, “Determinate Sentencing in California: the First Year’s Experience,” *Journal of Research in Crime and Delinquency*, July 1981
<http://jrc.sagepub.com/content/18/2/200.full.pdf>, 201

⁸⁹ Friedman, *Crime and Punishment in American History*, 308

⁹⁰ Brewer et al, “Determinate Sentencing in California: the First Year’s Experience,” 203

⁹¹ Friedman, *Crime and Punishment in American History*, 306-307

⁹² Friedman, *Crime and Punishment in American History*, 307

imposed for lesser offenses.”⁹³ They argued that the decision of release entirely based on the nature of the offense and prior criminal history ignored other important variables such as conduct in prison and post-release safety. The Court found that these other variables should be part of the individualized treatment under the existing indeterminate sentencing.⁹⁴ This case demonstrates a flaw in judicial discretion under indeterminate sentencing that existing laws were inadequate in incorporating all of the essential variables in judging an individual’s parole case. The indeterminate sentencing law was unable to fulfill its own intended purpose. *In re Stanley* motivated the need for new standards, even among supporters of indeterminate sentencing, in turn driving the Governor and other groups to support the new Uniform Determinate Sentencing Act.

The Attorney General’s Office’s statement in support of the bill was also important in propelling its passage. Attorney General Jack Winkler issued a supportive paper in 1975. He argued that indeterminate sentencing did not control recidivism. His statement focused on the principled aim of punishments which should be upholding “societal values” among other goals, though he questioned deterrence and isolation as appropriate goals. To achieve the aim of upholding societal values, Winkler urged the adoption of a sentencing scheme to account for mitigating and aggravating factors, criminal history, and behavior in prison. Johnson and Messinger note that Winkler’s principles mirror those important in guiding the provisions in Uniform Determinate Sentencing Act. If their analysis is correct, the Attorney General’s statement emphasizes the retributive justice important in the shift from indeterminate to determinate sentencing.

⁹³ Johnson and Messinger, “California’s Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression,” 20

⁹⁴ *Ibid*

Winkler prioritizes upholding values, similar to Berns' moral community, rather than deterrence as the goal of punishment.

The specific movement for determinate sentencing legislation was initiated by California Senator John A. Nejedly, Chairman of the Senate Select Committee on Penal Institutions in 1974.⁹⁵ He began an investigation into California juvenile justice and indeterminate sentencing more broadly, involving consultants, legislative staff, law professors, lobbyists, and judges in research on the laws and policies.⁹⁶ Nejedly's team produced a working paper "suggesting cut-down ranges of penalties for offenses and giving judges discretion to fix a maximum prison term within those ranges" while still permitting the Adult Authority to decide a prisoner's parole.⁹⁷ This working paper spurred open hearings in late 1974. In the hearings, most witnesses supported increased determinacy with fixed sentences from the legislature, while judges opposed the shift.⁹⁸ The working papers were modified, resulting in the introduction of SB 42 to the Senate in March 1975 and passed in May 1975.⁹⁹ A later version of SB 42 passed in May 1976 incorporating amendments supported by the Governor and law enforcement groups.¹⁰⁰

Determinate sentencing arose in many states during the 1970's. All alternative proposals emphasized the need for fixed prison terms and rejected rehabilitation but "varied greatly on such provisions as parole, good time, commitment criteria, and the

⁹⁵ Johnson and Messinger, "California's Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression," 17

⁹⁶ Ibid

⁹⁷ Johnson and Messinger, "California's Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression," 18

⁹⁸ Ibid

⁹⁹ Johnson and Messinger, "California's Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression," 19

¹⁰⁰ Johnson and Messinger, "California's Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression," 21

overall severity of punishment.”¹⁰¹ Thus, the shift did not abolish all elements of indeterminate sentencing, as there was still judicial discretion but combined with stricter standards and sentencing limits. Determinate sentencing in California sets the “length of the prison term appropriate for each felony is prescribed by law; within limits, the courts may add to or subtract from this term to fit the individual case.”¹⁰²

The Judicial Council Report on the Uniform Determinate Sentencing Act begins with discussing the causes for the new law. The two main reasons are the uncertainty of actual prison terms under indeterminate sentencing and a rejection of the idea that optimum rehabilitation identified with a particular release date could be determined.¹⁰³ The first concern about uncertainty of actual prison terms could be motivated by both utilitarian and justice-based concerns. If serious offenders spend insufficient time in prison, they can be released and pose a danger to society. The justice issue is that prison terms could be too lengthy, short, or arbitrary, failing to give prisoners what they deserve. This objection relates to C.S. Lewis’s overarching criticism of treatment over punishment because he similarly argues that rehabilitative sentences “can be criticized only by fellow-experts and on technical grounds, never by men as men and on grounds of justice.”¹⁰⁴ Lewis’s objection differs from the judicial report’s preface because it is purely on the basis of justice, rather than the report’s list of causes ranging from arbitrary sentences to crime rates. The law combines concerns about justice and utilitarian issues.

¹⁰¹ Brewer et al, “Determinate Sentencing in California: the First Year’s Experience,” 202

¹⁰² Brewer et al, “Determinate Sentencing in California: the First Year’s Experience,” 201

¹⁰³ Sentencing Practices Advisory Committee, “Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System,” 1

¹⁰⁴ Lewis, “The Humanitarian Theory of Punishment,” 152

It is unclear which was prioritized in motivating this legal change. If indeterminate sentencing had been effective in reducing crime, critics may have overlooked the arbitrary sentencing problem. This prediction is bolstered by Friedman's above analysis about how crime rates, a utilitarian concern, motivate the public's pressure on politicians to enact more offense-focused legislation. On the other hand, the public's sentiment could be driven by Berns or Stephen's arguments that injustice incites anger, prompting individuals to seek justice for the increasing violent crimes. In this case, seeking justice would mean supporting determinate sentencing to lead to harsher sentences.

The Uniform Determinate Sentencing Law applied to felonies other than those resulting in life or death sentences.¹⁰⁵ It provided three possible sentences for judges to impose for each crime, a mitigated, base, and aggravated sentence.¹⁰⁶ For example, if a homicide also involved torture, the judge could select the aggravated sentence. These three options provided a more defined alternative to indeterminate sentencing, which gave judges more leeway. The law also promoted uniformity in the areas of imposing probation, the aggravated or mitigated sentence, concurrent or consecutive sentences, additional sentences for previously convicted offenders, and "an additional sentence for being armed with a deadly weapon, using a firearm, an excessive taking or damage or the infliction of great bodily injury."¹⁰⁷ These provisions for uniformity implicitly value proportionality, especially those regarding mitigated or aggravated sentences and particularly violent conduct.

¹⁰⁵ Sentencing Practices Advisory Committee, "Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System," 1

¹⁰⁶ Sentencing Practices Advisory Committee, "Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System," 1-2

¹⁰⁷ Sentencing Practices Advisory Committee, "Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System," 3

The Judicial Council Report highlights the main features of the Uniform Determinate Sentencing Law with a section on the law's uniformity of sentencing. Their analysis emphasizes that "the first sentence is, 'The Legislature find and declares that the purpose of imprisonment for crime is punishment.'"¹⁰⁸ Punishment as the purpose implies that the legislature's intent was retributive in nature, though punishment as a stated goal can be vague. If they had intended a purely utilitarian purpose like a Beccaria or Bentham, the authors likely would have inserted the words reducing crime or public safety as the immediate purpose. The Attorney General statement adds evidence to the interpretation of punishment as retributive because he supported punishment to uphold a moral community, and the principles in his statement mirror the law. Second, to further the retributive goals of the law, the Council highlights the requirement that sentences be proportional to the seriousness of the crime.¹⁰⁹ Third, the report notes that the determinate sentences are to be fixed by statute, only allowing variance within the permissible range of the law.¹¹⁰ Fourth and similarly, the report underscores the law's goal to have general uniformity of the grant or denial of probation.¹¹¹ Fifth, the rules do not address a specific way for judges to determine alternatives to imprisonment like probation. Judicial discretion to grant probation was not altered by the new determinate sentencing law.¹¹² Likely, these offenses were less important since they are not as morally egregious or dangerous to the public.

¹⁰⁸ Sentencing Practices Advisory Committee, "Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System," 4

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Sentencing Practices Advisory Committee, "Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System," 5

¹¹² Ibid

The report focuses on Rule 410 of the law on the General Objectives in Sentencing. This provision provides a list of objectives judges should consider during sentencing. The list is

“a) protecting society, b) punishing the defendant, c) encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses, d) deterring others from criminal conduct by demonstrating its consequences, e) preventing the defendant from committing new crimes by isolating him, f) securing restitution for victims of crime, g) achieving uniformity in sentencing.”¹¹³

At first glance, it seems as though these objectives could be in the form of an ordered list of priorities of punishment. However, “the sentencing judge should determine which objectives are of primary importance in the particular case.”¹¹⁴ The list differs from the law’s first sentence and Winkler’s statement since it does not purport that “b) punishing the defendant” is the primary goal in sentencing. Perhaps this list was a compromise to incorporate the different aims of punishment and judges’ desire for discretion. Some of the goals are consistent with one another; the only issue would be when they explicitly conflict. Punishing the defendant and achieving uniformity in sentencing seem related to justice since they do not reference the public or some utilitarian goal of safety. The other goals, protecting society, isolation, specific and general deterrence, reference utilitarian concerns. This list therefore represents a key example of the mixed sentencing discussed in the first two chapters. In the Chapter Two, Beccaria’s references to individual rights throughout his theory are striking given his utilitarian approach. The Beccarian example and Rule 410 bring up the question of if rights-based concerns are integrated into utilitarian provision to benefit the greater good.

¹¹³ Sentencing Practices Advisory Committee, “Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System,” 14

¹¹⁴ Ibid

For example, uniformity in sentencing can also benefit deterrence because the citizens are aware of the punishments associated with particular crimes.

Chapter Five: California Three Strikes Law

California's 1994 "Three Strikes and You're Out" legislation is an important case study for both policy and philosophical reasons. The legislation enhances penalties for felons convicted of second and third term offenses. From a policy perspective, California was one of the first states to adopt this legislation, influencing other states. Given the state's large prison population and comparative drastic change in sentencing from Three Strikes, the impacts of law were substantial and unique to California.¹¹⁵ Further, the adoption of the law occurred through both the legislature and the initiative process, contributing a distinctive element of populism to the discussion of this version of Three Strikes.

The strong influence of populism in California's enactment of Three Strikes explains in part why this case is noteworthy on a philosophical level. The California citizens' advocacy for Three Strikes provides insights into their stances on the various philosophies and purposes of punishment. The law itself seems to advance incapacitation as the goal of punishment, combined with elements of deterrence and retribution and a general rejection of rehabilitation. In this chapter, I will present the background of the causes leading to Three Strikes in California including some political factors and the provisions of the law. I will then discuss the philosophical implications and how Three Strikes fits into the broader discussion of theory. Finally, I will present the more recent modifications to Three Strikes.

Two tragic murder cases arose in California and motivated the enactment of Three Strikes. In October 1993, 12 year-old Polly Klaas was abducted from her Petaluma

¹¹⁵ Frank Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California*, (Oxford University Press: New York, 2001), ix

home, sexually assaulted, and killed. Her fate was unknown for a month after she was missing.¹¹⁶ The offender was a two-time violent offender who had been paroled. Had Three Strikes been enacted, this offender would have likely been in prison.¹¹⁷ The second case was the killing of 18 year-old Kimber Reynolds in Fresno. She was leaving a restaurant and was shot by an assailant after she resisted the theft of her purse.¹¹⁸ Following her death, Kimber's father, Mike Reynolds, proposed and advocated for the ballot initiative, Proposition 184, entitled "Three Strikes and You're Out." Much of the content of the provisions can be attributed to Reynolds. Both of these cases drew immense public attention focusing on the inadequacy of the criminal justice system to protect individuals against violent offenders.

The Klaas and Reynolds cases were emblematic of the larger trend of high violent crime rates in the early 1990's, both in California and nationwide. [Insert data from packet] The public in California, in particular, wanted harsher sentencing, motivated in part by Reynolds' effort. Enhanced sentencing for repeat offenders was common in the United States and England but was seldom used and deemed ineffective.¹¹⁹ Franklin Zimring, Gordon Hawkins, and Sam Kamin, in their book, *Punishment and Democracy: Three Strikes and You're Out in California*, emphasize that Three Strikes in California was strikingly an "outside the beltway" policy due to its populism and separation from the legislature.¹²⁰ The California Correctional Peace Officer's Association, a prison

¹¹⁶ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 5

¹¹⁷ Despite this fact that the offender was a two-time offender, the Klaas family did not support Three Strikes.

¹¹⁸ "Proposition 184," California Ballot Pamphlet General Election 1994, Acting Secretary of State Tony Miller http://librarysource.uchastings.edu/ballot_pdf/1994g.pdf, 36

¹¹⁹ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 4

¹²⁰ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 3

guard union and the National Rifle Association were two of the main supporters of Reynolds' proposal.¹²¹ The opposition consisted of groups such as the California Probation, Parole, and Correctional Association.¹²² According to Zimring et al., the Klaas case drove the public sentiment to support Three Strikes.

From the political side, Republican Governor Pete Wilson wanted to demonstrate to voters that he was taking action to promote more "tough-on-crime" policies. Wilson was particularly driven to appear "tough-on-crime" because he was facing reelection, a weak state economy, and low approval ratings.¹²³ The Democrat-controlled state legislature did not want "to give the vulnerable governor an opportunity to make crime a defining issue in his reelection campaign."¹²⁴ However, the Democrats and Wilson ultimately "had swallowed whole the outside-the-beltway version of Three Strikes because they were unwilling to concede the ground on 'getting tough' to the other side in the political campaign to come."¹²⁵ Wilson chose the Proposition 184 version of Three Strikes over the District Attorneys of California's proposal which affected a narrower group of felons and was perceived as soft on crime.¹²⁶ His choice and both the legislative and executive deferral to the populist account demonstrates the power of public opinion in shaping legislation. This deferral stands out in California since government officials usually alter or influence initiatives.¹²⁷ Of course, the issue arose during an election year, which exaggerated the influence of public opinion. It is still striking how an initiative

¹²¹ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 5

¹²² "Proposition 184," 37

¹²³ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 6

¹²⁴ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 5

¹²⁵ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 6

¹²⁶ Ibid

¹²⁷ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 12

prevailed over more expert-driven laws, though certain experts do approve of the Three Strikes law.

The Three Strikes provisions were presented in the California voter guide of 1994 along with arguments for and against the proposition. Both the provisions and arguments provide insight into the reasons for developing this law, from policy and philosophical standpoints. There are four main provisions. First, there are increased sentences for repeat felons. If one has been previously convicted of a serious or violent felony, he or she has a mandatory sentence of twice the term required for any new felony. Any new felony refers to a broader category of offenses than serious or violent felonies. After two serious or violent felonies, the mandatory sentence for any new felony is life imprisonment with a minimum term of either 25 years or three times the statutory penalty for the new offense, whichever is greater.¹²⁸ Second, the initiative requires that serious and violent crimes committed by a minor 16 years or older count as previous convictions.¹²⁹ Third, the law restricts credits that reduce time spent in prison to no more than one-fifth of the time contrasted with the old standard of half time. This provision also abolished credits for county jail time served before a state prison sentence.¹³⁰ Fourth, the law eliminates alternatives to prison incarceration for second and third strike felons, which removes the options of probation or drug treatment facilities.¹³¹

The arguments presented in favor of Proposition 184 open with the tragic story of Kimber Reynolds.¹³² The proponents argue that Three Strikes targets career criminals

¹²⁸ "Proposition 184," 33

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Ibid

¹³² "Proposition 184," 36

and keeps them “behind bars where they belong.”¹³³ Kimber Reynolds’s story is invoked to emphasize how one of her assailants is only serving nine years, which seems insufficient. The argument refers to the 80% of the time requirement, appealing to the danger of the half-time credits for felons before the enactment of Three Strikes. On the issue of cost, the proponents contend that each released felon costs taxpayers \$20,000 in losses to the victims and repeatedly putting criminals through the courts and prison systems. The signatories on Proposition 184 include Mike Reynolds of Crime Victims United, Jan Scully of Women Prosecutors of California, and Mike Huffington of 3 Strikes and You’re Out. The argument concludes with the phrase “3 STRIKES SAVES LIVES AND TAXPAYER DOLLARS.”¹³⁴

In the “Rebuttal to Argument in Favor of Proposition 184,” the opposition first emphasizes the cost to voters in increased prison spending due to the enhanced sentencing. This spending, according to opponents, diverts resources from local schools, hospitals, and police departments among other public agencies. They criticize Proposition 184 for grouping nonviolent felons with violent criminals. Opponents include certain state district attorneys and police officers. The rebuttal states that victims will be less willing to report crimes like car break-ins because offenders could face life. The Klaas family opposed this proposition. The signatories include James Fox, San Mateo County District Attorney, Marlys Robertson, President of the League of Women Voters, and Marc Klaas of the Polly Klaas Foundation.¹³⁵ The “Argument Against Proposition 184” echoes the opposition’s rebuttal. It cites the example of how a 50 year-

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Ibid

old man who twice stole a bicycle as a teenager would face life in prison for writing a bad check under Three Strikes. This example illustrates the opposition's argument that Three Strikes targets minor felonies and aging criminals who are no longer a threat, but uses an extreme example of bicycle theft which would likely not be considered a serious felony under three strikes.¹³⁶ Finally, the proponent's rebuttal states that 815,000 California voters have signed Proposition 184.¹³⁷

The passage of Proposition 184 is striking on a theoretical level. The stories of Klaas and Reynolds largely motivated Three Strikes, tapping into the discussion of emotion and anger and their relation to punishment. During 1992, California experienced its highest violent crime rate of 345,624 crimes.¹³⁸ As points of contrast, in 1988, there were 261,912 violent crimes, and 207,879 in 1999.¹³⁹ Mike Reynolds helped write Proposition 184, which is an intriguing instance of a family member of a victim reacting to the crime through legal means. Emotion is involved in the writing of the law and advocacy for it given that Kimber's story opens the argument in favor of the proposition. Anger is represented differently than in Berns's or Stephen's accounts. These theorists focus solely on anger's connection to the moral community and upholding retributive punishment. They do not focus on the utilitarian effects like Proposition 184 does. An element of retribution motivates Three Strikes because of the argument that violent and serious felons do not receive sufficient prison time without the sentence enhancement. This is likely motivated by both a retributive sentiment and utilitarian calculation,

¹³⁶ "Proposition 184," 37

¹³⁷ Ibid

¹³⁸ "California Population and Number of Crimes 1960- 2013," Disaster Center 2014, <http://www.disastercenter.com/crime/cacrime.htm>

¹³⁹ Ibid

depending on the particular proponent. Opponents likely believe that Three Strikes is inconsistent with retribution since nonviolent and violent felons receive the same sentence. In this case, it seems that a concern for public safety prevails over justice. This discussion sheds light on the potential philosophical motivations of the voters. Since the violent crime rate and the Klaas and Reynolds cases were heavily emphasized, voters were likely most concerned with incapacitation rather than justice.

Incapacitation seems to be the guiding principle of this version of Three Strikes, given the drastic sentence enhancements. Zimring et al. allege that the adoption of the policy lacked principle and “is a penal practice without a theory” because of the grouping of violent and nonviolent felons in the mandatory sentencing requirements.¹⁴⁰ However, he notes that “it may be that the only general principle in the statute is to increase the seriousness of all punishments for those who had been convicted earlier of selected felonies.”¹⁴¹ This principle resembles incapacitation and attempts to target those who are most likely to recidivate and extend their sentences. Zimring et al. also argue that the provisions of Three Strikes conflict, particularly that the consideration of prior offenses contradicts the proportionality to the current offense.¹⁴² This conflict demonstrates another key difference between Three Strikes and retributive thought. The consideration of past record involves a utilitarian, predictive judgment on the likelihood of recidivism. Such calculation diverges from retribution because that theory holds that punishments should be maintained regardless of consequences.

¹⁴⁰ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 7

¹⁴¹ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 10

¹⁴² Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 9

Three Strikes effectively removes the option of rehabilitation for felons, unless they are deemed mentally ill. Thus, rehabilitation is limited to whatever rehabilitative services are offered within state prisons. This opposition to rehabilitation likely stems from two factors. First, the issue of effectiveness was important in the early 1990's because of the high violent crime rate. Expert policy had promoted rehabilitative policies, which had failed to minimize crime rates. Three Strikes, however, was not the beginning of this rejection of rehabilitation, as determinate sentencing represented a prioritization of retribution. Second, the view of criminals as dangerous enough to warrant life sentences stands at odds with rehabilitation since it considers inmates able to reform. Under Three Strikes and similar policies, criminal sentencing is "a zero-sum game between victims and offenders."¹⁴³ Rehabilitation is often perceived as catering to the offender, which under this paradigm, is at odds with helping victims.

The more recent modifications to Three Strikes exhibit a shift in public opinion, especially because they were enacted in the form of an initiative. The two relevant changes are Proposition 36 from 2012 and Proposition 47 from 2014. The ballot pamphlets from each year provide the supporting arguments and opposition, as well as the specifics of the modifications to Three Strikes.

Proposition 36 reduces prison sentences for third strikers who have committed non-serious or non-violent felonies.¹⁴⁴ Instead of the mandatory 25-year sentence, these individuals are required to serve twice the term for their crimes. Some drug, sex, or gun-related offenses constitute exceptions to this class of exempted felons in the third strike

¹⁴³ Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California*, 14

¹⁴⁴ "Proposition 36," California Ballot Pamphlet General Election 2012, Secretary of State Debra Bowen, <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf>, 49

class.¹⁴⁵ Proposition 36 provides for the resentencing of non-serious and non-violent felons who had been sentenced to 25 years as their third strike. The above exceptions apply and render those felons ineligible for resentencing.¹⁴⁶

The “Argument in Favor of Proposition 36” combines practical and retributivist considerations. The statement opens with the phrase, “make the punishment fit the crime,” criticizing the grouping of non-violent and non-serious felons with the most dangerous felons.¹⁴⁷ From a practical perspective, proponents argue that the proposition saves taxpayer money and reduces prison overcrowding. They note that despite the change from Proposition 36, California would still maintain the toughest Three Strikes law in the United States.¹⁴⁸ Conversely, the opponents cite that a third strike conviction emphasizes how a judge found the particular felon to be dangerous and deserving of the 25-year sentence. Proposition 36 would allow the release of these individuals under the resentencing provision, without parole or supervision.¹⁴⁹ Their assumption is that the group of non-serious and non-violent felons was still recidivists posing a threat to California. The sentiment in passing Proposition 36 indicates either an acceptance of the cost-saving argument or a rejection of grouping all felons to receive one mandatory sentence. Both reasons could have easily played a role in the passage of this proposition.

Proposition 47 is not explicitly about Three Strikes but changes the offenses considered felonies, thereby affecting Three Strikes implementation. Specifically, Proposition 47 reduces drug possession offenses and petty theft, receiving stolen

¹⁴⁵ Ibid

¹⁴⁶ “Proposition 36,” 50

¹⁴⁷ “Proposition 36,” 52

¹⁴⁸ Ibid

¹⁴⁹ “Proposition 36,” 53

property, and forging and/or writing bad checks if the amount in question is less than \$950 to misdemeanors.¹⁵⁰ Individuals previously convicted of rape, child molestation, murder, or registered sex offenders are exempt from the resultant decreased sentences.

The reasoning in favor of Proposition 47 mirrors those in favor of Proposition 47. Proponents argue that the change prioritizes violent and serious felons over less serious property and drug crimes and also cite the cost savings.¹⁵¹ Opponents contend that felons with previous convictions of armed robbery, kidnapping, child abuse, and other crimes will be exempted from sentence enhancements if they are later convicted of drug possession or a property crime involving a value below \$950.¹⁵² The statement notes that guns often cost less than \$950 so felony prosecution for gun theft would be eliminated. The rebuttal responds by distinguishing gun crimes from theft. Opponents argue that date-rape drugs are included in Proposition 47, while proponents argue that using date-rape drugs to commit a felony constitutes a different offense than possession. Their difference stems from a disagreement over whether possession of date-rape drugs is inherently wrong.

Both propositions rely on cost-saving arguments, and this is an important issue when considering philosophical implications of criminal punishment policy. The cost issue potentially overrides the philosophical considerations or represents an equally important consideration. The cost issue can refer to the actual or perceived cost of incarceration. Since corrections costs are often significant within state budgets, making

¹⁵⁰ “Official Title and Summary,” Proposition 47, Secretary of State Alex Padilla
<http://www.voterguide.sos.ca.gov/en/propositions/47/title-summary.htm>

¹⁵¹ “Arguments and Rebuttals,” Proposition 47, Secretary of State Alex Padilla,
<http://www.voterguide.sos.ca.gov/en/propositions/47/arguments-rebuttals.htm>

¹⁵² Ibid

corrections policy more cost effective can improve fiscal health and allows more resources for other areas.¹⁵³ Rachel Barkow, in her article, “Federalism and the Politics of Sentencing,” argues that the high costs of corrections sparks deliberation about the merits of sentencing policies.¹⁵⁴ She argues that a focus on the cost effectively counteracts the fear surrounding crime, forcing voters to consider policies from a more rational perspective. However, according to the California State Budget of 2013-2014, Health and Human Services, K-12 Education, Transportation, and Higher Education all receive more funding than Corrections and Rehabilitation.¹⁵⁵ The cost of corrections is significant, but not the largest expenditure. Often voters focus on the perceived expense of incarceration.

The contrast between a rational consideration of costs and benefits and emotion-based fear of crime is intriguing. The previous divergence between utilitarian and retributive theories on the question of emotions involved in criminal punishment occurs similarly on a theoretical level. Retributivists like Berns accept the role of anger in motivating response to crime. In the case of Three Strikes, anger motivated a utilitarian policy, with which retributivists may find flaws, depending on their perspective on the violent crime rates. The contrast between the theoretical accounts of retribution and utilitarianism are not clearly represented in policy. Some elements of them are evident in a mixed fashion, such as valuing both proportionality and cost in law. The cost element

¹⁵³ Rachel Barkow, “Federalism and the Politics of Sentencing,” *Columbia Law Review* Vol. 105, No. 4, May 2005, <http://www.jstor.org/stable/4099434> 1290

¹⁵⁴ Rachel Barkow, “Federalism and the Politics of Sentencing,” 1291

¹⁵⁵ “California State Budget 2013-2014,” *Edmund G. Brown Jr. Governor, State of California*, <http://www.dof.ca.gov/documents/FullBudgetSummary2013-14.pdf>

adds a variable not discussed by the previous theorists, but represents an important factor in determining the utility of policies like Three Strikes.

Chapter Six: Realignment

California's Criminal Justice Realignment Act of 2011, AB 109, is the shift of lower-level offenders from state prisons to jails in response to California's prison overcrowding. Before Realignment, there were four main ways convicted individuals could be sentenced: "straight probation, straight time in county jail, time in county jail followed by a period of probation, or time in a state prison followed by a three year term of parole."¹⁵⁶

Realignment, referring to AB 109, has four main provisions. First, certain felonies "are punishable by imprisonment in a county jail for 16 months, or 2 or 3 years."¹⁵⁷ The exceptions to the felonies transferred to county jail are serious, violent, and sexual. Individuals registered as sex offenders or those with prior convictions of serious and violent felonies are also exempt from the diversion to county jails. The categories of felons that can serve their sentences in county jails are often referred to as "non-non-non" offenders. Before Realignment, these felons would all be sentenced to state prison, but "AB 109 amended about 500 criminal statutes eliminating the possibility of a state prison sentence upon conviction."¹⁵⁸ Second, Realignment enacts the Postrelease Community Supervision Act (PCRS) of 2011, shifting the supervision of "non-non-nons" from state parole agents to county probation departments.¹⁵⁹ Individuals

¹⁵⁶ Rebecca Sullivan Silbert, "Thinking Critically About Realignment in California," *Chief Justice Earl Warren Institute on Law and Social Policy*, February 2012, <http://www.uchastings.edu/academics/first-class-assignment/Onek-ThinkingCriticallyAboutRealignment-California1-7-13.pdf> 1

¹⁵⁷ "Legislative Counsel's Digest," Bill Number: AB 109, California Legislative Counsel, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110404_chaptered.html

¹⁵⁸ Joan Petersilia and Jessica Greenlick Synder, "Looking Past The Hype: 10 Questions Everyone Should Ask About California's Prison Realignment," *California Journal of Politics Policy* 5(2), 2013, <http://www.law.stanford.edu/sites/default/files/childpage/183091/doc/slspublic/Joan%20and%20Jessica%20Issue%20Brief%20Cal%20J%20Politics%20April%202013.pdf>, 270

¹⁵⁹ "Legislative Counsel's Digest," Bill Number: AB 109

under the authority of PCRS include those whose prior convictions are serious, violent, or sexual even if their current offense is not.¹⁶⁰ Third, parole and probation violators serve revocation terms in county jails rather than state prisons. The only exception to this provision is for violators who have been released after serving an indeterminate life sentence.¹⁶¹ Fourth, judges can split sentences for lower-level offenders into jail time and probation time since there is no parole requirement.¹⁶² The sentence length is required to remain the same. In this chapter, I will discuss the legal motivation for Realignment, Supreme Court case *Brown v. Plata*, AB 109 and AB 117, and the reflection of philosophical theories within the Realignment. My philosophical analysis of Realignment will focus on a discussion of the sentence lengths, Governor Brown's statement, and county implementation of Realignment.

Brown v. Plata is significant in explaining the impetus for Realignment, as the California State Government was mandated by the Supreme Court to fix its unconstitutional conditions in state prisons caused by overcrowding. *Plata* began in 2001 and was filed in the Northern District of California by the Prison Law Office on behalf of nine specific inmates and those generally in the custody of the California Department of Corrections.¹⁶³ In May 2011, a three-judge district court found that the state prison overcrowding was a violation of cruel and unusual punishment under the Eighth Amendment. The three-judge court consisted of the Coleman v. Brown and Plata v.

¹⁶⁰ Joan Petersilia and Jessica Greenlick Synder, "Looking Past The Hype: 10 Questions Everyone Should Ask About California's Prison Realignment," 271

¹⁶¹ Ibid

¹⁶² Dean Mischynski, "Corrections Realignment: One Year Later," *Public Policy Institute of California*, August 2012 http://www.ppic.org/content/pubs/report/R_812DMR.pdf, 7

¹⁶³ Margo Schlanger, "*Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics," *Harv. C. R. - C. L. L. Rev.* 48, no. 1, 2013 <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1462&context=articles>, 173

Brown District Judges, and a third Ninth Circuit Judge. This court was convened because the judges were deciding an order to release prisoners under an Eighth Amendment violation, which is “a power reserved to a three-judge district court, not a single-judge district court.”¹⁶⁴ Their ruling ordered the State to reduce its prison population to 137.5% of its capacity within two years.¹⁶⁵ Anthony Kennedy delivered the opinion of the Supreme Court. Chief Justice John Roberts, Anthony Scalia, Samuel Alito, and Clarence Thomas dissented. The majority opinion determined that the question to be decided was whether the order issued by the three-judge court is consistent with the statute, Prison Litigation Reform Act (PLRA) of 1995.¹⁶⁶ PLRA is a congressional statute concerning when prisoners can bring litigation against states. The order holds that absent a plan to decrease overcrowding by states, prisoners must release some prisoners before the completion of their full sentences.

Within the disagreement between Kennedy and the dissenting opinions, a significant component of the discussion is dedicated to the three-judge court’s jurisdiction under PLRA. This question is too broad to discuss in this chapter. Instead, I will focus on Kennedy’s arguments about prison conditions and the violation of the Eighth Amendment. He holds that “the degree of overcrowding in California’s prisons is exceptional,” as prisons designed to house 80,000 inmates had populations of double designed capacity.¹⁶⁷ Severely inadequate medical and mental healthcare are frequently cited as being particularly severe in California. Several examples illustrate the extreme

¹⁶⁴ “Opinion of the Court, *Brown v. Plata*” *Supreme Court of the United States*, <http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf>,

¹⁶⁵ “Syllabus, *Brown, Governor of California, et al, v. Plata et al*,” *Supreme Court of the United States* <http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf>, 1

¹⁶⁶ “Opinion of the Court, *Brown v. Plata*” *Supreme Court of the United States*, 2

¹⁶⁷ “Opinion of the Court, *Brown v. Plata*” *Supreme Court of the United States*, 4

inadequacy of care such as “a prisoner with severe abdominal pain [who] died after a 5-week delay in referral to a specialist” and “a prisoner with ‘constant and extreme’ chest pain died after an 8-hour delay in evaluation by a doctor.”¹⁶⁸ Overcrowding decreases the quality of care, access to care, sanitation of medical facilities, and quality of medical professionals. These negative conditions make attracting and retaining qualified medical staff very difficult. The inhumane and unsafe results of overcrowding result in a violation of the Eighth Amendment, according to the majority opinion. Kennedy notes that “prisoners retain the essence of human dignity inherent in all persons” and “respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”¹⁶⁹ Respecting dignity in turn requires that the state provide for the basic needs of inmates while they are in custody. If the state fails to protect the constitutional rights of prisoners, the courts must step in. However, Kennedy specifies that “Courts must be sensitive to the State’s interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals.”¹⁷⁰ The phrase, “the State’s interest in punishment, deterrence, and rehabilitation,” is interesting for the purpose of this thesis since Kennedy acknowledges the importance of these interests in designing policy and even cautions against the Court’s involvement in state policy.

Plata occurred concurrently as California’s legislative action to enact Realignment. The Supreme Court decision was released in May 2011 after Governor

¹⁶⁸ “Opinion of the Court, *Brown v. Plata*” *Supreme Court of the United States*, 6-7

¹⁶⁹ “Opinion of the Court, *Brown v. Plata*” *Supreme Court of the United States*, 11

¹⁷⁰ “Opinion of the Court, *Brown v. Plata*” *Supreme Court of the United States*, 13

Brown signed AB 109 into law. Realignment had been discussed in the legislature five years before the Court's decision.¹⁷¹ The original lawsuit began in 2001, and prison overcrowding had been an ongoing problem. Extreme budgetary issues were also important in motivating the enactment of Realignment. The Legislative Counsel's analysis states "this bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on January 20, 2011, pursuant to the California Constitution."¹⁷² California was experiencing an unprecedented financial crisis which forced legislators to cut spending in the criminal justice system.¹⁷³ Increasing the inmate population in the state prison would require covering the health care costs of those individuals. Healthcare spending within corrections had increased from 12.4 percent of spending to 22.8 between 2010 and 2011.¹⁷⁴

In the introduction of this chapter, I mentioned the main provisions of Realignment, but there are some additional relevant components of AB 109. The legislation enhances the discretion granted to county correctional administrators to include voluntary home detention and involuntary home detention within the sentences of any inmate in county jail.¹⁷⁵ Time served in home detention qualifies as fulfilling an individual's mandatory jail time. AB 109 amends Section 1203.016 of the Penal Code to

¹⁷¹ Rebecca Sullivan Silbert, "Thinking Critically About Realignment in California," 6

¹⁷² "Legislative Counsel's Digest," Bill Number: AB 109

¹⁷³ Sara Abarbanel, Angela McCray, Kathryn McCann Newhall, and Jessica Snyder, "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans," *Stanford Criminal Justice Center*, 2013 <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties%20080113.pdf>, 1

¹⁷⁴ Abarbanel et al, "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans," 3

¹⁷⁵ "Legislative Counsel's Digest," Bill Number: AB 109

allow a broader range of individuals to receive a sentence including home detention.¹⁷⁶ No correctional administrator, however, is required to impose this sentence. The bill amends section 17.5 of the California Penal Code to read “California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state’s substantial investment in its criminal justice system.”¹⁷⁷ Finally, the bill imposes “a state-mandated local program,” since the counties are responsible for developing plans to implement the Realignment, house, and rehabilitate a new group of offenders.¹⁷⁸

Governor Jerry Brown’s AB 109 signing message partially addresses the concern that certain felons will be misplaced in county jails. The press release states that AB 109 will not permit any early releases of inmates currently serving in state prison or placement of convicted sex offenders in county jails.¹⁷⁹ Brown’s signing message supports Realignment because the state prison system undergoing recidivism and overcrowding “wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision.”¹⁸⁰ Brown’s motivations represent a combination of spending and crime reduction and a desire to improve rehabilitation.

An examination of the sentence lengths as a result of Realignment provides insight into its connection to punishment theories. Specifically, AB 109 alters determinate sentencing law by replacing the combination of time in state prison and

¹⁷⁶“Section 454,” Bill Number: AB 109

¹⁷⁷ “Section 229,” Bill Number: AB 109

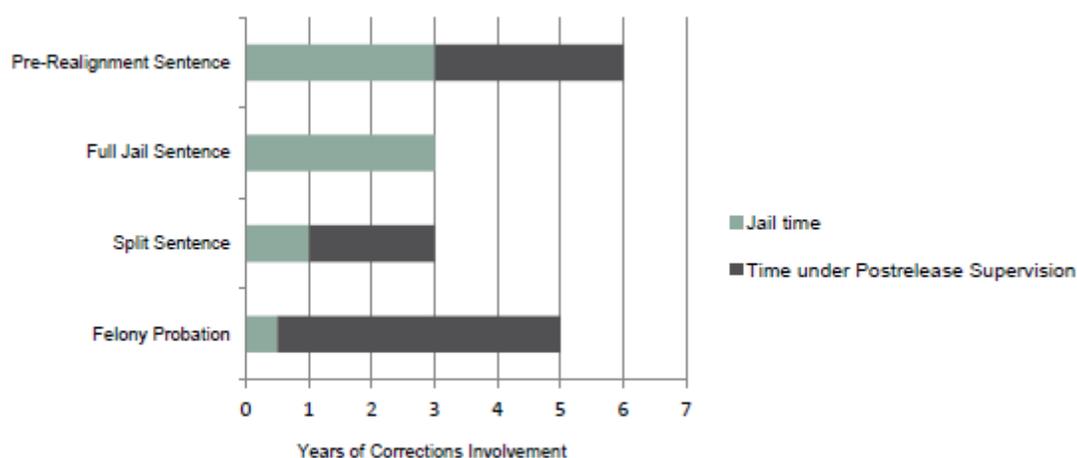
¹⁷⁸ “Legislative Counsel’s Digest,” Bill Number: AB 109

¹⁷⁹ “Governor Brown Signs Legislation to Improve Public Safety and Empower Local Law Enforcement,” Office of the Governor Edmund G. Brown Jr., April 5, 2011, <http://gov.ca.gov/news.php?id=16964>

¹⁸⁰ “AB 109 Signing Message,” Office of the Governor Edmund G. Brown Jr., April 5, 2011 http://gov.ca.gov/docs/AB_109_Signing_Message.pdf

parole with three potential options.¹⁸¹ Before Realignment, one's sentence may have been three years in state prison followed by three years of parole. The new options are, three years in county jail with no post-release supervisory period, a split sentence between jail and probation, or felony probation in which the sentences are "suspended and replaced by post-release supervision."¹⁸²

FIGURE 8
Sentencing possibilities before and after realignment



NOTE: Figure shows sentencing possibilities for a crime with a three-year determinate sentence, if there are no unusual circumstances.

183

The shift from determinate sentencing could reflect desert-based concerns about the severity of sentences for "non-non-nons." Split sentences and felony probation allow convicted individuals to spend more time outside of prison or jail, constituting a less severe penalty than pre-Realignment. The increased probability of receiving probation may reflect a more rehabilitative attitude since individuals can readjust to their home and community lives instead of being incarcerated. However, a final motivation could be

¹⁸¹ Dean Misczynski, "Corrections Realignment: One Year Later," 25

¹⁸² Dean Misczynski, "Corrections Realignment: One Year Later," 25-26

¹⁸³ Dean Misczynski, "Corrections Realignment: One Year Later," 25 (Figure 8) The figure shows felony probation as including jail time, referring to the jail time after the arrest.

fiscal and practical in that shorter sentences will reduce overcrowding and be cheaper (at least in the short term).

The specifics of the county plans and stakeholder views provide greater insight into the interplay between rehabilitation, retribution, and deterrence. Joan Petersilia interviewed stakeholders and presents her findings in “Voices from the Field: How California Stakeholders View Public Safety Realignment.” I will present some of these findings and explain how they relate to the theories of punishment. Probation officers generally held favorable attitudes towards Realignment and “spoke with the most unified voice” in contrast with other groups.¹⁸⁴ AB 109 expands probation so that it is a greater part of lower-level offenders’ sentences. Probation officers “unequivocally felt that Realignment gave them an opportunity to fully test whether well-tailored rehabilitation services can keep lower-level felony offenders from committing new crimes and returning to prison.”¹⁸⁵ This statement contains rehabilitative sentiments, given that probation within the community is better funded and more widely used for lower-level offenders under Realignment. Rehabilitation is supported in the context of “non-nonnons” rather than all offenders. The “test” aspect of this statement indicates that rehabilitation is mainly one intention of these officers rather than results supported by empirics. Public defenders noted “that treatment was either unavailable or not intensive enough for the most serious offenders” within counties.¹⁸⁶ However, probation officers

¹⁸⁴ Joan Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” Stanford Criminal Justice Center, November 2013 http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/SCJC_Voices-full-report.pdf, 7

¹⁸⁵ Ibid

¹⁸⁶ Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 10

criticized how only 25% of offenders receive split sentences under Realignment, meaning that probation is not a part of their sentence.¹⁸⁷

Prosecutors represent the least supportive group of Realignment, often motivated by concerns of decreased incapacitation. For example, “Steve Cooley, three-term former Los Angeles County District Attorney, was perhaps the most vocal in his criticism, calling Realignment a ‘public safety nightmare.’”¹⁸⁸ The nightmare refers to the ability of the California criminal justice system to keep dangerous criminals incapacitated. The prosecutors believe that the “non-non-non” category still encompasses felonies that should be in state prison such as commercial burglary and vehicular manslaughter.¹⁸⁹ Further, technical violations do not result in jail time under Realignment. The prosecutors’ views are influenced by incapacitation. Retribution could play a role since the prosecutors specified offenses that ought to receive harsher penalties.

Local police officers in many counties were overwhelmed by their additional burden from Realignment, especially due to concurrent budget cuts.¹⁹⁰ Police believed crime reduction had occurred due to their efforts in community policing, but they were stretched thin because of Realignment’s diversion of offenders to their locales.¹⁹¹ These sentiments reflect concerns about deterrence because police presence and targeted patrolling decreases crime. The alleged shift from Realignment prevented such intense targeting, potentially increasing crime according to police officers. Sheriffs were more divided on the issue, but noted that California’s high recidivism and prison as a

¹⁸⁷ Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 9

¹⁸⁸ Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 10

¹⁸⁹ Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 11

¹⁹⁰ Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 12

¹⁹¹ Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 12-13

“revolving door” had remained problems, warranting change. Many sheriffs worried about the diversion of overcrowding to county jails, which could lead to the same issues in *Plata*.¹⁹²

Judges represent another important group of stakeholders since they impose the sentences outlined by Realignment’s guidelines. Some judges in counties that have focused more on rehabilitative programs view Realignment more favorably since “these judges have experience working with probation and community treatment specialists to provide services to offenders with mental health, substance abuse, and domestic violence issues.”¹⁹³ One judge noted that judges have wider discretion to manage offenders’ treatment and compliance post-sentencing. However, this discretion is limited due to counties lacking the community-based resources to implement these sentences.¹⁹⁴ The decrease in the determinacy of sentencing, at least for “non-non-nons” could bring up similar conflicts surrounding the debate over indeterminate sentencing in the late 1970’s. The increased discretion, combined with potentially inadequate rehabilitation, could incite criticism on arbitrary sentences and recidivism rates. Petersilia cautions that “it is important to remind ourselves that California current system of determinate sentencing was adopted in 1977 in part to rid the state of racial biases and geographical differences that were evident in its former highly discretionary indeterminate sentencing law.”¹⁹⁵ Rehabilitation and deterrence models both seek to decrease crime, but stakeholders often

¹⁹² Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 14

¹⁹³ Petersilia “Voices from the Field: How California Stakeholders view Public Safety Realignment,” 16

¹⁹⁴ *Ibid*

¹⁹⁵ Petersilia, and Snyder, “Looking Past The Hype: 10 Questions Everyone Should Ask About California’s Prison Realignment,” 287

grow wary of rehabilitative experiments and return to traditional models. Realignment could experience this problem if county services are not improved.

An assessment of the county plans provides an added and similar insight to Petersilia's stakeholder interviews. According to Sara Abarbanel's study of county implementation plans, some counties were enthusiastic, but all were concerned about inadequate funding from the state.¹⁹⁶ In terms of alternative sanctions, "the highest percentage of counties that mention they plan to use them are electronic or GPS monitoring pre- or post-sentence (96 percent), flash incarceration (72 percent), work release (71 percent), day reporting centers (52 percent), community service (48 percent), and drug courts (38 percent)."¹⁹⁷ Certain counties will institute these sanctions for "non-nons" more frequently than others based on funding and existence of community based programs. The county plan language, especially in counties like Santa Cruz, indicates a favorable attitude towards rehabilitation.

Ultimately, Realignment represents a partial and limited shift towards rehabilitation for certain lower-level offenders dependent on county resources and discretion. The ideal differs from practice in many counties. Moreover, the maintenance of deterrence and retribution at the state prison level indicates a different view of higher-level offenders, despite some debate on which felonies should be included in the "non-non" category.

¹⁹⁶ Sara Abarbanel, Angela McCray, Kathryn McCann Newhall, and Jessica Snyder, "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans" Stanford Criminal Justice Center, 2013 <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties%20080113.pdf>

¹⁹⁷ Sara Abarbanel et al, "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans," 18

Conclusion

The combination of the philosophical perspective on the theories of punishment and these policies provides a more insightful angle than viewing each in isolation. The main insights derived from this thesis relate to human nature, the differences between legislators and voters and the importance of a mixed theory.

In the *Laws of Plato*, the Athenian stranger observes that the laws are not designed for gods and instead designed for flawed humans. The fairly pessimistic account of human nature shapes almost all theories of punishment. The distinction between gods and humans implies that humans are flawed, and some will necessarily commit crimes, despite the existence of laws. However, a punitive criminal law must exist to guide conduct and ensure the public safety. There is an important category of people that will abstain from crime because of laws because they view the costs of getting caught as too high. The assumption about human nature is even present in Menninger's account. Viewing crime as a disease implies some flaw about those individuals.

The three case studies all demonstrate the legislators' commitment to utilitarian concerns. In determinate sentencing and Three Strikes, the increasing violent crime rate was a major consideration for legislators. More specifically, the effectiveness of policies is measured by the decrease in recidivism and overall crime. The public often shares this attribute of the legislature. The insights of J.L. Mackie and Walter Berns on the natural impulse towards retribution provide an intriguing caveat. If individuals are inherently predisposed to seek justice, this also motivates their advocacy of certain policies. The example of Three Strikes and Proposition 47 is useful here. Some voters may have

supported Three Strikes because they believe repeat offenders deserve harsher punishment. Similar logic can be applied to Proposition 47, as some of its proponents believe punishments for petty theft and drug possession were undeservedly severe. Ripstein mixed theory in part answers the dichotomy between the citizens' beliefs. His theory holds that serious criminals deserve harsh punishment, but that effectiveness is also important to guarantee justice.

A mixed theory is less useful in the dilemma over rehabilitation for lower-level offenders. Rehabilitation's acceptance hinges on its effectiveness as demonstrated in the shift to determinate sentencing and in negative reactions to Realignment. Since there is no theoretical basis for rehabilitation, it is difficult to justify without appealing to its consequences. Conversely, one could support retribution by making an argument premised upon desert. Lorraine Smith Pangle's proposal supports reformatory education to address deeper problems with offenders' character. However, Pangle's theory is not reflected in actual policy making it difficult to justify in that manner. If rehabilitation in practice could be altered to mirror Pangle's approach, it could be supported as a principle rather than entirely based on its effectiveness.

The stakeholders involved in the punishment process render it a uniquely emotional experience. Beyond the victims, offenders, and relevant family and friends, the other people determining policy often represent invested parties. For example, sheriffs, police officers, and criminal law attorneys have experience witnessing crimes and interacting with both victims and offenders. The recognition of emotions as essential elements of theory is important given this personal context of criminal punishment. Though theories can be divorced from empirical reality, Berns and Mackie recognize the

importance of emotions within retribution. Instead of classifying emotions as external to the theory and punishment process, anger expresses a sense of morality in that serious actions receive the appropriate emotional reaction. This emotional element accords with reality, as one can easily imagine feeling enraged if a murder occurred to a friend or even acquaintance. The absence of emotion would be strange in this situation. Perhaps, rehabilitation is motivated by compassion for criminals, though that is not explicitly mentioned within the main arguments for rehabilitation. Hearing about the harsh prison conditions, long sentences, and socio-economic backgrounds of many offenders could influence people to support rehabilitation on a partially emotional basis. The emotions surrounding deciding someone's fate through the punishment process make these instances of theory and policy incredibly intriguing.

Ultimately, philosophy does not shape policy, but instances of philosophy having an impact on policy exist in these case studies. The compromising nature of the legislative process, empirical realities of crime, and public opinion prevent a punishment system entirely based on one theory. The mixed theory can be used to counterbalance the extremes of one theory such as a concern for rights trumping utility to prevent punishment of the innocent. Theoretically, there are some inconsistencies when mixing the theories. For example, the minimum punishment required to achieve deterrence could be compromised because it does not satisfy the retributive demand of harsh punishment for serious offenses. It is important to have philosophical reflection about public policy to truly understand the origins of laws or find flaws with them. Even if Socrates' observation that individuals cannot voluntarily commit crimes cannot be incorporated to

public policy, it provides an indication that questioning the foundations of punishment is important.

References

- “AB 109 Signing Message,” Office of the Governor Edmund G. Brown Jr., April 5, 2011 http://gov.ca.gov/docs/AB_109_Signing_Message.pdf
- Abarbanel, Sara, Angela McCray, Kathryn McCann Newhall, and Jessica Snyder, “Realigning the Revolving Door: An Analysis of California Counties’ AB 109 2011-2012 Implementation Plans,” *Stanford Criminal Justice Center*, 2013 <http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties%20080113.pdf>
- Angell, Kelly M. “The Regressive Movement: When Juveniles are Tried as Adults Nobody Wins” *Southern California Interdisciplinary Law Journal* Vol. 14:125 2003 http://weblaw.usc.edu/why/students/orgs/ilj/assets/docs/14-1_Angell.pdf
- Barkow, Rachel “Federalism and the Politics of Sentencing,” *Columbia Law Review* Vol. 105, No. 4, May 2005, <http://www.jstor.org/stable/4099434>
- Beccaria, Cesare, transl by David Young, *On Crimes and Punishment* (Indianapolis: Hackett Publishing Company, 1986)
- Bentham, Jeremy, *The Principles of Morals and Legislation* (New York, NY: Hafner Publishing Company, 1948)
- Brewer, David Gerald E. Beckett, and Norman Holt, “Determinate Sentencing in California: the First Year’s Experience,” *Journal of Research in Crime and Delinquency*, July 1981
- Brooks, Thom, *Punishment* (Routledge: Abingdon, Oxon, 2012)
- “California Population and Number of Crimes 1960- 2013,” Disaster Center 2014, <http://www.disastercenter.com/crime/cacrime.htm>
- “California State Budget 2013-2014,” Edmund G. Brown Jr. Governor, State of California, <http://www.dof.ca.gov/documents/FullBudgetSummary2013-14.pdf>
- Dershowitz, Alan M., “Indeterminate Confinement: Letting the Therapy Fit the Harm,” *University of Pennsylvania Law Review*, Vol. 123, No. 2 December 1974
- Duff, Antony, *Punishment, Communication, and Community* (New York : Oxford University Press, 2003)

“Governor Brown Signs Legislation to Improve Public Safety and Empower Local Law Enforcement,” Office of the Governor Edmund G. Brown Jr., April 5, 2011, <http://gov.ca.gov/news.php?id=16964>

Friedman, Lawrence, *Crime and Punishment in American History*, (Basic Books: New York, NY, 1993),

Hampton, Jean, “The Moral Education Theory of Punishment” *Philosophy & Public Affairs* Vol. 13, No., 1984

Johnson, Phillip E. and Sheldon L. Messinger, “California's Determinate Sentencing Statute: History and Issues, 1 Determinate Sentencing: Reform or Regression,” Berkeley Law Scholarship Repository 1978, <http://scholarship.law.berkeley.edu/facpubs/188>

Kant, Immanuel, edited by Mary Gregor, *Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996)

“Legislative Counsel’s Digest,” Bill Number: AB 109, California Legislative Counsel, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110404_chaptered.html

Mackie, J.L., “Morality and the Retributive Emotions,” *1 Crim. Just. Ethics* 9 (1982) <http://philpapers.org/rec/JLMMAT>

Menninger, Karl, “Do We Have a Moral Responsibility to Criminals? Yes” Saturday Review, 1968

Menninger, Karl, *The Crime of Punishment* (The Viking Press: New York, NY 1999),

Miszczynski, Dean “Corrections Realignment: One Year Later,” *Public Policy Institute of California*, August 2012 http://wwkw.pplic.org/content/pubs/report/R_812DMR.pdf

“Opinion of the Court, Brown v. Plata” *Supreme Court of the United States*, <http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf>

Pangle, Thomas, *The Laws of Plato* (University of Chicago Press: Chicago, 1980),

Petersilia, Joan and Jessica Greenlick Synder, “Looking Past The Hype: 10 Questions Everyone Should Ask About California’s Prison Realignment,” *California Journal of Politics Policy* 5(2), 2013, <http://www.law.stanford.edu/sites/default/files/childpage/183091/doc/slspublic/Joan%20and%20Jessica%20Issue%20Brief%20Cal%20J%20Politics%20April%202013.pdf>

Petersilia, Joan, “Voices from the Field: How California Stakeholders view Public Safety Realignment,” Stanford Criminal Justice Center, November 2013

<http://www.law.stanford.edu/sites/default/files/child- page/183091/doc/slspublic/SCJCVoices-full-report.pdf>,

Pillsbury, Samuel H., “Emotional Justice: Moralizing the Passions of Criminal Punishment.” *Cornell Law Review* (1988-1989),
<http://scholarship.law.cornell.edu/clr/vol74/iss4/2/>

“Proposition 36,” California Ballot Pamphlet General Election 2012, Secretary of State Debra Bowen, <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf>

“Proposition 47,” Secretary of State Alex Padilla,
<http://www.voterguide.sos.ca.gov/en/propositions/47/arguments-rebuttals.htm>

“Proposition 184,” California Ballot Pamphlet General Election 1994, Acting Secretary of State Tony Miller http://librarysource.uchastings.edu/ballot_pdf/1994g.pdf

Ripstein, Arthur *Equality, Responsibility, and the Law* (Cambridge University Press: Cambridge, UK: 1999)

Ripstein, Arthur, “Kant on Law and Justice,” in Thomas Hill’s *The Blackwell Guide to Kant’s Ethics* (Blackwell, Oxford, UK: 2009)
<http://onlinelibrary.wiley.com/doi/10.1002/9781444308488.ch7/summary>

Schlanger, Margo, “*Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics,” *Harv. C. R. -C. L. L. Rev.* 48, no. 1, 2013
<http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1462&context=articles>,

Sentencing Practices Advisory Committee, “Report and Recommendation concerning Proposed Sentencing Rules and Recommended Reporting System,” Judicial Council of California March 17, 1977
<https://www.ncjrs.gov/pdffiles1/Digitization/39947NCJRS.pdf>

Silbert, Rebecca Sullivan, “Thinking Critically About Realignment in California,” *Chief Justice Earl Warren Institute on Law and Social Policy*, February 2012,
<http://www.uchastings.edu/academics/first-class-assignment/Onek-ThinkingCriticallyAboutRealignment-California1-7-13.pdf>

Stephen, James Fitzjames, *A History of the Criminal Law of England*, 3 vols. (London: Macmillan, 1883)

“Syllabus, Brown, Governor of California, et al, v. Plata et al,” *Supreme Court of the United States* <http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf>,

West, Thomas G. and Grace Starry West, *Four Texts on Socrates* (Ithaca: Cornell University Press, 1998)

Young, David "Cesare Beccaria: Utilitarian or retributivist," *Journal of Criminal Justice*
Vol. 11, 1983

Zimring, Frank, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three
Strikes and You're Out in California*, (Oxford University Press: New York, 2001)