

The “Ideal” Pendulum Swing: From Rhetoric to Reality

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Of course no victim should be neglected. But the individual victim has no more right to be protected than those of us who may become victims. . . . And we are not protected by a system that attacks ‘criminals’ as if they were the embodiment of all evil.‡

INTRODUCTION

California has been dominated for decades by a criminal justice system that places a strong emphasis on retribution. In other words, the central goal of our criminal justice philosophy has been to punish the offender for his or her “blameworthy” behavior. This focus on retributive punishment has led, in turn, to widespread prison overcrowding and revolving-door recidivism.¹ However, in recent years the looming threat of court-ordered population caps has caused even “tough on crime” policy-makers to think seriously about the implications of retributive policies and practices on public safety and budgetary constraints.² Governor Schwarzenegger responded to these pressures in July 2005 by reorganizing the Department of Corrections into the new California Department of Corrections and Rehabilitation (CDCR).³

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‡ KARL MENNINGER, *THE CRIME OF PUNISHMENT* 9 (Viking Press 1968) (emphasis in original).

1. LITTLE HOOVER COMMISSION, REPORT 185, (2007), *available at* www.lhc.ca.gov/lhcdir/report185.html.

2. *See Plata v. Schwarzenegger*, 2007 WL 2318898 (N.D. Cal. 2007). In this and other cases, Schwarzenegger was sued by inmates alleging poor health conditions in California prisons. Judge Thelton Henderson threatened mass inmate releases if California remained unable to resolve the issue.

3. LITTLE HOOVER COMMISSION, *supra* note 1, at 4.

Some commentators have argued that this shift in name has done little in substance, since policymakers pay lip-service to reform while withholding the support and funding necessary to enact real change.⁴ Additionally, corrections staff have demonstrated what Judge Thelton Henderson has termed a “trained incapacity” for reform; prison officials drag their feet in implementing reform, convinced that the system is too entrenched and will never change, or that any changes made will be reversed with the next shift in political leadership.⁵

In this note, I analyze the failures of our retributivist state, the rehabilitative ideal⁶ that preceded it, and how this ideal can be combined with evidence-based contemporary reform efforts to create an effective strategy for recidivism-reduction. Finally, I critique the actions and optimism of the CDCR, and suggest several proposals that it, the legislature, and the Governor can implement to more quickly resolve the prison crisis. Ultimately, I note that any effort at change will be met with resistance until we resolve the critical moral and social issue, namely, whether our current penal philosophy is still justified in light of recent empirical discoveries. The politicians and the public have long accepted the retributive model, but the social science evidence illustrates that it is ineffective—and even immoral—to continue following this antiquated model. As a matter of moral philosophy and public safety, we must learn to put aside our instinctual hostility toward criminals and instead work to remedy the social and personal pressures that drove them to commit crime in the first place.

I. THE RISE AND RESULTS OF RETRIBUTION

A. *The Indeterminate Era*

Some narratives analogize the historical shifts in American sentencing policy to a “pendulum,” swinging from extreme certainty in sentencing to extreme judicial discretion and back.⁷ For more than a century before the passage of California’s Determinate Sentencing Law (DSL) and the Federal Sentencing Reform Act (SRA),⁸ judges were granted wide discretion in

4. *Id.* at 2-5.

5. *Id.* at 6, 9.

6. The “rehabilitative ideal” refers to a philosophy of criminal justice that emphasizes rehabilitating the offender rather than punishing him or her. It will be discussed more fully below. See generally KARL MENNINGER, *THE CRIME OF PUNISHMENT* 9 (Viking Press 1968); NORVAL MORRIS & GORDON HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* (1969). For a look at more contemporary reform proposals which are similar in many respects, see Little Hoover Commission, *supra* note 1; MILES HARER, *RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987* (1994), available at http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf; Michael Vitiello and Clark Kelso, *A Proposal for a Wholesale Reform of California’s Sentencing Practice and Policy*, *LOJ. L.A. L. REV.* 903 (2004).

7. *Id.* at 578; Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 526 (2007).

8. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 570 (2008).

sentencing, a time period I refer to as the indeterminate era.⁹

During the indeterminate era, many people rejected notions of vengeance and “just deserts” in favor of rehabilitation.¹⁰ Rather than focusing narrowly on avenging the victim through punishing the wrongdoer, the justice system’s primary goal was correcting criminals’ behavior and ensuring that they would commit fewer crimes in the future; judges were given wide judicial discretion towards that end.¹¹ Psychologists, sociologists, criminologists, and penologists worked together to discover the best ways to manage recidivating criminals; they advocated expanding the use of therapeutic counseling and the proliferation of community-based educational, vocational, and job placement programs.¹²

The most recent determinate pendulum swing ended this movement with the passage of the DSL and SRA, both of which were based on two different justifications. On the one hand, supporters sought to improve uniformity and consistency in sentencing, while on the other they sought to marginalize the rehabilitationist movement described above.¹³ This philosophical victory for retributivists and free will theorists was, at least in part, an indication of the ineffective and inconsistent manner with which indeterminate era judges exercised their discretion.¹⁴

For example, indeterminate era judges were not trained in conducting proper risk and needs assessments of inmates, determining which inmates were most likely to be rehabilitated, or choosing the appropriate rehabilitative programs to do so effectively.¹⁵ But even if they sought such training, the social science on the issue had only come so far, leaving a considerable dearth of conclusive research on recidivism and its prevention.¹⁶ Furthermore, their sentencing decisions were not subject to appellate review, depriving the judges of a much-needed incentive to discover proper rehabilitative techniques and coordinate the best practices across jurisdictions.¹⁷ These factors resulted in an unpredictable, unprincipled system that disproportionately impacted African-

571 (2005). For further discussion of the DSL and SRA, see *supra* Part II.B, “The Birth of the Retributive Era.”

9. “Indeterminate” as used here refers to the wide discretion granted to judges, who were allowed to tailor sentences to the peculiarities of the individual offender and to impose harsh penalties for even the smallest offenses. The latter was done so that offenders would have an incentive to participate in rehabilitative programs, namely, the opportunity to be paroled out of life sentences. The differences between the indeterminate and determinate eras in parole implementation and purpose are discussed more fully below.

10. Gertner, *supra* note 7, at 526.

11. *Id.*

12. MENNINGER, *supra* note 6, at 4-5; MORRIS & HAWKINS, *supra* note 7, at 112.

13. Gertner, *supra* note 8, at 583.

14. *Id.* at 572-73. Later, I will discuss the connection between the rehabilitative ideal and determinism, the often-misunderstood antithesis to theories of free will.

15. *Id.* at 572.

16. *Id.*

17. *Id.*

American offenders, who were often given arbitrarily greater sentences for similar crimes.¹⁸ In the 1970s, the determinate sentencing movement sought to solve these problems, while also scoring a victory for the retributivists.

B. *The Birth of the Retributive Era*

In 1976, California enacted its determinate sentencing law (DSL), which rejected the rehabilitative model of indeterminate sentencing and stated unequivocally that “the purpose of imprisonment for crime is punishment.”¹⁹ The DSL created presumptive sentences and drastically limited the judicial discretion enjoyed in sentencing policy during the indeterminate era.²⁰ The California Rules of Court, which govern many procedural aspects of lawsuits filed in California state courts, were also amended to state explicitly the following goals of sentencing: social protection, punishment, specific and general deterrence, incapacitation, restitution to victims, and uniformity among sentences.²¹ Conspicuously absent from this list was any mention of rehabilitation as a valid sentencing purpose.

California’s determinate sentencing reforms did not occur in a vacuum. They were part of a broader, nationwide movement away from indeterminate sentencing toward a retributive state that culminated in the Federal Sentencing Reform Act (SRA) of 1984.²² Among other things, the SRA created the United States Sentencing Commission and mandated that the commission draft sentencing guidelines that would end the “unwarranted disparity” paradigmatic of indeterminate sentencing.²³ The retributivist underpinnings of the reform can be seen in the Senate Hearings report on the SRA, which suggests that retribution “should be reflected clearly in all sentences.”²⁴

In enacting the SRA, Congress rejected the proposition that prisoners could be rehabilitated; it deemed the evidence presented by rehabilitationists to be incredulous.²⁵ While the SRA incorporated some language of the rehabilitative movement, it also explicitly stated that rehabilitation could never be the purpose of imprisonment, and it provided presumptive prison terms without the possibility of alternative sanctions; as a result, rehabilitation was effectively excised as a goal of the criminal justice system.²⁶ In this regard, the

18. *Id.* at 573.

19. Vitiello and Kelso, *supra* note 7, at 918; CAL. PENAL CODE § 1170(a) (West 2008).

20. CAL. PENAL CODE § 1170(b) (West 2008). *See also infra* notes 8-13 and accompanying text.

21. CAL. R. CT. 4.410 (West 2007).

22. Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 421-23 (1992).

23. *Id.* at 416, 419-20, 422.

24. *Id.* at 432.

25. *Id.* at 435. Whatever the state of the evidence in the 1980s, no one can deny the substantial body of evidence on recidivism and rehabilitation we have today, much of which will be discussed below.

26. *Id.* at 429, 437, 466. HeinOnline -- 13 Berkeley J. Crim. L. 178 2008

SRA mirrored both the DSL's presumptive prison terms and the declaration by the California legislature about the punitive purpose of imprisonment.²⁷

C. Vengeful Entrenchment, Mandatory Minimums, and "Drive-by" Sentencing Legislation

Since the early days of the retributivist shift in criminal justice policy, the forces of vengeful sentencing have become increasingly entrenched and draconian. Almost every amendment to the federal sentencing guidelines in the years immediately following the SRA's enactment increased either the severity of sentences or the use of prison sanctions generally, a problem that was aggravated further by the congressional movement towards mandatory minimum sentences for a variety of offenses.²⁸

California has been no exception to this trend. The legislature passed the Three Strikes Law in 1993,²⁹ and, despite overwhelming evidence that it adds greatly to the prison population while doing very little to protect public safety,³⁰ it has been the law in California for more than a decade. This law is the greatest indication that the general public has given up on the idea of rehabilitating the offender. The excessive sentence enhancements are exacerbated by the fact that nearly half of those receiving their third strike receive it for a felony that the statute itself characterizes as non-violent and non-serious;³¹ this large group of offenders presumably does not pose a sufficient threat to public safety to warrant a life sentence.

In addition to Three Strikes, California has cleansed itself of the indeterminate era through extensive parole reforms. Under indeterminate era sentencing, parole was a reward for those inmates who were deemed ready for release, and it was the only way to circumvent a life sentence and procure early release.³² Now California is one of only two states that place every offender on parole, and it is the only state where parole can last up to three years, sometimes longer than the actual prison term.³³ Further, rather than allowing these parolees a chance to succeed, we dash their hopes with excessive enforcement of technical parole violations and reduced evidentiary standards for prison re-commitment.³⁴ As a result, more than half of the new admissions

27. CAL. PENAL CODE § 1170(a) (West 2008).

28. Miller, *supra* note 22, at 414-15, 446.

29. CAL. PENAL CODE §§ 667 (West 2008), 1170.12 (West 2007).

30. Vitiello and Kelso, *supra* note 7, at 904-06. For example, San Francisco county is the least likely to invoke Three Strikes, but it has experienced a greater drop in crime than either Sacramento or Los Angeles Counties, where the law is seven times more likely to be used. *Id.* at 958 n.303.

31. *Id.* at 928 n.115; CAL. PENAL CODE § 1192.7 (West 2008) (list of "serious offenses" under Three Strikes); CAL. PENAL CODE § 667.5(c) (West 2008) (list of "violent offenses" under Three Strikes).

32. LITTLE HOOVER COMMISSION, *supra* note 1, at 22.

33. *Id.*

34. See *id.* at 22-24. HeinOnline -- 13 Berkeley J. Crim. L. 179 2008

to California prisons are returning parolees.³⁵ In this manner, determinate sentencing and Three Strikes serve to punish the inmate for as long as possible, while parole reforms ensure that they are unlikely to return to society with any sort of success or permanency.

Even before Three Strikes and parole reforms, California demonstrated its retributivist leanings through the process sometimes referred to by critics as “drive-by” sentencing legislation.³⁶ After a high-profile crime receives adequate media attention and public outcry reaches a critical mass, legislators react to the crisis by passing a new sentencing enhancement related to the event.³⁷ The combined effect of the decades-long promulgation of these so-called “determinate sentencing” enhancements has been to create a sentencing system that can result in disparate sentences for like offenses, betraying the very rationale of the determinate sentencing movement. The lofty goals of consistency and uniformity in sentencing have apparently faded from consciousness as retribution and vengeance have taken their place atop the criminal justice throne.

D. Cleaning up the Mess: California's Prison Crisis

The inevitable result of a focus on retribution has come to fruition, as California faces its greatest criminal justice challenge to date—overcrowded prisons that threaten to overwhelm the system. The CDCR currently incarcerates more than 160,000 inmates in facilities designed to hold less than half that number.³⁸ The CDCR has received a fifty-two percent budget increase over the last five years, yet the problems have only grown worse.³⁹ The health conditions have become so deplorable that, in December 2006, a federal judge ordered the State to reform the prisons within six months or face the prospect of a mandatory population cap.⁴⁰ Despite this and ample evidence-based recommendations by contemporary reformers, policy-makers continue dragging their feet.

The Governor reorganized the CDCR in 2005, utilizing the rhetoric of rehabilitation and the need for evidence-based recidivism-reduction

35. *Id.* at 22.

36. Vitiello and Kelso, *supra* note 7, at 916-17.

37. *Id.*; see, e.g., CAL. HEALTH & SAFETY CODE § 11370.2 (West 2008) (enacted in 1985, provides a three year enhancement for defendants with prior drug convictions when they are convicted of a new drug-related offense); CAL. PENAL CODE § 667.7 (West 2008) (increases sentences for those with prior convictions when the new offense involves an intent to inflict great bodily injury); CAL. PENAL CODE § 667.51 (West 2008) (providing five-year enhancement for defendants with one prior conviction of lewd act with a child, and fifteen-years-to-life for defendants with two prior convictions, when the new offense is for the same).

38. California Department of Corrections and Rehabilitation, *Weekly Report of Population*, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Population_Reports.asp, (last visited Feb. 8, 2008).

39. LITTLE HOOVER COMMISSION, *supra* note 1.

40. Plata, 2007 WL 2518898. HeinOnline -- 13 Berkeley J. Crim. L. 180 2008

strategies.⁴¹ This came as a relief to many who felt that California's recidivism rate, at seventy percent, had been one of the biggest factors contributing to the over-crowding crisis.⁴² Yet in August 2006, when the Governor called a special legislative session to hear a variety of reform proposals, most of the proposals emphasized the need for prison and bed construction, undermining the contention that he truly had rehabilitation in mind.⁴³ Reform advocates continue to present recommendations to the Governor and the legislature, but those recommendations have typically been ignored.⁴⁴ Fortunately for the future of our prisons and our state budget, the problem has reached undeniable proportions and the recommendations must now be taken seriously.

One of the most striking features of contemporary reform efforts has been the incredible similarity between the new recommendations and those made some forty years ago by the leading rehabilitation advocates of the time, particularly Norval Morris, Gordon Hawkins, and Karl Menninger. The following is an analysis of the theories and recommendations of these indeterminate era reform advocates, followed by a comparison to the theories and recommendations of more contemporary reformers. These contemporary reformers have shown empirically what Morris, Hawkins, and Menninger realized intuitively, and the case for a synthesized reform package is thus made.

II. THE REHABILITATIVE IDEAL AND OTHER REFORMERS OF THE INDETERMINATE ERA

As noted above, the indeterminate era lasted for more than a century.⁴⁵ While the entire history of the rehabilitationist movement is beyond the scope of this piece, I highlight here the views of just a few of the prominent indeterminate era authors to provide an example of the ideals and reforms the movement sought. Specifically, I will discuss the psychiatric perspective of Karl Menninger, before moving toward the more sociological perspectives of Norval Morris and Gordon Hawkins.⁴⁶

A. Menninger's Ideal

One of the most prominent advocates of the rehabilitative ideal, Karl

41. See LITTLE HOOVER COMMISSION, *supra* note 1, at 4-5.

42. *Id.* at 22.

43. *Id.* at 4-5.

44. See generally LITTLE HOOVER COMMISSION, *supra* note 2; Legislative Analyst's Office, *California's Criminal Justice System: A Primer* (2007), available at http://www.lao.ca.gov/2007/cj_primer/cj_primer_013107.pdf; LITTLE HOOVER COMMISSION, REPORT 144, available at <http://www.lhc.ca.gov/lhcdir/144/TC144.html> (last visited March 3, 2008); LITTLE HOOVER COMMISSION, REPORT 171 (2003), available at <http://www.lhc.ca.gov/lhcdir/171/Report171.pdf>; LITTLE HOOVER COMMISSION, REPORT 172 (2003), available at <http://www.lhc.ca.gov/lhcdir/report172.html>.

45. Gertner, *supra* note 8, at 571.

46. See generally MENNINGER, *supra* note 6; MORRIS & HAWKINS, *supra* note 7.

Menninger was also a renowned psychiatrist and criminologist. A sharp critic of retributivism, Menninger argued that we should cease placing blame on the prisoner, and instead recognize that criminal behavior is simply a maladaptation to societal pressures indicative of a reduced ability to control one's violent impulses or facilitate them through socially acceptable outlets.⁴⁷ Indeed, Menninger believed that our desire for vengeance against the criminal provides just such an outlet for our own violent impulses, much the same way that contact sports and violent art and literature portrayals act as outlets for violence.⁴⁸ The criminal act itself is often the offender's attempt to exact vengeance against a perceived or actual injustice.⁴⁹ When society reacts to this conduct with its own vengeance, it creates a vicious cycle that places all of us in danger of becoming victims.

Imprisonment, Menninger argued, only exacerbates the already antisocial behavior of criminals by reversing the typical socialization process.⁵⁰ Prisoners are exposed to constant physical and sexual abuse, loss of autonomy, lack of personal possessions, and a lack of heterosexual relationships, all of which promote the very criminogenic psychological and emotional imbalances we seek to correct in the offender.⁵¹

To counter-act these reverse-socialization effects, referred to in contemporary parlance as the "prisonization" effect,⁵² Menninger proposed a number of reforms. First, he insisted on the necessity of indeterminate sentencing and wide judicial discretion both in determining the length of sentences and in choosing among a set of alternative sanctions (both prison and non-prison sanctions such as prison factories, forestry camps, and drug treatment facilities).⁵³ Under the indeterminate scheme, inmates would have a psychiatric case worker, and they would be ineligible for parole until their case worker deemed them ready for release.⁵⁴ This often required prisoners to complete some sort of educational or vocational training in addition to therapeutic counseling.⁵⁵ Combined with the expansion of work-release and prison industry programs, these reforms would maximize the rate of successful reentry into society.⁵⁶

Menninger also argued that psychiatrists should play a different role in the criminal justice system and that they should no longer be called to testify in

47. MENNINGER, *supra* note 6, at 19 (stating that crimes are the "spasms and struggles and convulsions of a submarginal human being trying to make it in our complex society with inadequate equipment and inadequate preparation").

48. *Id.* at 163, 173.

49. *Id.* at 190.

50. *Id.* at 79 (quoting JOHN L. GILLIN, *TAMING THE CRIMINAL* (MacMillan 1931)).

51. *Id.* at 74-75.

52. Harer, *supra* note 7, at 37.

53. MENNINGER, *supra* note 6, at 64, 225.

54. *Id.* at 225.

55. *Id.*

56. *Id.* at 223-25.

adversarial hearings,⁵⁷ because doing so made them divisive and uncooperative, drastically limiting their utility in the process.⁵⁸ Rather, he argued that a panel of psychiatrists should be appointed to review the defendant's risks and needs only post-conviction, after which time they would make their sentencing and treatment recommendations to the judge.⁵⁹

In a more extreme version of this reform, sentencing decisions would be taken away from the judge altogether and placed in the hands of a panel of psychiatrists, penologists, legal experts and the like who would work together to discuss the best treatment options for the defendant.⁶⁰ This panel, then, would have the ability to send prisoners to reformatories, penitentiaries, prison farms, honor camps, or mental hospitals, where they could be assigned to a variety of educational and vocational treatment programs, tailored to the offender's specific needs.⁶¹

Menninger also supported closing prisons for all but the most dangerous offenders, substituting in their place a variety of "diagnostic centers" where prisoners would undergo a combination of personality evaluation, social investigation, and industrial/vocational appraisal and training.⁶² The staff at these centers, as well as law enforcement personnel generally, would be trained in the social science of criminal behavior and its prevention, ensuring that the most effective methods of rehabilitating the criminal are carried out by individuals with the knowledge and skills to succeed.⁶³ Menninger offered as an exemplar his own Menninger School of Psychiatry, where juvenile offenders who came through experienced an extraordinarily low recidivism rate.⁶⁴

Finally, Menninger supported direct media involvement.⁶⁵ He discussed how media coverage of substandard conditions at mental hospitals in the 1940s led to widespread reform, and challenged the media to reveal the not dissimilar conditions of our own prison system.⁶⁶ This, he argued, would be the key to paving the way for future reforms, by first convincing the public of the need for change.⁶⁷

California could implement a number of these strategies, specifically

57. *Id.* at 138-39. Menninger also characterized the insanity defense as absurd, unnecessary, and unscientific; he argued that the defense should be abolished. *Id.* at 139. According to Menninger, this defense doctrine is just one example of the problems with forcing psychiatrists to adapt to the legal theories and structure, rather than the more appropriate method of adapting legal theory to the advances of behavioral science. *Id.*

58. *Id.* at 139-40.

59. MENNINGER, *supra* note 6, at 139.

60. *Id.* at 225-26.

61. *Id.* at 230.

62. *Id.* at 229-30, 251.

63. *Id.* at 229, 251.

64. The recidivism rate at the school was between four and nine percent. *Id.* at 231.

65. MENNINGER, *supra* note 6, at 145.

66. *Id.*

67. *Id.*

within the CDCR. The CDCR could expand furlough programs and employ expert criminologists to determine the proper programming for individual offenders. The CDCR could also launch an effective media campaign highlighting the importance of rehabilitation and its effectiveness at improving public safety. Finally, the legislature could work to restore a little discretion in our sentencing scheme so that judges have the ability to divert low-level offenders to alternative programs that would be implemented by the CDCR.

B. Furlough Reform, "Morals Legislation," and the Standing Law Revision Commission: The Indeterminate Era Reforms Proposed by Morris and Hawkins

Menninger's contemporaries, Norval Morris and Gordon Hawkins, also advocated widespread reform of the justice system. In their book, *The Honest Politician's Guide to Crime Control*,⁶⁸ they suggested that the banishment of prisoners severs their cultural roots, often leaving them socially and psychologically inept for release to society.⁶⁹ While sharing some commonalities with Menninger's medical model of rehabilitation, they also advocated radical changes in society's definition of criminal behavior.

In particular, they proposed that all "morals" legislation should be abolished.⁷⁰ They contended that victimless crimes such as gambling, prostitution, and drug abuse constitute undue restrictions on personal liberty, all while constituting nearly half of all arrests made in the United States and posing a significant drain on taxpayer resources.⁷¹ Furthermore, these goods and services are in high black-market demand, such that their illicit nature fosters the development and expansion of organized crime, which tends to diversify into other, more serious crimes.⁷² In sum, legalizing such vices could result in a net decrease in other, more serious crimes as well.

The authors also advocated for the creation of a Standing Law Revision Commission.⁷³ The Commission would be appointed by the Legislature rather than elected,⁷⁴ so that it could exercise independent judgment and avoid the tendency, paradigmatic of our politicians, to overreact to the crisis of the day.⁷⁵ Additionally, the Commission would be required to frequently review and

68. MORRIS & HAWKINS, *supra* note 7.

69. *Id.* at 127-28.

70. *Id.* at 2-5.

71. *Id.* at 2-5, 26. The authors also discuss abortion, sodomy, and fornication laws, all of which have since been abolished or have been rarely enforced in recent years. *Id.* at 2-5. The fact that society has come to agree with them on these select issues demonstrates the arbitrary nature of morals legislation generally and further supports their argument.

72. *Id.* at 5.

73. *Id.* at 27.

74. Except that they would be appointed by the legislature, presumably with life tenure to ensure as much objectivity as possible. MORRIS & HAWKINS, *supra* note 7, at 27.

75. *Id.*

revise the criminal law to promote the most effective reduction of crime.⁷⁶ As we shall see in the next section, this is quite similar to a contemporary proposal by the Little Hoover Commission.⁷⁷

Much like Menninger, Morris and Hawkins pushed for the expansion of “open-institutions,”⁷⁸ work-release, and prison industry programs.⁷⁹ They also favored the reallocation of funds from prison construction projects to community-based intensive treatment facilities as an alternative to traditional institutionalization.⁸⁰ Again, these reform strategies mirror those of contemporary reform advocates. Finally, they argued that the offender must be socialized or re-socialized through a combination of strategies to ensure successful re-entry upon release.⁸¹ For example, home leave, frequent visits and unrestricted correspondence with family and friends, more frequent use of halfway houses as an intermediate step to release, and the creation of a more therapeutic environment within the prison itself would all aid in reducing the likelihood of recidivism.⁸²

While Menninger, Morris, and Hawkins are but three of a very large number of indeterminate era writers, an overview of their theories illustrates how different the perception of the criminal justice system and its purpose was during the indeterminate era. A few consistencies in the recommendations just mentioned are shared by not only these indeterminate era writers, but also the social scientists of today. For example, there has been consistent support for the expansion of furlough programs, which could be undertaken by the CDCR. Moreover, both these authors and the Little Hoover Commission suggest that legislatures should create independent agencies to oversee criminal justice policy and practice, ensuring that rehabilitation is carried out effectively and recidivism is kept to a minimum.⁸³

By comparing Menninger with Morris and Hawkins, subtle distinctions between the sociological and psychological approaches to rehabilitation begin to emerge. From Menninger’s psychological perspective, the determinants of criminal behavior include the emotional and personality characteristics of the offender, whereas the sociologists tend to emphasize the role of group factors such as social norms, social roles, and urbanization.⁸⁴ Although starting from very different perspectives, they tend to observe similar phenomena and posit

76. *Id.*

77. *See supra* Part IV.B, “The Little Hoover Commission.”

78. These include inmate forestry and land reclamation services, as well as farming camps. MORRIS & HAWKINS, *supra* note 7, at 125

79. *Id.* at 112, 125.

80. *Id.* at 112.

81. *Id.* at 128.

82. *Id.*

83. *See infra* notes 113-144 and accompanying text. In this portion of the note, I will discuss these recommendations in greater detail.

84. MORRIS & HAWKINS, *supra* note 6, at 128.

similar recommendations. For example, the modern “normalization” hypothesis, discussed more fully in the next section, attempts to distinguish itself from the “medical model” of rehabilitation proposed by the psychiatrists of the indeterminate era.⁸⁵ Ultimately, however, the normalization hypothesis simply reframes the same policies and practices advocated by the indeterminate era rehabilitationists. The empirical support for the normalization hypothesis, then, also lends empirical support to the very rehabilitative ideal that California eliminated with the DSL.⁸⁶

In light of these findings, California legislators and especially the CDCR can no longer ignore the growing body of evidence that supports the rehabilitative ideal as it is currently reframed. The time has come for California to take the ideas of Menninger, Morris, and Hawkins seriously, and implement the aspects of their work that have been empirically supported since then. The CDCR has indeed recognized the importance of rehabilitation, at least in their press releases.⁸⁷ However, the numbers speak for themselves, and they indicate that the CDCR has not gone nearly far enough to rehabilitate offenders.⁸⁸

As will be seen in Part V, many of the reforms proposed by the indeterminate era reformers described above have been implemented by the CDCR, but in such small numbers as to be negligible. These small numbers more directly manifest the CDCR’s actual commitment to rehabilitation. The CDCR gives a nod to the modern social science that will be described in Part IV below, but it does not actually implement the research in a manner that will be effective. If the CDCR continues to ignore the social science, however, there will be no room left for optimism inside our inhumanely overpopulated prison walls, and little increase in public safety for the rest of us.

85. MILES HARER, PRISON EDUCATION PROGRAM PARTICIPATION AND RECIDIVISM: A TEST OF THE NORMALIZATION HYPOTHESIS 2-3 (May 1995), available at http://www.bop.gov/news/research_projects/published_reports/recidivism/orepredprg.pdf (last visited March 1, 2008).

86. As noted above, the problems with the indeterminate era were due in large part to a lack of empirical support for rehabilitationist theories. See *supra* notes 13-18 and accompanying text. The small amount of support that was offered to Congress and the California legislature was rejected when they enacted the SRA and DSL, respectively. See *supra* notes 22-26 and accompanying text. Since the contemporary “normalization” hypothesis and the rehabilitative ideal have so much in common, and the former theory has significant empirical support, both legislatures were demonstrably incorrect in their judgments; the time for a return to rehabilitation has come. See *infra* notes 94-108 and accompanying text.

87. See, e.g., Press Release, California Department of Corrections and Rehabilitation, California Responds to Federal Courts with Plan to Reduce Prison Overcrowding (May 16, 2007), available at http://www.cdcr.ca.gov/News/2007_Press_Releases/Press20070516.html; Kathy Jett, Director of Division of Addiction & Recovery Services for CDCR Discusses Historic Prison Reform Agreement in Governor’s Weekly Radio Address (May 5, 2007) (transcript available at http://www.cdcr.ca.gov/News/2007_Press_Releases/Press20070507.html). Both praise Assembly Bill 900 for its effort to reduce prison overcrowding and expand rehabilitative programming.

88. See generally CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, SUCCESSES AND CHALLENGES: THE CDCR STORY (2007), available at http://www.cdcr.ca.gov/Reports_Research/docs/CDCR_Story_051807.pdf.
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III. CONTEMPORARY REFORM EFFORTS

A. *The Normalization Hypothesis*

Miles Harer, a researcher for the Federal Bureau of Prisons, used data on federal inmates released in 1987 to examine the effects of education program participation on the rates of recidivism, and the implications of these effects for general theories of normalization and public policy formation.⁸⁹ Using these data and his prior research, Harer found that a variety of factors make an individual more or less likely to recidivate, and he laid the groundwork for a reasoned and purposeful reform of the criminal justice system in light thereof.⁹⁰

He first articulated the “five pains” of “prisonization,” which he described as: (1) isolation from the larger community; (2) lack of material possessions; (3) blocked access to heterosexual relationships; (4) reduced personal autonomy; and (5) reduced personal security.⁹¹ The combined effect of these pains and imported criminogenic norms is to foster the development and growth of an inmate subculture of hostility towards prison management and the larger community, resulting in a higher likelihood of recidivating upon release.⁹²

The normalization hypothesis is the theory that prisons can be structured so as to minimize the effects of prisonization and imported criminogenic norms, thereby facilitating a reduction in recidivism rates.⁹³ Among other things, Harer found that a history of prior convictions, heroin or alcohol dependency, and the commission of new offenses while under some form of criminal justice supervision are among the best predictors of recidivism.⁹⁴ In contrast, factors inversely related to recidivism (and therefore directly related to normalization) include stable employment both before prison and post-release, the receipt of social furloughs while incarcerated, the opportunity to live with a spouse after one’s release, and participation in educational or vocational training programs.⁹⁵

In light of these findings, Harer put forth a number of potential reforms supported by empirical data. First, intensive custody and security should be reserved for those with the highest risk (i.e. those with prior convictions or certain chemical dependencies).⁹⁶ The evidence indicates that these factors predict not only recidivism but also prison misconduct and violence, lending

89. HARER, *supra* note 85, at 4.

90. *Id.*

91. *Id.* at 1. Note the similarity of these “prisonization” stimuli to the “reverse-socialization” stimuli described by Menninger.

92. *Id.*

93. HARER, *supra* note 6, at 37.

94. Harer, *supra* note 85, at 9.

95. *Id.*

96. *Id.* at 9-10.

further support to the contention that only these high-risk offenders need the highest levels of security.⁹⁷ For prisoners with chemical dependency, intensive drug treatment therapy should also be utilized to reduce the odds of recidivating.⁹⁸

Second, well-managed prison education and vocational training programs, currently used by only two percent of offenders, should be drastically expanded with increased incentives for voluntary participation.⁹⁹ Indeed, the data indicate that even those most unwilling to participate in the programs can realize a small reduction in recidivism probability by participating in them.¹⁰⁰ For this reason, it might be best to make program participation compulsory for all inmates, although Harer does not go so far.

Next, prisons should provide more social furloughs and social training, such as parenting or marital enrichment classes, which would also help reduce recidivism rates.¹⁰¹ The fact that building social and familial ties reduces the likelihood of a return to criminality lends further support to Harer's normalization hypothesis and Menninger's reverse-socialization theory. Social furloughs seem to be particularly successful at reducing recidivism, even more so than halfway-house pre-release stays, although the latter are better at securing post-release employment.¹⁰² Other socializing methods, such as frequent visitations and correspondence with family and friends,¹⁰³ should also be utilized. Moreover, the state should do everything it can to ensure post-release employment for willing prisoners.¹⁰⁴ While halfway-house stays may not significantly impact recidivism directly, evidence shows that they increase the likelihood of post-release employment, which indirectly reduces the risk of recidivism.¹⁰⁵ For this reason, their use should be expanded as well.

Some may question my reliance on Harer's work, since his sample involved federal inmates and the research was conducted more than a decade ago. While it may be true that significant differences exist between the federal and California inmate populations, the risk factors identified by Harer are now well-documented in the social sciences, even amongst California inmates.

97. HARER, *supra* note 6, at 4, 54. Indeed, Harer also suggests that Criminal History Category I Offenders, since they recidivate at the relatively low rate of nineteen percent, are prime targets for shortened sentences or sanctions that represent an alternative to incarceration, such as home detention, electronic monitoring, and intense parole supervision. *Id.* at 20, 40-41. These policies could be better able to normalize such low-level offenders than imprisonment could ever accomplish.

98. *See id.*

99. *Id.* at 3-10; LITTLE HOOVER COMMISSION, *supra* note 1, at 24 (arguing that the two percent participation rate is in part a reflection of the move towards a retributive model of justice).

100. *See* HARER, *supra* note 85, at 15.

101. *Id.* at 9-10.

102. HARER, *supra* note 6, at 58.

103. HARER, *supra* note 85, at 9-10.

104. HARER, *supra* note 6, at 4, 6, 30.

105. *Id.* at 5.

Take, for example, a recent study of California's "Therapeutic Community" (TC) program, a drug treatment program modified for use in the unique environment of a prison.¹⁰⁶ While several studies have already confirmed the effectiveness of this in-prison drug treatment program at reducing recidivism and relapse, especially when combined with post-release treatment, the researchers here tracked participants in the program to determine what other factors, if any, were also correlated with the already reduced recidivism rate of its participants.¹⁰⁷ Factors they identified included gender (women were less likely to recidivate), age (older people were less likely to recidivate), education (more educated people were less likely to recidivate), pre-incarceration employment status (those with jobs before prison were less likely to recidivate), and drug/alcohol addiction (addicts were more likely to recidivate).¹⁰⁸

Similarly, a recent study of California's Preventing Parolee Crime Program (PPCP) revealed that parolees given employment training and assistance, educational opportunities, drug-abuse treatment and education, or temporary housing were all less likely to recidivate than those who did not receive such programming.¹⁰⁹ In particular, those simply participating in the program experienced an eight percent drop in the average recidivism rate, while those completing at least one treatment goal¹¹⁰ experienced a twenty percent drop, and those completing two or more experienced a forty-seven percent drop.¹¹¹ Both of these studies demonstrate that the recidivism risk factors identified by Harer apply to criminals generally, and not only to the federal inmates in his sample.

For these reasons, the CDCR should be implementing alternative sanctions, such as electronic monitoring or community-treatment programs, for low-level offenders and those least likely to recidivate, based on risk and needs assessments that incorporate the risk factors discovered by social scientists.¹¹²

106. William Burdon et al., *The California Treatment Expansion Initiative: Aftercare Participation, Recidivism, and Predictors of Outcomes*, 84 PRISON J. 61, 61-62 (2004).

107. *Id.* at 62-65.

108. *Id.* at 72. It should be noted that the sample population, all of whom were participants in an in-prison TC drug treatment program, were not necessarily representative of the California prison population as a whole. This potential bias is somewhat mitigated, however, by the fact that participation in the program was mandatory for those who qualified. *Id.* at 65. Thus, the extra selection bias that follows from a study of voluntary participants does not apply.

109. Sheldon Zhang et al., *Preventing Parolees from Returning to Prison Through Community-Based Reintegration*, 52 CRIME & DELINQ. 551, 553-62 (2006).

110. Different programs defined "treatment goals" differently. For example, the job training programs might define one goal as completing a workshop, whereas the temporary housing programs would view certain steps toward independent living to be a treatment goal. *Id.* at 557-59.

111. *Id.* at 562.

112. This reform cannot be accomplished by the CDCR alone. For these alternatives to be successful, the legislature must first repeal some of the restrictions of our determinate sentencing system and return to judges the discretion to divert convicted offenders to these alternatives.

It should also vastly expand the educational and vocational programming at California's institutions and community-based facilities, perhaps even making participation compulsory. It should continue to expand both social and work furlough programming. Finally, the CDCR should do everything it can to ensure post-release employment for all willing inmates, including the expanded use of halfway-houses to ease the transition. These important policy recommendations are supported by a litany of social science research that policy advocates have long acknowledged. Below, I address how these reform proposals relate to those of the Little Hoover Commission.

B. The Little Hoover Commission

The Little Hoover Commission is an independent state oversight agency that was created in 1962.¹¹³ The Commission is a balanced bipartisan board with five members appointed by the Governor, four members appointed by the legislature, two senators, and two assembly members.¹¹⁴ The Commission reviews issues raised by California citizens, legislators, and others to see if the state agencies and political actors are functioning as efficiently and effectively as possible.¹¹⁵ Commission members discuss these issues with key players, review the academic literature, and interview those most affected by the issues.¹¹⁶ This research culminates in written reports that serve as a factual basis for the reform efforts of policymakers, and often include specific policy recommendations for the legislature and/or Governor.¹¹⁷

In its January 2007 report, the Little Hoover Commission made a variety of recommendations in light of research regarding the prison crisis.¹¹⁸ These will sound familiar: expanding work furlough programs, investing in alternative sanctions for low-level offenders, and eliminating the current parole system.¹¹⁹ Additionally, the Commission, sympathizing with the political posturing that can prevent reform in this area, also recommended that the legislature and the Governor create a politically insulated independent body to enact these reforms if they find themselves unable or unwilling to do so.¹²⁰

As mentioned above, the Commission's first recommendation was to expand work furlough programs, such as the California Conservation Camp

Furthermore, the judiciary would have to support such programs enough to actually want to divert low-level offenders.

113. Little Hoover Commission, About the Commission ¶ 1 (2007), <http://www.lhc.ca.gov/lhcdir/about.html>.

114. *Id.* at ¶ 2.

115. *Id.* at ¶¶ 3-5.

116. *Id.* at ¶ 8.

117. *Id.* at ¶¶ 6-7. The Commission also conducts public hearings and forms coalitions, and its members often testify at legislative hearings in an attempt to push their initiatives through. *Id.* at ¶¶ 6-9.

118. LITTLE HOOVER COMMISSION, *supra* note 1.

119. *Id.*

120. *Id.* at 2, 4.

Program.¹²¹ The state could also utilize inmate labor when implementing bond measures, such as the 2006 transportation bonds.¹²² To help facilitate both the expansion of work furlough programs and re-entry in general, the Commission recommended developing inter-agency teams to provide a more holistic approach to inmate release.¹²³ For example, the CDCR could work with the Employment Development Department to provide employment services at all parole offices, and the Department of Housing and Community Development could be brought in to locate appropriate transitional housing.¹²⁴

These inter-agency teams could work together to expand and improve community-based educational, vocational, and drug-treatment programs.¹²⁵ Additionally, the CDCR could use part of the funding for prison construction to develop alternative sanctions for low-level offenders, such as electronic monitoring, day reporting centers, local jail time, and probation.¹²⁶ For many of these reforms to have a powerful impact, however, judges would need to regain the discretion necessary to divert otherwise prison-bound offenders to community-based programs and alternative sanctions.¹²⁷

Finally, the Commission noted the failures of the current parole system. Under the indeterminate era, parole was a valuable incentive given to inmates as a reward for good behavior, which often included having participated in a development program.¹²⁸ Since the 1980s, however, the rise of retribution has fundamentally changed the nature of California parole.¹²⁹ Now, parole is mandated for all prisoners, who are released at the end of their determinate sentence regardless of their aptitude for successful assimilation with society.¹³⁰ As a result, six out of ten new admissions to California's prison system are returning parolees,¹³¹ and many of them are back because of low-level, technical violations.¹³² Moreover, these parolees have been sent back not by a judge or jury, but by a corrections official utilizing much lower standards of evidence than would have been permissible in court.¹³³ For these reasons, the Commission recommended abolishing the current parole system and developing a new post-release supervision system that focuses resources on the

121. *Id.* at 12. In this program, low-level offenders assist during fire season with a variety of tasks, including flood control, search and rescue, and other community service operations. Despite the program's success, thousands of inmates sit on the waiting list. *Id.*

122. *Id.* at 13.

123. *Id.*

124. LITTLE HOOVER COMMISSION, *supra* note 1, at 12-13.

125. *Id.* at 28.

126. *Id.* at 31-32.

127. *Id.* at 28-32.

128. *Id.* at 22.

129. *Id.* at 20.

130. LITTLE HOOVER COMMISSION, *supra* note 1, at 22.

131. *Id.* at 22.

132. *Id.* at 23.

133. *Id.* at 24.

most high-risk offenders.¹³⁴

Finally, the Commission recognized that the Governor and legislature might find these reforms too controversial to risk enacting them.¹³⁵ For this reason, they recommended establishing an independent, politically-insulated agency to enact these reforms on their behalf.¹³⁶ This agency could create criminal justice policies that become law by default if they are not rejected by the Governor or two-thirds of the legislature within a prescribed time period.¹³⁷ The agency should also have the power to oversee the CDCR, ensuring that corrections officials are implementing the reforms successfully.¹³⁸

The Little Hoover Commission has been proposing such reforms for a number of years.¹³⁹ In a letter attached to their January 2007 report, they expressed frustration with the politicians who have, for the most part, ignored their pleas.¹⁴⁰ While their criticism extends to the Governor and the legislature as well, their suggestion for furlough program expansion could be adopted by the CDCR. At the same time, the legislature and the Governor should work on the parole reform and independent agency plans, in addition to the alternative sanctions advocated by the Commission and Harer alike. After two years under the new CDCR and the passage of Assembly Bill 900, will the rehabilitative ideal finally become a reality? Despite the CDCR's enthusiasm, recent criticisms indicate that California has yet to move beyond mere rhetoric toward an evidence-based and fiscally sustainable model of prison reform premised on the rehabilitative ideal.

IV. SOME SIGNS OF HOPE: THE SHORTCOMINGS, SUCCESSES, AND RHETORIC OF THE CDCR

Despite the criticism, the CDCR remains optimistic, repeating the assertion that it is dedicated to rehabilitative programs and ideals.¹⁴¹ It contends that the history of cuts to rehabilitative programs and the current overcrowding crisis have been substantial impediments to the return of widespread rehabilitation.¹⁴² Nevertheless, it points to several "success" stories it says evince its commitment to the reform effort, including the programming of the Prison Industry Authority (PIA), the "Alternatives to

134. *Id.* at 21-24.

135. *Id.* at 2.

136. LITTLE HOOVER COMMISSION, *supra* note 1, at 11, 15-16. The Commission offers the Defense Base Closure and Realignment Commission as an example, used by the President to close military bases when it would otherwise be politically impossible.

137. *Id.* at 16.

138. *Id.*

139. *See id.* at 13, 22-24.

140. LITTLE HOOVER COMMISSION, *supra* note 1 (attached Letter to Governor Schwarzenegger and the California Legislature).

141. California Department of Corrections and Rehabilitation, *supra* note 87, at 4.

142. *Id.*

Violence” program, and the Parole Employment Program (PEP).¹⁴³

The PIA operates more than sixty service, manufacturing, and agricultural enterprises at twenty-two California institutions.¹⁴⁴ While much of the PIA's programming is grounded firmly in the social science discussed in Parts III and IV of this note, it has been designed to serve only a very small portion of the overall prison population. Altogether, their programs reach 8000 inmates a year, compared to the 160,000 total inmates¹⁴⁵ in California's institutions.¹⁴⁶ For example, the PIA re-established the Marine Technology Training Center at Chino State Prison in 2006.¹⁴⁷ While the program does an excellent job of recognizing the benefits of work furloughs and teaches the inmates valuable construction, welding, diving, and drilling skills, it supports fewer than 100 inmates a year, demonstrating a commitment too insignificant to have a serious impact.¹⁴⁸

A similar criticism can be leveled at the “Alternatives to Violence” program and the PEP as well. The “Alternatives to Violence” program is an organization that offers workshops in conflict resolution, responses to violence, and personal growth.¹⁴⁹ The CDCR cites the program’s thirty-inmate graduation in February as an exemplar of their commitment to rehabilitation, but surely this nominal subgroup of parolees has little or nothing to do with the overall recidivism rate.¹⁵⁰ Perhaps more importantly, it does not produce the kind of widespread attention needed to demonstrate to the general public what successful rehabilitative programs look like or their impact on public safety. The PEP does a somewhat better job, securing temporary housing and vocational training and placement to around 10,000 parolees a year, but this is still substantially insufficient.¹⁵¹

Altogether, the CDCR must recognize that the rehabilitative ideal is the key to solving the prison crisis, and it is not being realized by reaching out to such a negligible portion of the prison population. The CDCR also evinces an unwarranted faith in the efficacy of Assembly Bill 900 to solve its problems by building 53,000 new beds.¹⁵² It fails to heed the rational suggestion that if we

143. *Id.* at 9-21. This is not an exhaustive list, but there are only a handful of other programs and agencies mentioned in this press release that I have not listed here. *Id.* Furthermore, the fatal flaw identified in these three “success” stories, namely, the very limited number of inmates who benefit from them, applies to all the programs discussed in the release. *Id.*

144. *Id.* at 3.

145. See *supra* note 38 and accompanying text.

146. California Department of Corrections and Rehabilitation, *supra* note 87, at 3; LITTLE HOOVER COMMISSION, *supra* note 1.

147. California Department of Corrections and Rehabilitation, *supra* note 87, at 15.

148. *Id.*

149. *Id.* at 10.

150. *Id.*

151. *Id.* at 19.

152. See Friends Committee on Legislation of California, *State Government in the "Post-Partisan" Era: Schwarzenegger, State Legislature Agree to Spend \$283,018.87 per Prison Bed to Avoid Early Release of Non-Violent Prisoners*, *Appeal Federal Courts* ¶ 1 (2007), available at <http://www.fcl.org/2007/07/20/07072001.htm>.

simply rehabilitate our prisoners, there will be no need to keep building prisons and adding beds.¹⁵³ Altogether, actions speak louder than words, and the results demonstrated by the CDCR are unimpressive in the scheme of what must be done.

CONCLUSION

Ultimately, it is unfair to place the blame for the failures of our criminal justice system squarely on the shoulders of any one agency, legislature, governor, or even culture. Nothing could be more natural than to cringe when we learn of some horrendous crime, and our natural inclination is to blame someone, particularly the criminal. It is also natural to feel that causal explanations for criminal behavior that go beyond the scope of the individual's intentions, say by ascribing some of the blame to economic conditions or our failed education system, are simply a scapegoat for an individual who refuses to accept responsibility for his or her own actions. In the philosophical debates, which have been going on for thousands of years, this mode of thought regarding free will has traditionally won out over determinism, primarily because it more closely comports with our commonsense assessments of the situation.¹⁵⁴

Free will theorists contend that our actions are always preceded by some mental event initiated by the "will," which gives all of us causal control over, and hence complete responsibility for, our behavior.¹⁵⁵ Determinism, on the other hand, contends that our will plays little to no role in the process, as social and hereditary pressures dictate our mental processes to a greater or lesser extent.¹⁵⁶ Most of us naturally believe that we have conscious control over our behaviors, as we so often have conscious awareness of the "reasons" upon which our decision is based long before the decision is made. For a long time, this introspective evidence was enough to satisfy many philosophers (and certainly the mass public) that free will theories were more accurate.¹⁵⁷

However, this intuition is not contrary to the determinist position. It would be absurd for the determinist to deny that we have this conscious awareness of our reasons for acting precisely because each of us experiences

http://www.fclca.org/curnews/actionalerts/2007/prison_beds0407.html.

153. *Id.* at ¶ 10.

154. Don Gustafson, *Neurosciences of Action and Noncausal Theories*, PHIL. PSYCHOL. 367, 368 (2007); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 157-61 (2005).

155. Gustafson, *supra* note 154, at 368 (discussing how "traditional philosophical theories of action," which I call "free will theories," assume we have causal control of our actions, but scientific research is refuting this claim).

156. Slobogin, *supra* note 154, at 158. There are two varieties of determinism: hard determinism posits that our actions are caused by forces completely outside our control, while soft determinism concedes that we may have some control, although we are limited severely in our choices by externally caused predispositions. *Id.*

157. Gustafson, *supra* note 154, at 368. HeinOnline, 13 Berkeley J. Crim. L. 194 2008

this phenomenon directly. For example, when I am given some choice to make, my conscious mind will provide me with information relevant to the choice, and I will make my decision based on these “reasons.” However, what the determinist claims, and what the social science discussed above and elsewhere confirms, is that these “reasons” are themselves caused by factors outside of our control or even our awareness.¹⁵⁸ That is, we all make a conscious “choice,” but that choice is limited by the information our brain chooses to activate when we are given the choice, and we do not have control over these subtle functions of the mind.

For example, some cognitive science has found that basic body movements, such as wiggling a finger, are actually started before the conscious desire or “will” to move has been realized, albeit by fractions of a second.¹⁵⁹ This suggests that our “reasons” do not cause our actions, but rather both are caused almost simultaneously by something else, most likely events taking place in our subconscious or unconscious mind.¹⁶⁰ The reasons provided to our conscious mind, then, are more of a post-hoc rationalization than they are some sort of causal mechanism for our behaviors. The implications of this on the retributivism debate are profound.

Retributivism is based on the premise that we must punish the offender to demonstrate societal blame, and the punishment should be proportional to culpability (hence the varying *mens rea* requirements). If none of us truly has free will, then we also are not blameworthy for our actions, and none of us *intends* them in any meaningful sense of the word (certainly not in the clear-cut categories delineated by the *mens rea* requirements). If we are not blameworthy for our choices, then it is also immoral for society to blame criminals for their actions, as culpability only makes sense when the culpable could have done otherwise.

However, we do have the option, perhaps even the responsibility, to modify the criminal’s behavior by focusing on those causal factors that the state has the power to manipulate. This is precisely what rehabilitative models and methods purport to do. We cut the criminal behavior off at its true source, which has nothing to do with punishing the individual or the severity of that punishment.¹⁶¹

In light of all this, the CDCR should implement the reforms mentioned in this piece, including: (1) implementing alternative sanctions, such as electronic

158. *Id.* at 367-69.

159. *See id.* at 367-68.

160. *Id.* at 368.

161. Some research suggests that not only do increased levels of security within the prisons do nothing to deter the offender from recidivating, but they may actually increase the likelihood of recidivism. *See, e.g.,* Keith Chen & Jesse Shapiro, *Do Harsher Prison Conditions Reduce Recidivism?*, 9 AM. L. & ECON. REV. 1 (2007). This is just one more causal factor related to recidivism that is outside the offender’s control, further supporting the determinist thesis (inmates do not choose the security level in which they are placed).

monitoring or community-treatment programs, for low-level offenders and those least likely to recidivate; (2) vastly expanding the educational and vocational programming at California's institutions and community-based facilities, and perhaps even making participation compulsory; (3) expanding furlough programming, including both social and work furloughs; (4) ensuring post-release employment for all willing inmates, including the expanded use of halfway-houses to ease the transition; (5) abolishing the current parole system and replacing it with a system that directs resources to those most at risk of re-offending;¹⁶² (6) utilizing expert opinions in developing the risk and needs assessment tools necessary to implement these reforms effectively, instead of marginalizing the programs by using them sparsely on a small minority of the prison population in an unprincipled way; and (7) working with the media to demonstrate the need and efficacy of this type of programming to reverse decades of pro-retribution public opinion.

On the last recommendation, it should be noted that merely advertising the need for rehabilitation will doubtfully be sufficient to overcome the public's folk theories of free will and the need to blame criminals. We must demonstrate the falsity of these free will theories, and show the public the scientific evidence of physical and societal causation. This must be connected to the need to rehabilitate, and the immorality of continued retributivist "tough on crime" policies.

The CDCR will need some help. Governor Schwarzenegger and the legislature must help them reach these goals. First, the legislature should roll back the strictures of the determinate sentencing scheme, granting judges more leeway to divert low-level offenders to alternative sanctions. Also, the legislature should consider creating an independent body to oversee the CDCR and ensure that the proposals mentioned above are being implemented effectively and in significantly larger numbers than the status quo. If the legislature does not want to allow diversion, it could also grant this independent agency the authority to do so, as advocated by Morris and Hawkins. Governor Schwarzenegger must sign any such bills into law, and continually appoint corrections staff who are committed to implementing these plans effectively.

Together, these actors can overcome the overcrowding crisis and serve as a model for the rest of the nation by demonstrating that the rehabilitative ideal was not some quack theory; rather, it is an ideology that has been supported by decades of social science. This is sound fiscal and humanitarian policy, and it would also be the greatest thing to happen to public safety in decades. By shifting focus to the normalization of the individual offender

162. Parole violators should also need more than a single technical violation to be incarcerated again, and anytime re-institutionalizing the offender is an option, there ought to be the same due process and evidentiary standards as the offender would receive in court. Furthermore, either judges or magistrates should preside over revocation hearings, as opposed to the corrections officials who currently do so.

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instead of vindicating the primal urges of the current victim, we ensure a safer tomorrow for all the rest of us who might have otherwise become victims.

