

# DJP supports the ACLU's Campaign for Smart Justice

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Due Justice Project supports the Smart Justice Campaign under the proposition that the U.S. is locking up too many people for sentences that are too long. Acquiring deep insights into neuropsychiatric disorders can remodel one's outlook on criminal justice in general, leading to a re-consideration of the prevailing theories of justice and punishment. Philosophies such as Rehabilitation, Restitution, and Containment may begin to supersede Punishment.

As these models relate to neuropsychiatric and other brain disorders, containment may be the only justifiable application in cases of dangerousness but the place of confinement should not be jail or prison. Someone with a psychosis-spectrum disorder should be contained in a high security hospital and if the individual's symptoms sufficiently remit, a step-down to other appropriate secured facilities where there is close monitoring. The ideal would be for a closely coordinated system to manage or identify risk for dangerous before violence happens with containment and intensive case management taking place proactively before there is a victim of violence. State and county governments do not want to pay for the system and infrastructure that prevents violence but are all too willing to pay for unjust incarceration in prison.

The intellectual informant of DJP's mindset toward criminal justice is neuroscience. Neuroscience will lead human beings to recognize that criminal justice is punishing people who do not have neurocognitive and/or neurological capacity to conform their behaviors to the requirements of the law. In punishing people who are clinically insane or neurally unequipped to conform to the law, the criminal justice system is punishing crimes - not guilty minds. Neuroscience has the potential to eviscerate current notions of mens rea.

Of course, clinical insanity is not the only type of brain dysfunction that should exempt someone from punishment (some of those disorders are discussed on the *About SMI and Violence* page). This site does not discuss conditions classified as psychopathy or sociopathy (which are criminology - not medical terms) at this time. However, it may be very likely that a subset of people with these conditions have different dysfunctions that cause criminal or violent behaviors - most likely hard-wired abnormal electrochemical and physiological conditions of the brain that might afflict people with psychosis-spectrum disorders only transiently, i.e. when the psychosis exacerbates acutely due to lack of treatment. Neuroscientists are studying these other pathologies and their discoveries will one day impose upon the application of criminal justice.

DJP will not endeavor to venture into the boundless philosophical topic of Theories of Justice - which is clearly related but not synonymous with Theories of Punishment. Yes, the word Justice is part of the name of this (Due Justice) project, however, principally for the purpose of casting aspersions upon Due Process.

## **There are two Predominant Theories of Punishment in U.S. Criminal Justice**

### **Utilitarian and Retributive**

The following article provides a good overview of both theories as they relate to criminal justice in the U.S. and discusses Denunciation as a hybrid theory of the two.

<http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html>

**There are aspects of both principles that can support reform of criminal justice.**

## Utilitarian

> The notion that punishment has consequences for both society as a whole and the offender:

- We are all burdened financially when society must pay the costs of incarceration along with all other aspects of adjudicating people through pre-trial proceedings, appeals, and a host of cost people rarely consider as the price of prosecution and incarceration.

Due Justice Project will never use cost-savings in making the case for criminal justice reform even though cost burden is a legitimate argument to make. People who have strong instincts to prosecute and punish are very adaptive to change - that is, they seek to navigate around reform or obstacles that interfere with their ability to punish harshly. If mass incarceration or certain specific forms of punishment can be made more cost-effective than smart justice, then the cost argument is lost. Moreover, DJP advocates on the basis of what is morally or ethically right and good, the cost argument can be left for others to make.

- Mass incarceration destroys families and fragile, disenfranchised communities psychologically and financially. All of us pay the cost of this destruction in some way.

> Rehabilitation is a principle that has been forgotten and abandoned. People who are behaving in anti-social ways and driven by criminal thinking should not just be warehoused with the possibility of returning one day to society still disposed toward criminality just as much or more than when they began their sentences. Rehabilitation is inconsistent with the lock 'em up and throw away the key mentality. Probation and Parole, which are intended to reflect utilitarian ideals "on paper" are betrayed in practice.

One caveat in reference to the linked-to article: Neuropsychiatric disease should not be considered as subject for rehabilitation. The vast majority of the populace, including professionals in criminal justice consider mental illness to be subject to rehabilitation...incorrectly believing that mental illness generically describes emotional or psychological problems or behavioral disturbances. Behavioral health is a controversial term when referring to mental illness because it involves choice and is subject to behavior modification interventions- whereas serious mental illness involves involuntary thoughts and behaviors. The public and many professionals in law and criminal justice do not understand the distinction between "mental health issues" and serious mental illness - disorders that can cause the neurological symptom of psychosis.

All this said, just because the article does not cite Utilitarianism as promoting exemption from punishment for insanity does not mean that the philosophy does not recognize the injustice of punishing the insane.

## Retributive

The retributive philosophy does not have much to offer in support of criminal justice reform. The primitivism of this just deserts, eye-for-an-eye, duty to punish, vengeance-driven theory of punishment is at root of how the U.S. has come to be the greatest incarcerator on earth.

> However, as the linked-to article specifically defines the theory, there are some features that are consistent with Smart Justice:

- Exempts the insane or incompetent
- Allows for the offender to pay the debt to society and then return to society theoretically free of guilt and stigma.

The caveat would be that this philosophical position exists in theory only. Criminal justice, as it is practiced by the greatest incarcerator on earth applies comprehensive, "holistic" punishment that extends to the offender's whole family in its impact, has liberal tolerance for extrajudicial punishment within the penal institution (meaning violent and abusive conditions), and follows the offender to the grave post release from incarceration.

Given how the spirit of the predominant theories of punishment is violated in practice, simply moving toward more faithful application of these principles might further at least some of the goals of Smart Justice.