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## HOW MUCH PUNISHMENT IS ENOUGH?: EMBRACING UNCERTAINTY IN MODERN SENTENCING REFORM

*Jalila Jefferson-Bullock\**

*For nonviolent drug crimes, we need to lower long mandatory minimum sentences—or get rid of them entirely. Give judges some discretion . . . . We need to ask prosecutors to use their discretion to seek the best punishment, the one that’s going to be most effective, instead of just the longest punishment.*

President Barack Obama<sup>1</sup>

He describes every day as a waste of time. He rises daily at five o’clock in the morning, jarred awake by the remembrance that he is still there. In actuality, the journey to full wakefulness begins when he lays his head down to sleep. Haunted by visions of what life should be like—fully vested retirement, family vacations, loving wife beside him, giggling children—he sleeps in disarray. It does not matter much. Long gone are the times when a good night’s rest

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<sup>1</sup> President Barack Obama, Speech at the NAACP’s 106th National Convention in Philadelphia (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

was necessary fuel for an activity-laden day. These days are an unending abyss of torpidity.

After rising, dressing, and breakfasting, he sits around and writes. He uses a tiny corner spot where no one bothers him. After writing for several hours, he exercises by walking several miles on an outside track, weather permitting. After that, he eats lunch. There are no classes at the facility where he is housed, so he writes again until dinnertime. After dinner, he goes to bed. This is the routine that he follows Monday through Friday. His Saturday schedule is identical, except that he spends one hour cleaning the family visiting room before breakfast. He mops.

Sunday is his favorite day. On Sundays he attends three one-hour religious services after breakfast. He sings with an unrehearsed choir and plays the tambourine. By noon, services are over. He has lunch, and then returns to writing. After dinner, he lays his head down and commences another night of fitful slumber.

Every day is a waste of time. He will follow this routine every day for the next decade. His ten-year period of incarceration will cost American taxpayers approximately \$290,000 in total.<sup>2</sup> Worse, in ten years of time, he will not have acquired any additional educational or professional degrees, certifications, or skills. He will not have learned any supplementary emotional intelligence techniques, nor will a qualified, licensed expert have taught him coping mechanisms. Quite simply, he will not be ten years better.<sup>3</sup> Yet, he will be expected to reenter society and reintegrate fully. The stakes are even higher if he fails and recidivates. Sadly, there are scores more prisoners just like him.<sup>4</sup> How much punishment is enough?

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<sup>2</sup> See NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES AND OPTIONS 9 (2013), <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>3</sup> The goal of federal incarceration cannot be rehabilitation. See *Tapia v. United States*, 564 U.S. 319, 334–35 (2011) (noting that a court may not take into consideration a person's rehabilitation "or otherwise . . . promote rehabilitation" when making sentencing decisions).

<sup>4</sup> This particular story is of a federal prisoner who is well-known to the author. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.); JORDAN BAKER ET AL., A SOLUTION TO PRISON OVERCROWDING AND RECIDIVISM: GLOBAL POSITIONING SYSTEM LOCATION OF PAROLEES AND

## INTRODUCTION

It has now become fashionable to loudly proclaim that the U.S. criminal justice system is irreparably broken and requires a complete dismantling and total reconfiguration.<sup>5</sup> The evidence is robust and the record is clear.<sup>6</sup> Prisons are bloated and bursting with prisoners; budgets are ill endowed to support them; and offenders, due to excessive periods of unfruitful incapacitation, reenter society lacking in contributable and marketable skills.<sup>7</sup> Racial disparities continue to corrupt charging and sentencing decisions; police brutality and human massacre are, woefully, commonplace; and the cycle continues.<sup>8</sup>

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PAROLEES AND PROBATIONERS 42 (2002) (addressing the “plummet[ing]” support of rehabilitative programs due to recidivism).

<sup>5</sup> See generally Peter Baker, *2016 Candidates are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <http://nyti.ms/1DERGad>; Peter Baker, *Bill Clinton Concedes His Crime Law Jailed Too Many for Too Long*, N.Y. TIMES (July 15, 2015), <http://nyti.ms/1HvZBL9>; Erik Eckholm, *A.C.L.U. in \$50 Million Push to Reduce Jail Sentences*, N.Y. TIMES (Nov. 6, 2014), <http://nyti.ms/1uDzbnQ>; Bill Keller, *Prison Revolt*, NEW YORKER (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/prison-revolt>; Editorial Board, *Justice Kennedy’s Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), <http://nyti.ms/1EXdUcJ>; Editorial Board, *Ending the Rikers Nightmare*, N.Y. TIMES (June 24, 2015), <http://nyti.ms/1SJ6cH2>.

<sup>6</sup> See, e.g., Erik Eckholm, *How to Cut the Prison Population (See for Yourself)*, N.Y. TIMES (Aug. 11, 2015), <http://nyti.ms/1L3HwZ4>; Ian Lovett, *Los Angeles Agrees to Overhaul Jails to Care for Mentally Ill and Curb Abuse*, N.Y. TIMES (Aug. 5, 2015), <http://nyti.ms/1ORJART>; Marc Mauer & David Cole, *How to Lockup Fewer People*, N.Y. TIMES (May 24, 2015), <http://nyti.ms/1dr0RoH>.

<sup>7</sup> Jesselyn McCurdy, *New Report Shines a Light on Solitary Confinement*, AM. CIV. LIBERTIES UNION (June 5, 2013, 11:20 AM), <https://www.aclu.org/blog/new-report-shines-light-solitary-confinement>; Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), <http://nyti.ms/1IkH1E3>.

<sup>8</sup> John Eligon & Mitch Smith, *Emergency Declared in Ferguson After Shooting*, N.Y. TIMES (Aug. 10, 2015), <http://nyti.ms/1IDHpOa>; Adam Liptak, *Exclusion of Blacks From Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), <http://nyti.ms/1LeZEzd>; John Eligon, *A Year After Ferguson, Housing Segregation Defies Tools to Erase It*, N.Y. TIMES (Aug. 8, 2015), <http://nyti.ms/1KZj0Z5>.

The United States' criminal sentencing laws too often fail to advance any legitimate law enforcement objective.<sup>9</sup> Criminologists, judges, practitioners, political leaders on both sides of the aisle, social scientists, other impartial observers, and even President Obama point to wasted fiscal resources, overcrowded prisons and

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<sup>9</sup> See Jelani Jefferson Exum, *Sentencing, Drugs, and Prisons: A Lesson from Ohio*, 42 U. TOL. L. REV. 881, 882 (2011) [hereinafter Exum, *Sentencing, Drugs, and Prisons*]; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59 (2010) (stating that the war on drugs targeted mostly low-level street dealers). See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993); Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155 (1988) (“[W]hen prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism.”). These sentencing laws not only detrimentally impact the individuals who serve the time in prison, they undermine the communities and families who have loved ones behind bars. See generally SENTENCING PROJECT, *INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007* (Feb. 2009), [http://www.sentencingproject.org/doc/publications/publications/inc\\_incarcerated\\_parents.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_incarcerated_parents.pdf); CHARLENE W. SIMMONS, CALIFORNIA RESEARCH BUREAU, *CHILDREN OF INCARCERATED PARENTS* (Mar. 2000), <http://www.library.ca.gov/crb/00/notes/v7n2.pdf>; JEREMY TRAVIS ET AL., *URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY* (2005), [http://www.urban.org/UploadedPDF/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf). Academics continue to document these problems and offer concrete solutions. See, e.g., JULIE SAMUELS ET AL., *URBAN INST., STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM 1* (2013), <http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf>. Even those charged with enforcing the laws agree the system continues to be broken and in need of reform. See, e.g., Eric Holder, U.S. Attn’y Gen., Remarks at the Annual Meeting of the Am. Bar Ass’n’s House of Delegates (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>; see also MICHAEL HOROWITZ, U.S. OFFICE OF THE INSPECTOR GENERAL, *TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE DEPARTMENT OF JUSTICE* (2013), <http://www.justice.gov/oig/challenges/2013.htm> (listing the “growing crisis in the federal prison system” as a top management and performance challenge); Editorial Board, *Prison Reform: Seize the Moment*, CHRISTIAN SCI. MONITOR (Aug. 12, 2013), <http://www.csmonitor.com/Commentary/the-monitors-view/2013/0812/Prison-reform-Seize-the-moment>.

court dockets, growing recidivism rates, and overly punitive punishment as significant failures that sentencing reform must correct immediately.<sup>10</sup> After decades of imposing an ill-reasoned sentencing regime on multiple generations of offenders, federal sentencing reform is finally upon us.<sup>11</sup> Federal lawmakers are poised to reform criminal sentencing laws now.<sup>12</sup>

There are many roots of this criminal justice crisis and numerous injurious fruits borne of it.<sup>13</sup> Countless well-intended proposals have emerged to cure federal punishment of its ills,<sup>14</sup> yet one simple remedy emerges as a leader in overhauling our outmoded, unjust sentencing structure: abolishing lengthy, determinate federal

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<sup>10</sup> See Exum, *Sentencing, Drugs, and Prisons*, *supra* note 9, at 882; see also ALEXANDER, *supra* note 9, at 59 (2010) (stating that the war on drugs targeted mostly low-level street dealers). See generally Stith & Koh, *supra*, note 9 at 227; Orsagh & Chen, *supra* note 9, at 155 (“[W]hen prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism.”). In a recent speech to the American Bar Association, former Attorney General Eric Holder censured the use of excessive prison terms as an unsound criminal justice tool, blaming inflexible mandatory minimum sentences and like practices for unreasonable sentencing disparities, unsustainable prison overcrowding, astronomical recidivism, illogical financial burden, and an overall ineptitude in achieving any true goal of criminal punishment. Holder, *supra* note 9. More recently, President Obama has proclaimed that the time is ripe for sentencing reform. Obama, *supra* note 1.

<sup>11</sup> See generally Exum, *Sentencing, Drugs, and Prisons*, *supra* note 9.

<sup>12</sup> According to President Obama, “We should pass a sentencing reform bill through Congress this year.” Obama, *supra* note 1. Concrete efforts have already been made to follow through on this declaration. See, e.g., Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System Act, S. 467, 114th Cong. (2015); Smarter Sentencing Act, S. 502, 114th Cong. (2015); Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. (2015).

<sup>13</sup> These “fruits” include, but are not limited to, prison overpopulation, recidivism, exorbitant cost, and separation of families. See generally Jalila Jefferson-Bullock, *The Time is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73 (2014).

<sup>14</sup> S. 467; S. 502; H.R. 2944.

criminal sentences will cure a litany of America's criminal justice ills.<sup>15</sup>

The enactment of lengthy criminal sentence legislation relied on two misguided beliefs: (1) that long sentences can achieve utilitarian and retributive punishment purposes; and (2) that law and policy makers and judges can accurately predict how much punishment is enough at sentencing.<sup>16</sup> In an effort to appear tough on crime, lawmakers chose long sentencing periods almost arbitrarily, with no empirical foundation or justification for sentence length.<sup>17</sup> It is now painfully obvious that lawmakers indiscriminately created an overly punitive sentencing scheme with disastrous outcomes.<sup>18</sup> Strict, determinate sentencing ignores the indispensable and often overlooked principle of uncertainty. While we know that the current

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<sup>15</sup> Marc Santora, *City's Annual Cost Per Inmate Is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), <http://nyti.ms/17QnidC>; Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 10, 2012), <http://nyti.ms/18RVtb3>; Brandi Grissom, *Proposals Could Make It Harder to Leave Prison*, N.Y. TIMES (Mar. 12, 2011), <http://nyti.ms/1Tz8Lx3>; Helen Vera, *The Definitive Case for Ending Solitary Confinement*, SLATE (Feb. 26, 2014) [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/02/against\\_solitary\\_confinement\\_states\\_are\\_finding\\_it\\_s\\_impractical\\_as\\_well.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/against_solitary_confinement_states_are_finding_it_s_impractical_as_well.html).

<sup>16</sup> PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 81 (2008) [hereinafter ROBINSON, *DISTRIBUTIVE PRINCIPLES*].

<sup>17</sup> See, e.g., Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More than Kingpins*, WASH. POST (Nov. 4, 1990), <https://www.washingtonpost.com/archive/opinions/1990/11/04/getting-too-tough-on-drugs/2b616e5c-e450-47d9-ad6d-09e0c83d449b/>; Peter Beinart, *Hillary Clinton and the Tragic Politics of Crime*, ATLANTIC (May 1, 2015); see also Jeff Stein, *The Clinton Dynasty's Horrific Legacy: How "Tough-on-Crime" Politics Built the World's Largest Prison System*, SALON (Apr. 13, 2015), [http://www.salon.com/2015/04/13/the\\_clinton\\_dynastys\\_horrific\\_legacy\\_how\\_tough\\_on\\_crime\\_politics\\_built\\_the\\_worlds\\_largest\\_prison/](http://www.salon.com/2015/04/13/the_clinton_dynastys_horrific_legacy_how_tough_on_crime_politics_built_the_worlds_largest_prison/); Ben Schreckinger & Annie Karni, *Hillary Clinton's Criminal Justice Plan: Reverse Bill's Policies*, POLITICO (Apr. 29, 2015), <http://www.politico.com/story/2015/04/hillary-clintons-criminal-justice-plan-reverse-bills-policies-117488>.

<sup>18</sup> William Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1266 (1996); Carrie Johnson, *20 Years Later, Parts Of Major Crime Bill Viewed As Terrible Mistake*, NPR (Sept. 12, 2014), <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>.

federal sentencing scheme is broken, we are unsure of how to design a new sentencing structure.

The goals of federal punishment, as expressed in 18 U.S.C. § 3553(a), rely on both utilitarian and retributivist principles that profess to punish offenders for both a larger societal benefit and to properly penalize moral blameworthiness.<sup>19</sup> The statute offers deterrence of specific offenders, incapacitation, crime prevention, distribution of just punishment, and effective offender rehabilitation as appropriate sentencing goals.<sup>20</sup> According to 18 U.S.C. § 3553(a), federal criminal punishment must align with the aforementioned objectives, and they should directly inform the length of criminal sentences.<sup>21</sup> Regrettably, our current federal incarceration scheme fails to fully achieve the purposes of 18 U.S.C. § 3553(a) or any other U.S. penal code, and it has become evident that the damage done to society and offenders due to these exorbitantly long sentences is a substantial enough reason to restructure the components of federal sentencing.

As modern-day reformers attempt to reinvent federal sentencing laws, myriad questions must be answered: is incarceration still the preferred punishment method? If so, how long must an offender remain incarcerated? If not, how should offenders be punished? Where should the punishment floor or point of departure begin? And notwithstanding the punishment mode, *how much punishment is enough?* This article submits that the current sentencing reform debate must embrace the “principle of uncertainty” by admitting the impracticality of determining the appropriate duration of incarceration at sentencing.<sup>22</sup> When attempting to solve a problem involving a high degree of doubt or improbability, the principle of uncertainty acknowledges what we do not yet know, accepts the uncertainty, and then borrows from experimentalist theory to create best practices that will assist in resolving the problem.<sup>23</sup> This principle must be honored in order to properly reapportion federal criminal sentencing laws.

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<sup>19</sup> See 18 U.S.C. § 3553(a) (2012).

<sup>20</sup> See generally *id.*

<sup>21</sup> *Id.*

<sup>22</sup> The “principle of uncertainty” is a term coined by the author. The concept is borne of experimentalist literature theories. See *infra* Part III.

<sup>23</sup> *Id.*



Determinate sentencing was instituted, in part, to remedy the unfairness and lack of uniformity inherent in indeterminate sentencing.<sup>24</sup> In its present form, however, determinate sentencing has proven too rigid and far too excessive.<sup>25</sup> This is its critical defect. Its predecessor, indeterminate sentencing, while flawed in application,<sup>26</sup> was more ideologically sound. Indeterminate sentencing permitted, through federal parole review, evaluations of

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<sup>24</sup> Modern-day determinate federal sentencing is a product of the Sentencing Commission's work under the Comprehensive Crime Control Act of 1984. U.S. SENT'G COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION [hereinafter U.S. SENT'G COMM'N], [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (last visited July 12, 2016). Determinate sentences are definite in length and are not reviewed by parole boards. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV 83, 89–93 (1988).

<sup>25</sup> Press Release, Justice Policy Inst., How To Safely Reduce Prison Population and Support People Returning To Their Communities 1 (June 2, 2010), [http://www.justicepolicy.org/images/upload/10-06\\_fac\\_forimmediaterelease\\_ps-ac.pdf](http://www.justicepolicy.org/images/upload/10-06_fac_forimmediaterelease_ps-ac.pdf) (“Contributing to the total number of people incarcerated is the reluctance of parole boards to grant parole to all people who are eligible. Parole boards often face public scrutiny if someone they release commits a new offense.”).

<sup>26</sup> See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 3, <https://oig.justice.gov/reports/2015/e1505.pdf> (“Research indicates that the growth in the aging inmate population can be attributed to sentencing reforms beginning in the late 1980s, including the elimination of federal parole and the introduction of mandatory minimums and determinate sentences.”); Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES (Apr. 8, 2015), <http://nyti.ms/1u2IVGc>; Charles M. Blow, *Black Lives and Books of the Dead*, N.Y. TIMES (July 9, 2015), <http://nyti.ms/1HhEhc9>; Jeffery Goldberg, *A Matter of Black Lives*, ATLANTIC (Sept. 2015) <http://www.theatlantic.com/magazine/archive/2015/09/a-matter-of-black-lives/399386/>; Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <http://nyti.ms/1L82Hcv>; Sharon LaFraniere et al., *Texas County's Racial Past Is Seen as Prelude to Sandra Bland's Death*, N.Y. TIMES (July 26, 2015), <http://nyti.ms/1SJ4hAp>; Kevin Sack & Megan Thee-Brenan, *Poll Finds Most in U.S. Hold Dim View of Race Relations*, N.Y. TIMES (July 23, 2015), <http://nyti.ms/1JBB3P4>; Brent Staples, Opinion, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), <http://nyti.ms/1qnflv5>; Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>; Justin Wolfers et al., *1.5 Million Missing Black Men*, N.Y. TIMES (Apr. 20, 2015), <http://nyti.ms/1P5JAPc>.

whether continued incapacitation was necessary post-incarceration.<sup>27</sup> Indeterminate sentencing acknowledged that it is impossible to accurately determine duration of incapacitation at sentencing.<sup>28</sup> Creation of a new sentencing structure that utilizes a sentencing effectiveness assessment tool post-sentencing will assist lawmakers in formulating rational sentences that appropriately punish offenders and benefit society.

This article proposes an alternative federal sentencing model that embraces the principle of uncertainty. This new model will punish the illegal behavior of offenders, while accepting that, currently, tools do not exist to accurately apportion punishment at sentencing. It will also argue that probation or home incarceration is an appropriate floor or point of departure for most federal offenses. Part I of this article provides lessons learned from the pre-Sentencing Reform Act (“SRA”) rehabilitative sentencing model by presenting a glimpse of the history of criminal sentencing in the United States, emphasizing the shift from indeterminate to determinate sentencing. Part II considers the failures wrought by the SRA and questions the logic of that reform. Part III examines current criminal sentencing reform-seeking legislation, assesses the oft-neglected principle of uncertainty, and argues for its inclusion in the current sentencing reform debate. Part IV critiques the presumption of prison, examines the impact to offenders and the entire community of lengthy, determinate sentences, and argues that none of these outcomes are aligned with stated goals of federal sentencing. Finally, Part V offers an alternative model of federal criminal sentencing that both promotes sentencing goals and supports offender and community success by embracing uncertainty. This article does not propose the total abolition of incarceration.<sup>29</sup> Instead, it proposes a new model of sentencing, which ensures that offenders are adequately and fairly punished and prepared to successfully reenter society.

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<sup>27</sup> Weigel, *supra* note 24, at 104 (noting how the new sentencing guidelines “eliminate[d] the ability of the Parole Commission to respond to prison overcrowding by paroling less dangerous offenders”).

<sup>28</sup> Indeterminate sentencing consists of a range of years, with a minimum term, but an uncertain release date that is regulated by parole review. *Id.*

<sup>29</sup> This article also does not suggest that particularly heinous crimes do not warrant lengthy prison or other terms of incapacitation.

## I. THE RISE AND FALL OF INDETERMINATE SENTENCING

Understanding today's determinate sentencing posture requires a brief historical account of the history of punishment in our country. Punishment has undergone drastic transformations since the founding of the United States. Its development reflects society's assessment of man's propensity for rehabilitation.<sup>30</sup> For example, colonial courts approved of society's religious belief in the "basic depravity" of man, and therefore refused to accept any sentencing model that contemplated offender rehabilitation.<sup>31</sup> Instead, colonial courts punished offenders according to three distinct purposes: retribution, deterrence, and incapacitation. Punishment was both swift and harsh, often employing corporal punishment and various forms of severe public chastisement.<sup>32</sup>

Following the Revolutionary War, public sentiment changed to conclude that people were curable, capable, and deserving of an occasion to rehabilitate themselves.<sup>33</sup> The predominant opinion was that if offenders were appropriately incapacitated, they would, with a program of "hard work and moral training," become "cured of [their] moral disease."<sup>34</sup> Criminal punishment, then, adapted to mirror society's overall perception of human beings as "rational and

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<sup>30</sup> See *United States v. Scroggins*, 880 F.2d 1204, 1206–07 (11th Cir. 1989); see, e.g., Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 750 (2012) ("Presumably, a state's legislature already considered community views on appropriate levels of punishment when it graded offenses and set sentencing ranges or guidelines."); BAKER ET AL., *supra* note 4, at 42 (addressing the "plummet[ing]" support of rehabilitative programs due to recidivism); THE SENTENCING PROJECT, CRIME PUNISHMENT AND PUBLIC OPINION: A SUMMARY OF RECENT STUDIES AND THEIR IMPLICATIONS FOR SENTENCING POLICY 2 (2000) [hereinafter THE SENTENCING PROJECT], [http://lobby.la.psu.edu/049\\_Criminal\\_Justice\\_Reform/Organizational\\_Statement/s/Sentencing%20Project/SP\\_Crime\\_Pub\\_Opinion.pdf](http://lobby.la.psu.edu/049_Criminal_Justice_Reform/Organizational_Statement/s/Sentencing%20Project/SP_Crime_Pub_Opinion.pdf).

<sup>31</sup> *Scroggins*, 880 F.2d at 1206 (citing ARTHUR W. CAMPBELL, THE LAW OF SENTENCING §2 at 9 (1st ed. 1978)).

<sup>32</sup> See, e.g., *id.* (noting how, in colonial courts, "[f]elonies generally were punished by death; the penalty for misdemeanors ranged from being pilloried or flogged to a term of hard labor").

<sup>33</sup> *Id.* at 1206–07.

<sup>34</sup> See *id.* at 1206.

responsible for their own acts,” and able to “respond to measures designed to remedy their anti-social diseases.”<sup>35</sup> The rehabilitative model was born.

Quaker philosophy was fundamental in the development of the rehabilitative model.<sup>36</sup> Quakers contested the Puritan belief in the basic depravity of man and espoused redemption.<sup>37</sup> They fervently trusted that incarceration in correctional facilities, combined with hard labor and religious instruction, could provide freedom from “corrupting influences” and requisite time to “reflect on moral questions” so that offenders could be “restored to fellowship with God and humanity.”<sup>38</sup> Further, Quakers believed that “social conditions were a cause of crime” and that society’s influence created a “moral imperative to offer the offender a chance at moral transformation.”<sup>39</sup> Accordingly, many states abolished public displays of punishment and corporal abuse, and began to explore rehabilitation as a feasible goal of criminal punishment.<sup>40</sup> During this time of enlightenment, prisons were regarded as curative institutions, qualified to teach inmates how to coexist lawfully with others.<sup>41</sup> More importantly, inmates were considered agents worthy and capable of rehabilitation. By the late 1800s, the near exclusive purpose of punishment was rehabilitation, with retribution and deterrence holding incidental roles.<sup>42</sup> Indeterminate sentencing, with parole board review as the assessor of rehabilitation, was the cornerstone of the rehabilitative model.<sup>43</sup>

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<sup>35</sup> ARTHUR W. CAMPBELL, *THE LAW OF SENTENCING* § 1:2 at 11 (1st ed. 1978).

<sup>36</sup> See Michael Vitiello, *Reconsidering Rehabilitation*, 65 *TUL. L. REV.* 1011, 1013–14, 1039 (1991).

<sup>37</sup> See *id.* at 1039.

<sup>38</sup> See *id.* at 1039 (citing GERALD A. MCHUGH, *CHRISTIAN FAITH AND CRIMINAL JUSTICE* 34–35 (1978)).

<sup>39</sup> See *id.* at 1040.

<sup>40</sup> *United States v. Scroggins*, 880 F.2d 1204, 1206–07 (11th Cir. 1989).

<sup>41</sup> See *id.* at 1207.

<sup>42</sup> *Id.*

<sup>43</sup> See Paul J. Larkin, *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 *GEO. J. L. & PUB. POL’Y* 1, 7–8 (2013) (discussing the creation of parole and its function under the rehabilitative model of punishment).

The rehabilitative model utilized a two-fold approach to indeterminate sentencing, loosely mirroring healthcare delivery models.<sup>44</sup> First, judges rendered a “diagnosis” of an offender’s individual “condition.”<sup>45</sup> Probation officers prepared detailed reports chronicling offender life history, accepting “any and all evidence” as “relevant and necessary.”<sup>46</sup> Second, correctional officers began implementing a rehabilitative plan of care for offenders upon their commitment to the correctional system.<sup>47</sup> The process worked as such:

Judges committed an offender to the custody of the warden under an indeterminate sentence that gave correctional officers ample opportunity to attempt rehabilitation. Ultimately, a parole board would decide if and when the prisoner had been reformed and could be released. Once released, a parolee would be subject to numerous restrictions on what he could do, as well as subject to the supervision of a parole officer.<sup>48</sup>

Under the rehabilitative model, then, indeterminacy and parole were suitable partners, working together for the mutual benefit of offenders and the public.<sup>49</sup> The indeterminate sentencing model accepted that duration of incarceration could not be correctly

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<sup>44</sup> *Scroggins*, 880 F.2d at 1206–07.

<sup>45</sup> See Larkin, *supra* note 43, at 8.

<sup>46</sup> *Id.* at 8 n.39.

<sup>47</sup> See *id.* at 8.

<sup>48</sup> *Id.*

<sup>49</sup> According to Professor Joan Petersilia:

Parole . . . during the first half of the twentieth century made perfect sense. First, it was believed to contribute to prisoner reform by encouraging participation in programs aimed at rehabilitation. Second, the power to grant parole was thought to provide corrections officials with a tool for maintaining institutional control and discipline. The prospect of a reduced sentence in exchange for good behavior encouraged better conduct among inmates. Finally, release on parole, as a ‘back-end’ solution to prison crowding, was important from the beginning.

Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 489 (1999).

established pre-incapacitation. Indeterminate sentencing relied on parole review in evaluating when an offender was appropriately rehabilitated, and therefore, suited for release. A close observation of the history of indeterminate sentencing and its principal evaluative tool, parole review, provides invaluable insight and information that can assist in developing a new, effective criminal sentencing model that embraces the principle of uncertainty by evaluating sentence effectiveness post-sentencing.

*A. Indeterminacy and its Progeny, Parole*

Indeterminate sentencing birthed modern-day parole. Alexander Maconochie, widely regarded as the father of the indeterminacy movement, created the theoretical precursor to modern parole—the mark system.<sup>50</sup> The mark system recognized and celebrated prisoner autonomy and dignity by incentivizing earned release through good behavior.<sup>51</sup> Prisoners were given a measure of “marks” at sentencing, which could be accumulated by completing discrete tasks.<sup>52</sup> Further, marks were awarded for good behavior.<sup>53</sup> For instance, adhering to facility rules, educational excellence, and acts of service and kindness merited marks.<sup>54</sup> Marks were also used as currency and to pay for prisoner food and clothing.<sup>55</sup> Discipline was administered through the mark system as well. In these ways, Maconochie’s mark system apportioned “concrete and measurable [goals], recorded from day to day, rather than at some distant point in the future.”<sup>56</sup> Prisoners received additional freedoms as they earned marks, and the final stage of confinement prepared prisoners for reentry into the community.<sup>57</sup> Once prisoners completed the

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<sup>50</sup> Helen Leland Witmer, *The History, Theory and Results of Parole*, 18 AM. INST. CRIM. L. & CRIMINOLOGY 24, 28 (1927).

<sup>51</sup> Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1029 (2013).

<sup>52</sup> Witmer, *supra* note 50, at 26 n.2.

<sup>53</sup> Doherty, *supra* note 51, at 968.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

program and earned all assigned marks, release was unconditional.<sup>58</sup> The goal “was to allow prisoners to earn early remission of their sentences and at the same time provide them with the skills and motivation to reenter society successfully.”<sup>59</sup> Maconochie’s vision relied primarily on prisoner autonomy by establishing an indeterminate sentence that allowed prisoners to ultimately determine their release dates. Under this system, marks evaluated whether rehabilitation had been achieved.

Following Maconochie, Sir Walton Crofton further developed the concept of indeterminacy by adopting the mark system and expanding it to include conditional release, a precursor to modern-day parole.<sup>60</sup> Crofton believed that “prison programs should be directed more toward reformation, and that ‘tickets of leave’ should be awarded to prisoners who had shown definitive achievement and positive attitude change.”<sup>61</sup> Crofton’s model imprisoned offenders under strict conditions for a period of time.<sup>62</sup> Following initial incapacitation, prisoners were transferred to intermediate prisons, and were allowed to collect marks in a manner substantially similar to Maconochie’s system.<sup>63</sup> However, once they amassed an appropriate number of marks, they were not released unconditionally.<sup>64</sup> Instead, prisoners were released on parole and awarded tickets of leave.<sup>65</sup> Police “generally oversaw [parolees’] activities,” and helped them locate suitable employment.<sup>66</sup> For Crofton, marks were critical post-conviction tools that assisted in determining whether an offender was sufficiently rehabilitated.<sup>67</sup> Crofton, however, added conditional release to the rehabilitation rubric. Unlike Maconochie, Crofton favored conditional release, and firmly believed that it was critical to offender reintegration and

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<sup>58</sup> *Id.* at 969.

<sup>59</sup> *Id.* at 968.

<sup>60</sup> *Id.* at 974–75.

<sup>61</sup> Petersilia, *supra* note 49, at 488.

<sup>62</sup> Doherty, *supra* note 51, at 972.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 973.

<sup>65</sup> *Id.*

<sup>66</sup> Petersilia, *supra* note 49, at 488.

<sup>67</sup> *See id.* at 483.

overall success.<sup>68</sup> Crofton “justified . . . police supervision as the key to overcoming stigma” and “believed that effective supervision and summary revocation . . . would give the public . . . the confidence necessary to accept convicts back into the community.”<sup>69</sup> Under Crofton’s system, “tickets were revoked for infractions such as irregular reporting, loss of employment through drink, and brawling in public.”<sup>70</sup> This enhanced form of sentence indeterminacy coupled with conditional release morphed into the modern-day parole system.<sup>71</sup>

Zebulon Brockway, the architect of the U.S. parole system, perfected Maconochie’s and Crofton’s models by merging indeterminate sentencing and conditional release, and adding novel components of post-release supervision and parole revocation procedures.<sup>72</sup> The Elmira Reformatory first implemented this new system in 1876 when Brockway was appointed superintendent.<sup>73</sup> Upon admission, inmates were automatically placed into the second grade of classification, from which they could advance within six months of good conduct.<sup>74</sup> Promotion to the first grade, with a showing of continued good conduct and character, earned release.<sup>75</sup> Bad behavior, however, resulted in swift demotion.<sup>76</sup> Once released, offenders were paroled and closely monitored for an additional six-month period.<sup>77</sup> Brockway touted the success of his model and reported that, “eighty-two percent of parolees adjusted successfully and did not return to crime.”<sup>78</sup> Other U.S. prison systems duplicated

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<sup>68</sup> See Doherty, *supra* note 51, at 971.

<sup>69</sup> *Id.* at 975.

<sup>70</sup> *Id.*

<sup>71</sup> See generally *id.* at 976.

<sup>72</sup> Petersilia, *supra* note 49, at 488.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 488–89.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 489. During this period, parolees were required to “report on the first day of every month to his appointed volunteer guardian (from which parole officers evolved) and provide an account of his situation and conduct.” *Id.* (citing HOWARD ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE (12th ed. 1997)).

<sup>78</sup> See Doherty, *supra* note 51, at 982.



the Elmira system, and, by 1927, only Florida, Mississippi, and Virginia did not have parole systems.<sup>79</sup> By the 1950s, every state and the federal government incorporated indeterminate sentencing and parole review into its “core criminal justice policy.”<sup>80</sup> Near the end of the twentieth century, however, many criticized indeterminacy’s usefulness and integrity.

*B. Indeterminate Sentencing and the Modern Parole Movement*

For both Maconochie and Crofton, the goal of indeterminate punishment, as measured by parole review, was successful prisoner reentry to society. However, the indeterminacy movement strayed far from its original intent.<sup>81</sup> Historically, reentry was almost exclusively premised on prisoner autonomy.<sup>82</sup> In parole’s purest form, parolees should earn parole release because they wish to be better citizens, and prison must endow them with the tools they need to be successful members of society. Sadly, the main focus of parole shifted from rehabilitation based on free will to coercive rehabilitation. Professor Fiona Doherty writes that Maconochie would have been “horrified at the kind of arbitrary power” awarded to parole boards.<sup>83</sup> Likewise, Crofton respected the ticket of leave as an earned “public symbol of trust.”<sup>84</sup> The U.S. federal parole system looked far different than this.

Congress enacted the first federal parole law in 1910,<sup>85</sup> which authorized the creation of individual parole boards at each federal

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<sup>79</sup> Petersilia, *supra* note 49, at 489.

<sup>80</sup> Doherty, *supra* note 51, at 983.

<sup>81</sup> *Id.* at 987.

<sup>82</sup> *See infra* Section II.A.

<sup>83</sup> Doherty, *supra* note 51, at 987. Maconochie believed that prisoner that autonomy was a critical component of rehabilitation-based release. *Id.*

<sup>84</sup> *Id.* at 987–88. Crofton regarded conditional release as “a means of publicly testing and showing confidence” in the criminal justice system. *Id.* at 987.

<sup>85</sup> PETER B. HOFFMAN, U.S. DEP’T OF JUSTICE, U.S. PAROLE COMM’N, HISTORY OF THE FEDERAL PAROLE SYSTEM I (2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf> (noting the federal parole began when the first law was enacted in 1910).

correctional institution.<sup>86</sup> Law and policy makers agreed that it was “better to return an offender to freedom ‘through a period of controlled liberty’ than ‘abruptly to return him to complete freedom’ at the end of the prison sentence.”<sup>87</sup> According to its terms, parole was available to any inmate serving a sentence of one year or more, upon completion of one-third of his sentence.<sup>88</sup> In reality, however, the U.S. parole system never focused on the type of rehabilitation that was the epitome of Maconochie’s, Crofton’s, and Brockway’s work. Instead, prison authorities used parole “primarily to manage prison crowding and reduce inmate violence.”<sup>89</sup> The congressional record for the first federal parole statute in 1910 indicates a departure from the rehabilitative goal of parole.<sup>90</sup> Legislators instead emphasized uniformity with state parole procedures and the financial benefit of releasing prisoners early.<sup>91</sup>

The 1910 statute authorized the creation of autonomous, three-member parole boards, comprised of the physician of the penitentiary, the Superintendent of Prisons of the Department of Justice, and the warden of the institution at each federal correctional facility, all of whom were free to make parole decisions at their discretion.<sup>92</sup> Upon release from prison, parolees remained in the warden’s custody, and were supervised by parole officers and U.S. Marshalls.<sup>93</sup> Release and revocation standards were “vague,” relying on such nebulous terms as “reasonable probability” and “reliable information.”<sup>94</sup> Parole boards authorized release if there was a “reasonable probability that such applicant would live and remain at liberty without violating the laws, and if in the opinion of

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<sup>86</sup> Parole Act of 1910, ch. 387, 36 Stat. 819, 819–21, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2006)).

<sup>87</sup> Doherty, *supra* note 51, at 1022.

<sup>88</sup> Parole Act § 1.

<sup>89</sup> Petersilia, *supra* note 49, at 490.

<sup>90</sup> Doherty, *supra* note 51, at 984–85.

<sup>91</sup> *Id.* at 984.

<sup>92</sup> *Id.* at 985. In 1910, there were three federal penitentiaries in the United States. HOFFMAN, *supra* note 85, at 1.

<sup>93</sup> Doherty, *supra* note 51, at 985.

<sup>94</sup> *Id.* (quoting Parole Act of 1910, ch. 387, 36 Stat. 819, 819–21 § 3, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987).

the board, such release was not incompatible with the welfare of society.”<sup>95</sup> Both parole boards and wardens had authority to issue revocation warrants, which were followed by board-administered revocation hearings. Parole boards could revoke parole if there was “‘reliable information’ that the prisoner had violated his parole.”<sup>96</sup> Later in 1910, the Department of Justice promulgated rules stating that “boards would only consider prisoners for parole if they had been in the highest grade of conduct for six months preceding the application,” and that “[a]pplicants had to secure a ‘first friend or adviser,’ who would agree to employ them directly or try to find employment for them while on parole.”<sup>97</sup>

Parole transformed radically in ensuing years. Congress amended the federal parole statute in 1913 to include parole eligibility for prisoners serving life sentences after completing fifteen years of their sentence.<sup>98</sup> General deterrence and incapacitation were not primary goals of sentencing, and were achieved only “‘incidentally to the offender’s rehabilitative incarceration.”<sup>99</sup> The parole board, whose job was to “monitor[] the offender’s rehabilitative progress,” determined the actual length of an offender’s term of imprisonment.<sup>100</sup> The parole board would only release the offender upon a determination of full rehabilitation.

Aligned with society’s belief in the reformation of individuals, the rehabilitative model of punishment and the parole system were honed in the 1930s, and dominated throughout the 1940s and 1950s.<sup>101</sup> The 1930 amendment to the 1910 statute consolidated the several parole boards into one board, empowered to grant release

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 985 (quoting Parole Act § 4); see HOFFMAN, *supra* note 85, at 12.

<sup>97</sup> Doherty, *supra* note 51, at 986.

<sup>98</sup> HOFFMAN, *supra* note 85, at 7.

<sup>99</sup> *United States v. Scroggins*, 880 F.2d 1204, 1207 (11th Cir. 1989).

<sup>100</sup> *Id.* Good-time laws, laws that predated parole laws, offered inmates time off their sentences for “good behavior.” Larkin, *supra* note 43, at 11. “New York adopted the first good-time law in 1817 and 44 other states followed by the end of the century.” *Id.* Parole was initially viewed as a motivating “vehicle” that urged offenders to rehabilitate themselves in order to gain early release. See Stith & Koh, *supra* note 9, at 227.

<sup>101</sup> HOFFMAN, *supra* note 85, at 7–16.

absent Attorney General review.<sup>102</sup> In 1932, parole board authority expanded further, while parole became more restrictive.<sup>103</sup> The amended law provided that parolees shall remain paroled until the expiration of the maximum terms of their sentences, without good conduct credit deduction.<sup>104</sup> Moreover, inmates released prior to the expiration of the maximum terms of their sentence, due only to an accumulation of “good time” credit, would be subject to conditions of parole.<sup>105</sup> In 1945, the board began to report directly to the Attorney General, and in 1948 its membership was increased to five.<sup>106</sup> As time progressed, parole underwent even more significant transformations.

Parole’s transformation continued into the second half of the twentieth century. In 1948, Congress created the U.S. Parole Commission,<sup>107</sup> an independent agency within the Department of Justice, charged with the “responsibility for making federal parole release decisions, setting the conditions of that release, issuing warrants for the arrest of parolees who have allegedly violated conditions of their release, and determining whether release conditions have in fact been violated and, if so, whether parole should be revoked, modified, or continued.”<sup>108</sup> Additionally, in 1949 the landmark Supreme Court case *Williams v. New York* clarified that rehabilitation was the proper penal purpose and that sentences must be individualized in order to accomplish effective offender rehabilitation.<sup>109</sup> The Commission’s powers were expanded in 1958, when Congress again modified parole conditions to allow the Commission to consider parole release either at any time or within

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<sup>102</sup> *Id.* at 7. During this period, the role of parole officer was also formally created. *Id.* at 8.

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 13.

<sup>107</sup> Larkin, *supra* note 43, at 9 n.45.

<sup>108</sup> Project Staff, *Parole Release Decision Making and the Sentencing Process*, 84 YALE L.J. 810, 817 (1975). See generally 18 U.S.C. §§ 4201–18 (repealed 1984).

<sup>109</sup> *Williams v. New York*, 337 U.S. 241, 247–48 (1949).

a period less than one-third of time served.<sup>110</sup> This new legislation's goal was to allow the Commission wider discretion.

Despite its many metamorphoses, the U.S. parole system never employed the concept of prisoner autonomy that was essential to original parole models. Indeterminate sentencing was designed to rely on self-driven prisoner improvement to assess and achieve rehabilitation and release from confinement.<sup>111</sup> Instead, the goal of rehabilitation was thrust upon prisoners, and the Parole Commission exclusively rendered decisions.<sup>112</sup> Lack of prisoner participation easily encouraged the sentiment that rehabilitation was unachievable. Likewise, heavy-handed, exclusive decision-making left room for ruinous condemnation of parole and the indeterminacy movement. Parole's reputation was sullied; it was no longer considered a reliable evaluative tool.<sup>113</sup>

### *C. Criticisms of Indeterminate Sentencing, Rehabilitation, and Parole*

Scrutiny of the rehabilitative model jeopardized indeterminate sentencing's future. Beginning in the 1960s, scathing criticisms of the rehabilitative model arose.<sup>114</sup> By the 1970s and 1980s, increased recidivism and a tide of drug-related violent crime drove law enforcement, academics, political leaders, and the public to begin

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<sup>110</sup> HOFFMAN, *supra* note 85, at 15. Additionally, the 1958 legislation created a presentencing observation period. *Id.*

<sup>111</sup> See Doherty, *supra* note 51, at 987.

<sup>112</sup> See HOFFMAN, *supra* note 85, at 11–12.

<sup>113</sup> See *infra* Part II.

<sup>114</sup> Several studies in the 1970s condemned rehabilitation as an unattainable goal of criminal punishment. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974). In his work, Martinson surmises that in the case of prison rehabilitation, “nothing” has worked or will work. See generally *id.* at 48–50; Donald E.J. MacNamara, *The Medical Model in Corrections: Requiescat in Pace*, 14 CRIMINOLOGY 439 (1977). Some critics of rehabilitation claimed that it “victimized” prisoners by creating indeterminate sentences which caused “uncertainty about their release date,” thereby subjecting them to “arbitrary treatment because parole board decisions were unguided by standards.” Vitiello, *supra* note 36, at 1027. Others criticized the rehabilitative model claiming that rehabilitation was too lenient and not tough enough on crime. *Id.* at 1030.

doubting whether true rehabilitation of offenders was occurring or even achievable.<sup>115</sup> In response, the Parole Commission implemented targeted reforms aimed at combatting allegations of rehabilitation's ineffectiveness and unfettered discretion inherent in indeterminate sentencing.<sup>116</sup>

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<sup>115</sup> Vitiello, *supra* note 36, at 1024–27; see Stith & Koh, *supra* note 9, at 227–28.

<sup>116</sup> First, the Commission began relying on community resources to inform rehabilitation evaluations and support offenders post-release. HOFFMAN, *supra* note 85, at 16. In 1962, the Commission began using pre-release centers established by the Bureau of Prisons to assist offenders in transitioning back into the community. *Id.* In 1963, consistent with an appeals court decision, the Commission began conducting pre-revocation interviews with citizens in communities where alleged parole violations took place. *Id.* at 17. Additionally, Congress passed the Narcotic Addict Rehabilitation Act in 1967, which provided for a fixed sentence, but allowed for parole consideration after six months in treatment and a certificate of eligibility from the surgeon general. *Id.* Next, the Commission endeavored to curb commissioner discretion by instituting a new pilot program designed to decentralize the parole decision-making process. The program addressed six factors:

- (1) the development of explicit parole policy guidelines to provide greater consistency and equity in parole decision making;
- (2) the provision of well-reasoned, written decisions;
- (3) the guarantee of more timely decisions;
- (4) the development of procedures to provide the opportunity for representatives to appear at parole hearings;
- (5) the development of a two-level appellate process to provide greater due process; and
- (6) increased collaboration between the board and related agencies.

*Id.* at 18. In 1976, Congress passed the Parole Commission and Reorganization Act (PCRA), its most significant reform. *Id.* at 21. Passage of the PCRA was a direct response to parole's harshest critics. New PCRA guidelines required hearings every eighteen months for sentences less than seven years and every twenty-four months for sentences greater than seven years. *Id.* at 22. Among other things, it set procedures for appeals, set explicit guidelines for making parole decisions, required denials in writing, and allowed inmates to review files. *Id.* The PCRA also mandated that an "acceptable record of institutional behavior was required" before granting parole. Kathleen M. Braga, *Parole*, 73 GEO. L. J. 727, 730 (1984). Once an offender was deemed sufficiently reformed, the Parole Commission would then determine if release would "depreciate the seriousness of the prisoner's offense, promote disrespect for the law, or jeopardize the public welfare." *Id.* In accordance with PCRA directives, Congress enacted legislation authorizing the formulation of a guideline table, similar to today's sentencing grids. Stith & Koh, *supra* note 9, at 229. The guideline table "consisted of a two-

Reforms, however, proved unpersuasive, and in an attempt to ensure uniformity in sentencing, Congress responded by wholly abolishing federal parole in the SRA.<sup>117</sup> The SRA placed sentencing exclusively under the domain of the courts, with guidance from the newly formed Sentencing Commission.<sup>118</sup> By 1987, sentencing reforms limited the Parole Commission's authority to only a few cases.<sup>119</sup> Under new, stringent criminal justice reforms, offenders would be sentenced to determinate terms of confinement, and were required to complete 85 percent of their sentence, subject to limited "good time" credit.<sup>120</sup> Consequently, harsh punishments were arbitrarily created.

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dimensional matrix, with one axis assessing the severity of the offense and the other axis assessing the seriousness of the inmate's prior record. The box where the axes met set a narrow range within which the inmate presumptively would be released." *Id.* Under this new system, the Commission

determine[d] the prisoner's parole prognosis by calculating an individual 'salient factor score' and then classifie[d] the seriousness of the prisoner's offense according to a chart listing categories of severity. The matrix of the prisoner's offense severity rating and the individual's salient factor score yield[ed] the suggested time range of incarceration before release on parole.

Braga, *supra* note 116, at 731.

<sup>117</sup> *United States v. Blake*, 89 F. Supp. 2d 328, 345 (E.D.N.Y. 2000) (relating the history of the establishment of sentencing guidelines and stating that "[p]arole was abolished"). See generally *United States v. Scroggins*, 880 F.2d 1204, 1206–09 (11th Cir. 1989) (detailing the history leading to the establishment of the sentencing guidelines and the process by which the guidelines are implemented); Robinson et al., *supra* note 30, at 750 ("Presumably, a state's legislature already considered community views on appropriate levels of punishment when it graded offenses and set sentencing ranges or guidelines."); BAKER ET AL., *supra* note 4, at 42 (addressing the "plummet[ing]" support of rehabilitative programs due to recidivism); THE SENTENCING PROJECT, *supra* note 30.

<sup>118</sup> U.S. SENT'G COMM'N, GUIDELINES MANUAL 2 (2015), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf>.

<sup>119</sup> See HOFFMAN, *supra* note 85.

<sup>120</sup> The "[g]ood-time laws predate parole" and were often called "commutation laws." Larkin, *supra* note 43, at 11. Generally, the idea was to offer an incentive for good behavior. In 1817, New York became the first state to adopt laws allowing prisoners to earn good-time. *Id.* Federal good-time credit laws

The abolition of indeterminate sentencing was fueled, in part, by the sentiment that judges exercised unwarranted and dangerously unfettered discretion in crafting sentencing decisions.<sup>121</sup> During the pre-SRA era, judges reserved the right to consider, more heavily, offenders' ability to rehabilitate in making sentencing decisions.<sup>122</sup> That is, judges could tender sentences with a higher regard for offenders' individual characteristics and could offer indeterminate sentences, with the benefit of parole review.<sup>123</sup> After a period of years short of the maximum sentence, parole boards would determine whether an offender was sufficiently rehabilitated for release.<sup>124</sup> In this way, the indeterminate sentencing model acknowledged that judges were ill equipped to determine how much punishment was enough at sentencing. Judges imposed a shorter sentence of incarceration, and then evaluated whether an offender was appropriately rehabilitated through parole board review. If

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began in 1875, before the federal prisons existed, and “[i]t offered . . . 5 days of credit toward release.” *Id.* Today that good-time has increased to a maximum of fifty-four days per year of “good behavior.” *Id.* It also extended to nonviolent offenders who complete substance abuse programs. *Id.* After the enactment of the SRA, parole began to die a slow death. Today, the commission continues to oversee five groups of prisoners: (1) those convicted of crimes prior to 1987; (2) those convicted of crimes committed in the District of Columbia; (3) military offenders; (4) treaty transfer cases; and (5) witness protection cases. HOFFMAN, *supra* note 85, at 30. The current Commission is composed of three commissioners and a chairman, and was reauthorized in 2013 to supervise this limited group of prisoners for another five years. Press Release, U.S. Parole Comm’n, Senate Passes Five-Year Reauthorization for the U.S. Parole Commission (Nov. 7, 2014), <http://www.justice.gov/uspc/pr/senate-passes-five-year-reauthorization-us-parole-commission>. In its latest iteration, parole eligibility depends upon an offender’s sentencing status. If sentenced as a “Regular Adult,” an inmate is eligible for parole after serving one-third of his sentence. Project Staff, *supra* note 108, at 818. Under an “(a)(2) sentence,” an offender is eligible at the Parole Board’s discretion. *Id.* Such an offender is not subject to any mandatory sentence length. *Id.* An (a)(1) sentence allows judges to “set a minimum eligibility date at any point earlier than one-third of the completion maximum imposed.” *Id.*

<sup>121</sup> Weigel, *supra* note 24, at 98–99.

<sup>122</sup> See *id.* (noting how judges made different determinations for sentencing despite a similar end goal of rehabilitation).

<sup>123</sup> *Id.* at 89.

<sup>124</sup> *Id.* at 104.



administered properly, the rehabilitative, indeterminate sentencing model could have been wildly successful. Critics, however, argued that indeterminate sentences were unjust and ineffective; that they were too soft on crime and were administered inconsistently across judicial districts.<sup>125</sup>

## II. THE SENTENCING REFORM ACT AND THE UNREASONED FIGHT AGAINST INDETERMINATE SENTENCING

Over the last few decades, we've also locked up more and more nonviolent drug offenders than ever before, for longer than ever before. And that is the real reason our prison population is so high. In far too many cases, the punishment simply does not fit the crime. If you're a low-level drug dealer, or you violate your parole, you owe some debt to society. You have to be held accountable and make amends. But you don't owe 20 years. You don't owe a life sentence. That's disproportionate to the price that should be paid. And by the way, the taxpayers are picking up the tab for that price. Every year, we spend \$80 billion to keep folks incarcerated—\$80 billion.<sup>126</sup>

Sentencing reform legislation and the dismantling of indeterminate sentencing was nearly a decade in the making, and involved the marriage of unlikely partners.<sup>127</sup> Liberal and conservative sentencing reformers alike viewed indeterminacy, rehabilitation, and parole skeptically.<sup>128</sup> Both groups demanded determinate, 'truthful' sentences and feared judges' unfettered sentencing discretion. Liberal reformers worried that indeterminate sentences favored members of the white, upper and middle classes, while conservatives dreaded the "perceived leniency" of sentences

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<sup>125</sup> *Id.* at 98–99.

<sup>126</sup> Obama, *supra* note 1.

<sup>127</sup> Sandra Shane-Dubow, *Introduction to Models of Sentencing Reform in the United States*, 20 L. & POL'Y 231, 235–36 (1998).

<sup>128</sup> Vitiello, *supra* note 36, at 1014–15; see Stith & Koh, *supra* note 9, at 227–28 (discussing the history of liberal and conservative critics of the rehabilitative model of prison).

meted out by judges.<sup>129</sup> Conservative criticisms of rehabilitation were perennial—prisoners should not be coddled and must experience pain of a measure at least proportionate to that of the victim and/or the committed crime.<sup>130</sup> Liberal critiques attacked rehabilitation as an unquantifiable, incognizable, and therefore, unachievable goal.<sup>131</sup> Conservatives and liberals, then, combined powers to create new sentencing guidelines.<sup>132</sup> Parole was collectively viewed as a “sham.”<sup>133</sup> Both sides agreed that indeterminate sentencing was fundamentally unfair and trusted that sentencing uniformity and determinacy were keys to reform.

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<sup>129</sup> Stith & Koh, *supra* note 9, at 227.

<sup>130</sup> Francis T. Cullen, *Beyond Nothing Works*, 42 CRIME & JUST. 299, 360–61 (2013).

<sup>131</sup> Liberal condemnations of rehabilitation were premised on the idea that three specific factors would always trump the realization of prison rehabilitation: (1) prison officials’ need to control prisoners to prevent escape; (2) prison officials exercised broad discretion in rehabilitating prisoners; and (3) prisoners were coerced into receiving rehabilitative treatments. *Id.* at 317–20. According to liberals, these combined factors melded into a “toxic brew” that rendered prison rehabilitation impracticable. *Id.* at 319.

<sup>132</sup> The liberal ideal reasoned that “custody should only be used as a sanction of last resort,” which “proved to be wishful thinking. *Id.* at 320. According to Professor Frank Cullen,

[L]iberals and conservatives in the 1970s were calling for similar policies—purging state officials’ discretion justified by rehabilitation through determinate sentencing—but for different reasons. Liberals believed that rehabilitation allowed for coercive practices that *victimised offenders*; conservatives believed that rehabilitation allowed for permissive practices that *victimised innocent citizens* . . . . The key difference was that liberals thought that prison was a severe punishment that should be used sparingly and in small doses; conservatives thought that prison was a much-needed mechanism—a disincentive for the deterrable and a cage for the wicked—that should be used extensively and in large doses . . . . But for that moment, liberals and conservatives joined forces to accomplish what they agreed on: to constrain discretion and to move toward determinacy in sentencing.

*Id.* at 325 (citation omitted).

<sup>133</sup> Vitiello, *supra* note 36, at 1021.

*A. Support for Indeterminate Sentencing's Demise*

The arguments that fueled the attack of indeterminate sentencing were exceptionally well timed. In 1969, 81 percent of Americans believed that the criminal justice system was damaged and that “law and order had broken down.”<sup>134</sup> Public opinion opposed leniency in any form, including the idea of rehabilitation, and reformers agreed that the inconsistency plaguing the judiciary required elimination.<sup>135</sup> Critics judged that prisons were incapable of rehabilitation and insisted that, “[n]obody knows how to rehabilitate people in prison.”<sup>136</sup> As Judge Marvin Frankel—widely regarded as the father of the sentencing reform movement and the architect of the SRA—stated:

If rehabilitation was not happening [in prison], it was an illusion to have parole officials ostensibly observing the process to determine when it had gone far enough to warrant release. The illusion did not gain substance from the accompanying realization that responsible parole authorities were not claiming that they knew how to gauge rehabilitation and were not actually pretending to do so.<sup>137</sup>

Change was inevitable. Nevertheless, the course of change was debatable.

In 1974, the Yale Law Journal engaged in a major project to examine sentencing reform.<sup>138</sup> The proposals borne of this project and a seminar produced in its support assisted in providing the impetus necessary to push Congress into action.<sup>139</sup> Judge Frankel produced his groundbreaking work as a result of these efforts. In this seminal work, *Criminal Sentences: Law Without Order*, Judge Frankel largely censured the unfettered sentencing discretion of judges.<sup>140</sup> Frustrated with the lack of guidance given to parole

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<sup>134</sup> Cullen, *supra* note 130, at 324.

<sup>135</sup> *Id.* at 324–25.

<sup>136</sup> Marvin E. Frankel, *The Quest for Equality in Sentencing*, 25 *ISR. L. REV.* 549, 597 (1991).

<sup>137</sup> *Id.* at 598.

<sup>138</sup> Stith & Koh, *supra* note 9, at 228–29.

<sup>139</sup> *Id.* at 230.

<sup>140</sup> *Id.* at 228.

boards and the resulting absence of uniformity in release date determinations, Frankel argued that:

We charge [parole boards] to make indeterminate sentences determinate, but we give them no conceptual or other tool to work with. We set them lofty goals of rehabilitation, but with no direction or means of achievement. The result is rage and cynicism among the “alleged beneficiaries of the rehabilitative ideal.” The system leaves them unable to plan their time or to discover the rules on how to secure their release.<sup>141</sup>

Around the same period, critics relied heavily on Robert Martinson’s article, *What Works?—Questions and Answers About Prison Reform*, accepting the author’s research and conclusion that “nothing works” because “the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”<sup>142</sup> *What Works?* is a comparative study that aims to decipher whether rehabilitation works by measuring the effects of rehabilitative techniques and models on recidivism.<sup>143</sup> Martinson considered the educational and vocational training, counseling, medical treatment, and post-release programs of his time to determine rehabilitative efficacy and ultimately concluded that “these data . . . give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation.”<sup>144</sup> Martinson’s work,

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<sup>141</sup> Vitiello, *supra* note 36, at 1023 (quoting M. FRANKEL CRIMINAL SENTENCES: LAW WITHOUT ORDER 95–97 (1973)).

<sup>142</sup> *Id.* at 1032–33 (quoting Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974)); see Robert Martinson, *What Works? Questions and Answers about Prison Reform*, NAT’L AFFAIRS, Spring 1974, at 23–25, [http://www.nationalaffairs.com/doclib/20080527\\_197403502whatworksquestion sandanswersaboutprisonreformrobertmartinson.pdf](http://www.nationalaffairs.com/doclib/20080527_197403502whatworksquestion sandanswersaboutprisonreformrobertmartinson.pdf).

<sup>143</sup> Martinson, *supra* note 142, at 23–25.

<sup>144</sup> *Id.* at 49. Further, Martinson questions the utility of the medical model itself, stating that

[O]ur present treatment programs are based on a theory of crime as a “disease”—that is to say, as something foreign and abnormal in the individual which can presumably be cured. This theory may well be flawed, in that it overlooks—indeed, denies—both the normality of crime in society and the personal

which became a battle cry for reformers, may be viewed as the most influential popular text against indeterminacy and rehabilitation of its time.<sup>145</sup> Armed with popular support and scholarly evidence, legislators were finally prepared to pass sentencing reform legislation.

Judge Frankel and others convinced members of Congress to consider legislation that would erase the “commonplace” nature of sentencing disparity and the broad discretion of federal judges.<sup>146</sup> Senator Ted Kennedy, one of many sentencing reform leaders in Congress at that time, expressed the prevalent belief that “[o]ne offender may receive a sentence of probation, while another, convicted of the very same crime and possessing a similar criminal history, may be sentenced to a lengthy term of imprisonment.”<sup>147</sup> Kennedy advocated for the creation of a Sentencing Commission tasked with the responsibility of creating sentencing guidelines “with the goal of limiting excessive discretion while allowing the full exercise of informed discretion in tailoring sentences to fit the circumstances of individual cases.”<sup>148</sup> He and other lawmakers anticipated that legislation could reduce disparity in sentencing by abolishing indeterminacy.<sup>149</sup> This, he trusted, would render sentences fairer and “reduce the widespread cynicism concerning the penal system.”<sup>150</sup>

As a result, Congress investigated the state of federal sentencing, ultimately concluding that the lack of confidence in rehabilitation rendered rehabilitative sentencing impracticable.<sup>151</sup> The

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normality of a very large proportion of offenders, criminals who are merely responding to the facts and condition of our society.

*Id.*

<sup>145</sup> Vitiello, *supra* note 36, 1032–33.

<sup>146</sup> Edward M. Kennedy, Commentary, *The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. VA. L. Rev. 423, 423 (1980).

<sup>147</sup> *Id.* at 423–24. Senator Kennedy wrote that, “[s]entencing uncertainty has become the rule, caused, in large part, by the unfettered discretion of federal judges and the United States Parole Commission.” *Id.* at 424.

<sup>148</sup> *Id.* at 429–30.

<sup>149</sup> *See id.*

<sup>150</sup> *Id.* at 432.

<sup>151</sup> *United States v. Scroggins*, 880 F.2d 1204, 1207 (11th Cir. 1989). The congressional report concluded that “[we] know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine

congressional inquiry concluded that judges arbitrarily and inconsistently administered indeterminate, rehabilitation-focused sentences.<sup>152</sup> Consequently, the focus of federal criminal punishment shifted from rehabilitation to retribution and deterrence.<sup>153</sup> The Comprehensive Crime Control Act's sentencing provisions, which were included in the SRA, stated that the "primary focus of sentencing attention was no longer the offender, but rather the offense."<sup>154</sup> Additionally, the Senate Report to the SRA described the existing state of punishment as "based largely on an *outmoded* rehabilitation model."<sup>155</sup> In fact:

The [Senate] committee rejected rehabilitation as the primary justification of punishment. They argued that deterrence was not a sufficient justification of punishment although it was indeed relevant in "justifying the existence of the criminal sanction." Ultimately, they endorsed the notion of just deserts and concluded that "those who violate others' rights deserve punishment" . . . The just-deserts model, according to the committee, is at odds with rehabilitation.<sup>156</sup>

Rehabilitation and indeterminacy were dead. Ultimately, "the conservative vision in due course prevailed,"<sup>157</sup> and the result was disastrous.

The Comprehensive Crime Control Act of 1984 was "precedent shattering."<sup>158</sup> It created the SRA, which formed the Sentencing Commission, whose duty was to establish Sentencing Guidelines

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accurately whether or when a particular prisoner has been rehabilitated. *Id.* (citing S. REP. NO. 98-225, at 40 (1984)).

<sup>152</sup> See Vitiello, *supra* note 36, at 1027–29.

<sup>153</sup> *Scroggins*, 880 F.2d at 1208; see *United States v. Roman*, 989 F.2d 1117, 1121–23 (11th Cir. 1993) (Tjoflat, C.J. concurring). The Comprehensive Crime Control Act of 1984 featured retribution and deterrence as dominant federal punishment goals. *Id.* at 1122–23.

<sup>154</sup> Shane-Dubow, *supra* note 127, at 236.

<sup>155</sup> *United States v. Blake*, 89 F. Supp. 2d 328, 345 (E.D.N.Y. 2000) (emphasis added) (quoting S. REP. NO. 98-225, at 40 (1984)).

<sup>156</sup> See Vitiello, *supra* note 36, at 1025–26.

<sup>157</sup> Cullen, *supra* note 130, at 325.

<sup>158</sup> See BAKER ET AL., *supra* note 4, at 16.

“regarding the appropriate form and severity of punishment for offenders convicted of federal crimes.”<sup>159</sup> The Sentencing Commission’s explicit directive was to address Congress’s concerns in the following areas: “(1) [structuring] the previously unfettered sentencing discretion accorded federal trial judges. . .; (2) [making] the administration of punishment . . . more certain; and (3) [targeting] specific offenders . . . for more serious penalties.”<sup>160</sup> The SRA required imprisonment to be determinate in length, abolished parole, and rendered release subject to “good time” credits only.<sup>161</sup>

Reform seekers decried judges’ and parole boards’ unfettered discretion, formed unlikely bipartisan support, and stripped judges of the sentencing authority they had practiced for years.<sup>162</sup> Consequently, law and policy makers tied judges’ hands by implementing lengthy, determinate mandatory minimum sentencing.<sup>163</sup> As a result, sentencing judges’ ability to consider offenders’ unique circumstances was severely diluted. Rendering mandatory minimum sentences advisory in later years did little to empower sentencing judges to reduce the imposition of excessively lengthy mandatory minimum criminal sentences.<sup>164</sup> Recent studies support the conclusion that lengthier sentences directly lead to increased recidivism rates, negatively affect efforts to rehabilitate prisoners, and are unfairly and undeservedly issued for most, if not all, of the examined offenses.<sup>165</sup> The sentencing scheme borne of the

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<sup>159</sup> U.S. SENT’G COMM’N, *supra* note 24, at 1.

<sup>160</sup> *Id.* Prior to sentencing standardization, judges enjoyed wide discretion in imposing indeterminate sentences. See BAKER ET AL., *supra* note 4, at 16.

<sup>161</sup> See BAKER ET AL., *supra* note 4, at 16–17.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Exum, *Sentencing, Drugs, and Prison*, *supra* note 9.

<sup>165</sup> See, e.g., PAUL GENDREAU ET AL., PRISON POL’Y INITIATIVE, THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM (1999), <http://www.prisonpolicy.org/scans/e199912.htm> (citing D. R. Jaman, et al., *Parole Outcome as a Function of Time Served*, 12 BRIT. J. OF CRIMINOLOGY 5, 7 (1972)) (“[T]he inmate who has served a longer amount of time, becoming more prisonised in the process, has had his tendencies toward criminality strengthened and is therefore more likely to recidivate than the inmate who has served a lesser amount of time.”); Shawn D. Bushway & Emily G. Owens, *Framing Punishment: Incarceration, Recommended Sentences, and Recidivism*, 56 J. L. & ECON. 301, 304 (2013) (estimating that “a 10 percent increase in the recommended

SRA neglected to achieve the type of uniformity or fairness that reformers sought. Instead, it ignored the principle of uncertainty by failing to acknowledge the difficulty in determining how much punishment is enough pre-incapacitation.

The Sentencing Guidelines purported to establish honesty, uniformity, and proportionality in sentencing.<sup>166</sup> Specifically, the Guidelines abolished parole in order to “avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison.”<sup>167</sup> Ironically, the Senate committee “favored alternatives to incarceration and short periods of incarceration in all but the most serious cases if imprisonment was necessary.”<sup>168</sup> The committee did not foresee the SRA’s legacy of excessively long federal criminal sentences.<sup>169</sup> The Sentencing Commission’s legacy lingers today in the form of severe mandatory sentences,<sup>170</sup> limited parole opportunities,<sup>171</sup> and astoundingly increased numbers of

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sentence . . . is associated with a 1.2 percent increase in recidivism”); VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 5 (2010), <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf> (“[L]onger prison sentences were associated with a three percent increase in recidivism. Offenders who spent an average of 30 months in prison had a recidivism rate of 29%, compared to a 26% rate among prisoners serving an average sentence of 12.9 months.”).

<sup>166</sup> U.S. SENTENCING COMM’N GUIDELINES MANUAL, *supra* note 118, at § 1A1.3.

<sup>167</sup> *Id.*

<sup>168</sup> *See* Vitiello, *supra* note 36, at 1029.

<sup>169</sup> *See id.*

<sup>170</sup> *See supra* notes 160–61 and accompanying text; *see, e.g.*, FAMILIES AGAINST MANDATORY MINIMUMS, FEDERAL MANDATORY MINIMUMS (Feb. 25, 2013), <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf> (providing a chart that shows the various statutes, offenses, sentence lengths, and dates of enactment of federal mandatory minimums).

<sup>171</sup> *See, e.g.*, Press Release, Justice Policy Inst., *supra* note 25, at 1 (“Contributing to the total number of people incarcerated is the reluctance of parole boards to grant parole to all people who are eligible. Parole boards often face public scrutiny if someone they release commits a new offense.”).



incarcerated offenders.<sup>172</sup> Unfortunately, in many respects the Guidelines are the product of crafters' creative imaginations and their biases.

*B. The Problem of Bias*

Scholars agree that the Sentencing Commission "failed to give the task [of developing Sentencing Guidelines] the serious attention that it deserves."<sup>173</sup> Surprisingly, length of confinement and severity of sentence was not premised on any evidence-based data, and "[n]owhere in the forest of directives that the Commission has promulgated over the last decade can one find a discussion of the rationale for the particular [sentencing] approaches."<sup>174</sup> Instead, Commissioners relied on the same "outmoded" sentencing structure they wished to reform, and employed data that reformers themselves deemed biased.<sup>175</sup> In the words of sentencing scholar Professor Jelani Jefferson Exum, "the Commission adopted an 'empirical approach that used as a starting point data estimating pre-guidelines sentencing practice.' However, developing sentencing ranges based on past practices was not done in any regularized fashion."<sup>176</sup> Instead, "[t]he Commission increased penalties for white-collar crimes and violent crimes, finding that the existing sentences were

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<sup>172</sup> See *infra* notes 287–89 and accompanying text; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-121, BUREAU OF PRISONS, OPPORTUNITIES EXIST TO ENHANCE THE TRANSPARENCY OF ANNUAL BUDGET JUSTIFICATIONS 1 (2013), <http://www.gao.gov/assets/660/659518.pdf> (finding the federal inmate population has grown 27 percent between 2003 and 2013).

<sup>173</sup> Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 5 (1987); see Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 27–28 (2003) (noting other scholars' work that concluded the Commission had only a "general and superficial discussion" concerning the purpose of criminal sentencing).

<sup>174</sup> Hofer & Allenbaugh, *supra* note 173, at 27–28 (quoting KATE SMITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 56 (1998)).

<sup>175</sup> Jelani Jefferson Exum, *Why March to a Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing*, 15 TEX. J. ON C.L. & C. R. 141, 155–56 (2010) [hereinafter Exum, *Why March to a Uniform Beat?*].

<sup>176</sup> *Id.* at 155.

inadequate.”<sup>177</sup> Penalties for drug offenses relied on “weight rather than empirical data related to the type of sentences being imposed for such offenses or the harms,” thereby resulting in much harsher penalties.<sup>178</sup> In some instances, Commissioners averaged existing sentences. However, in doing so, “the Commission retained the same biases in the Guidelines ranges that led to disparate sentencing in the first place,” and “allowed problematic sentences to serve as the basis for the new sentencing ranges, as though those problems could be averaged away.”<sup>179</sup> Law and policy makers’ biases are largely to blame for the unreasoned exercise that begat Guidelines formulation, and for why judges followed suit.

### 1. Confirmation Bias

Scholars note that Guidelines formulation and application represents psychologically biased responses to the widely accepted problem of unfairness and inconsistency in federal sentencing.<sup>180</sup> Since liberal and conservative “sensibilities” had already abandoned rehabilitation, the necessity of its demise needed only be gently “confirmed.”<sup>181</sup> This is known as “confirmation bias.” Criminologist Frank Cullen explains:

Psychologists use the term “confirmation bias” to refer to the process of deliberately searching for “confirming evidence . . . people and scientists quite often seek data that are likely to be compatible with the beliefs they currently hold.” At that time [during sentencing reform], the confirmation bias was writ so large that any evidence of [rehabilitative] program success was attacked through an array of selectively applied methodological and ex post facto criticisms . . . called “treatment destruction techniques.” Despite being on shaky empirical grounds, . . . the “conventional wisdom” about

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 156.

<sup>180</sup> See Cullen, *supra* note 130, at 326–27.

<sup>181</sup> See *id.* at 327.

rehabilitation's ineffectiveness had become so widespread that it was "agreed upon by criminologists of nearly every persuasion and theoretical orientation."<sup>182</sup>

This is true even though much of the popular data supporting rehabilitation's ineffectiveness was blatantly unreliable and "opponents of rehabilitation grossly overstated" their case.<sup>183</sup> Enlightened studies explain that true comprehension of recidivism rates involve "focusing not just on whether an offender committed an additional offense, but also whether an offender continued to commit new crimes at the same frequency after contact with the criminal justice system."<sup>184</sup> Even Martinson's seminal *What Works?* is subject to scrutiny because, according to criminologists, it inaccurately "define[s] 'recidivism rate' as 'proportion who fail,' and neglects to account for other factors."<sup>185</sup> The "regrettable fact that many researchers had failed to follow rigorous scientific procedures while evaluating these [rehabilitation] programs" was "buried deep" inside Martinson's article for the world to see.<sup>186</sup> These studies found that diversion from high security facilities into less crowded halfway houses can help reduce recidivism rates for low-risk offenders, and that strict post-release supervision can reduce youth recidivism rates.<sup>187</sup> Nevertheless, confirmation bias allowed Martinson's work to effectively "nail[] the door shut on rehabilitation's coffin."<sup>188</sup>

Even more shockingly, Martinson subsequently retracted his findings and advocated for sentencing reform based on his new research.<sup>189</sup> His new, fully developed study concluded that rehabilitation does work in particular situations, and that sound

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<sup>182</sup> *Id.* at 327–28 (quoting Michael R. Gottfredson, *Treatment Destruction Techniques*, 16 J. RES. CRIME & DELINQ. 39, 39 (1979)).

<sup>183</sup> Vitiello, *supra* note 36, at 1032.

<sup>184</sup> *Id.* at 1035.

<sup>185</sup> *Id.* (quoting James Q. Wilson, "What Works?" Revisited: New Findings on Criminal Rehabilitation, 61 PUB. INTEREST 3, 11 (1980)).

<sup>186</sup> MICHAEL WELCH, CORRECTIONS: A CRITICAL APPROACH 97 (3rd ed. 2013).

<sup>187</sup> See Vitiello, *supra* note 36, at 1035–36.

<sup>188</sup> See Cullen, *supra* note 130, at 327–29.

<sup>189</sup> See Vitiello, *supra* note 36, at 1033–34.

methods can be implemented to determine helpful, individualized treatments.<sup>190</sup> Martinson also advocated for the integration of parole and rehabilitation into a more rational, determinate sentencing scheme.<sup>191</sup> Despite its availability, his new research was ignored.<sup>192</sup> Instead, “rehabilitation was unintentionally sabotaged by evaluation researchers (including many academics) who relied on weak or faulty methodological procedures.”<sup>193</sup> Confirmation bias had already won. And it was supported by its brethren, status quo bias.

## 2. Status Quo Bias

The Guidelines’ starting point is also the product of unsound psychological factors. In writing the Guidelines, Commissioners “took ‘average current practice’ as the starting-point,” and, “by analysis of many thousands of cases, [d]ascertained broadly . . . the existing ranges of sentences, the recurrent factors influencing actual sentences imposed, and the actual amounts of time served under incarcerative sentences.”<sup>194</sup> Even sentencing commissioners extensively criticized this strategy in the immediate aftermath of Guidelines creation. According to Judge Frankel:

One of the seven Commissioners, in a dissent, charges that the guidelines were preceded by little or no empirical study; that the starting-point of ‘averaging’ past sentences is not rationally acceptable; that the Commission has failed to rank offenses systematically, to chart a course that will in fact reduce disparities, or to control departures effectively or sufficiently. Coming from an opposite direction, lawyers and judges have charged that the Commission’s guidelines are an exercise in ‘robotics,’ substituting mechanics and arithmetic for ‘human’ sentencing; that the effort to administer the guidelines will be uselessly complex and a source of

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1034.

<sup>192</sup> See Michael Welch, *Rehabilitation: Holding its Ground in Corrections*, 59 FED. PROBATION 3, 5 (1995).

<sup>193</sup> See *id.* at 5.

<sup>194</sup> See Frankel, *supra* note 136, at 604.

voluminous litigation over issues never known before; and that the claimed goal of reducing irrational disparities will not be approached through these formulations.<sup>195</sup>

Studies reveal that even in today's era of advisory Guidelines, judges still feverishly cling to the Guidelines, thereby exhibiting status quo bias in making sentencing decisions.<sup>196</sup>

Many scholars have noted the presence of status quo bias in the Guidelines formulation. Professor Jelani Jefferson Exum writes that status quo bias empowers people to anchor numerical judgments in initial values already available to them.<sup>197</sup> Judges do the same—their sentencing decisions are greatly influenced by suggested sentences. However, a court's reliance on the Guidelines as an anchor becomes problematic when that anchor is biased in some fashion.<sup>198</sup> Nevertheless, the Supreme Court continues to insist that the Guidelines be used as the baseline in rendering sentencing determinations, and is “hesitant to let go of a familiar sentencing instrument.”<sup>199</sup> More disturbingly, status quo bias is the central factor underlying the assumption that incarceration is an appropriate punishment form. In formulating new, reformed sentences, law and policy makers retained incarceration as the primary punishment vehicle, never seriously considering its efficacy.<sup>200</sup> Reformers bashed rehabilitation, yet relied on its principal distributive tool in devising new, “improved” guidelines.<sup>201</sup> “[T]he Guidelines were designed to be a work in progress, [yet thirty] years after their

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<sup>195</sup> *Id.* at 604–05.

<sup>196</sup> See Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 122, 141–42 (2008) [hereinafter Exum, *The More Things Change*] (discussing how judges' practices regarding sentencing have not deviated very much from the Guidelines even when given more discretion); see, e.g., *United States v. Booker*, 543 U.S. 220 (2005).

<sup>197</sup> Exum, *The More Things Change*, *supra* note 196, at 122, 141.

<sup>198</sup> See *id.* at 123.

<sup>199</sup> *Id.* at 145.

<sup>200</sup> See *id.* at 147–48 (discussing how “even [the] revised Guidelines are simply new numbers set within the existing Guideline grid format”).

<sup>201</sup> Exum, *Why March to a Uniform Beat?*, *supra* note 175, at 144; see Exum, *The More Things Change*, *supra* note 196, at 147–48.

inception,” similar problems exist.<sup>202</sup> The Guidelines have “fallen short of their intended goals to bring uniformity, honesty, and proportionality to sentencing, even after years of use and many opportunities for improvements.”<sup>203</sup> Yet, the Supreme Court has continued to advocate for the Guidelines to “play a prominent position.”<sup>204</sup>

### III. EMBRACING THE PRINCIPLE OF UNCERTAINTY

To date, Congress has introduced several legislative instruments that attempt to offer solutions to the present criminal justice crisis.<sup>205</sup> Three principal bills, the Safe Justice Act, Smarter Sentencing Act, and Corrections Act propose alternatives to the current sentencing system.<sup>206</sup> All three bills aim to improve our criminal justice system by reducing recidivism, decreasing prison costs, and lowering the prison population.<sup>207</sup> The Corrections Act endeavors to decrease recidivism and prison costs by offering vigorous rehabilitative and job programs in prison, subject to “good time” credits.<sup>208</sup> The Smarter Sentencing Act reduces harsh prison sentences for drug offenses by cutting existing lengthy sentences in half.<sup>209</sup> Of the three, only the Safe Justice Act unequivocally eliminates universal imposition of excessive mandatory minimum sentences by limiting their use to instances when “the defendant was an organizer, leader,

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<sup>202</sup> Exum, *Why March to a Uniform Beat?*, *supra* note 175, at 164.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *E.g.*, CORRECTIONS Act, S. 467, 114th Cong. (2015); Smarter Sentencing Act, S. 502, 114th Cong. (2015); and Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. (2015).

<sup>206</sup> S. 467; H.R. 2944; S. 502.

<sup>207</sup> S. 467 (stating the purpose of the bill is “[t]o reduce recidivism and increase public safety, and for other purposes”); S. 502 (stating the purpose of the bill is “[t]o focus limited Federal resources on the most serious offenders”); H.R. 2944 (stating the purpose of the bill is “[t]o improve public safety, accountability, transparency, and respect for federalism in Federal criminal law”).

<sup>208</sup> S. 467 § 4 (proposing prisoners can become “eligible to serve a portion of [his] sentence in prerelease custody”—which includes “residential reentry centers, on home confinement, or . . . community supervision”—if they have earned enough “credits”).

<sup>209</sup> S. 502.

manager, or supervisor of a drug trafficking organization of five or more participants.”<sup>210</sup> The Safe Justice Act eliminates strict mandatory minimum sentences at both the beginning and end of the sentencing process by limiting the imposition of lengthy mandatory minimum sentences to instances where the defendant exercises a leadership role in a drug trafficking organization,<sup>211</sup> and expanding back-end safety-valve relief.<sup>212</sup> Unlike other bills, it imposes a “presumption of probation” for nonviolent offenders, instead of incarceration, as the sentencing starting point.<sup>213</sup> Further, Title III of the Safe Justice Act directs the Sentencing Commission to amend its Guidelines to reflect “the intent of Congress that prison be reserved for serious offenders for whom prison is most appropriate.”<sup>214</sup> All three proposals are preliminary steps in the right direction. However, while each bill admirably attempts to create robust reforms, each is significantly informed by status quo and confirmation bias.

#### *A. Confirmation and Status Quo Bias in Current Legislation*

None of the aforementioned legislative proposals dispenses with the problem of bias. Neither the Corrections Act nor the Smarter Sentencing Act questions the conclusion that prison is the appropriate default criminal punishment. By simply decreasing existing sentence length, the Corrections Act assumes that the status quo—excessive sentences—is the appropriate point of departure, and that merely decreasing sentence length will render sentences just.<sup>215</sup> Likewise, the Smarter Sentencing Act merely reduces prevailing sentences without probing their effectiveness.<sup>216</sup> The Safe

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<sup>210</sup> H.R. 2944, tit. IV, § 401(a).

<sup>211</sup> *Id.* at § 401(a)(i)(2).

<sup>212</sup> *Id.* at § 402.

<sup>213</sup> *Id.* at tit. III, § 302(a)(3).

<sup>214</sup> *Id.* § 303(b)(4).

<sup>215</sup> See CORRECTIONS Act, S. 467, 114th Cong. (2015) (proposing prisoners be permitted to earn “time credits” which would allow them to serve part of the end of their sentence in “prerelease custody”, which includes things like home confinement and community supervision).

<sup>216</sup> See Smarter Sentencing Act, S. 502, 114th Cong. § 4 (2015).

Justice Act assumes that lengthy prison sentences are, in some form, acceptable by neglecting to apply its amendments retroactively.<sup>217</sup> The exercise of determining suitable sentences must begin with what is before us—our current sentencing model—but must evolve beyond it.

In actuality, it is unclear how criminal sentences should look. The Safe Justice Act, Corrections Act, Smarter Sentencing Act, and other modern reform bills strive to improve our federal sentencing regime, but neglect to employ hard, evidence-based research to support sentencing choices. Any fair, rational sentencing structure must embrace the principle of uncertainty and admit the difficulty in properly designing criminal sentences. Law and policy makers should impose indeterminate sentencing pedagogy on the current sentencing structure. The principle of uncertainty requires that determinate sentences be subjected to rigorous review of effectiveness post-sentencing, akin to indeterminate sentencing's parole review tool. Such a system would utilize a less restrictive point of origin and rely on constant benchmarking and evaluation, akin to that used in experimental literature, to determine the length of sentence duration.

One major criticism of the rehabilitative model is that it did not provide strict guidelines for criminal sentence duration.<sup>218</sup> The pre-SRA sentencing scheme permitted judges to render unregulated, disproportionate punishment.<sup>219</sup> Reformers declared that the pre-SRA era failed to deliver real truth in sentencing by neglecting to inform both the public and offenders of precisely how long an offender would remain incapacitated.<sup>220</sup> Such knowledge, reformers insisted, is essential to a successful sentencing regime—one in which the punisher, the punished, and the larger community can enjoy confidence.<sup>221</sup> SRA reforms, they maintained, remedied these problems.<sup>222</sup> This reasoning, however, is exceedingly problematic. First, it ignores the possibility of bias and assumes that the

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<sup>217</sup> See H.R. 2944, tit. IV, § 403(e)(2).

<sup>218</sup> See Weigel, *supra* note 24, at 98–99.

<sup>219</sup> *Id.*

<sup>220</sup> *See id.*

<sup>221</sup> *See id.*

<sup>222</sup> *See id.* at 99–103.



Sentencing Commission initially apportioned sentences correctly. Second, it presumes that judges are capable of accurately calculating the precise duration of incapacitation necessary to fulfill punishment purposes at sentencing. Third, and most importantly, it professes that an exact or correct term of incarcerative punishment actually exists.

In reality, our criminal sentencing structure is a sort of “guessing game,” during which we simply hope that we have correctly chosen sentence duration. Current literature and failed sentencing reforms demonstrate that the exercise of criminal sentencing is a task that possesses immense uncertainty.<sup>223</sup> The answer to the question, “*how much punishment is enough?*” may never elicit a concrete, fixed answer. In order to create a rational, fair sentencing regime, the uncertain nature of this answer must be embraced. Yet, uncertainty need not equal haphazardness or irrationality. Processes can be established to create logical, well-reasoned outcomes even in the face of uncertainty. Probing best practices from experimentalist literature can assist in creating a structure that accounts for the unknowns inherent in criminal sentencing in a responsible manner.

#### *B. Linking Experimentalist Literature and the Principle of Uncertainty*

Experimentalism thrives in areas of increased flux where “rigid forms of regulation are ill-suited to accomplish . . . designated tasks,” and is often utilized in spaces where empirical and experiential data is insufficient to provide accurate roadmaps.<sup>224</sup> Instead of clinging to inflexible, ill-fitting rules, experimentalist theory incorporates benchmarking of best practices, followed by appropriate adjusting, and concluding with the adoption of sound, well-informed, workable rules. Scholars suggest that experimentalism can provide solutions in a variety of areas characterized by “volatility and diversity, with concomitant changing states of knowledge,” including education, administrative regulation, community policing, environmental regulation,

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<sup>223</sup> See *infra* Part IV.

<sup>224</sup> William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L. J. 145, 153 (2007).

employment discrimination, and public law.<sup>225</sup> Through periodic review and responsive recalibration, experimentalism succeeds in creating a series of best practices that can propel progression of uncertainty resolution.

The principle of uncertainty borrows from experimentalist theories by searching for solutions in situations with a high degree of ambiguity.<sup>226</sup> In the area of federal sentencing, the principle of uncertainty accepts what is yet unknown, recognizes that uncertainty, and then relies on experimentalist theory to create best practices that will assist in resolving the problem or completing the task, despite the uncertainty. By setting appropriate “benchmarks” and processes for constant reevaluation, experimentalism can assist in creating sentencing order in an otherwise disorderly situation.<sup>227</sup> To achieve sentencing fairness and effectiveness, length of incarceration must rely on indeterminate sentencing pedagogy’s acknowledgement of uncertainty, specifically by utilizing post-sentencing review. Experimentalist literature provides a framework for devising a sentencing structure that is effective, stable, fair, and reviewable, despite uncertainty. Rooted in experimentalism, the principle of uncertainty accepts the verity that “what works” is constantly evolving as conditions naturally change.<sup>228</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *See id.* at 155–58.

<sup>227</sup> *Id.* at 154.

<sup>228</sup> According to scholars,

[r]ather than a top-level bureaucrat choosing in a final way how a car should be produced, “learning by monitoring occurs.” Under learning by monitoring, the production process is monitored . . . . Recent works observe analogous political and regulatory actions and argue that this mode of pragmatic adjustment can and should be more widely adopted in the world of government and law. This literature argues that for effective regulatory choices, one needs to have a diversity of actors and institutions, providing them room for experimentation, sharing, and learning.

*Id.* Learning by monitoring requires pooling resources and periodic review of existing systems, with the goal of creating viable, sound best practices. In both the industry and government markets, “[c]ontinuous adjustment” and “exchanges of information” are employed “to engage in benchmarking, simultaneous engineering, and error correction,” which allows “collaborators to monitor one

Experimentalist principles are already being adopted in nonprofit and government settings to “redefine what counts as a means to a guiding end.”<sup>229</sup> Professors Michael Dorf and Charles Sabor submit that government systems can be radically improved by “the combination of decentralization and mutual monitoring intrinsic to democratic experimentalism.”<sup>230</sup> The experimentalist view that they espouse lies in older pragmatist theories that emphasize and embrace doubt or uncertainty as necessary to improvement. Professors Dorf and Sabor describe this concept as such:

The pragmatists understood doubt as the recurrent yet always surprising breakdown of some of the settled beliefs and expectations upon which we must depend for active investigation of the world, not as the expression of a global skepticism about the very possibility of knowledge. Seen as localized breakdowns in our expectations, doubt spurs inquiry into remedial action and reforms conceptions. To emphasize just how much doubt depends on surprise, and how little on a first principle of skepticism, the pragmatists urged a simple test: Try to doubt a belief you hold deeply, and you will discover that you cannot. Thus, pragmatism guides us in better coming to grips with a circumstance that we have come to anticipate: That experience will again and again disrupt our habits and the understandings that rest on them.<sup>231</sup>

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another’s activities closely enough to detect performance failures and deception before these latter have disastrous consequences.” Michael C. Dorf & Charles F. Sabor, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 287 (1998).

<sup>229</sup> Dorf & Sabor, *supra* note 228, at 284–85.

<sup>230</sup> *Id.* at 267. They offer an improved version of democracy that balances the Madisonian and New Deal governmental ideas, while permitting room for recalibration. *Id.* at 283–84. They focus on “three central but troubled institutions of American constitutionalism: federalism, separation of powers, and judicial protection of individual rights,” and use them to illustrate this novel design of government. *Id.* at 284.

<sup>231</sup> *Id.* at 285.

Following Dorf and Sabor's model, uncertainty or doubt can assist in eradicating bias. This design principle can work well in reforming federal criminal sentencing laws.

In government settings, experimentalism, at its core, would call for "a new connection between the broad pronouncements of the legislature and the courts, and applications of these pronouncements to particular situations."<sup>232</sup> In experimental settings, agencies pool resources, share information, adopt best practices from each other, and are open to the possibility of correctable error.<sup>233</sup> Practices are monitored scrupulously at all levels, and are improved or even abandoned when proven unhelpful.<sup>234</sup> This is what true reform looks like. For Dorf and Sabor, experimentalist principles should be injected into our government systems to improve government function. In their opinion, states and the federal government should pool information, employ benchmarking, and create best practices to aggressively correct error.<sup>235</sup> Successful engineering and benchmarking requires agencies to share information across disciplines, both vertically and horizontally.<sup>236</sup> In this way, power shifts "from 'rulers' to the 'people.'"<sup>237</sup> This experimentalist model can be extended to federal sentencing as well.

### *C. Embracing Uncertainty in Current Legislation*

Crafting a reformed sentencing model requires recognizing and embracing the uncertainty inherent in determining punishment by borrowing from experimentalist theory. Each aforementioned congressional bill requires gathering best practices from state and federal government entities, as well as continuous review at each level of federal government to ensure that reforms are achieving their desired end.<sup>238</sup> In creating new rehabilitative prison programs,

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<sup>232</sup> *Id.* at 283.

<sup>233</sup> *See generally id.*

<sup>234</sup> *Id.* at 287.

<sup>235</sup> *Id.* at 287–88.

<sup>236</sup> *See id.* at 287 (detailing how "[t]he model requires linked systems of local and inter-local or federal pooling of information").

<sup>237</sup> *Id.* at 313.

<sup>238</sup> These bills require information gathering of "what works" among government agencies. Sensenbrenner-Scott SAFE Justice Reinvestment Act of

the Corrections Act requests that the Attorney General, Senate Committees, and other relevant federal agencies certify proposed programs, gather best practices from community and industry partners, assess programs periodically, and evaluate the successes and failures of specific prisoner participants.<sup>239</sup> The Smarter Sentencing Act mandates that the Attorney General submit reports to Congress outlining cost savings resulting from reforms, and concerning assessments of other efforts that will be used prospectively to reduce crime.<sup>240</sup> The Smarter Sentencing Act also requires tendering of general reports on criminal offenses.<sup>241</sup> Likewise, the Safe Justice Act includes strenuous, multiagency review of offender case plans, recidivism rates, and overall effects of each proposed reform, including revoking mandatory minimum sentences, alternatives to incarceration, elimination of tough punishment for technical probation violations, and implementation of rehabilitative programs.<sup>242</sup> It requires review to occur between the Attorney General, Bureau of Prisons, state and federal agencies, and other entities qualified to provide and/or assist in developing quantitative and qualitative data.<sup>243</sup> This type of multi-tiered, continuous review, and fostering of best practices present in each bill is lacking in our current system, but is critical in creating a new, reformed model.

Embracing the principle of uncertainty demands an understanding and acknowledgment of what is yet unknown, coupled with a willingness to learn what appropriate punishment should be. It demands commencing punishment from a well-researched and thoroughly examined starting point, followed by information sharing, benchmarking, and regular, stringent review. The type of information sharing, benchmarking, and consistent multi-tiered review espoused in the Corrections Act, Smarter

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2015, H.R. 2944, 114th Cong. §§ 501–604 (2015); Smarter Sentencing Act, S. 502, 114th Cong. §§ 6–7 (2015); CORRECTIONS Act, S. 467, 114th Cong. § 5 (2015).

<sup>239</sup> S. 467 §§ 2–3.

<sup>240</sup> S. 502 § 6.

<sup>241</sup> *Id.* at § 7.

<sup>242</sup> H.R. 2944 §§501–604.

<sup>243</sup> *Id.* at § 604.

Sentencing Act, and Safe Justice Act<sup>244</sup> fits well into the experimentalist model that is critical to sentencing reform. Any revised criminal sentencing structure must employ these same types of review processes to evaluate reform effectiveness. Each proposal correctly identifies critical areas of review. What is missing from these and other federal sentencing reform proposals, however, is a well-researched point of departure, instead of accepting prison as default punishment. None of the proposals offer a clear rationale for the duration of incarceration and simply fail to answer the question: *why incarceration?*

#### IV. AN ARGUMENT AGAINST INCARCERATION

The American prison system is borne of the rehabilitative model,<sup>245</sup> and “[t]he concept of rehabilitation [has] decisively determined Western society’s preference for incarceration as a mode of punishment.”<sup>246</sup> Historically, prisons and jails were institutions where offenders could separate from society to reflect on their misdeeds and contemplate return following an improved moral condition.<sup>247</sup> Oddly, the principal purpose of punishment radically changed while the punishment distribution tool remained unaffected.<sup>248</sup> SRA reforms abandoned rehabilitation, thereby promoting retribution and deterrence to punishment purpose prominence.<sup>249</sup> However, this shift in punishment purpose was not accompanied by any contemplated or realized shift in punishment method. The new Sentencing Guidelines strongly favored custody over probation for most offenses.<sup>250</sup> Reformers concluded that prisons lacked the capacity to rehabilitate, yet failed to fully consider whether prisons were capable of successfully deterring

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<sup>244</sup> *Id.*; CORRECTIONS Act, S. 467, 114th Cong. (2015); Smarter Sentencing Act, S. 502, 114th Cong. §§ 6–7 (2015).

<sup>245</sup> Edwin L. Rubin, *The Inevitability of Rehabilitation*, 19 L. & INEQ. 343, 352 (2001).

<sup>246</sup> *Id.* at 350.

<sup>247</sup> *Id.* at 351–52.

<sup>248</sup> *See id.* at 360–65.

<sup>249</sup> *See Weigel, supra* note 24, at 104.

<sup>250</sup> Exum, *Why March to a Uniform Beat?*, *supra* note 175, at 155.

crime or properly punishing moral blameworthiness.<sup>251</sup> Confirmation and status quo bias contributed to this phenomenon. Status quo bias allowed reformers to rely on an established prison regime, while confirmation bias permitted reformers to rest comfortably in that decision. This is best illustrated in the case of drug offenses:

There is no empirical evidence that prior drug trafficking convictions are better predictors of future offending than other types of convictions. Nor is there reason to believe that incapacitation of drug traffickers is a sound crime control policy, since most incarcerated offenders are readily replaced by others willing to satisfy the unmet demand for drugs. The best explanation, which is no justification, is that a ‘war on drugs’ mentality led to the harsher treatment of drug trafficking offenses apart from any reason grounded in . . . incapacitation theory.<sup>252</sup>

Likewise, recent studies reveal that “there is little evidence of any link between crime rates and imprisonment,”<sup>253</sup> yet status quo bias continues to justify excessive prison terms.

Federal sentencing guidelines purport to meld utilitarian and retributivist theories of punishment, as expressed in the provisions of 18 U.S.C. § 3553(a).<sup>254</sup> Among the governing principles of punishment enumerated in the statute are deterrence of specific offenders, crime prevention, distribution of just punishment, and effective offender rehabilitation.<sup>255</sup> Together, the 3553(a) factors

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<sup>251</sup> See *id.* at 156.

<sup>252</sup> Hofer & Allenbaugh, *supra* note 171, at 73. Under the Career Criminal Guideline § 4B1.1, certain classes of drug trafficking must be punished “‘at or near the maximum term authorized’ for offenders with two prior adult convictions for either trafficking or violent offenses.” *Id.* at 43 n.98.

<sup>253</sup> Weigel, *supra* note 24, at 104–05.

<sup>254</sup> See 18 U.S.C. § 3553(a) (2010) (listing several factors a court must consider when imposing a sentence, including “the nature and circumstances of the offense and the history and characteristics of the defendant”).

<sup>255</sup> *Id.*

work collaboratively to guide judge and Sentencing Commission decisions.<sup>256</sup> According to the Supreme Court:

In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) . . . . The provision also tells the sentencing judge to “impose a sentence sufficient, but not greater than necessary, to comply with” the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.<sup>257</sup>

The Guidelines themselves explicitly proclaim that “[t]he continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act’s intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a).”<sup>258</sup> It is clear that federal sentences must reflect the 3553(a) factors. Congress desired that the 3553(a) factors would contribute to a sentencing scheme that advanced its overarching goal of achieving honesty, proportionality, and uniformity in sentencing.<sup>259</sup>

The 3553(a) factors encompass the two major theories of criminal punishment: utilitarianism and retributivism.<sup>260</sup> According to 18 U.S.C. § 3553(a)(2):

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider . . .

(2) the need for the sentence imposed—

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<sup>256</sup> U.S. SENTENCING COMM’N GUIDELINES MANUAL, *supra* note 118, at § 1B1.1(a)–(c).

<sup>257</sup> *Rita v. United States*, 551 U.S. 338, 347–48 (2007) (emphasis in original).

<sup>258</sup> U.S. SENTENCING COMM’N GUIDELINES MANUAL, *supra* note 118, at § 1A1.2.

<sup>259</sup> *Id.* (citing *Rita v. United States*, 551 U.S. 228 (2007)).

<sup>260</sup> *See* 18 U.S.C. § 3553(a)(2)(A) (2010).



- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>261</sup>

Paragraph (2) expresses both utilitarianism and retributivism.<sup>262</sup> In declaring that criminal sentences should “reflect the seriousness of the offense” and “provide just punishment for the offense,” paragraph (2)(A) communicates the retributivist concept that an offender should only be punished according to his individual moral blameworthiness.<sup>263</sup> Paragraphs (2)(B), (2)(C), (2)(D), and the remainder of (2)(A) illustrate utilitarian concepts.<sup>264</sup> All four sections discuss future crime prevention through general and specific deterrence and detection, by proclaiming that federal criminal sentences should “promote respect for the law,” “afford adequate deterrence to criminal conduct,” “protect the public from further crimes of the defendant,” and “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”<sup>265</sup> All of these factors can be appreciated as abstract theories upon which punishment must rely. Further, the beginning of § 3553(a) highlights that imprisonment should both be informed and shaped by utilitarianism and retributivism. Despite the express provision that rehabilitation is a governing federal punishment principle, it is in fact not a goal of modern-day incarceration. Similarly, neither deterrence nor retribution support today’s imprisonment model. Our current sentencing scheme does not deter crime effectively, nor does

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<sup>261</sup> *Id.*

<sup>262</sup> 18 U.S.C. § 3553(a)(2) (2010).

<sup>263</sup> 18 U.S.C. § 3553(a)(2)(A) (2010).

<sup>264</sup> § 3553(a)(2)(A)–(D).

<sup>265</sup> *Id.*

it fairly punish moral blameworthiness. This is troubling, especially because incarceration has emerged as the United States' chief punishment distribution vehicle. According to Professor Paul H. Robinson, "the system's general shift . . . has not been accompanied by a corresponding shift in how the system presents itself."<sup>266</sup>

#### A. *Modern-Day Prison Does Not Satisfy Retribution*

Ultimately, today's system of incarceration fails to satisfy retribution because it lacks fairness. The theory of desert is grounded in the notion that offenders should be punished *fairly*, based solely on moral blameworthiness.<sup>267</sup> There are three main categories of desert, all of which apportion moral blameworthiness differently. First, vengeful desert determines moral blameworthiness from the victim's point of view.<sup>268</sup> Second, deontological desert embodies "a set of principles derived from fundamental values and principles of right and good," and apportions moral blameworthiness based on the views of moral philosophers.<sup>269</sup> Third, empirical desert assigns moral blameworthiness according to the community's shared intuitions of justice.<sup>270</sup> None of the three categories of desert, however, justify current-day incarceration as the principal mode of punishment

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<sup>266</sup> Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) [hereinafter Robinson, *Punishing Dangerousness*].

<sup>267</sup> See *id.* at 1442 (discussing how under the desert principle, "justice requires that offenders of lesser blameworthiness receive less punishment than offenders of greater blameworthiness").

<sup>268</sup> Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L. J. 145, 147 (2008) [hereinafter Robinson, *Competing Conceptions of Modern Desert*]. Under a vengeful desert regime, offenders are punished in a manner similar to the harm done to the victim. *Id.*

<sup>269</sup> ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 16, at 139. Deontological desert rests on moral judgments made "from the point of view of the universe." *Id.* (quoting HENRY SIDWICK, *THE METHODS OF ETHICS* 420–21 (7th ed. 1991)). "[T]hus . . . [deontological desert] produce[s] justice without regard to the political, social, or other peculiarities of the situation at hand." *Id.*

<sup>270</sup> Robinson, *Competing Conceptions of Modern Desert*, *supra* note 268, at 149.

because today's system of incarceration fails to apportion moral blame proportionally, and therefore lacks fairness.

Desert's effectiveness strictly depends upon the community's perception of punishment as fair or deserved. In a desert-based sentencing model, society agrees upon what criminal sanctions are deserved by "pre-determin[ing] the severity of the punishments it believes should accompany particular crimes."<sup>271</sup> Scholars agree that desert is only effective if the general population is convinced of its fairness. Professor Robinson writes that "deviating from a community's intuitions of justice can inspire resistance and subversion among participants—judges, juries, prosecutors, and offenders—where effective criminal justice depends upon acquiescence and cooperation" and that "[l]iability and punishment rules that deviate from a community's shared intuitions of justice undermine that reputation."<sup>272</sup>

Modern-day incarceration lacks fairness and utilizes lengthy criminal sentences to achieve retribution, even though it is possible to accomplish desert with much shorter sentences.<sup>273</sup> Sixty-two percent of judges responding to a 2010 Sentencing Commission survey stated that "penalties across all offenses were 'too high,'" and therefore, unfair.<sup>274</sup> The Judicial Conference of the United States has labeled mandatory minimums as producing sentences that are excessively harsh relative to the gravity of the offense, stating that, "a severe penalty that might be appropriate for the most

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<sup>271</sup> Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH L. 1, 10 (2008).

<sup>272</sup> ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 16, at 95–96.

The system's intentional and regular deviations from desert also undermine efficient crime control because they limit law's access to one of the most powerful forces for gaining compliance: social influence. The greatest power to gain compliance with society's rules of prescribed conduct may lie not in the threat of official sanction but rather in the influence of the intertwined forces of social and individual moral control.

*Id.* at 96.

<sup>273</sup> Robinson, *Punishing Dangerousness*, *supra* note 266, at 1432.

<sup>274</sup> U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, 7 tbl.1 (June 2010), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf).

egregious of offenders will likewise be required for the least culpable violator.”<sup>275</sup> Even federal judges on both sides of the aisle have expressed extreme regret and disappointment due to the sentences that they had to impose statutorily. Supreme Court Justice Anthony Kennedy stated our “[prison] resources are misspent, our punishments too severe, our sentences too loaded . . . I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In all too many cases, mandatory minimum sentences are unjust.”<sup>276</sup> Former President Bill Clinton also lamented that mandatory minimums were “overdone” and that “we [the federal government] were wrong about that.”<sup>277</sup> The current incarcerative sentencing structure lacks the proportionality that retribution requires.

Further, retributive punishment is grounded in morality and relies upon the concept of free will, where offenders have “made a rational and voluntary choice to violate a community norm,”<sup>278</sup> and “deserve to be punished because they freely chose to commit

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<sup>275</sup> *Mandatory Minimum Sentences: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 2 (2009) (statement of Hon. J. Julie E. Carnes, Chair, Criminal Law Comm. of the Judicial Conference), [https://judiciary.house.gov/\\_files/hearings/pdf/Carnes090714.pdf](https://judiciary.house.gov/_files/hearings/pdf/Carnes090714.pdf).

<sup>276</sup> ALEXANDER, *supra* note 9, at 93. In her book, Professor Alexander recounts stories of federal judges, both conservative and liberal, who have openly denounced mandatory minimum sentences. According to Professor Alexander, “Judge Lawrence Irving, a Reagan appointee, noted upon his retirement: ‘If I remain on the bench, I have no choice but to follow the law. I just can’t, in good conscience, continue to do this.’” *Id.* at 92 (citing *Criticizing Sentencing Rules, US Judge Resigns*, N.Y. TIMES (Sept. 30, 1990), <http://www.nytimes.com/1990/09/30/us/criticizing-sentencing-rules-us-judge-resigns.html>). Further, she writes, “[a]nother Reagan appointee, Judge Stanley Marshall told a reporter, ‘I’ve always been considered a fairly harsh sentencer, but it’s killing me that I’m sending so many low-level offenders away for all this time.’” *Id.* (citing Chris Carmody, *Revolt to Sentencing is gaining Momentum*, NAT’L L. J., 10 (May 17, 1993)).

<sup>277</sup> Peter Baker, *Bill Clinton Concedes His Crime Law Jailed Too Many for Too Long*, N.Y. TIMES (July 15, 2015), <http://nyti.ms/1HvZBL9>.

<sup>278</sup> Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1535 (1992).

crime.”<sup>279</sup> According to the theory of desert, criminality is a choice manifested at the time that the criminal act is committed.<sup>280</sup> Punishment is then distributed in accordance with the degree of immorality of the criminal choice—a more immoral choice requires more punishment, while a less immoral choice requires less.

For desert to function fairly proportionality must be measureable—retribution requires punishment no more and no less than what is deserved, “solely because the offender deserves it.”<sup>281</sup> The basic premise underlying desert, however, is that what is “deserved” is identifiable and quantifiable. In its current form, retribution cannot be gauged and translated into precise prison terms. Professor Paul H. Robinson argues that:

[T]raditional principles of incapacitation and desert conflict; they inevitably distribute liability and punishment differently. To advance one, the system must sacrifice the other. The irreconcilable differences reflect the fact that prevention and desert seek to achieve different goals. Incapacitation concerns itself with the future—avoiding future crimes. Desert concerns itself with the past—allocating punishment for past offenses.<sup>282</sup>

Further, Professor Russell Christopher insists that retribution does not justify modern-day incarceration because it is temporal punishment that consists of discrete component parts.<sup>283</sup> He concludes that temporal punishment can never satisfy retribution’s proportionality requirement because it is impossible to serve the entire sentence without unfairly serving less time.<sup>284</sup> In his estimation, serving less time than what is deserved violates

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<sup>279</sup> Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23, 32 (2011).

<sup>280</sup> See *id.* at 45 (“[C]riminal liability requires a voluntary act by the defendant that caused (or created a sufficient risk of) a specified social harm.”); see also Arenella, *supra* note 278, at 1534–35 (discussing the view that some “[j]ust desert’ retributivists” have of focusing on the individual’s choice).

<sup>281</sup> Russell Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 282 (2005).

<sup>282</sup> Robinson, *Punishing Dangerousness*, *supra* note 266, at 1441.

<sup>283</sup> Christopher, *supra* note 281, at 285–90.

<sup>284</sup> *Id.* at 285–89.

retribution's guiding principles.<sup>285</sup> His reasoning and that of other scholars, however, assumes that retributive blameworthiness can be precisely quantified in imprisonment terms, *and* that we have already correctly identified that measure.<sup>286</sup> Professor Christopher's assertion that retribution cannot justify modern-day incarceration because it consists of temporal, divisible terms, can be extended to include that retribution cannot justify terms of incarceration because what is "deserved" cannot be translated into prison time with any degree of certainty.<sup>287</sup> Retribution, though attractive, cannot justify incarceration because, standing alone, it is unquantifiable.<sup>288</sup> Any improved sentencing model that embraces uncertainty cannot rely on retribution as its guiding punishment principle.

*B. Deterrence Does Not Yet Justify Modern-Day Incarceration*

Deterrence cannot reasonably justify modern-day incarceration. Incapacitation aims to specifically deter because it demands physical restraint as punishment in order to categorically prohibit individual offenders from engaging in future crimes.<sup>289</sup> Theoretically, incarceration is considered general deterrence as well because it is crafted to threaten would-be offenders against engaging in crime by publicizing imprisonment as its consequence.<sup>290</sup> However, it is well established that lengthy incarceration fails to deter crime, whether specifically or generally.<sup>291</sup> This is most evident when studying recidivism statistics.

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<sup>285</sup> *Id.* at 286.

<sup>286</sup> *See id.* at 307–08 (discussing how retributivism “seeks to precisely determine-no more and no less than what an offender deserves-the appropriate punishment”).

<sup>287</sup> *Id.* at 286–87.

<sup>288</sup> *See id.* at 307–09.

<sup>289</sup> *See* Robinson, *Punishing Dangerousness*, *supra* note 266, at 1441.

<sup>290</sup> *See id.* at 1432.

<sup>291</sup> *See id.*; *see also* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 336 (2014), <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> (concluding that “[t]he unprecedented rise in incarceration rates can be attributed to an increasingly

Despite the imposition of excessively lengthy sentences, recidivism rates continue to rise.<sup>292</sup> More often than not, the long and unfair prison experience turns offenders into hardened criminals who are more likely to reoffend.<sup>293</sup> For example, a study of national recidivism rates of offenders released in 2005 reported that 68 percent were rearrested within three years and 77 percent were rearrested within five years.<sup>294</sup> Even certain courts have noted that, “[t]he [prison] atmosphere makes debilitation much more likely than rehabilitation. Whether by introducing petty criminals to more violent offenders, forcing prisoners into racist gangs, or subjecting them to violence and rape, too often the prison system serves merely to exacerbate the criminal tendencies of its inhabitants.”<sup>295</sup> Further, the lack of rehabilitative programs in prison often leads to increased recidivism. Many prisoners idly pass the time because rehabilitative

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punitive political climate” that “provided the context for a series of policy choices . . . that significantly increased sentence lengths”).

<sup>292</sup> Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, U.S. Correctional Population Reaches 6.3 Million Men and Women Represents 3.1 Percent of the Adult U.S. Population (July 23, 2000), <http://www.bjs.gov/content/pub/press/pp99pr.pr>; see John Moore, *Report: America’s Prison Population Is Growing Again* (Dec. 22, 2014), <http://www.newsweek.com/americas-correctional-system-numbers-293583>.

<sup>293</sup> See Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, U.S. Correctional Population Reaches 6.3 Million Men and Women Represents 3.1 Percent of the Adult U.S. Population (July 23, 2000), <http://www.bjs.gov/content/pub/press/pp99pr.pr>; Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, National Correctional Population Reaches New High (Aug. 26, 2001), <http://www.justice.gov/opa/pr/2001/August/429ag.htm>.

<sup>294</sup> Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010 (Apr. 2014), [www.bjs.gov/content/pub/press/rprts05p0510pr.cfm](http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm).

<sup>295</sup> See *United States v. Blake*, 89 F. Supp. 2d 328, 344 (E.D.N.Y. 2000). Additionally, lengthy prison sentences and higher spending has not decreased state recidivism. In the state system, two-thirds of offenders return to prison within three years of release. Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, 3 In 4 Former Prisoners in 30 States Arrested Within 5 Years of Release (Apr. 22, 2014), <http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm>. This number is close to 60 percent in some states. *Id.*

educational programs, libraries, and drug program funding have been cut.<sup>296</sup>

Academics contend that the incarceration rate is so elevated that the “net effect is ‘crimogenic.’”<sup>297</sup> This broken system actually leads to a reduction in public safety, as prisoners leave jails more harmful to society than when they entered.<sup>298</sup> Studies now show that increased penalties for second and third offenses may actually “escalate the severity of a recidivist’s crimes.”<sup>299</sup> Finally, former federal prisoners are routinely returned to federal prison on probation violations—most of them small, such as traveling out of territory, missing a report appointment, using marijuana, and the like.<sup>300</sup> Often, returns are accompanied with new charges and more

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<sup>296</sup> See, e.g., *Rehabilitation Programs can Cut Prisons Cost, Report Says*, ORANGE COUNTY REG. (July 1, 2007), <http://www.ocregister.com/articles/inmates-194495-prison-programs.html>; Matt Clarke, *Prison Education Programs Threatened*, PRISON LEGAL NEWS (May 19, 2014), <https://www.prisonlegalnews.org/news/2014/may/19/prison-education-programs-threatened/>; Michael Rothfield, *As Rehab*

*Programs are Cut, Prisons Do Less to Keep Inmates from Returning*, L.A. TIMES (Oct. 17, 2009), <http://articles.latimes.com/2009/oct/17/local/me-rehab17>; Mike Ward, *State Jails Struggle with Lack of Treatment, Rehab Programs*, STATESMAN.COM (Dec. 30, 2012), <http://www.statesman.com/news/news/state-regional-govt-politics/state-jails-struggle-with-lack-of-treatment-rehab-1nTh8q/>.

<sup>297</sup> John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 12, 2012), <http://nyti.ms/1BaNfWQ>.

<sup>298</sup> See *id.* (defining “crimogenic” as “creating more crime over the long term by harming the social fabric in communities and permanently damaging the economic prospects of prisoners as well as their families”); VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 6–7 (2010), <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf> (describing the findings of studies that showed longer sentences were affiliated with higher rates of recidivism).

<sup>299</sup> See BAKER ET AL., *supra* note 4, at 19.

<sup>300</sup> See generally PEW CHARITABLE TRUSTS, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS (2007), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2007/when20offenders20break20the20rulespdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2007/when20offenders20break20the20rulespdf.pdf); M. Kevin Gray et al., *Examining Probation Violations: Who, What, and When*, 47 CRIME & DELINQ. 537 (2001) (reporting that “most probation violations were for technical reasons”); WILLIAM RHODES ET AL., RECIDIVISM OF OFFENDERS ON FEDERAL COMMUNITY SUPERVISION (2013), <https://www.ncjrs.gov/pdffiles1/bjs/grants/241018.pdf>.



jail time arising from these violations.<sup>301</sup> Modern-day incarceration thus does not deter criminal behavior.

Further, scholars contend that current deterrence models cannot predict future conditions. In Professor Paul Robinson's words, "not only does reliable deterrence analysis require information that is not now available and an understanding of the interrelation among the relevant factors that we do not now have, but it also requires a constant updating of the analysis because the relevant factors themselves are constantly in motion."<sup>302</sup> This disregard of change extinguishes any meaningfulness in deterrence-purposed incapacitation. Specific deterrence asserts that specific punishment, usually incapacitation, is necessary to prohibit future crimes of the offender. General deterrence hopes that the public crime prevention message invoked at sentencing will remain the same throughout the sentence, thus deterring others from committing crime. Neither of these factors has proven true in our criminal justice system. An offender's degree of dangerousness, as a predictor of propensity to commit future crime, cannot be measured at sentencing. Logically, then, deterrence does not yet justify present-day incarceration.

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<sup>301</sup> See generally PEW CHARITABLE TRUSTS, *supra* note 300. Yet, concurrently, federal expenditures for prisons have increased as the need to build new prisons arises to support the exploding population. James Ridgeway & Jean Casella, *New Federal Budget: Plenty of Money for Prisons*, SOLITARY WATCH (Feb. 25, 2012), <http://solitarywatch.com/2012/02/25/new-federal-budget-plenty-of-money-for-prisons/>.

<sup>302</sup> See ROBINSON, *DISTRIBUTIVE PRINCIPLES*, *supra* note 16, at 77. In Professor Robinson's words,

[T]his practice [of imposing determinate sentences soon after trial] is highly inappropriate for effective prevention. It is difficult enough to determine a person's present dangerousness—whether he would commit an offense if released today. It is . . . [much] more difficult to predict . . . an offender's future dangerousness—whether he would commit an offense if released at . . . the end of the deserved punishment term in the future. It is still more difficult, if not impossible, to predict today precisely how long the future preventive detention will need to last. Yet that is what determinate sentencing demands: the imposition now of a fixed term that predicts preventive needs far in[to] the future.

*Id.* at 129.

However, embracing the uncertainty inherent in deterrence-aligned sentencing can assist in recalibrating prison's purpose.

In this age of mass incarceration, deterrence and rehabilitation must work as allies. Measuring rehabilitation can inform whether specific deterrence has been accomplished, and ultimately, if incarceration prevents or reduces crime. To do this, it is necessary for incarceration's focus to shift. If imprisonment is to remain as our chief punishment tool, incarceration's purpose must be specific deterrence, measured by rehabilitation. However, fulfillment of rehabilitation's goals must be critically evaluated throughout the period of incarceration.

*C. Rehabilitation Should Be Modern-Day Prison's Purpose*

In *Tapia v United States*, the Supreme Court confirmed that rehabilitation must never be the goal of federal incarceration.<sup>303</sup> In a unanimous opinion, the Court reasoned that sentencing judges must choose among “imprisonment, . . . probation, or a fine” as punishment, and that they must consider the § 3553(a) factors in doing so.<sup>304</sup> However, the Court clarified that “a particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration,” and that rehabilitation should never be considered in determining if and for how long to incarcerate an offender.<sup>305</sup>

Alejandra Tapia was convicted of smuggling unauthorized aliens into the United States and was sentenced to fifty-one months in prison, followed by three years of supervised release.<sup>306</sup> The issue before the Court was whether the SRA “precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation.”<sup>307</sup> The Court held that the sentencing judge unlawfully lengthened Tapia's sentence to include

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<sup>303</sup> *Tapia v. United States*, 564 U.S. 319 (2011).

<sup>304</sup> *Id.* at 325.

<sup>305</sup> *Id.* at 326, 332.

<sup>306</sup> *Id.* at 321.

<sup>307</sup> *Id.*

a directive to attend a rehabilitative drug treatment program.<sup>308</sup> The Court found that the prohibition against using rehabilitation to determine length of incapacitation was clear, emphasizing that even the Guidelines “reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant.”<sup>309</sup> According to the Court, “[e]ach actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender.”<sup>310</sup> Rehabilitation is only an appropriate consideration if courts choose probation or supervised release.<sup>311</sup> The Court emphasized that length of detention must only be settled by § 3582 (a)(2).<sup>312</sup> § 3582 (a)(2) states, in part:

The court, in determining whether to impose a term of imprisonment, and if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.<sup>313</sup>

In *Tapia*, the Court made it abundantly clear that rehabilitation cannot be incarceration’s purpose. However, if incarceration is to continue as the principal punishment method, this must change. The task of creating appropriate measures of rehabilitation remains to be undertaken. Embracing the doctrine of uncertainty can assist in repairing the relationship between rehabilitation and incarceration. Following the experimentalist model, multileveled information sharing and periodic reviews can assist in informing how to rehabilitate and whether rehabilitation has been met in cases where we choose to incarcerate.

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<sup>308</sup> *Id.* at 334–35.

<sup>309</sup> *Id.* at 329–30 (quoting 28 U.S.C. § 994(k)).

<sup>310</sup> *Id.* at 330.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 326.

<sup>313</sup> *Id.* at 326 (quoting 18 U.S.C. § 3582(a)).

## V. A NEW MODEL OF SENTENCING REFORM

Any new model of federal criminal sentencing must embrace the principal of uncertainty to craft fair, meaningful determinate sentences that utilize a well-informed punishment floor, yet allow room for substantial post-conviction review. It must begin with a reasoned starting point, followed by periodic opportunities for robust evaluation. If incarceration is to be imposed on offenders, rehabilitation should be its only reasonable goal.<sup>314</sup> However, history has proven that traditional imprisonment should not be presumed as the paramount punishment for the general population of offenders.<sup>315</sup> Instead, home incarceration and probation should be considered sound as sentencing starting points.<sup>316</sup> Current research demonstrates that probation and community-based programs effectively punish nonviolent offenders.<sup>317</sup> To be successful, home

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<sup>314</sup> See *supra* Part IV.

<sup>315</sup> *Id.*

<sup>316</sup> Studies show that probation has been proven to achieve punishment purposes for many offenses, and that strict home incarceration is sound punishment as well. Jefferson-Bullock, *supra* note 13.

<sup>317</sup> In a recent speech to the American Bar Association, former Attorney General Eric Holder lauded the accomplishments of community-based programs in Kentucky, Texas, Arkansas, Hawaii, Georgia, North Carolina, Ohio and Pennsylvania that have worked to reduce recidivism, decrease the prison population, and save money. Att’y Gen. Holder, *supra* note 9. Attorney General Holder praised a Kentucky program that “reserved prison beds for the most serious offenders and re-focused resources on community supervision and evidence-based alternative programs.” *Id.* This particular program saved more than \$400 million and is “projected to reduce the prison population by more than 3,000 over the next ten years.” *Id.* He also specifically referenced rehabilitative programs in Texas and Arkansas that helped to reduce the prison populations of those states by 5,000 and 1,400, respectively. *Id.* According to him, these types of state programs have resulted in “three consecutive years of decline in America’s overall prison population.” *Id.* He notes, however, that the federal prison system continues to expand. *Id.* There is further evidence that community based programs that de-emphasize incarceration work. For example, the West End Project in High Point, North Carolina reduced crime by not incarcerating possible offenders against whom they had acquired damning evidence. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 25 (2009). Instead, police officers engaged their families, community groups and evidence based programs to try to steer them from a life of crime. See *id.* at 175. The program led to a 36 percent decrease in crime. See *id.* (citing *Drug Market Intervention Initiative*, DEP’T OF JUST.,

incarceration and probation must be supported by intensive, community-grounded, evidence-based programs. Studies show that implementing such reforms would decrease the prison population by half, “with no detriment to public safety, and considerable savings to taxpayers.”<sup>318</sup> Home incarceration and probation are well-researched sentencing points of departure.<sup>319</sup>

Using home incarceration and probation as sentencing starting points, legislators can borrow concepts from the Safe Justice Act, Smarter Sentencing Act, and Corrections Act to assist in crafting a novel model of federal sentencing that ensures community safety, penalizes offenders fairly, achieves punishment’s goals, and embraces the principle of uncertainty.<sup>320</sup> Without explicitly stating so, the Corrections Act and Safe Justice Act correctly convert

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<http://www.ojp.usdoj.gov/BJA/topics/DMII.pdf> (last visited July 12, 2014)). Research suggests that, “[i]n-prison vocational programs produced net benefits of \$13,738 per offender” and that community-based employment and job training services “yielded \$4,359 per offender, the equivalent of \$11.90 per dollar invested.” PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 23 (2010), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/collateralcosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf) (citing STEVE AOS, MARNE MILLER, & ELIZABETH DRAKE, WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006), <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>); see ALISON LAWRENCE, NAT’L CONF. OF ST. LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS (2009), [http://www.ncsl.org/documents/cj/Earned\\_time\\_report.pdf](http://www.ncsl.org/documents/cj/Earned_time_report.pdf).

<sup>318</sup> BUTLER, *supra* note 317, at 182 (citing JAMES AUSTIN ET AL., JFA INSTITUTE, UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION (Nov. 2007), <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>; see also FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997).

<sup>319</sup> See *supra* note 317 and accompanying text.

<sup>320</sup> See, e.g., Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong., § 523(b) (2015) (proposing alternative sanctions to the revocation of probation such as “community confinement[] or home detention in order not to disrupt employment or other community obligation”); Smarter Sentencing Act, S. 502, 114th Cong. (2015) (reducing sentence lengths); CORRECTIONS Act, S. 467, 114th Cong. (2015) (allowing individuals to earn “time credits” to become eligible for “prerelease custody”).

incarceration's principal purpose to rehabilitation.<sup>321</sup> The Corrections Act allows some offenders access to certified rehabilitative and job programs and offers generous time credit incentives.<sup>322</sup> Recidivists and violent offenders are barred from earning time credits for participation in such programs, but are nevertheless awarded with increased visitation and phone usage upon program completion.<sup>323</sup> Likewise, the Safe Justice Act establishes reliable, vigorous rehabilitation programs for all offenders in order to fuel and improve reentry.<sup>324</sup> Offering the types of rehabilitative programs submitted in the Corrections Act and Safe Justice Act in the manner prescribed by the Safe Justice Act will result in a fair, cost-effective incarceration paradigm in situations where imprisonment is deemed necessary.<sup>325</sup>

While ambitious, the Safe Justice Act and Corrections Act neglect to provide genuine sentencing relief for the bulk of existing offenders. Instead, they permit prospective relief for a small group of future nonviolent, low-level, first-time offenders through the presumption of probation and the option of home incarceration, respectively.<sup>326</sup> Those sentenced prior to the Safe Justice Act becoming law may move the court to determine whether, in light of maximum term reductions, the court will award them a comparable sentence reduction.<sup>327</sup> If denied, first-time offenders may refile upon completion of recognized rehabilitative or reentry programs.<sup>328</sup> The

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<sup>321</sup> See S. 467 (focusing on using programs to reduce recidivism); H.R. 2944. The Smarter Sentencing Act appears to ignore rehabilitation completely by only slashing certain mandatory minimum sentences by approximately half. See S. 502 § 4.

<sup>322</sup> S. 467 § 7(c)(3)(B).

<sup>323</sup> *Id.* at § 2(b).

<sup>324</sup> See H.R. 2944, tit. V, § 502(1)(B).

<sup>325</sup> See Neil King, Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL ST. J. (June 21, 2013), <http://online.wsj.com/news/articles/SB10001424127887323836504578551902602217018>; BUTLER, *supra* note 317, at 1184; Tierney, *supra* note 297.

<sup>326</sup> See S. 467 § 4; H.R. 2944, tit. IV, § 405.

<sup>327</sup> If the motion is denied, the movant may refile within 5 years of each denial if the offender demonstrates successful completion of rehabilitative or reentry programs. H.R. 2944, tit. IV, § 405.

<sup>328</sup> *Id.*

Corrections Act does not even allow this type of partial relief.<sup>329</sup> Moving forward, sentencing relief must apply retroactively.

Moreover, none of the bills contain a clear, evidence-based sentencing starting point. This omission is most glaring in the Smarter Sentencing Act, which simply shortens existing prison sentences.<sup>330</sup> The Smarter Sentencing Act neglects to employ any hard research to justify why proposed sentences are suitable.<sup>331</sup> The Corrections Act steps in the right direction by demanding the implementation of valuable recidivism reduction and job programs in federal prison, but fails to confront the complex question of why prison is the appropriate default punishment.<sup>332</sup> It attempts to question the efficacy of prison by introducing home incarceration, but severely restricts that option.<sup>333</sup> The Corrections Act also effectively fails to reduce criminal sentences.<sup>334</sup> The Safe Justice Act also chooses a reasonable, reviewable sentencing point of departure—probation. In presuming probation for certain offenders, the Safe Justice Act's authors affirm that they are not convinced that prison is always the best punishment option. This presumption is limited, however, to a small class of first-time, low-level, nonviolent offenders.<sup>335</sup> Any new sentencing model must seriously consider probation and home incarceration as firm points of sentencing departure for all nonviolent offenders.

Most importantly, embracing uncertainty requires the adoption of rigorous review tools to evaluate the effectiveness of punishment post-conviction. Each bill includes evaluative tools critical to the experimentalist model. The Safe Justice Act's reporting stipulations, however, best mirror the type of resource pooling, information sharing, benchmarking, and continuous evaluation required of an experimentalist-informed sentencing archetype.<sup>336</sup> First, the Safe Justice Act compels resource gathering and sharing among the

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<sup>329</sup> See S. 467.

<sup>330</sup> See Smarter Sentencing Act, S. 502, 114th Cong. § 4 (2015).

<sup>331</sup> See *id.*

<sup>332</sup> See S. 467 § 4.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> See Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. tit. III (2015).

<sup>336</sup> *Id.* at § 604.

Sentencing Commission, courts, U.S. Attorney General, Bureau of Prisons, and other state, federal, and community entities to create thoroughly-proven, evidence-based recidivism reduction programs.<sup>337</sup> Next, the Safe Justice Act mandates creation of individual offender case plans created by the Bureau of Prisons and the Attorney General, and subject to local and executive review, which will assist in benchmarking offender-specific best practices.<sup>338</sup> Finally, Title VI of the Safe Justice Act champions vigorous continuous evaluation by requiring “transparency accuracy” in reporting of mandatory minimum data, prison budget and population impact, prosecutorial charging decisions, specific offender data by institution, credit and recidivism reduction programming, probation data, and supervised release data usage, within one year of enactment of the Act.<sup>339</sup>

Further, reporting in the Safe Justice Act does not only occur vertically. Rather, reporting is distributed horizontally among the U.S. Attorney General, Government Accountability Office, Congress, Bureau of Prisons, Inspector General, the courts, states, and the community.<sup>340</sup> The Safe Justice Act accepts the uncertain nature of measuring punishment effectiveness, and appropriately insists that both programs and case plans be reviewed, and possibly reconfigured annually, to ensure offender and program success.<sup>341</sup> This type of benchmarking and development of best practices is most essential in fashioning a fair, rational, unbiased reformed sentencing model. Combining a rational sentencing starting point with vigorous evaluation will produce meaningful, *true* criminal sentencing reform.

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<sup>337</sup> *Id.*

<sup>338</sup> Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. tit. V (2015).

<sup>339</sup> Sensenbrenner-Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. tit. VI (2015).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*



## CONCLUSION

The time is ripe for criminal sentencing reform.<sup>342</sup> Similar to the SRA era, critics on both sides of the aisle enthusiastically advocate for change<sup>343</sup>—lamenting the fiscal, social, emotional, and cultural costs of our present ill-structured system.<sup>344</sup> Legislative and executive leadership have joined forces to construct a rational, fair sentencing paradigm and are poised to remedy the calamitous ills wrought by criminal justice reform nearly three decades ago.<sup>345</sup> The setting is eerily familiar and the timing is again perfect—an overwhelming majority of decision makers and the public agree that our archaic sentencing structure must be reconfigured.<sup>346</sup> This time, however, it is essential to get it right. Modern-day sentencing reform should proceed with the assistance of sound research, and must remain committed to reevaluating that research until we achieve an effective sentencing design.

During this renewed season of sentencing change, law and policy makers must deliberately acknowledge the myriad SRA-produced catastrophes and disavow repeating the same ill-fated mistakes. To do so, it is absolutely necessary to eliminate lengthy mandatory minimum sentences for the general population of offenders. Instead of following past practice of thrusting poorly conceived terms of incarceration on offenders, sentencing type and duration should be informed by reason and logic. Research proves that probation and home incarceration is effective punishment for the majority of offenders.<sup>347</sup> Law and policy makers should engage these tools to reduce prison overcrowding, decrease prison costs, renew the fabric of communities, and properly and safely punish offenders.

Finally, it is essential to harness the power of uncertainty by imposing continuous evaluation of sentence type and duration to measure effectiveness. Decision makers must reach back beyond

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<sup>342</sup> See *supra* note 6 and accompanying text.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> See *supra* Part V.

SRA-era reforms and bring such knowledge to bear in crafting current legislation. Borrowing from indeterminate sentencing pedagogy, specifically in the area of post-sentence review, can assist in engineering today's renewed sentencing model design. Embracing uncertainty will guarantee the creation of a sound, fair, unbiased sentencing regime that is closer to understanding *how much punishment is enough*.