When Further Incarceration Is No Longer in the Interest of Justice: Instituting a Federal Prosecutor-Initiated Resentencing Framework

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The dire state of the prison population in the United States has become common knowledge both at home and abroad. Mass incarceration in the United States has been caused by nearly four decades of retributive criminal justice policies that do little to reduce crime. This mass incarceration imposes a multitude of costs on American society, both financially and socially. Furthermore, congressional goals to reduce crime rates are necessarily undermined by punitive policies at the federal level. The history of California's penal system during the same time frame parallels the federal history. Yet in 2017, California began to remedy this history by instituting Prosecutor-Initiated Resentencing, a framework allowing prosecutors to file motions for resentencing using postconviction rehabilitation as a primary factor. This Note discusses why restraints on the current federal resentencing framework defeat the goals of the Sentencing Reform Act of 1984, as well as the goals of sentencing as articulated by that Act. Subsequently, this Note explains why instituting the California framework at the federal level would further federal sentencing goals while decreasing the federal prison population and maintaining public safety.

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INTRODUCTION

Years of retributivist criminal justice policies[1] at both the federal and state level have resulted in the mass incarceration for which the United States has become infamous. The Federal Sentencing Reform Act of 1984 (SRA) was passed to counteract a history of "arbitrary and capricious" sentencing that had led to disparities in sentences and uncertainty on behalf of the defendant.[2] What resulted was an overcorrection focused on increasingly retributivist policies that led to the mass incarceration we see today.[3] These results undermine the original legislative purpose of the Act, which not only was to allow for more certainty in sentencing, but also to leave room for individually warranted considerations and advances in science regarding criminal justice. A remarkable amount of research has shown that retributive criminal justice policies do little to prevent recidivism or effectuate general deterrence.[4]

Given this background, this Note discusses the federal application of a resentencing framework known as Prosecutor-Initiated Resentencing.[5] Implementing a Prosecutor-Initiated Resentencing (PIR) framework would accomplish two key things. First, it would allow federal prosecutors to file motions for sentence modification based on "extraordinary and compelling reasons" under title 18 U.S.C. § 3582(c)(1)(A).[6] Second, a PIR framework would allow for those extraordinary and compelling reasons to be based primarily on postconviction rehabilitation. This proposed model is based on the PIR model, discussed in detail in Part IV, first introduced by California in 2017,[7] and which has now been adopted by several states, including Oregon,[8] Illinois,[9] Washington,[10] and Louisiana.[11]

Part I gives a brief overview of the issues that federal mass incarceration poses to the United States and of the theories of punishment that inform sentencing law. Part II discusses the legislative goals behind federal sentencing

1. *See* discussion *infra* Part I.C.

2. *See* S. REP. NO. 98-225, at 65 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3248 (1983).

3. *See* discussion *infra* Part I.A. In the three decades after the United States began instituting tough-on-crime policies, the number of people convicted of felonies by state and local governments tripled, with sentence lengths doubling. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307 (2009).

4. *See* discussion *infra* Part II.

5. The proposed framework would continue to allow the Director of the Bureau of Prisons in the district of conviction, or the defendant themselves, to file motions for sentencing reduction.

6. Sentence modifications under § 3582(c)(1) are often referred to as "compassionate releases." U.S. SENTENCING COMMISSION, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 1 (2022).

7. *See* Assemb. B. 1812, 2018 Gen. Assemb., Reg. Sess. (Cal. 2018) (codified as amended at CAL. PENAL CODE § 1170 (West 2022)) (current version at CAL. PENAL CODE § 1172.1 (West 2022)); Assemb. B. 2942, 2018 Gen. Assemb., Reg. Sess. (Cal. 2018) (codified as amended at CAL. PENAL CODE § 1170 (West 2022)) (current version at CAL. PENAL CODE § 1172.1 (West 2022)).

8. OR. REV. STAT. § 414.359(2)(k), 414.688(2)(e) (2021).

9. *See* S.B. 2129, 102d Gen. Assemb., Reg. Sess. (Ill. 2021).

10. WASH. REV. CODE § 36.27.130 (2020).

11. *See* S.B. 186, 2021 Gen. Assemb., Reg. Sess. (La. 2021)

law. Part III discusses why the purposes behind the original SRA and subsequent criminal justice reforms that seek to reduce the federal prison population are in tension with specific parameters placed on those goals. Namely, those parameters prevent rehabilitation as a basis for sentence modification and arbitrarily dispose of the need to craft sentencing policy with an eye toward the underlying theories of punishment. The proposed solution in the form of adopting California's PIR framework is summarized in Part IV, and Part V concludes with recommendations for the logistics of implementing prosecutor-initiated resentencing on the federal level.

I. BACKGROUND

A. THE ISSUE OF OVERINCARCERATION

It is hardly a secret that the United States imprisons far more people per capita than any other nation.[12] In the past thirty years there has been a 409% increase in the federal prison population,[13] and federal institutions currently incarcerate a population equal to nearly a third of the population of Sacramento.[14]

Fortunately for criminal justice reform, in the last fifteen years, the discussion has shifted so that formerly grassroots conversations around reform have come into the mainstream. Now, instead of the conversations being about convincing the public that mass incarceration is an issue, the conversation has shifted to solving the problem of mass incarceration. Take, for example, meetings between reality star, Kim Kardashian, and former President Donald Trump. Kardashian worked with the former president's son-in-law, Jared Kushner, to lobby the former president around the issue and pass the 2018 First Step Act.[15] Yet mainstream policy discussions are often focused on the front-end of incarceration, such as targeting mandatory minimums and strike-enhancements. This forward-looking approach is necessary but does not solve the *current* issue of mass incarceration in the United States. Convincing the public that presently incarcerated offenders should be released from prison early may take a little more work. The public must understand the costs that mass

12. *See* Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html.

13. *Population Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Feb. 23, 2023) (using the statistics from 1982 and 2022).

14. *See id.*; *Quick Facts: Sacramento City, California; United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/0664000,00 (last visited Feb. 23, 2023).

15. Brian Bennett, *How Unlikely Allies Got Prison Reform Done—with an Unlikely Assist from Kim Kardashian West*, TIME (Dec. 21, 2018, 3:57 PM), https://time.com/5486560/prison-reform-jared-kushner-kim-kardashian-west/; *see also* Clear & Austin, *supra* note 3, at 307–08 (citing both politically conservative and liberal commentary critical of U.S. mass incarceration).

incarceration poses to our nation as a whole and to justice-impacted communities specifically.[16]

1. General Cost

The cost of incarceration is a significant financial burden on U.S. taxpayers. From 1982 until 2002, expenditures on corrections nationwide (including on state and county levels) increased from $9 billion to $59.6 billion.[17] In 2020, the average cost of incarceration for federal inmates alone was $39,158 per inmate.[18] Extrapolated to 2022 population numbers, this represents an annual cost of over $6 billion to incarcerate federally held inmates.

Further, the cost of incarcerating elderly inmates is twice that of younger inmates.[19] Evidence from the Bureau of Prisons (among other organizations) shows that most individuals, even violent offenders, age out of criminality.[20] The propensity to commit violent crimes declines by an individual's early thirties, and the propensity to commit property and similar crimes drops sharply after age forty-five.[21] Now consider that 34.6% of federal inmates are over the age of forty-five. In addition to "undermining our ability to hold the most violent accountable,"[22] those costs could instead be spent on reparative justice for crime victims and criminogenic prophylactics.[23]

2. Cost to Specific Communities

The greatest costs incurred by mass incarceration are those felt by justice-impacted communities. These communities, overwhelmingly concentrated in non-White populations,[24] shoulder the socioeconomic, health, and emotional burdens of mass incarceration. Not only can having an incarcerated family member mean losing household income,[25] but it also can entail additional costs

16. "Justice-impacted" is used to include those who have been incarcerated as well as their families and communities.

17. Second Chance Act of 2007, Pub. L. No. 110-199, § 3, 122 Stat. 657, 659 (codified as amended at 42 U.S.C. § 17501).

18. Annual Determination of Average Cost of Incarceration Fee, 86 Fed. Reg. 49060, 49060 (Sept. 1, 2021).

19. ACLU, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY ii (2012), https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf.

20. Emily Bloomenthal, *The Older You Get: Why Incarcerating the Elderly Makes Us Less Safe*, FAMM FOUND. (Apr. 19, 2022), https://medium.com/famm/the-older-you-get-why-incarcerating-the-elderly-makes-us-less-safe-ce8cd0a9801.

21. *Id.*

22. Rachel Swan, *Man Who Spent 17 Years in Prison for Orinda Burglary Is Freed Under New Law*, S.F. CHRON. (May 3, 2021, 8:26 PM), https://www.sfchronicle.com/local/article/Man-who-spent-17-years-in-prison-for-Orinda-16148865.php#photo-20944392 (internal quotation marks omitted) (quoting Contra Costa District Attorney Diana Becton).

23. Some examples include vocational education programs and programs for at-risk youth.

24. Elizabeth J. Gifford, *How Incarceration Affects the Health of Communities and Families*, 80 N.C. MED. J. 372, 372 (2019). For further reading on the disproportionate incarceration of Black communities, see Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 100–09 (2008).

25. *See* Gifford, *supra* note 24.

to make sure that an incarcerated family member has access to scarce resources in prison.[26] Incarceration of family and community members also affects the physical health of their loved ones. Dr. Elizabeth Gifford has explained that "[h]igh incarceration rates may also have detrimental effects on communities due to . . . increased exposure to infectious diseases[] and shifting public resources from health and social supports to the penal system."[27] One of the most alarming health effects is that children who live in impacted neighborhoods "[a]re linked to worse cognitive outcomes in reading comprehension, math problem solving, and memory- and attention-related tasks."[28] These health effects are at least partly attributable to the social and emotional tolls that incarceration places on a community.[29] Finally, because incarceration rates are highly concentrated in specific areas, felony disenfranchisement essentially translates into community-wide disenfranchisement.[30] Simply put, high rates of incarceration in a community "impair children, family functioning, mental and physical health, labor markets, and economic and political infrastructures."[31] That the detrimental results of incarceration extend so far beyond the prison walls is another reason to reconsider the sentences of people who no longer pose a risk to public safety.

B. FEDERAL SENTENCING COMMISSION AND GUIDELINES

The U.S. Sentencing Commission plays a vital role in shaping federal sentencing law and policy. The Sentencing Commission is an independent judicial agency created by the enactment of the SRA,[32] which itself was a part of a comprehensive criminal justice omnibus, The Comprehensive Crime Control Act of 1983.[33] The Sentencing Commission is composed of seven voting members and one nonvoting member, appointed by the President with the advice and consent of the Senate,[34] with the Attorney General or their designee serving

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26. *See* Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration#:~:text=The%20Bureau%20of%20Justice%20Statistics,2.3%20million%20people%20behind%20bars ("Public prisons are public only by name . . . . These days, you pay for everything in prison.").

27. Gifford explains that:

> One of the most well studied effects of community-level incarceration is increased risk of contracting a sexually transmitted infection (STI), including HIV/AIDS. This effect is particularly salient for Black women, partly due to the increased exposure of men to STIs while incarcerated and the smaller sexual partner network that results from removing men from the community for incarceration.

Gifford, *supra* note 24.

28. *Id.*

29. *Id.* ("Community characteristics such as feeling safe, trusting one's neighbors, and having access to resources are important determinants of health and well-being.").

30. Clear, *supra* note 24, at 116.

31. *Id.* at 97.

32. *See* 28 U.S.C. § 991(a); *see also* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 28 U.S.C. §§ 991–998 and in scattered sections of 18 U.S.C.).

33. *See* S. REP. NO. 98-225, at 65 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3248 (1983).

34. 28 U.S.C. § 991(a).

as a second nonvoting member.[35] It is a bipartisan agency, with no more than four members of the same political party able to serve on the Commission and no more than two out of three vicechairs from the same party serving at one time.[36] An affirmative vote of four voting members is required to promulgate guidelines and policy.[37] The Commission lacked a voting quorum from 2019 until August 2022 when President Biden appointed, and the Senate confirmed, new nominees.[38]

Before the first Federal Sentencing Guidelines were issued by the Sentencing Commission, federal sentencing law employed a system of indeterminate sentencing constrained only by statutory minimums and maximums.[39] Consequently, the Sentencing Commission was created to issue guidelines that would solve the problems posed by indeterminate sentences being applied in an opaque and arbitrary fashion, which created a fundamentally unpredictable and racialized system.[40] The goal was to implement a nonarbitrary sentencing structure that still afforded sentencing courts flexibility to consider mitigating or aggravating circumstances.[41] And while the Guidelines are subject to rulemaking under the Administrative Procedure Act, Congress gave the Commission significant authority to issue policy statements. Provisions throughout federal sentencing statutes require the judiciary to make sentencing determinations in light of policy statements made by the Commission.[42] For example, the portion of the U.S. Code prescribing sentencing guidance requires courts to consider "any pertinent policy statement . . . issued by the Sentencing Commission."[43] While the Guidelines were initially considered mandatory, the Supreme Court in *United States v. Booker* ruled that they are merely advisory as applied to a defendant's original sentence.[44] This decision shifted some sentencing deference back to the courts.

Of course, the Guidelines are constrained by federal statute. Current federal sentencing law allows for the modification of a final sentence in only four situations.[45] This Note focuses on 18 U.S.C. § 3582(c)(1)(A), which allows for an otherwise final sentence to be modified for "extraordinary and compelling

35. *Id.*

36. *Id.*

37. *Id.* § 994(a).

38. Madison Alder, *US Sentencing Commission Restocked After Senate Confirmations*, BLOOMBERG L. (Aug. 4, 2022, 9:32 PM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XC7KMM7G000000?bna_news_filter=us-law-week#jcite.

39. Mistretta v. United States, 488 U.S. 361, 363, 368 (1989).

40. *See* Michael Tonry, *Federal Sentencing "Reform" Since 1984: The Awful as Enemy of the Good*, 44 CRIME & JUST. 99, 99, 103 (2015).

41. 28 U.S.C. § 991(b)(1)(B).

42. *See* 18 U.S.C. § 3553(a)(5)(A).

43. *Id.*

44. 543 U.S. 220, 222 (2005).

45. 18 U.S.C. § 3582.

reasons."[46] While the Guidelines provide a fairly comprehensive framework for reasons that qualify as "extraordinary and compelling" under § 3582(c)(1)(A), they are prohibited by statute from including rehabilitation alone as such extraordinary and compelling reasons for resentencing.[47] Reasons that do qualify include the medical condition of the defendant, such as in cases of terminal illness, and the age of a defendant who is at least sixty-five years old and has served the lesser of at least ten years or seventy-five percent of their sentence of imprisonment.[48] The Guidelines also consider changes in family circumstances, such as the incapacitation of the defendant's partner, leaving minor children without a caretaker.[49] For a defendant to qualify for sentence modification under § 3582(c)(1)(A), no matter the reason, they cannot pose a danger to the community or specific persons upon release.[50] These particular Guidelines are comparable to a number of those used in state PIR frameworks,[51] and as a result lay part of the groundwork for a federal PIR framework.[52]

C. THEORIES OF PUNISHMENT

It is important to note that the Guidelines explicitly reject the idea that one theory of punishment should inform sentencing law above any other.[53] However, as discussed throughout this Note, utilizing different theories of punishment does result in different sentencing policies and has a fundamental effect on the goals achieved as a result. The four theories cannot be viewed in a vacuum and must be considered with an eye toward their preferred ends. The theories are retribution, deterrence, incapacitation, and rehabilitation.[54]

First, retributive policies can be seen in the form of mandatory minimums and three-strikes laws. The theory of retribution is necessarily backwards looking; it justifies punishment on the basis that the offender deserves to be punished as a result of the offense that they committed and to the extent warranted by the offense.[55] In fact, the positive retributive theory is the only

46. *Id.* § 3582(c)(1)(A)(i). The other situations are when a sentence has been set aside on appeal, *id.* § 3742(f); when the Guidelines for the convicted offense have been subsequently downgraded, *id.* § 3582(c)(2); and for substantial assistance to the state under Rule 35 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 35.

47. 28 U.S.C. § 994(t).

48. U.S. SENT'G GUIDELINES MANUAL § 1.B.1.13, application note 1(A)–(B) (U.S. SENT'G COMM'N 2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

49. *Id.* § 1.B.1.13, application note 1(C).

50. *Id.* § 1.B.1.13(1)(B)(2), application note 1.

51. *See infra* Part IV.

52. *See infra* Part V.

53. U.S. SENT'G GUIDELINES MANUAL, *supra* note 48, § 1.A.1 ("Adherents of each of these points of view urged the Sentencing Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.").

54. These are simplified categorizations.

55. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. L. REV. 843, 847–48 (2002) ("[R]etributivism justifies punishment, or the suffering by the punished, not on any actual good consequences that might be attained, but solely because the punished deserve it.").

widely accepted theory of punishment that does not justify punishment as a means to another end.[56] However, *negative* retribution *is* used as a means to an end, in that it can provide for both victim vindication[57] and restore the balance that was upset when the offender broke the social contract to which others in the society have adhered.[58] On a theoretical level, it is no doubt logical that those ends could be achieved through policies based in negative retributivism, and in practice negative retributivism may indeed provide those effects to some extent. Yet frameworks that cost less to taxpayers and do less damage to the moral fiber of our society can also provide for victim vindication and the recognition of shared moral norms.[59]

Deterrence is a more forward-looking theory focused on the ends of criminal punishment. Its core idea is that whatever the means of punishment, those means should be tailored to deter society at large from committing crimes (general deterrence), as well as to dissuade specific individuals from recidivating after release (specific deterrence).[60]

Incapacitation is perhaps the most straightforward theory of punishment. In essence, incapacitation is a means by which someone is physically prevented from committing crimes through restraint and isolation.[61] As a result, the goal of crime reduction is achieved through incapacitating the person during their imprisonment.[62]

Finally, rehabilitation is often posed as the counter to the theory of retribution. Instead of focusing punishment on just deserts, rehabilitation focuses on the root causes of criminality and prepares the offender to successfully reenter society. The theory of rehabilitation can be controversial because of its focus on the offender rather than on the victim. However, the two are not mutually exclusive. An offender who is truly rehabilitated will no longer pose a danger to people they have previously harmed. Additionally, research shows that victims support a focus on rehabilitation over punishment by a margin of two-to-one.[63]

II. LEGISLATIVE GOALS

Current federal criminal sentencing law and policy has three primary objectives. First, federal law and the Guidelines must reflect the purposes of

56. *Id.*

57. *See* Alec Walen, *Retributive Justice*, STAN. ENCYC. OF PHIL. § 5.3 (2021), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justice-retributive.

58. *See id.* § 5.1.

59. *See* discussion *infra* Parts I.A, III.

60. Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 34 (2016). For more information on deterrence as a theory of punishment, see Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 200 (2013).

61. *See* Nagin, *supra* note 60.

62. *Id.*

63. ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK 15 (2019), https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf.

sentencing under 18 U.S.C. § 3553.[64] The second primary goal as laid out by the SRA is for the Sentencing Commission to design such sentences to be fair, transparent, and nonarbitrary.[65] More recent legislation aims to reduce both the federal prison population and longstanding racial disparities.[66] With the passage of the SRA, Congress made clear its intent for the Commission to become the expert on the most efficient policies and practices for effectuating § 3553 sentencing.[67] Congress also acknowledged that such policies and practices would evolve with growing research and knowledge.[68] Yet critically, the Commission is impeded from fulfilling this mission to the best of its ability by the prohibition on rehabilitation as a basis for extraordinary and compelling reasons for resentencing.

A. BROADER LEGISLATIVE PURPOSES BEHIND CRIMINAL JUSTICE STATUTES: CERTAINTY, FAIRNESS, AND TRANSPARENCY

The legislative purpose behind the SRA is laid out explicitly in the text establishing the Sentencing Commission. History shows that the Act came at a time when sentencing disparities were an obvious issue to both parties;[69] part of the Sentencing Commission's purpose was to establish policy at the federal level that encourages "certainty and fairness in sentencing."[70] To achieve "certainty and fairness," the policy statement for the Guidelines lays out the objectives Congress sought to pursue with the SRA and the creation of the Sentencing Commission: to create "honesty," "reasonable uniformity," and "proportionality in sentencing."[71] The Guidelines are meant to do this by increasing sentencing parity between similar offenses (certainty through honesty and uniformity), while allowing for individualized considerations warranted by individual defendants (fairness and proportionality).[72]

Unfortunately, the enactment of the Guidelines, the first of which took effect in 1987, also coincided with the "tough-on-crime" policies of the 1980's

64. 28 U.S.C. § 991(b)(1)(A).

65. Koon v. United States, 518 U.S. 81, 92 (1996) (quoting S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3248 (1983)) ("The Sentencing Reform Act of 1984 . . . made far reaching changes in federal sentencing. Before the Act, sentencing judges enjoyed broad discretion in determining whether and how long an offender should be incarcerated. . . . The discretion led to perceptions that 'federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.' . . . In response, Congress created the United States Sentencing Commission.").

66. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C.).

67. 28 U.S.C. § 991(b).

68. *Id.* § 991(b)(1)(C) (explaining that one of the purposes of the Sentencing Commission is to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process").

69. For example, the bill was sponsored by Senators Edward Kennedy, a Massachusetts Democrat, and Strom Thurmond, the notoriously segregationist Dixiecrat. *See* S. REP. NO. 98-225, at 37 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3220 (1983). It was also notably supported by current President and then-Senator Joe Biden. *Id. See* Tonry, *supra* note 40, at 102.

70. 28 U.S.C. § 991(b)(1)(B).

71. U.S. SENT'G GUIDELINES MANUAL, *supra* note 48, § 1.A.3.1.

72. 28 U.S.C. § 991(b)(1)(B).

and 1990's. For historical context, observe that the D.A.R.E. campaign started in California in 1983 and became national in 1989, two years after the first Guidelines were issued.[73] This unfortunate convergence of policy and culture meant that "certainty and fairness" became proxies for "rigidity and security."[74] Decades of evidence has since shown that pursuing certainty at all costs necessarily undermines the goals of fairness, proportionality, and elimination of racial disparities.[75] Most importantly, the retributive policies born since the Act fail to control or prevent crime.[76]

B. EFFECTUATING THE GOALS OF SENTENCING AND DECREASING THE PRISON POPULATION

The Sentencing Commission is supposed to design the Guidelines to effectuate Congress's specific statutory goals for federal sentencing.[77] According to § 3553(a), those goals are "for the sentence imposed[] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense";[78] to deter criminal conduct;[79] to incapacitate the defendant;[80] and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[81]

The stated goals of § 3553(a) can be viewed in terms of the broader theories of punishment that they implicate.[82] The first relies on a theory of retribution—the idea that punishment is just because the person being punished deserves the punishment.[83] Recall that another aspect of retributivist theories is for the degree of punishment to match the culpability of the offense, which is reflected in § 3553(a) with the provision that the punishment should "reflect the seriousness

73. *See The History of D.A.R.E.*, D.A.R.E., https://dare.org/history/ (last visited Feb. 23, 2023). D.A.R.E. was an antidrug education program implemented in public schools. Tellingly, the D.A.R.E. campaign "tended to focus on punitive consequences versus rehabilitative education." Matt Berry, *3 Reasons Why the DARE Program Failed*, AM. ADDICTION CTRS. (Nov. 10, 2022), https://americanaddictioncenters.org/blog/why-the-dare-program-failed.

74. Tonry, *supra* note 40, at 102.

75. *See* discussion *infra* Parts III.A–.B.

76. *See* discussion *infra* Part III.

77. 28 U.S.C. § 991(b)(1)(A); U.S. SENT'G GUIDELINES MANUAL, *supra* note 48, § 1.A.1(1) ("[The Sentencing Commission's] principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.").

78. 18 U.S.C. § 3553(a)(2)(A).

79. *Id.* § 3553(a)(2)(B).

80. *Id.* § 3553(a)(2)(C).

81. *Id.* § 3553(a)(2)(D). However, the need for "educational or vocational training, medical care, or other correctional treatment" cannot be the basis for lengthening someone's sentence upon conviction.

82. *See e.g.*, U.S. SENT'G GUIDELINES MANUAL, *supra* note 48, § 1.A.1(2) ("The Sentencing Reform Act of 1984 . . . provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.").

83. Christopher, *supra* note 55, at 843 n.1.

of the offense."[84] As explicitly stated in the statute, the second goal relies on a theory of deterrence—the idea that punishment will deter both the individual defendant and potential future defendants from desiring to commit the same or similar crimes.[85] The third goal of sentencing—incapacitation—is meant to prevent the defendant from being able to commit further crimes while they are incarcerated.[86] The fourth, while not as explicit in its evocation of theories of punishment as the other three, relies on a theory of rehabilitation. It discusses multiple quality of life factors that criminologists believe contribute to the cycle of crime: the lack of medical care, the lack of educational and vocational opportunities, and substance abuse disorders.[87]

The realization that mass incarceration in the United States poses an unacceptable issue has finally become a mainstream topic of political conversation. Recent legislation cites the explicit purpose of decreasing the federal prison population with an additional focus on how to improve the reentry process. In 2008, then-President Obama signed the Second Chance Act into law, which focused primarily on reentry programs that would increase public safety and prevent recidivism.[88] The First Step Act, a bipartisan bill, was signed into law by then-President Trump in 2018.[89] The Act was a significant piece of legislation, representing the "culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population while also creating mechanisms to maintain public safety."[90]

C. EVOLUTION OF KNOWLEDGE REGARDING HUMAN BEHAVIOR AND CRIMINALITY

The Sentencing Commission's purpose to consider the evolution of knowledge regarding human behavior and criminality is meant to inform all other sentencing policies and statutes. The text of the authorizing statute provides that not only is the Commission expected to issue guidelines, but it is also responsible for continuously gathering data on nearly every aspect of the federal criminal justice system to update its policies in accordance with such research.[91] One of the purposes of the Commission is to "establish policies and

84. § 3553(a)(2)(A).

85. Nagin, *supra* note 60.

86. *Id.*

87. § 3553(a)(2)(D).

88. *See* Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified as amended in scattered sections of 34 U.S.C.).

89. CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019), https://crsreports.congress.gov/product/pdf/R45558.

90. *Id.*

91. *See* 28 U.S.C. § 995(a)(1) ("The Commission . . . shall have the power to . . . establish general policies and promulgate such rules and regulations . . . as are necessary to carry out the purposes of this chapter . . . ."); *see also id.* § 995(a)(14)–(16) ("The Commission . . . shall have the power to . . . publish data concerning the sentencing process; . . . collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United

practices" that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[92] This point is underscored by the sentence that follows: "[The purpose of the Sentencing Commission is to] develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code."[93] Not only did Congress delegate authority to the Commission to update sentencing policies, but it also had the *expectation* that policies would necessarily shift as new information becomes available. This is emphasized by the introduction to the Guidelines themselves:

> [The Sentencing Reform Act] empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.[94]

Moreover, most major sentencing legislation since the enactment of the Guidelines has anticipated the need to gather information on the results of the new program so that it may be modified if necessary.[95] Clearly, Congress has long understood the need for sentencing policy to be informed by research and empirical evidence. Unfortunately, this goal is undermined by the parameters placed on sentence modifications under § 3582.

III. THE CURRENT RESENTENCING FRAMEWORK IS INEFFECTIVE AND UNDERMINES ITS OWN GOALS.

The Guidelines assert that in order to effectively control crime through § 3553 sentencing objectives, it is not necessary to choose between theories of punishment.[96] The policies that have been born as a result are retributive in

States Code; [and] . . . collect systematically and disseminate information regarding effectiveness of sentences imposed . . . .").

92. *Id.* § 991(b)(1)(C).

93. *Id.* § 991(b)(2).

94. U.S. SENT'G GUIDELINES MANUAL, *supra* note 48, § 1.A.2.

95. *See* First Step Act of 2018, Pub. L. No. 115-391, § 101, 132 Stat. 5194, 5205 (codified as amended at 18 U.S.C. § 3632); Second Chance Act of 2007, Pub. L. No. 110-199, § 241, 122 Stat. 657, 690 (codified as amended at 34 U.S.C. § 60551).

96. *See* U.S. SENT'G GUIDELINES MANUAL, *supra* note 48, § 1.A.3 ("Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, the punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant. Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, *this choice was unnecessary because in most*

nature, and thus serve only the small aspect of the legislature's goal that sentencing should reflect "the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment for the offense."[97] Therefore, the remaining federal sentencing objectives are undermined by the use of retribution as an end and by resulting retributivist policies. Underlying the tension between all of these provisions is the failure of Congress to allow the Sentencing Commission to carry out its statutorily mandated duties. One of the Commission's primary purposes is to use advances in knowledge regarding human behavior and criminality to inform policies and to recommend changes to the legislature.[98] Yet this objective is fundamentally undermined by the inability to use postconviction rehabilitation as one of the factors for sentence modification under § 3582(c)(1).

A. THE CURRENT FRAMEWORK SACRIFICES FAIRNESS FOR HONESTY AND CERTAINTY.

Racial disparities persist in every level of the United States penal system despite the headway made under the SRA.[99] Professor Clear has discussed the way that the combination of risk factors for incarceration—race (Black),[100] gender (male), age (eighteen to forty-four years), and human capital (education and wealth)—in addition to "[t]he extreme racial and socioeconomic segregation of housing in the United States means that the odds of incarceration add up in some places to reach stunning levels."[101] Subsequent legislation aimed at remedying laws that target minority communities, though helpful, have also come up short. Black Americans are still vastly overrepresented in federal prison. While Black Americans make up just 13.6% of the United States population, they account for 38.4% of the federal prison population.[102] In fact, one of the express purposes of the Fair Sentencing Act of 2010 is to remedy the racial disparities that resulted from the sentencing differential between crack and powder cocaine.[103]

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sentencing decisions the application of either philosophy will produce the same or similar results." (emphasis added)).

97. 18 U.S.C. § 3553(a)(2)(A)–(D).

98. *See supra* Part II.B.

99. *See e.g.*, FOR THE PEOPLE, *supra* note 5, at 28–29; *Inmate Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (Jan. 31, 2023); *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last visited Feb. 23, 2023).

100. This author uses the terms used by Professor Clear, while noting the inherent problems with classifying race—and not *racism*—as a risk factor.

101. Clear, *supra* note 24, at 103.

102. *Inmate Statistics*, *supra* note 99; *Quick Facts*, *supra* note 99. Compare this to the general population of white Americans, 75.8%, versus the federal prison population of white Americans, 57.6%.

103. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. Before the Fair Sentencing Act, the federal penalty for the distribution of five grams of crack cocaine was a five-year mandatory minimum prison sentence; the same penalty was given for distribution of 500 grams of powder cocaine. DEBORAH J. VAGINS & JESSELYN MCCURDY, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 2 (2006), https://aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf. Because crack

It is possible to argue that the objectives of honesty and certainty will be subverted by allowing courts to modify a defendant's otherwise final sentence, using postconviction rehabilitation as a factor. However, a postconviction sentence modification framework that incorporates rehabilitation does not fall prey to the same issues posed by the indeterminate sentencing used before the establishment of the Sentencing Commission. Prior to the SRA, the issue with indeterminate sentencing was the vast level of discretion afforded to trial judges, with no guiding system in place to ensure that the sentences handed down were not arbitrary. Affording trial court judges some discretion to review already final sentences does not pose the same problems; now, there are guardrails in the form of the Guidelines that judges can turn to. Unless defendants present extraordinary and compelling instances of rehabilitation, they can still expect to serve their original sentence.

Additionally, trial courts are required to record the sentences they hand down and the basis for those sentences.[104] Finally, trial courts can consider time served as one of the factors for sentence modification, which helps ensure that defendants will not serve so little of their sentence so as to undermine the goal of certainty. It is also notable that the Supreme Court has cautioned against limiting the amount of information considered in sentencing decisions and pointed to Congress's unequivocal intention to not limit such information.[105] The Supreme Court has also differentiated between "unwarranted" disparities in sentencing and those resulting from the normal sentencing process. Here, disparities that may result from considering post-sentencing rehabilitation in resentencing proceedings are not the same as disparities resulting from the arbitrary sentencing that spurred the creation of the Sentencing Commission.

B. RETRIBUTIVE POLICIES KEEP PRISON POPULATIONS HIGH AND FAIL TO REDUCE CRIME.

The Sentencing Commission's assertion that it is unnecessary to choose between retribution and rehabilitation as underlying theories of criminal sentencing has proven to be erroneous. The research, data, and information gathered since the original Guidelines were issued in 1987 shows that retributive sentencing policies do one thing: increase the prison population.[106] Retributive

cocaine costs less than powder cocaine, it tends to be used by poor Americans, who are disproportionately Black. As a result, Black Americans were sentenced at vastly disproportionate rates for drug crimes. *See id.* at 2–3 ("Due in large part to the sentencing disparity based on the form of the drug, African Americans serve substantially more time in prison for drug offenses than do whites.").

104. 18 U.S.C. § 3582.

105. *See* Pepper v. United States, 562 U.S. 476, 488 (2011) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 50, 55 (1937)); *id.* at 500 ("[E]vidence of postsentencing rehabilitation may be highly relevant to several of the sentencing factors that Congress has specifically instructed district courts to consider.").

106. Clear & Austin, *supra* note 3, at 309.

policies like mandatory minimums and three-strikes laws not only fail to reduce crime but can even increase it,[107] due possibly in part to a criminogenic effect of prison sentences.[108] Take for instance the fact that approximately one-third of those who go to prison for the first time will recidivate; of those who return a second time, four-fifths will recidivate.[109] Clearly, the threat of a second strike or longer prison sentence does not act as deterrence. The criminal justice system has finite resources to effectuate the objectives of criminal law. Money put toward retributive policies that are ineffective at accomplishing their purported objectives means that money is not being put toward policies that accomplish said goals. Money spent on incarcerating inmates who do not pose a risk to public safety might instead be spent on restorative justice for victims and criminogenic prophylactics. In short, retributive policies are not very effective in reducing crime but are very effective at increasing the prison population.

IV. THE CALIFORNIA FRAMEWORK: PROSECUTOR-INITIATED RESENTENCING

California was no stranger to the tough-on-crime laws that plagued the nation over the past four decades. Between 1980 and 2006, the state's prison population increased seven-fold.[110] After a lawsuit was brought against the California Department of Corrections (CDCR) for "severe overcrowding" and "poor" conditions, a series of judicial decisions, including one by the Supreme Court,[111] mandated that California decrease its prison population.[112] What resulted has been some of the most, if not the most, significant criminal justice reforms in the nation.

Perhaps the most significant of those reforms are Assembly Bill 1812 and Assembly Bill 2942. Assembly Bill 1812 amended the California Penal Code to allow a resentencing court "to reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement if it is in the interest of justice."[113] Assembly Bill 2942 then expanded the list of actors able to motion for recall and resentencing, establishing what is now referred to as the Prosecutor-Initiated Resentencing framework.[114]

107. Clear, *supra* note 24, at 98.

108. *Id.* at 102.

109. *Id.* at 98.

110. MAGNUS LOFSTROM, MIA BIRD & BRANDON MARTIN, CALIFORNIA'S HISTORIC CORRECTIONS REFORMS 4 (2016).

111. Brown v. Plata, 563 U.S. 493, 545 (2011) (holding that the overcrowding in California's prisons resulted in violations of the Eighth Amendment).

112. *Id.*

113. Assemb. B. 1812, 2018 Gen. Assemb., Reg. Sess. (Cal. 2018) (codified as amended at CAL. PENAL CODE § 1170 (West 2022)) (current version at CAL. PENAL CODE § 1172.1 (West 2022)).

114. *See* FOR THE PEOPLE, *supra* note 5, at 4. The bill was drafted by former San Francisco prosecutor Hillary Blout and was enacted in 2018. *Id.*

A. BASICS

California Penal Code section 1172.1 allows several state actors to motion for the reexamination of a felony sentence by the sentencing court.[115] The District Attorney in the county of conviction, the CDCR Secretary, or the Board of Parole Hearings can bring a motion on an incarcerated person's behalf.[116] If the Department of Justice originally prosecuted the case, the State Attorney General can also bring a motion under section 1172.1.[117] After receiving a motion for sentence review, the court can "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced."[118]

Proceedings under section 1172.1 can happen in several ways. The court may "reduce [the] term of imprisonment by modifying the sentence";[119] vacate the original conviction and "impose judgment on any necessarily included lesser offense or lesser related offense . . . and then resentence the defendant to a reduced term of imprisonment."[120] Additionally, credit may be given for time served.[121]

Despite the involvement of multiple state actors, this Note refers to the California framework as Prosecutor-Initiated Resentencing, as prosecutors have been the primary state actors driving resentencing under section 1172.1. And a prosecutor-focused approach is the most significant shift away from federal policy. Similar resentencing or sentence-modification frameworks using postconviction rehabilitation records refer to those frameworks as "second-chance" or "second-look" mechanisms.[122] However, the framework introduced by Assembly Bill 2942 is the first suggested on a federal level that utilizes the power of prosecutors in sentence modification or plenary resentencing processes.

B. PARAMETERS

There are a number of reasons why a defendant can be resentenced under section 1172.1. Primarily, the focus is on the risk of recidivism and whether circumstances have changed such that further confinement is no longer in the interest of justice. California does not have a statutorily defined meaning of what constitutes "in the furtherance of justice."[123] Still, courts have found that such

115. CAL. PENAL CODE § 1172.1(a)(1) (West 2022).

116. *Id.* Defendants incarcerated in county jail can also have a motion brought on their behalf by the county correctional administrator. *Id.*

117. *Id.*

118. *Id.*

119. 18 U.S.C. § 1172.1(a)(3)(A).

120. *Id.* § 1172.1(a)(3)(B).

121. *Id.* § 1172.1(a)(4).

122. *See generally* Janeanne Murray, Sean Heckler, Michael Skocpol & Marissa Elkins, *Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation*, 33 FED. SENT'G REP. 341 (2021).

123. CAL. PENAL CODE § 1172.1.

circumstances apply in situations of excessively lengthy sentences that would not be handed down today and for defendants who committed their offense at a young age and have since been rehabilitated while they were incarcerated.[124]

The PIR model uses several factors to determine the likelihood of recidivism upon release. Factors include future risk of violence; the defendant's support needs; whether age, time served, or diminished physical capacity have reduced the risk for future violence; whether the defendant was a youth at the time of the offense; and whether the defendant was a youth victim of psychological, physical, or sexual abuse.[125]

The defendant's risk and needs assessment is conducted by the CDCR. The CDCR uses tools to assess both the defendant's risk to institutional safety as well as their risk of recidivating upon release. Factors used to make this determination include the defendant's postconviction disciplinary record, as well as positive institutional behavior.[126] A low risk to institutional safety also indicates that the defendant is at a low risk for future violence if released.[127] Additionally, the CDCR uses an assessment tool called the California Static Risk Assessment that analyzes "a set of risk factors which are most predictive of recidivism" and subsequently "computes the likelihood to re-offend."[128] These assessments help ensure that defendants released under section 1172.1 are not at a high risk of recidivating. Thus, these tools are a method of ensuring both individual deterrence upon release, as well as public safety.

C. FEDERAL LEGISLATIVE GOALS FURTHERED BY THE MODEL

In many ways, the trajectory of the federal criminal justice system mirrors that of California's. Instead of addressing the crime rates of the 1970s and 1980s with policies targeting the roots of criminality, both California and the federal government reacted by instituting retributive policies. These policies relied on the mistaken assumption that the harsher the punishment, the more deterrence afforded, leading to proportionally lower crime rates. However, the consensus from criminologists and social scientists is that longer and harsher prison sentences do not prevent crime and are actually more likely to *increase* rates of recidivism. Professors Todd R. Clear and James Austin, both leading contemporary criminal justice scholars, have noted that "a consensus has emerged among criminologists that the impact of imprisonment on crime is modest compared to other factors."[129]

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124. *See generally* Swan, *supra* note 22 (discussing the story of Derric Lewis, who was the first person out of Contra Costa County to be resentenced under Assembly Bill 2942).

125. CAL. PENAL CODE § 1172.1(a)(4).

126. CAL. CODE REGS. tit. 15, § 2281(d)(9).

127. *Id.*

128. *Id.* § 3768.1.

129. Clear & Austin, *supra* note 3, at 309. Professors Clear and Austin explain that this lack of effect is due to a cycle: as soon as one person is incarcerated, another takes their place in committing a crime. This is especially true of low-level drug offenses. *Id.* at 310.

Further, in the case of federal sentencing policy, these longer, harsher sentences were supposed to provide more clarity and honesty. Yet, as previously discussed, the pursuit of clarity and honesty has resulted in less fairness between socioeconomic groups and has widened racial gaps. Overall, this Note's analysis is informed by Congress's goal that sentencing law and policy should be updated to reflect advances in knowledge of human behavior and criminality. The evidence overwhelmingly shows that such an objective is effectuated by considering postconviction rehabilitation as a basis for sentence modification.

1. Effectuating the Purposes of Sentencing

A PIR resentencing framework best effectuates the purposes of sentencing under 18 U.S.C. § 3553. First, time served acts as retribution to restore societal balance. When a sentencing court considers a motion for resentencing, it may consider whether the defendant's time served satisfies the government's goal under § 3553(a)(2)(A) "for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[130] Second, PIR helps achieve individual deterrence by limiting recidivism for inmates not serving life sentences. Inmates not currently serving life sentences will at some point be released from incarceration. Preparing those inmates for successful reentry is vital for public safety as well as community healing. Third, incapacitation is served while the defendant is being rehabilitated and is no longer needed when the defendant poses a low risk to public safety or of reoffending. The only reason to incapacitate someone who is unlikely to commit a crime is for retribution. If the justification for retribution is either individual or general deterrence, such a justification relies on the mistaken assumption that deterrence is provided.

2. Reducing the Prison Population While Maintaining Public Safety

There are many inmates in federal prison who could be released today without any risk to public safety. PIR necessarily accounts for the potential risk to public safety posed by the release of the defendant. It also incentivizes defendants to participate in rehabilitative programming within prison that reduces the defendant's risk of recidivating by targeting the risk factors that led the defendant to criminality in the first place. Moreover, research shows that repeat offenders contribute little to the overall crime rate.[131] Essentially, "[b]ecause decreasing a prisoner's length of stay does not lead to an increased chance of recidivism (if anything, the relationship is in the other direction), and because almost everyone going to prison gets out eventually, we can reduce sentence lengths substantially without affecting crime rates or prison reentry rates."[132]

130. 18 U.S.C. § 3553(a)(2)(A).
131. Clear & Austin, *supra* note 3, at 311.
132. *Id.* at 318.

Additionally, in order to increase the number of motions brought under § 3582(c)(1)(A), the First Step Act made it possible for defendants to bring motions on their own behalf.[133] The efficiency of the process for bringing motions based on extraordinary and compelling reasons will be increased by giving prosecutors the authority to file such motions. Prosecutors' position of familiarity with the courts in the districts where they practice gives them special insight into the types of cases those courts will be willing to consider for resentencing. Additionally, even though defendants can bring motions on their own behalf, federal prosecutors have access to a vast number of resources that defendants do not. Thus, not only does this result in stronger cases being filed, but it also ensures the efficiency and likelihood of success for such proceedings.

V. ENACTING FEDERAL PROSECUTOR-INITIATED RESENTENCING: POLITICS AND POLICY

To enable PIR on the federal level, Congress must pass legislation removing the prohibition on rehabilitation as a basis for extraordinary and compelling reasons under 28 U.S.C. § 994(t). Under the existing framework, many federal inmates may already qualify for PIR resentencing on the basis of age, terminal illness, physical disability, or family circumstances. However, as discussed throughout this Note, legislative goals in general and sentencing goals specifically are better served by a mechanism that allows for sentence modification based on rehabilitation.

A. POLITICS

1. The Biden Administration's Role

During the summer of 2022, the Biden Administration made progress by appointing a voting quorum to the Sentencing Commission for the first time since 2019. Again, the Commission was created specifically to advise Congress on policies like PIR.[134]

The Administration can use public interest campaigns to garner political support for criminal justice reform. As a former prosecutor and the former Attorney General of California, Vice President Kamala Harris could play a unique role garnering support for a PIR framework. Considering the recent recall campaigns of several prominent federal prosecutors, political strategists may scoff at the idea of the Administration publicly lobbying for an expansion of resentencing law. To be sure, such a campaign would require a well-planned messaging strategy and is unlikely to be enacted during the Biden-Harris Administration. However, the Administration can still help shift the national conversation toward rehabilitation over retribution.

133. U.S. SENT'G COMM'N, *supra* note 6.

134. *See supra* Part I.B.

2. Responding to Critiques

Criticisms of this policy will come from two positions. This Note has primarily focused on the critiques that will come from the tough-on-crime position. Such criticisms are likely to criticize the frameworks as being soft on crime.[135] Another criticism might be that a PIR framework rooted in the rehabilitation of defendants is superfluous given the President's ability to grant clemency. While the President's clemency authority (also known as the pardon power) is a powerful tool for ensuring that justice is done, outside of political amnesty,[136] it has traditionally been employed in cases where evidence is highly suggestive of a wrongful conviction, cases where procedural hurdles delay or prevent justice, and in cases of historical wrongs that were never righted.[137] Subsequently, there is still need for a plenary second-look resentencing framework at the federal level that utilizes rehabilitation as a basis for resentencing.

To be sure, there will also be criticisms that this framework is too conservative. These arguments are likely to center around concerns with allotting even greater prosecutorial deference in the criminal justice system and with the lack of a role for federal public defenders. Arguments concerning federal prosecutors' outsized roles in the criminal justice system are firmly grounded in reality. Nonetheless, affording prosecutors this role is the right first step for two reasons. First, it is likely that in the eyes of Congress and the general public, prosecutors will be the most politically palatable actors to fill this role. Hence, a framework that initially allows federal prosecutors the discretion to bring motions will get a proverbial foot-in-the-door for federal second-look mechanisms based in offender rehabilitation. Second, because prosecutors are adverse to defendants in initial proceedings, they hold a unique position when they present cases for resentencing to a court.

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135. For example, the mayor of a small town in Cook County, Illinois, Keith Pekau, wrote an op-ed criticizing Foxx. *See Op-ed: Orland Park Works Around Kim Foxx To Deter Crime*, THE CENTER SQUARE (June 16, 2022) https://www.thecentersquare.com/opinion/op-ed-orland-park-works-around-kim-foxx-to-deter-crime/article_b4ebceca-ed99-11ec-8329-3f481da0e7e1.html.

136. Presidents have historically used the pardon power to grant amnesty to various groups found in violation of laws, usually during times of war. Some of the most famous political amnesties were granted to confederates by Presidents Lincoln and Johnson after the end of the Civil War. U.S. CONG. RSCH. SERV., 74-179F, AMNESTY: A BRIEF HISTORICAL OVERVIEW 7, 11, 13 (1974).

137. For example, in 2018 then-President Trump posthumously pardoned the boxer Jack Johnson for a 1946 conviction of transporting a white woman across state lines in violation of the Mann Act. The Mann Act was a Jim Crow–era law that acted as a tool of anti-miscegenation. Jacob Bogage, *Boxer Jack Johnson Is Posthumously Pardoned by President Trump*, WASH. POST (May 24, 2018, 3:30 PM) https://www.washingtonpost.com/news/early-lead/wp/2018/05/24/boxer-jack-johnson-is-posthumously-pardoned-by-president-trump/.

B. POLICY

1. Statutory Amendments

Once political support is garnered and bill sponsors are found, Congress will need to expand the list of actors able to file a motion for sentence modification under § 3582(c)(1)(A) to include the federal prosecutor in the district of the defendant's original conviction. The amended statute could provide as follows:

> [T]he court, upon motion of the Director of the Bureau of Prisons; *upon motion of the U.S. Attorney's Office in the district of the defendant's original sentencing*; or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment.

Additionally, Congress will need to amend § 994(t) by striking the last sentence, which reads: "Rehabilitation alone shall not be considered an extraordinary and compelling circumstance." To ensure that legislative intent is not undermined by subsequent judicial interpretation, Congress should amend the statute to explicitly allow rehabilitation as a factor lending to extraordinary and compelling reasons for sentence modification.

A federal district court's latitude to modify a sentence will depend on whether § 3582(c)(1)(A) proceedings are considered "modifications" or "plenary resentencings."[138] In *Dillon v. United States*, the Supreme Court differentiated between a "sentence modification" and a "plenary resentencing" hearing.[139] There, the Court explained that "[s]ection 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding."[140] As a result, § 3582(c)(2) only permits "a sentence reduction within the narrow bounds established by the Commission."[141]

On one hand, both sections refer to a sentence modification and not a "resentencing."[142] But on the other hand, the broader scope of § 3582(c)(1)(A) is a strong reason to believe that courts would evaluate § 3582(c)(1)(A) and § 3582(c)(2) motions differently. Further, the full context of § 3582(c)(1)(A) in addition to the Guidelines policy statements allude to a congressional intent to allow for the early release of defendants. While this is a strong indication that motions under § 3582(c)(1)(A) can initiate resentencing proceedings, Congress

138. Because California's PIR law allows for courts to proceed with either a sentence modification or a plenary resentencing, this Note uses the terms interchangeably in some places.

139. 560 U.S. 817, 826 (2010).

140. *Id.*

141. *Id.* at 831.

142. 18 U.S.C. § 3582(c)(1)–(2).

must clarify its intent in order to avoid the issue presented in *Dillon v. United States*.

As previously discussed, § 3582, in addition to the Guidelines, already provides some criteria for sentence modification in light of extraordinary and compelling reasons. Those criteria include a defendant's health, disability, and age. Additionally, a risk- and needs-assessment system for federal inmates is mandated by the First Step Act.[143] Subsequently, several important aspects of PIR have already been prescribed at the federal level.

2. Guideline Amendments and the Sentencing Commission

While the Sentencing Commission does not have the authority to implement PIR on its own, the Commission still plays an important role. Section 1B1.13 of the Guidelines is the policy statement governing extraordinary and compelling reasons for sentence modification. Now that President Biden has appointed a full voting quorum to the Commission,[144] the Commissioners will no doubt move quickly to update the Guidelines to reflect the changes made by the First Step Act, including the ability of defendants to bring their own § 3582(c) motions. After updating the current Guidelines to reflect the changes made by the First Step Act, the primary focus of the Commission should be to present research and policy proposals like PIR to the legislature.

In the event that federal law is amended to allow prosecutors to file § 3582(c) motions, the Commission will need to update section 1B1.13 of the Guidelines to ensure that it clearly applies to both defendant- and prosecutor-filed motions. It is necessary to make this explicit so as to avoid the situation that occurred during the latter years of the Trump Administration when the Commission lacked a quorum. As a result of the lack of quorum, the Commission was unable to update the Guidelines and accompanying policy statements to reflect the changes made by the First Step Act that allowed defendants to bring their own motions. Subsequently, several federal district and appeals courts concluded that motions based on extraordinary and compelling circumstances under § 3582(c)(1)(A) did not apply to prisoner-filed motions.[145]

CONCLUSION

Three decades of data illustrate the ineffectiveness of retributive sentencing policies. Mass incarceration and its accompanying costs resulting from these policies warrant sweeping changes at both the state and federal levels. A Federal Prosecutor-Initiated Resentencing framework utilizing rehabilitative polices

143. *See* First Step Act of 2018, Pub. L. No. 115–391, § 101, 132 Stat 5194, 5205 (codified as amended at 18 U.S.C. § 3632).

144. Madison Alder, *US Sentencing Commission Restocked After Senate Confirmations*, BLOOMBERG L. (Aug. 4, 2022, 6:32 PM), https://www.bloomberglaw.com/bloomberglawnews/us-lawweek/XC7KMM7G000000?bna_news_filter=us-law-week#jcite.

145. *See* United States v. Shkambi, 993 F.3d 388, 393 (5th Cir. 2021); United States v. Gunn, 980 F.3d 1178, 1181 (7th Cir. 2020); United States v. McGee, 992 F.3d 1035, 1050 (10th Cir. 2021).

would give sentencing courts some discretion to reexamine inmates' sentences at the request of prosecutors when further incarceration is no longer in the interest of justice. Doing so is one step toward eliminating the racial disparities and effectuating the fairness that Congress sought with the creation of the Federal Sentencing Guidelines.