**Article**

# Unpunishment Purposes

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*Sentencing scholarship often begins by exploring the traditional purposes of punishment: deterrence, retribution, incapacitation, and rehabilitation. However, little scholarship exists addressing how these four punishment purposes apply in the post-sentencing or second-look contexts. Further, abstract theories of sentencing can often seem sterile and disconnected from the realities of how violent, disproportionate, and dehumanizing the actual experience of incarceration is for many people, and tend to downplay the impact of incarceration on the families and communities of those who are incarcerated. This Article attempts to reconceptualize the traditional purposes of punishment to meet the current historical moment, and it does so through a decarcerative and abolitionist lens.*

*Within the past decade, an increasing number of state and federal retroactive relief mechanisms have enabled incarcerated people to petition courts for sentence reductions or early release from prison based on various legal theories. But guidance provided to courts and other decisionmakers about how to exercise their discretionary decarceration authority is lacking. Accordingly, this Article highlights the need to develop a theory of resentencing and asks whether the four purposes of punishment*

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*require revision or augmentation to account for the sentence reduction context. This Article uses the federal second-look context as a means to explore these themes.*

*This Article also aims to start a conversation about how abolitionist frameworks centered around harm prevention or reduction could be incorporated into the punishment purposes. Although adherence to the four punishment purposes has persisted at both initial sentencings and within second-look proceedings despite their clear shortcomings, this Article urges decisionmakers to look at the harm caused by incarceration more expansively. More than that, however, incorporating such a theory into a prospective sentencing may lead judges to rethink their reflexive reliance on the present formulation of the punishment purposes, resulting in less punishment altogether.*

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## INTRODUCTION

Scholars in law, philosophy, and criminology have written extensively about the four purposes of punishment (deterrence, retribution, incapacitation, and rehabilitation)[1] and have developed comprehensive theories of sentencing.[2] As Professor Richard S. Frase wrote almost two decades ago, the central questions that judges seek to answer at a prospective sentencing are, broadly, "Why should violators of criminal laws be punished, and what principles should be recognized to limit the type and degree of punishment?"[3] But in the sentence reduction or second-look contexts, when decisionmakers can reduce a person's sentence after they have already served some term of imprisonment, the interests at play are different.[4] Instead of asking what principles

1. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 78 (2005) (noting that utilitarian approaches to punishment stem from the philosophies of Beccaria and Bentham) [hereinafter Frase, *Punishment Purposes*]. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (Oxford Univ. Press 2d ed. 2008) (1968) (discussing modern skepticism with deterrent and retributive theories of punishment); MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (analyzing the shift from retaliatory punishment to incarceration).

2. *See, e.g.*, Richard S. Frase, *Limiting Retributivism* [hereinafter Frase, *Limiting Retributivism*] (describing limited retributivism concepts in model codes and standards and discussing examples of limited retributivism in practice), *in* THE FUTURE OF IMPRISONMENT IN THE 21ST CENTURY 83, 90–104 (Michael Tonry ed., 2004); Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 365–78, 388–407 (1997) [hereinafter Frase, *Sentencing Principles*] (summarizing Morris's theory of punishment and Minnesota's approach). *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (discussing federal sentencing guidelines, identifying defects in the federal sentencing system, and offering suggestions to remedy those defects); RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM (2013) (describing and defending a hybrid sentencing model that blends retributive and nonretributive principles); MICHAEL TONRY, SENTENCING MATTERS (1996) [hereinafter TONRY, SENTENCING MATTERS] (proposing a more just and effective sentencing system based on twenty-five years of information on sentencing, punishment, and the effects of changing sentencing laws).

3. Frase, *Punishment Purposes*, *supra* note 1, at 69.

4. *See, e.g.*, Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 205 (2016) ("[I]t is unclear why one should approach the decision not to punish (or to punish less) the same way as the decision to impose punishment (or to punish more)."). Second-look proceedings refer broadly to the universe of mechanisms by which people can petition to have sentences reduced, be granted parole, or otherwise be released from prison

guide the exercise of punishment in the first instance, judges are called upon to decide who is deserving of sentencing relief, why, and to what degree.[5] In other words, judges must grapple with when and how to exercise their discretion and authority to decarcerate rather than incarcerate.[6]

At the same time, in sentencing proceedings across the country, sentencers rely on these purposes to send people to prison for often lengthy terms of carceral custody, during which they may be subjected to severe forms of harm. Yet the purposes of punishment are often presented uncritically, glossing over the question of whether time in prisons, in their current state, can be a justifiable punishment for people or even whether "prisons, if done right, can be humane."[7] In light of what we know about prison conditions in the United States, this question verges on the absurd. Since the 1800s, American reformists have tried to create "humane" prisons[8]—but they have failed spectacularly.[9]

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early based on a wide range of legal theories. *See generally* Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149 (2015) (discussing questions and issues raised by second-look sentencing).

5. *See* Becky Feldman, *The Second Look Movement: A Review of the Nation's Sentence Review Laws*¸ THE SENT'G PROJECT (May 15, 2024), https://www.sentencingproject.org/reports/the-second-look-movement-a-review-of-the-nations-sentence-review-laws [https://perma.cc/24M9-UFW3] ("[L]egislators and the courts are looking to judicial review as a more effective means to reconsider an incarcerated person's sentence in order to assess their fitness to reenter society.").

6. *See id.* ("The due process protections that judicial review hearings afford, such as a transparent process with adversarial testing and appellate review, can provide a much more meaningful hearing.").

7. Sophie Angelis, *Limits to Prison Reform*, 13 U.C. IRVINE L. REV. 1, 2 (2022).

8. *See*, *e.g.*, Matthew W. Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 852 (1999) (describing the "second wave" of prison reformers as being concerned with "reforming prisoners through separation"); FOUCAULT, *supra* note 1, at 234 ("Prison 'reform' is virtually contemporary with the prison itself: it constitutes, as it were, its programme."). *See generally* Christopher Sturr, *Philosophical Theories of Punishment and the History of Prison Reform*, 30 STUD. L. POL. & SOC'Y 85 (2004) (discussing prison reform in the United States in the early twentieth century and in the 1960s and 1970s).

9. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 734–35 (2002) (describing how an incarcerated person was handcuffed to a hitching post for a prolonged period of time without water or breaks while the sun burned his skin and how he was taunted with water but not provided any); Payne v. Parnell, 246 F. App'x 884, 887 (5th Cir. 2007) (concluding that a reasonable jury could determine that an

Horrifyingly, it seems, prisons become worse, harms become more severe and more commonplace, and the public at large becomes more desensitized to the widespread suffering that happens behind bars.[10]

And so, it seems odd and perhaps misguided that legal scholars often refer to punishment theories without talking explicitly about prisons, prison conditions, and the contemporary American carceral state.[11] Law school courses on criminal law, as well as bodies that make sentencing policy, can sometimes refer to the four theories of punishment in a sterile and rote manner.[12] Although this may be changing to some degree,[13] it is important to point out that such a lifeless recitation of the punishment purposes often overlooks the fundamental violence and dehumanization that happens at the moment of incarceration.[14] The

officer had acted maliciously and sadistically when he, unprovoked, shocked an incarcerated person with a cattle prod); Davis v. Ayala, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) ("[T]he penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.").

10. *See* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 436–37 (2014) (describing the need for transparency in prisons in the context of prison exacerbating existing inequality).

11. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 520 (2021) ("[T]he gap between the arid doctrines crafted in courtrooms and the lived realities on American cellblocks is particularly stark."); Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin*,*"* 129 YALE L.J.F. 365, 384 (2020) (noting the tendency to put "questions about sentencing, probation, and prison conditions into different silos or walling off punishment decisions from their implementation").

12. *See, e.g.*, MARGO SCHLANGER ET AL., INCARCERATION AND THE LAW: CASES AND MATERIALS 34–37 (W. Acad. 10th ed. 2020) (1997) (describing the four theories of punishment).

13. Scholars have become increasingly critical of punishment theory, and as noted below, are now teaching the punishment purposes alongside discussions about prison abolition. For example, one notable new open-source criminal law textbook, emphasizes in its introduction that "Whether or not the acts designated as criminal are in fact wrongful or harmful in all cases, the designation of a person as 'a criminal' brings significant negative consequences to that person in all or nearly all cases." ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH 3 (2022), https://www.cali.org/sites/default/files/Ristroph-Criminal-Law-Integrated-Approach-Oct132022.pdf [https://perma.cc/VS8A-MCY5].

14. *E.g.*, David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison,* 93 NOTRE DAME L. REV. 2021, 2022 (2018) (describing horrors of American incarceration); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 931–35 (2009)

erasure of the carceral experience from discussions of sentencing theory also means that the voices of incarcerated people[15] are often lost in contemporary debates about sentencing and corrections.[16] As legal scholar Eve Hanan has lamented, "prison's cruelties literally and figuratively do not count in punishment decisions."[17] Similarly, punishment purposes, both in theory and as applied in real-world terms, often fail to take into account the vast numbers of people who are imprisoned within this terrorizing system for extreme periods of time.[18]

It is against this backdrop, and acknowledging the state of American punishment today, that this Article advances its arguments. In her seminal article, *Prison Abolition and Grounded Justice*, Allegra M. McLeod comments that "criminal law and criminological scholarship almost uniformly stop short of

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(describing the humiliating and dehumanizing state of American prisons); Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257–59 (2013) (describing the dehumanizing, traumatic, and psychological effects of incarceration during his years in the New York State prison system).

15. There is debate in the scholarly literature about whether to refer to people incarcerated in prisons as "prisoners" or "incarcerated people." In this Article, I use the terms "incarcerated people" or "incarcerated individuals" instead of "prisoners." I do this deliberately, although not without some hesitation. There are valid reasons for utilizing the word "prisoner," including the implicit recognition in that word of the oppressiveness and dehumanization that occurs behind prison walls. *See, e.g.*, Driver & Kaufman, *supra* note 11, at 525 ("[T]he term prisoner rejects the government's appellations while underscoring that prisons are degrading spaces, where numbers replace names and humans live in barren cells."); Sharon Dolovich, *How Prisoners' Rights Lawyers Do Vital Work Despite the Courts*, 19 U. ST. THOMAS L.J. 435, 435 n.1 (2023) (noting that the author would refer to incarcerated people as prisoners to acknowledge the dehumanization of imprisonment). Especially because this paper discusses personal stories, the choice to use "incarcerated people" reflects an attempt to recognize the individualized harm that people suffer behind bars and to further underscore the false dichotomy between "society" and those who are imprisoned.

16. Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1654 (2019) ("[P]eople find it difficult to imagine a world without prisons, yet they are largely unaware of what goes on inside of prison . . . ." (citing ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 11 (2003))).

17. M. Eve Hanan, *Invisible Prisons*, 54 UC DAVIS L. REV. 1185, 1190 (2020) (emphasis omitted) (introducing the umbrella concept of "prison's cruelties"); *see also* Dolovich, *supra* note 14, at 890 (discussing the meaning of the word "cruel" in the context of the Eighth Amendment).

18. *See* Hanan, *supra* note 17, at 1210 ("[T]heories of justice often conflate systemic harms with mere bad luck because the theory assumes justice is the norm.").

considering how the professed goals of the criminal law—principally deterrence, incapacitation, rehabilitation, and retributive justice—might be approached by means entirely apart from criminal law enforcement."[19] Drawing on, in particular, the vital work of abolitionist thinkers like McLeod and others, this Article asks, as a necessary corollary, whether and to what extent these traditionally recognized theories of punishment are still a useful framework for thinking about sentencing.

Theorizing around the intersection of abolition theory and the traditional punishment purposes is already gaining momentum. Abolitionist thinker Amna Akbar has begun to teach abolition theory alongside the punishment purposes.[20] A leading textbook on the law of incarceration likewise situates a discussion of abolition directly after its explanation of punishment purposes.[21] One theorist has tackled the specifics of how to merge abolition and retribution—concepts that are seemingly at odds with each other.[22] Indeed, this Article proposes re-envisioning the punishment purposes in a way that is fundamentally aligned with the project of "developing nonpunitive measures to deal with harm and creating new conditions to prevent harm from occurring in the first place."[23]

Moreover, starting a conversation about how sentencing theory squares with efforts toward decarceration is particularly critical in this moment. In November of 2023, the United States Sentencing Commission—the body that determines advisory sentencing ranges for federal offenses—drastically expanded the

19. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1160 (2015).

20. *See* Amna Akbar, *Teaching Penal Abolition*, LAW & POL. ECON. PROJECT (July 15, 2019), https://lpeproject.org/blog/teaching-abolition [https://perma.cc/3KKL-PJ2R] ("[I]n [criminal law], I teach abolition alongside the retributive and utilitarian theories of punishment.").

21. *See* SCHLANGER ET AL., *supra* note 12, at 36–37 ("[P]rison abolitions (or near-abolitionists) point to failures of all four purposes—incapacitation, deterrence, retribution, and rehabilitation to urge significant decarceration.").

22. *See* Rafi Reznik, *Retributive Abolitionism*, BERKELEY J. CRIM. L., Fall 2019, at 123, 145–75 ("[S]ome basic retributive tenets—under a capacious understanding of retributivism, which purposefully sidesteps internal disputes—are compatible with, and bring to fruition, basic abolitionist tenets.").

23. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 44 (2019).

scope of who can apply for sentencing relief in federal court.[24] People are now eligible to apply for early release based on a variety of factors including severe medical issues that are not being addressed in custody,[25] suffering from institutional abuse,[26] or serving excessive sentences for which they would not be eligible today.[27] These changes in federal sentencing are significant—many more federally incarcerated people are now eligible to move their sentencing courts for early release than ever before.[28] And these changes at the federal level reflect a national shift in attitudes toward prisons, policing, and excessive sentencing.[29] In states nationwide, state legislatures, sentencing commissions, and parole bodies are rethinking eligibility for various kinds of second-look measures.[30] New ideas about the fundamental value of decarceration are thus needed to meet this transformational moment in American sentencing.

Interrogating the issues at play in the sentence reduction context can inform the question of whether we are doing

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24. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b) (U.S. SENT'G COMM'N 2023) (listing "extraordinary and compelling" circumstances warranting eligibility for a sentence reduction).

25. *Id.* § 1B1.13(b)(1) (describing when medical issues are considered extraordinary and compelling circumstances).

26. *Id.* § 1B1.13(b)(4) (explaining that physical or sexual abuse committed by "a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant" is an extraordinary and compelling reason).

27. *Id.* § 1B1.13(b)(6) (recognizing that an unusually long sentence is an extraordinary and compelling reason).

28. *Cf., e.g.*, JaneAnne Murray et al., *Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation*, 33 FED. SENT'G REP. 341, 341 (2021) ("'Second look' is an idea whose moment has arrived.").

29. *See, e.g.*, Matt Kellner, *Excessive Sentencing Reviews: Eighth Amendment Substance and Procedure*, 132 YALE L.J.F. 75, 76–77 (2022) ("Recently, advocates and policymakers have grown more concerned about excessive criminal punishments and racial disparities in sentencing, which has produced bipartisan legislative reforms.").

30. The term "second-look" broadly refers to the idea that sentences can be revisited even long after they are imposed. Second-look provisions include those aimed at reviewing old sentences imposed for a variety of reasons including age at the time of the offense, changes in the law that would make a sentence lower today than at the time of the original sentencing, or other criteria. *E.g.*, Murray et al., *supra* note 28, at 344 (listing factors courts must consider under the National Association of Criminal Defense Lawyers' proposed second-look legislation).

sentencing correctly in the first instance.[31] For example, the very fact that more and more jurisdictions are passing second-look reforms aimed at sentence reductions should tell us what we already know: sentencing is broken because excessive sentences are both unnecessary and commonplace.[32] We know that sentences are far too long because judges have been, repeatedly, compelled to reduce them.[33] America's criminal legal system,[34] including its prisons, is in crisis, and the crisis is structural.[35] Prisons cannot keep people safe from harm and indeed cause more incalculable harm and suffering to individuals than a sentencing court can conceive of at an initial sentencing.[36] Sentencing finality is inhumane when knowingly invalid sentences cannot be challenged.[37] Modern American sentencing theory

31. There is some scholarly literature addressing the interplay between initial sentencings and conditions of confinement, but none specifically advocate, as this Article does, that countervailing punishment purposes may be necessary to account for such conditions. *See, e.g.*, E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 475 (2015) ("Reducing a prisoner's sentence on the basis of *anticipated* harsh prison conditions (and attendant hardships), however, is more problematic than reducing a sentence in light of *past* harm from conditions of confinement."); Hanan, *supra* note 17, at 1190 (discussing the notion that prison realities and cruelties do not factor into sentencing).

32. Kellner, *supra* note 29, at 76 ("[A] death-by-incarceration sentence is draconian, [but] it is not uncommon.").

33. United States v. Kramer, No. 23-1246, 2024 WL 313389, at *3 (3d Cir. Jan. 26, 2024) (Restrepo, J., concurring) (noting that "nearly five-thousand people nationwide" have received compassionate release from a federal judge between October 2019 and June 2023).

34. Deborah Tuerkheimer, *Criminal Justice for All*, 66 J. LEGAL EDUC. 24, 24 (2016) ("It is not hyperbolic to assert that our criminal justice system is very much in crisis."); *see also* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1436 (2016) (describing the contours and multifaceted aspects of the criminal legal system's crisis).

35. *See, e.g.*, Shapiro & Hogle, *supra* note 14, at 2024–25 (describing how prison abuse is rampant because "structural characteristics of the prison environment increase the likelihood of staff either abusing prisoners or permitting abuse to go on under their watch."); Dolovich, *supra* note 14, at 933 ("[T]he institution itself creates the conditions for cruel treatment and the violation of the state's carceral burden.").

36. *See, e.g.*, Mika'il DeVeaux, *supra* note 14, at 257–59.

37. *See* Jones v. Hendrix, 143 S. Ct. 1857, 1877 (2023) (Sotomayor & Kagan, JJ., dissenting) ("[T]oday's decision yields disturbing results. A prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred by 28 U.S.C. § 2255(h) from raising that claim, merely because he previously sought postconviction relief." (citation omitted)); United States v.

presumes that a reduction in societal harm[38] is achieved when people are sent away for acts that society deems criminal,[39] but does not account for the harms that come to individuals and communities when large numbers of people are incarcerated.[40] This assumption is misguided. Current sentencing theory also fails to acknowledge that other, non-carceral solutions exist to address culpable harms.[41]

Accordingly, this Article's aims are twofold: first, this Article seeks to expose theoretical gaps in second-look sentencing, and to start a conversation about theories and values that should guide sentence reductions in order to ensure maximum decarceral effect. Second, drawing on the work of abolitionist and transformative justice theorists, this Article asks how the established punishment purposes could be reimagined to focus specifically on the overarching goal of reducing carceral harm or "the harms inflicted by carceral punishment."[42]

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Wesley 78 F.4th 1221, 1223 (10th Cir. 2023) (Rossman, J., dissenting) ("It is critical to all stakeholders in the criminal justice process that our very busy federal trial courts apply the correct applicable law when adjudicating compassionate release motions.").

38. This Article uses the word "harm" to refer to ill effects that are caused by people and institutions, both within and outside the prison setting. *See, e.g.*, Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020) ("[R]estorative justice emphasizes relational harms."). The term is also utilized within the abolitionist movement when discussing the ways in which individuals and institutions negatively impact one another. *See* Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1215 (2022) (reviewing MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021)) ("[H]arm reduction is embedded into abolitionist practice."); *see also* Armstrong, *supra* note 10, at 440 ("The case law is replete with examples of prison sentences that impose extreme punishment through unconstitutional prison conditions.").

39. *Cf.* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 853 (2019) ("What is a crime? . . . A society makes choices about what acts or omissions to render worthy of different kinds of punishment.").

40. *See, e.g.*, TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 3 (2007) ("Imprisonment has grown to the point that it now produces the very social problems on which it feeds.").

41. This Article will generally refer to the harms inflicted on people in prison as carceral harms. This Article will use the term "culpable harms" to refer to harms that have traditionally been punished by the criminal law and connote some level of mens rea associated with a harmful act.

42. Roberts, *supra* note 23, at 118.

This Article is grounded in second-look resentencing case law and practice because a rethinking of the purposes of punishment is required to give judges a theoretical framework for making decarceration decisions. But the lessons learned from the second-look context are broader, and should lead scholars, judges, policymakers, and practitioners to question whether sentencing law and policy in the first instance should be revisited. In other words, sentencing theorists should examine the second-look context in order to reinvigorate debates about sentencing law, and to consider how abolition-based perspectives can be brought to bear on initial sentencings.

This Article proceeds in three parts. Part I of this Article explores some underlying concepts that form the basis of sentencing decisions including the traditional punishment purposes and relevant critiques. This Part also includes a short history of sentencing trends to demonstrate that sentencing law is based on insecure foundations. Sentencing theory is a dynamic, rather than static, aspect of the American criminal legal system—and is ripe for change.

Part II exposes the limits of the traditional punishment purposes when judges seek to reduce a sentence rather than impose more prison, and also demonstrates how the second-look sentencing context has exposed the need for a reimagination of the punishment purposes.

Finally, Part III argues that we are in yet another critical moment of shift within sentencing law. Emphasizing the goal of reducing harm—an idea that finds its home in abolitionist theories as well as restorative and transformative justice principles[43]—this Part describes how the four purposes of punishment could be reimagined to encompass a more holistic view of how incarceration affects people and communities. This Part is also a call to judges and decisionmakers to change the way they think about and impose punishment in both prospective sentencing and second look proceedings.

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43. *See generally* Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686 (2019) ("Abolition calls on us not only to destabilize, deconstruct, and demolish oppressive systems, institutions, and practices, but also to repair histories of harm across the board.").

## I. THE PUNISHMENT PURPOSES IN IDENTITY CRISIS

The purpose and method for punishing behavior viewed as harmful to society is a fundamental subject of historical debate and inquiry.[44] Philosophers have long pondered questions about who and what should be punished, to what extent, the nature of moral responsibility, and who has the authority to punish.[45] The nuances of these debates are, to be sure, outside the scope of this Article's current inquiry. But while certain aspects of punishment theory have endured, ideas around punishment and sentencing are subjective, fluid, and change according to historical whims and trends.[46]

Thus, to understand how sentencing theory on the front end relates to judicial discretion to resentence individuals on the back end, this Section looks briefly at the "four horsemen"[47] theories or purposes of punishment—deterrence, retribution, incapacitation, and rehabilitation—and asks why they have become so entrenched within modern punishment and sentencing.[48]

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44. *See generally* C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1953) (describing injustices in England's theory of punishment).

45. *See generally* CESARE BECCARIA ET AL., ON CRIMES AND PUNISHMENTS (Graeme R. Newman & Pietro Marongiu trans., Transaction Publishers 5th ed. 2009) (1764) (criticizing the idea that citizens somehow consent to punishment by the state as part of a "social contract"); JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT (James T. McHugh ed., Prometheus Books 2009) (1830) (introducing utilitarian rationales for and proportionality principles around criminal punishment); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Batoche Books 2000) (1781) (same); DIDIER FASSIN, THE WILL TO PUNISH (Christopher Kutz ed., 2018) (arguing that criminal laws stem from an inherent desire to punish antisocial behavior); NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990) (arguing against mass incarceration while suggesting that more criminal offenders should be subject to other types of community controls).

46. Karakatsanis, *supra* note 39, at 856 ("The criminal law is not an inviolate repository of right and wrong, but—just like any other policy fashioned in a country as unequal as ours—a tool related to cultural, racial, and economic features of our society.").

47. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1660 (2020) (referring to the punishment purposes as "the four horsemen of the carceral state").

48. *See* Frase, *Punishment Purposes*, *supra* note 1, at 70–74 (discussing both the utilitarian and nonutilitarian purposes and limitations of punishment theories); *see also* Frase, *Sentencing Principles*, *supra* note 2, at 369–71

Moreover, traditional historical accounts of sentencing and punishment typically gloss over the fact that the criminal legal system is itself a product of its unfortunate violent and racist history.[49] But sentencing law and theory are far from static.[50] Indeed, in both federal sentencing as well as in the broader history of sentencing and corrections, distinct historical eras are apparent.[51] It is hard to ignore that we are in a moment where the criminal legal system is being questioned and scrutinized, and that many stakeholders (i.e., judges, legislators, communities) have grown weary of and disillusioned with the current

(analyzing Morris's theory of retribution through the "guiding principles" of other theories of punishment); Tapia v. United States, 564 U.S. 319, 325 (2011) (explaining that the Federal Sentencing Reform Act enables judges to consider "the four purposes of sentencing generally"—retribution, deterrence, incapacitation, and rehabilitation).

49. *E.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1800 (2020) ("Understanding the criminal legal system as a historical and persistent force for violence, expropriation, and exclusion that defines our system of laws raises deep questions about whether and how the criminal legal system can be fixed."); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1618 (2019) ("Contemporary abolitionists recognize current democracies, and particularly that of the United States, as a farce, characterized by hollow pretensions of inclusion in the face of a collective failure to reckon honestly with histories of slavery, genocide of indigenous peoples, lynching, segregation, exploitation of the working poor, gendered violence, and the persistent inequalities those practices have wrought." (citing ANGELA Y. DAVIS, ABOLITION DEMOCRACY 84–85, 97–103 (2005))); Roberts, *supra* note 23, at 20 ("The pillars of the U.S. criminal punishment system—police, prisons, and capital punishment—all have roots in racialized chattel slavery." (citing Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 267 (2007))).

50. *See, e.g.*, Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 691–92 (2010) (explaining the shifts in policy goals animating federal sentencing law); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 51–56 (2011) (describing historical shifts in federal sentencing); TONRY, SENTENCING MATTERS, *supra* note 2, at 6–7 (describing significant shifts in sentencing law between the 1970s and 1990s).

51. *See, e.g.*, TONRY, SENTENCING MATTERS, *supra* note 2, at 4 ("In 1970, every state and the federal system had an 'indeterminate sentencing system' in which judges had wide discretion" but that, since the mid-1970s, "nearly every state has in some ways repudiated indeterminate sentencing and recast sentencing policies."); Meskell, *supra* note 8, at 840 ("[L]ittle remained constant in the United States from 1777 to 1867.").

American culture of excessive sentencing[52] and overincarceration.[53] The legal shifts that are taking place on a wide scale—in particular, increasing the availability of second-look sentencing avenues and the increasing momentum of prison abolition movements—demand a rethinking of the bedrock principles of sentencing and utility of the penal state.

Accordingly, after describing the four punishment purposes and exploring some criticisms, this Section then briefly surveys trends within sentencing law from early America until the present day in order to contextualize the current state of sentencing law and attitudes toward punishment.

### A. UNPRINCIPLED PUNISHMENT

Scholars and theorists of punishment theory largely agree that the established punishment purposes are often in conflict with each other. Indeed, "[s]ociologists of punishment will not be shocked to hear that the purpose of prison is unclear."[54] Some have cautioned that debate over these abstract purposes of punishment might actually "obscure the real issues in contest" rather than lead to meaningful and well-considered sentencing or punishment reform.[55] And yet, a brief look at the punishment purposes and dominant sentencing theories will help to frame the question of whether there are additional considerations that judges and advocates should be—or already are—considering whilst conducting the practices of sentencing and resentencing.

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52. *See generally* Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39 (2008) [hereinafter Frase, *Limiting Excessive Prison Sentences*] (describing the contours of constitutionally excessive sentencing under the Eighth Amendment); William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627 (2021) (addressing various state prohibitions on excessive non-capital punishment).

53. *E.g.*, James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/5PER-NQRE] (critiquing America's system and history of mass incarceration).

54. Driver & Kaufman, *supra* note 11, at 567; *see* Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1442 (2017) ("Great disagreement often exists about how to weigh and apply the purposes of punishment—deterrence, retribution, incapacitation, and rehabilitation—generally and in specific cases.").

55. Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1216 (2004).

Punishment theorists have tended to group punishment purposes into two camps: the utilitarian or consequentialist camp and the nonutilitarian or retributivist camp.[56] Consequentialist purposes include deterrence, incapacitation, and rehabilitation. Consequentialists justify punishment under the theory that punishment achieves certain aims such as lowering crime or recidivism rates, lowering rates of violence, or deterring future criminal conduct by an individual actor: "[I]f incarceration is justified, it's justified because it leads to good consequences, such as crime prevention and rehabilitation, that more than make up for the suffering and other bad consequences imprisonment inevitably causes."[57]

Retributivist punishment theories, on the other hand, are more ephemeral in nature and draw on notions of fairness, justice, retribution, revenge, and desert.[58] To retributivists, punishment can be justified if there was some objective wrongdoing "because prison gives offenders the punishment they deserve in proportion to their wrongdoing"[59]—even when there is no tangible effect associated with the punishment.[60]

But each of these camps have theoretical shortcomings.[61] And, more central to this Article's inquiry, each abstract theory has been incorporated—albeit imperfectly and awkwardly—into sentencing practice, with mixed results. Indeed, modern, practice-oriented sentencing has evolved into a hybrid of

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56. *See, e.g.*, *id.* at 1217–22 (describing the differences between consequentialists and retributivists in punishment theory); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 6 (1996) (discussing shortcomings of purely consequentialist view of punishment); ADAM J. KOLBER, PUNISHMENT FOR THE GREATER GOOD 2–9 (2024) (describing the concepts of "pure consequentialism" and "standard retributivism").

57. KOLBER, *supra* note 56, at 1; *see* Frase, *Limiting Excessive Prison Sentences*, *supra* note 52, at 44 ("Utilitarian theory punishes in proportion to the harm caused or threatened by the offense, but only when and to the extent that such punishment will prevent future crimes by this offender or others.").

58. Frase, *Punishment Purposes*, *supra* note 1, at 73 (characterizing retribution as "the most widely recognized nonutilitarian sentencing principle").

59. KOLBER, *supra* note 56, at 2.

60. Bilz & Darley, *supra* note 55, at 1217–19 (describing philosophical schools of thought in the writings of Jeremy Bentham (consequentialist theory) and Immanuel Kant (retributivist theory)).

61. *See, e.g.*, Duff, *supra* note 56, at 2–3 (discussing the chief "concern about the possible moral costs of a purely consequentialist perspective" that utilitarian goals would still be achieved even if the innocent were punished).

consequentialism and retributivism.[62] Most people believe punishment should *both* serve a legitimate societal aim of crime reduction *and* only be inflicted upon those who deserve to be punished.[63] Similarly, many sentencing schemes, guidelines, and statutes incorporate both consequentialist and retributivist aims.[64] The compromise between consequentialist and retributivist punishment philosophies has resulted in the dominance of "limiting retributivism" in sentencing practice: in many jurisdictions, the upper and lower ranges of a sentence are determined by the ideas of just deserts and proportionality while other, more utilitarian-based theories are used to determine a sentence within that range.[65] Although an abstract ideal that embraces both consequentialist and retributivist aims is attractive,[66] how to achieve such aims in practice, and how to measure the relative *degree* of punishment that is appropriate to punish certain acts, is often a subjective and challenging exercise.[67] Moreover, both consequentialist and retributivist purposes suffer serious

62. *See id.* at 88 (suggesting "a conception of punishment as communication" that does not lean towards either extreme of consequentialism or retributivism).

63. Bilz & Darley, *supra* note 55, at 1219 ("Retributivists have challenged consequentialism's failure to explain why the innocent can't be punished when it is expedient; nor can it explain why we should punish the guilty at all so long as the public *thinks* we have punished them (the 'let's not and say that we did' scenario). In turn, consequentialists have boxed retributivists into a corner, forcing them to try to explain why we should punish wrongdoers even when doing so seems to cost society far more than it stands to gain. More damningly, consequentialists have pointed out the problems with a theory based on desert, that doesn't specify what deserving *is*.").

64. *See id.* at 1219–20 (suggesting reliance on both theories when structuring penal systems).

65. *See, e.g.*, Frase, *Limiting Retributivism*, *supra* note 2, at 83–85 (describing limiting retributivism as a hybrid of utilitarian and nonutilitarian purposes); Frase, *Punishment Purposes*, *supra* note 1, at 73–74 (discussing both utilitarian and nonutilitarian theories of sentencing proportionality).

66. Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 277–78 (2005) (describing the influence of "limiting retributivism" on sentencing theory and practice and as a way to merge retributivist aims with consequentialist or utilitarian aims in sentencing); Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 528–29 (2002) (describing Norval Morris's theory of limited retributivism as reflected in the Model Penal Code).

67. Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1337 (1997) (explaining the "tension" between uniformity and proportionality when determining the extent of punishment for a crime).

problems in implementation that do not account for social forces and other factors relevant to sentencing.

It bears emphasis that, despite their shortcomings, the punishment purposes do not merely reflect abstract theoretical ideals—they are utilized by judges in actual sentencing determinations.[68] In the federal system, for example, the purposes of punishment are enshrined in the federal sentencing statute, 18 U.S.C. § 3553(a). At the end of every federal sentencing, after a complex guideline calculation has been completed, judges must consider whether a sentence is harsh enough to "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"—in other words whether the sentence is proportionally harsh enough under the banner of retribution.[69] A judge must also consider whether the sentence "afford[s] adequate deterrence to criminal conduct"[70] (deterrence), whether the sentence "protect[s] the public from further crimes of the defendant"[71] (incapacitation), whether the sentence provides "educational or vocational training, medical care, or other correctional treatment" (rehabilitation),[72] as well as "the need to avoid unwarranted sentence disparities."[73] Finally, the statute dictates that a sentencing court must impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of punishment, reflecting the parsimony principle.[74] These enumerated sentencing factors inform nearly every federal sentence, no matter the crime.[75] Many state systems justify punishment based on similar stated purposes and

68. *See* Gertner, *supra* note 50, at 705–06 (noting that judges were "advised to consider the purposes of sentencing" when determining the weight of an offense).

69. 18 U.S.C. § 3553(a)(2)(A).

70. *Id.* § 3553(a)(2)(B).

71. *Id.* § 3553(a)(2)(C).

72. *Id.* § 3553(a)(2)(D).

73. *Id.* § 3553(a)(6).

74. *Id.* § 3553(a); *see* Gall v. United States, 552 U.S. 38, 50 n.6 (2007) (listing and explaining the federal sentencing statute's factors).

75. The notable exception here is for sentences that are dictated by statutory mandatory minimum sentences. *Gall*, 552 U.S. at 46 n.2 (citing U.S. SENT'G GUIDELINES MANUAL § 1A1.1 (U.S. SENT'G COMM'N 2006)).

enshrine these purposes of punishment in their sentencing statutes.[76]

Further animating these punishment purposes are the additional principles of parsimony (that any sentence must be no more severe than is necessary to serve the aims of deterrence, incapacitation, or rehabilitation),[77] proportionality[78] (that the overall severity of the punishment must be proportionate to the seriousness of the offending behavior)[79] and parity or reduction in sentencing disparity (that similarly situated people should be punished similarly for similar crimes).[80] In sum, uniformity in

76. *E.g.*, COLO. REV. STAT. § 18-1-102.5(1) (2024); 42 PA. CONS. STAT. § 9721(b) (2024); CAL. PENAL CODE § 1170(a)(1) (West 2024); ARIZ. REV. STAT. ANN. § 13-101 (2024); OHIO REV. CODE ANN. § 2929.11(A) (LexisNexis 2023–24).

77. Hanan, *supra* note 17, at 1206 ("[T]he punishment should inflict no pain greater than what is required to accomplish its goal." (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 142 (Batoche Books 2000) (1781))).

78. It is important to distinguish the concept of constitutional proportionality from the way that it is more commonly used. The Eighth Amendment strictly bars only sentences that are disproportionate in a constitutional sense, but these have historically been limited to particular kinds of sentences, such as imposing the death penalty for juveniles. *See, e.g.*, Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 54 (2009) ("Proportionality litigation in the federal courts has not been particularly successful, especially in challenging non-capital sentences."). Although other sentences may seem extreme, the Supreme Court has nonetheless historically upheld, as a constitutional matter, sentences that most lay people would deem disproportionate and has left to state and federal legislatures the task of deciding what sentences should be imposed for what crimes. *E.g.*, Harmelin v. Michigan, 501 U.S. 957, 961, 990, 994–95 (1991) (upholding sentence of life without parole for a first-time offender convicted of possessing 672 grams of cocaine).

79. *See* Norval Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974) ("Desert: No sanction greater than that 'deserved' by the last crime or bout of crimes for which the offender is being sentenced should be imposed.").

80. *See* Hanan, *supra* note 17, at 1201 (highlighting the importance of "like cases being treated alike").

punishment is an elusive goal,[81] and worse, "we do not really know why we incarcerate."[82]

Scholars have pointed out that sentencing suffers from another fundamental infirmity: that sentences are calculated and imposed in increments of months or years without an acknowledgement of prison's realities.[83] The abstraction of this numerical system, however, obscures the fact that what sentencers are doing is ultimately dooming people to an existence that is by its very nature violent and dehumanizing.[84]

Indeed, there is an acknowledged absurdity involved in mapping a person's conduct onto a sentencing chart[85] that amounts to a term of months or years (as happens in federal sentencings and in jurisdictions with guidelines-based sentencing schemes). Indeed, it is an absurdity that lawyers and judges (and, tragically, people facing any kind of jail time) are forced to simply accept at the sentencing phase of a criminal case.[86] And that absurdity—the quantifiable term of months that a person deserves for, say, having a prior drug conviction or being the second lowest rather than the lowest man in a drug conspiracy[87]—takes on an even greater significance in the second-look context,

81. As Richard Frase famously wrote, "[i]t is intolerable to allow three identical [people] to receive very different sanction severity because one judge believes in community-based treatment, one believes in proportionality limits, and one believes in using very lengthy prison terms for deterrence." Frase, *Punishment Purposes*, *supra* note 1, at 82 (alteration in original). But this is what is happening in the sentencing context in many respects, largely due to the confusion around the punishment purposes.

82. Driver & Kaufman, *supra* note 11, at 558 (citing Sharon Dolovich, *Exclusion and Control in the Carceral State*, BERKELEY J. CRIM. L., Fall 2011, at 259, 261).

83. Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 2 (2012) ("We fetishistically focus on the length of prison terms, even though sentence severity cannot just be a function of time.").

84. Driver & Kaufman, *supra* note 11, at 520 ("[T]he gap between the arid doctrines crafted in courtrooms and the lived realities on American cellblocks is particularly stark.").

85. U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2023) (showing the sentencing table).

86. The single-minded focus on a term of years as a measure of a punishment's harshness is what Adam Kolber has called the "duration fetish." Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1159 (2013).

87. U.S. SENT'G GUIDELINES MANUAL §§ 3B1.1, 3B1.2 (U.S. SENT'G COMM'N 2023) (describing when to increase or decrease an offense level for sentencing purposes).

when that person could suffer some incalculable harm behind bars in the two-year discrepancy that may attach to that slight difference in criminal culpability.

The result is, thus, a confusing mélange of possible rationales that justify punishment, making punishment seem "notoriously confused about its own purpose."[88] While the four sentencing theories are "widely-recognized," sentencing theorists agree that they "often conflict with each other" to the point that "it is difficult [in practice] to find a sanction that satisfies all relevant sentencing purposes."[89] The internal inconsistency of these punishment purposes, in addition to the lack of empirical data justifying them, has created a morass of confusion in the realm of sentencing law, begging the question "who decides whether this set is complete, overinclusive or underinclusive, and how to achieve any of these objectives?"[90] And yet, American criminology has stubbornly clung to these rationales of punishment for centuries.

The shortcomings of the established punishment purposes are especially acute in second-look proceedings.[91] Though scholars have identified a lack of clear sentencing goals as a problem in the initial sentencing context,[92] such muddled theorizing is further complicated after a person has already been sentenced and judges are revisiting a sentence years later. As discussed herein, there is an urgent need for theorizing about the second-look context and to think about how existing sentencing theory may or may not map on to sentence reduction proceedings.

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88. Driver & Kaufman, *supra* note 11, at 558.

89. Frase, *Punishment Purposes*, *supra* note 1, at 75.

90. Resnik, *supra* note 11, at 376; *see* Driver & Kaufman, *supra* note 11, at 558 ("First-year law students can rattle off the goals of punishment—incapacitation, retribution, deterrence, rehabilitation—and can just as quickly identify their flaws and internal complications.").

91. *See, e.g.*, Hessick & Berman, *supra* note 4, at 165 ("[M]any courts remain uncertain about how to exercise their discretion to reduce sentences without devolving to lawless sentencing.").

92. Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 470–71 (1992) (observing that "[d]ifferent kinds of sentences will be better or worse at achieving different purposes[,]" and proposing that the "[Sentencing] Commission could provide guidance by exploring the comparative strengths and weaknesses of different sanctions in achieving different goals"); Frase, *Punishment Purposes*, *supra* note 1, at 75–79 (discussing "conflicts" between different sentencing purposes).

Considering all of this, when scholars and theorists agree that the purposes of punishment themselves are internally inconsistent, why does it make sense to delve into these theories rather than discard them altogether? First, because the punishment purposes are still the dominant framework by which judges and other legislative or decision-making bodies conceptualize why we punish. On the front end of a sentencing, judges still look to the punishment purposes to justify incarceration. Shedding light on the thin foundation of these punishment purposes is, thus, part of the project of dismantling the default mode of incarceration.[93]

But as the following Parts explore, the punishment decisionmakers are looking more and more for an established reasoning that tends toward decarceration rather than more punishment.[94] But, with no theory of *unpunishment*, judges and other stakeholders may not feel as empowered to do so.

### B. PUNISHMENT'S FRACTURED FOUNDATIONS

The enduring legacy of the "four horsemen"[95] is counterintuitive, given its many critics and critiques. But throughout the American history of incarceration, vast swings in thinking about the efficacy of sentencing have driven sentencing policy.[96] This current moment, too, demands and invites a new way of thinking about why we punish—one that aligns with a growing movement toward decarceration.

Although the behemoth character of the criminal legal system may seem immutable, the truth is that sentencing law and

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93. *See generally* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022) (discussing how prison abolitionists respond to "the dangerous few" and suggesting alternatives); Cullors, *supra* note 43 (discussing the history and modern-day application of abolition).

94. *See* Frampton, *supra* note 93, at 2027 (highlighting the overarching theme of decarceration for abolition programs (citing DAVIS, *supra* note 16, at 107)).

95. Ristroph, *supra* note 47, at 1660 (referring to the punishment purposes as "the four horsemen of the carceral state").

96. *See* Meskell, *supra* note 8, at 864 ("The story of what happened to American prisons between 1777 and 1867 is, in the end, common . . . . Disgusted with old habits, inspired by the opinion of the time, every resolver pledges to change and to do things better in the future.").

policy has always been in flux.[97] While public opinion is coalescing around the notion that the criminal legal system needs reform,[98] overhaul, or even total abolition,[99] legislative bodies and judicial actors are becoming increasingly aware that the criminal legal system's status quo cannot be maintained.[100] These changes in attitudes should be embraced, and sentencing theory should be updated to reflect these shifts. Indeed, if sentencing policy is to be reimagined, it must be reimagined in context, to attempt to both confront and "repair histories of harm"[101] that endure in the monolithic criminal injustice machine.

Two notable historical phenomena thus frame the discussion of how the punishment purposes came to be, and why it may be time to rethink them. First, the birth of sentencing emerged along with the birth of prisons, as well as a history of racial and class subordination. Sentencing as we know it, then, cannot be decoupled from this history. Second, during the latter half of the twentieth century, sentencing policy shifted from a focus on what scholars have called "the rehabilitative ideal"—in which reform and return to society was the goal—to one of overreliance on incapacitation. Both histories contribute to the reasons why decarceration is gaining momentum and counsel sentencing theorists to re-examine whether the punishment purposes as applied are achieving their stated aims.

***Prisons and the Birth of Sentencing.*** Sentencing in early America was dominated by determinate sentencing: a conviction

97. *Id.* (explaining how American prison policy has undergone numerous changes as various reformers sought to change the system in response to past "abuses").

98. Press Release, Am. C.L. Union, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/7YRS-QYJN] ("The data is clear—when it comes to criminal justice, Americans want reform and rehabilitation." (internal quotation marks omitted)); *see also* Press Release, Fams. Against Mandatory Minimums, 82% of Americans Support Prison Oversight, According to First-Ever National Poll, https://famm.org/82-of-americans-support-prison-oversight-according-to-first-ever-national-poll [https://perma.cc/3D7U-BZMQ].

99. *See, e.g.*, McLeod, *supra* note 19, at 1160–61 (explaining the growth and development of the "prison abolitionist framework").

100. *See* Mistretta v. United States, 488 U.S. 361, 366 (1989) (alluding to a historical interest in addressing and reforming unjust sentencing practices).

101. Cullors, *supra* note 43, at 1686 ("Abolition calls on us not only to destabilize, deconstruct, and demolish oppressive systems, institutions, and practices, but also to repair histories of harm across the board.").

for a certain crime was tied to a specific sentence—often noncarceral, and often death.[102] Once a person was convicted of a crime, the sentence was mandated by statute, so no separate sentencing proceeding was required because the possibility of sentencing discretion did not exist in the way that it does today.[103] In part, this was because "punishments were public and involved either quick, corporal tortures or more prolonged humiliation,"[104] including public whipping, maiming, and other forms of physical violence. As the narrative goes, the birth of the prison was tied to "progressive" reform: appalled by these barbaric punishments, reformers in early America sought to supplant the corporal punishment model with something more humane.[105] Starting around the 1820s, America's prisons emphasized rehabilitation in the form of silence, regular labor, and discipline.[106]

Historical accounts of punishment theory emphasize that the justification for punishment shifted from a more retributivist rationale (focused on corporal pain as revenge) to utilitarian rationales (focused on deterrence and rehabilitation) sometime in the mid-nineteenth century.[107] Consequently, our modern system of sentencing—calculated in terms of time rather than

102. Hessick & Hessick, *supra* note 50, at 51 (describing how, in early America, "the process of sentencing was virtually indistinguishable from the process of conviction"); David J. Rothman, *Perfecting the Prison: United States, 1789–1865* (explaining that in early American history the death penalty became a frequently imposed criminal penalty), *in* OXFORD HISTORY OF THE PRISON 100, 102 (Norval Morris & David J. Rothman eds., 1995); DAVIS, *supra* note 16, at 26 (describing how the new institution of the penitentiary would serve as a prelude to punishment).

103. Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) ("The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense." (quoting JOHN H. LANGBEIN, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 36–37 (A. Schioppa ed., 1987))).

104. Meskell, *supra* note 8, at 841.

105. DAVIS, *supra* note 16, at 27 ("[T]he penitentiary was generally viewed as a progressive reform, linked to the larger campaign for the rights of citizens.").

106. Rothman, *supra* note 102, at 105–06 ("The prison would transform the deviant into a law-abiding citizen, that is, rehabilitate the offender.").

107. Joseph M.P. Weiler, *Why Do We Punish?: The Case for Retributive Justice*, 12 U.B.C. L. REV. 295, 296–98 (1978) (attributing change in attitudes to the work of Jeremy Bentham, who popularized utilitarian theories of punishment).

pain—also came into being.[108] Prison also gave judges wider latitude and greater power over sentencing decisions, which transitioned from a question of the form of punishment to one of how long a term of incarceration a person should serve.[109]

Indeed, even in their earliest forms, contemporary sentencing and the origins of the carceral state were inextricably linked. As Angela Davis reminds us:

> [It is] important to grasp the fact that the prison as we know it today did not make its appearance on the historical stage as the superior form of punishment for all times. It was simply—though we should not underestimate the complexity of this process—what made the most sense at a particular moment in history.[110]

The same is true for sentencing policy, and the prevailing purposes of punishment. These emerged as the rationales that justified a reliance on the penitentiary in place of other forms of punishment; and these, too, were a product of a particular moment in time.[111]

As many scholars have explained, the American prison system soon became a tool of social and racial control.[112] In the 1860s, slavery was largely supplanted with a system of

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108. DAVIS, *supra* note 16, at 44 ("The prison sentence, which is always computed in terms of time is related to abstract quantification, evoking the rise of science and what is often referred to as the 'Age of Reason.'").

109. As the Supreme Court explained in *United States v. Booker*, "once determinate sentencing had fallen from favor, American judges commonly determined facts" that led to higher authorized sentences. 543 U.S. 220, 236 (2005). Once judges were permitted to find such enhancing facts, "[i]t became the judge, not the jury, who determined the upper limits of sentencing." *Id.*

110. DAVIS, *supra* note 16, at 43.

111. *See* McLeod, *supra* note 19, at 1207 ("[C]aging or confining human beings in a hierarchically structured, depersonalizing environment developed through historical practices of overt racial subordination tends inherently towards violence and degradation."); *see also* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 2–5 (2003) (describing the 1870s as a turning point for American penology and the move to calculation of sentences in terms of time that arose with the birth of modern prisons).

112. Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1580 (2019) ("The rise of the modern U.S. penitentiary in the early decades of the twentieth century was preceded and accompanied by the Thirteenth Amendment's juridical translation of slavery from a racial chattel institution to a criminal justice function in 1865 . . . .").

imprisonment and convict leasing, especially in the American South.[113] The legacy of this system left lasting impacts on the American system of incarceration.[114] So while prisons first developed as an answer to the barbarism of public executions and corporal punishment, they quickly became a way to warehouse and exploit people who society deemed criminal, and in particular perpetuated the forced labor of Black Americans.[115] The enormity and barbarity of the convict leasing system is staggering; this Article does not attempt a comprehensive accounting of this era in the history of American prisons as vast scholarship exists on the topic.[116] But what is clear is that the carceral system became a way to "strip and degrade the inmate of his former self," often under the banner of rehabilitation.[117]

Thus, sentencing as we understand it today—as a system in which people are removed from society for a term of years—evolved along with the birth of prisons. The penitentiary gave sentencers a new option for imposition of punishment,[118] but this new system of punishment was also disproportionately

113. DAVIS, *supra* note 16, at 29 ("In the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the possibilities of freedom for newly released slaves.").

114. *See* McLeod, *supra* note 19 at 1188–93 (describing the historical development of southern race-based criminal prohibitions that fueled mass incarceration). The legacy of convict leasing is still present in many communities—both the infrastructure that was the product of convict labor, as well as the continued culture of incarceration that such a system wrought. DAVIS, *supra* note 16, at 37 ("The persistence of the prison as the main form of punishment, with its racist and sexist dimensions, has created the historical continuity between the nineteenth- and early-twentieth-century convict lease system and the privatized prison business today.").

115. DAVIS, *supra* note 16, at 23 ("The antebellum criminal justice system, which focused far more intensely on black people than on whites, defined southern criminal justice largely as a means of controlling black labor."). On this point, some have pointed out that the desire for forced labor came first, and the way to achieve that was through criminalization via the Thirteenth Amendment. *See* Rodríguez, *supra* note 112, at 1580–83.

116. *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (2010); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); DAVIS, *supra* note 16; McLeod, *supra* note 19.

117. McLeod, *supra* note 19 at 1189.

118. *See, e.g.*, Rothman, *supra* note 102, at 103–04 (explaining the development in the popularity of incarceration as a form of punishment).

experienced by certain, already disadvantaged groups, and ushered in a new era of carceral control.[119]

***Criminal Regulation and the Abandonment of Rehabilitation.*** Then, beginning around the end of the nineteenth century, several changes to criminal sentencing and corrections[120] precipitated a shift to judicial sentencing. Around the end of the nineteenth century, many new crimes—including vice crimes or victimless crimes—were codified and prosecuted.[121] Where previously only a handful of serious crimes existed, the early twentieth century of American law is characterized by a rapid augmentation of the criminal code.[122] In particular, the Prohibition Era ushered in a system of federal criminal regulation[123] including an explosion of federal laws related not just to alcohol, but also to drugs such as cocaine.[124] The systemization and expansion of the American prison, as well as other programs aimed at reformation and rehabilitation, also occurred around

119. *Id.* at 114 (explaining how the incarceration-based system of punishment lead to a disproportionate number of immigrant inmates).

120. Wesley M. Oliver, *Prohibition's Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 479 (2018) ("Two innovations in the mid-nineteenth century fundamentally reshaped criminal law and its enforcement-police forces and vice crimes.").

121. *Id.* at 80 (describing the rise of victimless crimes in relation to the Fourth Amendment exclusionary rule and remarking that "there were virtually no victimless crimes in early America").

122. While in in 1873 the federal code, for example, contained only 183 separate offenses, today there are over 4,500 federal criminal statutes and far more regulations containing criminal penalties. *See* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 92 & nn.42–43 (2019) (first citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514 (2001); and then citing John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. (Aug. 6, 2014), https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations [https://perma.cc/VX9Q-B325]).

123. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 964 (2003) ("Federal criminal law did not begin to become a significant part of the national criminal firmament until Prohibition.").

124. *See* Alexander Testa & Jacqueline Lee, *Trends in Sentencing of Federal Drug Offenders: Findings from U.S. District Courts 2002–2017*, 51 J. DRUG ISSUES 84, 85 (2021). Even at their inception, the passage of these laws cannot be divorced from their racist origins. Testa and Lee's study notes that the regulation of opiates and cocaine by the Harrison Narcotics Act of 1914 was in part motivated by racial bias: "[C]ocaine raised the specter of the wild Negro, opium the devious Chinese, morphine the tramps of the slums." *Id.* (quoting D.M. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 65 (1987)).

the same time that these new crimes were codified, perpetuating a system of racial subordination and social control.[125]

In the realm of sentencing, attitudes toward punishment became, by necessity, more nuanced. Rather than simply being concerned with culpability or guilt—philosophers, sociologists, and legal actors increasingly began to probe questions of punishment and its justification.[126] Along with this increased judicial discretion,[127] penal philosophy was focused on rehabilitation.[128] This period is known to sentencing historians as the era of the "rehabilitative ideal," where prisons were primarily thought of as a place where people would be sent in order to be "reformed," and released once such reform had taken place.[129]

During this period and until the 1970s, sentencing was largely discretionary, and judges had wide latitude to sentence within certain ranges. In the federal system, for example, discretionary sentencing was the norm until the 1980s.[130] Within this

125. DAVIS, *supra* note 16, at 32 ("Marxist theorists of punishment have noted that precisely the historical period during which the commodity form arose is the era during which penitentiary sentences emerged as the primary form of punishment."); *see also* Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, LAW & CONTEMP. PROBS., Summer 2003, at 99, 105 (describing how, around the turn of the century, a "new era of individualization gave rise to departments of corrections, the juvenile court, and treatment and rehabilitation programs").

126. *See* Alessandro De Giorgi, *Punishment and Political Economy* ("Since its origins in the first decades of the 19th century, and for most of the 20th century, 'criminology' has been the study of *crime* rather than the study of *punishment*: punishments, criminal policies, and strategies of social control were not the objects of criminological analysis, but rather 'tools' to govern the criminal question."), *in* ALTERNATIVE CRIMINOLOGIES 40, 40 (Pat Carlen & Leandro Ayers França eds., 2017).

127. Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 190 (2014) ("For nearly a hundred years . . . discriminatory sentencing was the norm.").

128. *See* Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005) (describing the evolution of federal sentencing prior to *United States v. Booker*).

129. Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226, 226 (1959) (explaining that the "primary significance" of the rehabilitative ideal is to serve as a "therapeutic function" to change the behavior of the convicted person).

130. Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186 (1993) ("For the better part of this century, the federal system, like that of the states, operated under the rubric of the indeterminate sentence."); *see also*

system, Congress set the bounds of the penalties for crimes by passing statutory minimum and maximum sentences for certain criminal conduct.[131] The same was true of the states: in 1970, every state had an indeterminate sentencing system that gave judges broad discretion to sentence.[132] As in most state systems during this period, the animating rationale for indeterminate sentencing in the federal system was the promotion of rehabilitation. In theory, this wide discretion allowed "the judge and the parole officer to [base] their respective sentencing and release decisions upon their own assessments of the [person's] amenability to rehabilitation."[133]

However, by the mid-1990s "nearly every state," as well as the federal system "had in some ways repudiated indeterminate sentencing" to some degree, giving judges and parole boards far less latitude over sentencing.[134] There were several rationales behind this shift. First, critiques of discretionary or indeterminate sentencing resulted in wide sentencing disparities that often exposed stark racial divides in the sentences received.[135] Further, lawmakers and others grew skeptical that the system was really achieving its rehabilitative aims.[136] Indeed, "by the 1980s rehabilitation had receded as the dominant justification

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Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing.").

131. *Mistretta*, 488 U.S. at 364–65 ("[U]nder the indeterminate sentence system, Congress defined the maximum, [and] the judge imposed a sentence within the statutory range.").

132. TONRY, SENTENCING MATTERS, *supra* note 2, at 4 ("In 1970, every state and the federal system had an 'indeterminate sentencing system' in which judges had wide discretion to decide who went to prison and set maximum and sometimes minimum prison terms.").

133. *Mistretta*, 488 U.S. at 363.

134. TONRY, SENTENCING MATTERS, *supra* note 2, at 4.

135. *See generally* Joseph C. Howard, Racial Discrimination in Sentencing, 59 JUDICATURE 121 (1975); *Developments in the Law—Race and the Criminal Process*, HARV. L. REV. 1472, 1603–41 (1988). This division persists despite the U.S. Sentencing Commission purporting to apply penalties in a nondiscriminatory manner. *See* 28 U.S.C. § 994(d) (1988) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

136. *See* Mistretta v. United States, 488 U.S. 361, 366 (1989) (explaining that "fundamental and widespread dissatisfaction" for the rehabilitation model continued to be expressed).

for incarceration and the nation had shifted toward warehousing rather than reforming its prisoners."[137]

For example, the Sentencing Reform Act of 1984 overhauled federal sentencing practices, abandoned indeterminate sentencing and parole, and instead supplanted the old system with a new system of mandatory guidelines.[138] The apex of the crime control era in American policing also occurred during the 1980s and 1990s when a wave of anti-crime legislation was passed, aimed largely at the types of criminal activity associated with poor communities and communities of color.[139] Most notoriously, "[t]he now-infamous 'War on Drugs' campaign of the 1980s culminated in the adoption of the Anti-Drug Abuse Act of 1986, which included a provision for a one-hundred-to-one sentencing ratio of powder cocaine to crack cocaine."[140] Unsurprisingly, the period of time also saw a drastic expansion of the prison population, and a corresponding construction of an unprecedented number of prisons—both state and federal—nationwide.[141]

The dominant narrative that the move away from indeterminate sentencing decreased disparity thus has a darker side.[142]

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137. Driver & Kaufman, *supra* note 11, at 560.

138. *See* 18 U.S.C. §§ 3551–3586 (1988); *Id.* §§ 3551–3586 (Supp. III 1990); *Id.* §§ 991–998 (1988); *Id.* §§ 991–998 (Supp. II 1990).

139. *E.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (targeting crack cocaine); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (introducing further restrictions on habeas relief); *see also* Sarah Hyser, *Two Steps Forward, One Step Back: How Federal Courts Took the "Fair" Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 504 (2012) ("Under the Anti-Drug Abuse Act of 1986 . . . first-time possession of a small amount of crack yielded a mandatory minimum sentence of five years in prison. Meanwhile, the same offender found guilty of possessing powder cocaine would have to be in possession of 100 times that amount to receive the same five-year sentence. This scheme was known as the 100:1 sentencing ratio.").

140. Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2531 (2010).

141. Ashley Nellis, *Mass Incarceration Trends*, SENT'G PROJECT (May 21, 2024), https://www.sentencingproject.org/reports/mass-incarceration-trends [https://perma.cc/WE26-SY3W] ("The prison expansion that commenced in 1973 reached its peak in 2009 . . . [from] 1985 and 1995 alone, the total prison population grew an average of eight percent annually.").

142. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1285–89 (1995) (describing the draconian mandatory minimum sentencing schemes ushered in by the Anti-Drug Abuse Act of 1986 that drastically and disproportionately affected Black communities).

Increased reliance on mandatory minimum sentencing and guidelines was lauded under the banner of uniformity, but simply shifted discretion over sentencing to prosecutors (whose charging decisions often determine sentencing outcomes) rather than judges.[143] Startling statistics tell at least one story about the failure of mandatory sentences to achieve its stated aims: in 1986, before the U.S. Sentencing Guidelines were adopted, "the average federal drug sentence for African Americans was 11% higher than for whites,"[144] but after the Guidelines were adopted that number skyrocketed. "Four years later, and after the institution of the Guidelines, the average federal drug sentence for African Americans was 49% higher."[145] A cautionary tale is embedded in this example: a reform that sought to reduce sentencing disparity—in fact—simply increased penalties for many groups.

Whatever attempt at adherence to rational punishment purposes may have driven sentencing policy until the 1980s entirely deteriorated during this period, supplanted instead by draconian mandatory minimums, overincarceration, fearmongering, and a general abandonment of principled punishment. The next several decades of criminal regulation was dominated by harsher and harsher criminal penalties, fewer avenues for parole, harsher mandatory minimums, and a replacement of the rehabilitative ideal with an over-reliance on incapacitation as a crime control policy. Incarceration rates—driven largely by the crime control measures of the '80s and '90s—reached a peak sometime in the 2010s.[146] Now, it seems, incarceration rates may be falling, and decisionmakers may be becoming disillusioned with America's addiction to carceral punishment. This phenomenon

143. As one former federal judge has criticized, "[o]ne weapon only federal prosecutors have the power to unleash is doubling of drug mandatory minimum sentences potentially to a mandatory life sentence." Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 876, 903 (2014) (discussing the arbitrariness with which federal prosecutors seek draconian mandatory sentences and highlighting the "strong racial overtones").

144. *Id.* at 894 (citing Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Petitioner at 5–6, Kimbrough v. United States, 552 U.S. 85 (2007) (No. 06-6330), 2007 WL 2155556).

145. *Id.*

146. Nellis, *supra* note 141 (graphing the U.S. state and federal prison population between 1925 and 2022).

can be partially explained by a widespread recognition that American sentencing has become extreme,[147] cruel,[148] and out of step with most of the rest of the world.[149]

### C. THE PRESENT MOMENT AND EFFORTS TOWARD DECARCERATION

Recently, however, another movement has gained momentum in both the state and federal systems: increased avenues to review old sentences. Whether by Supreme Court statutory interpretation, the judgment of the United States Sentencing Commission, or by Congressional decree, these changes may reflect a growing discomfort among various branches of government responsible for sentencing law about the mandatory nature of sentences as well as the length of federal sentences.[150] The advocacy efforts and decisions that have come out of the second-look context demonstrate that the unrelenting drive toward mass incarceration may be slowing.

This Part of the Article provides an overview of recent second-look reforms in order to emphasize the point that the tides may be turning. The below are examples of attempts at mitigating the disasters of excessive sentencing. But this moment calls for more. In order to shore up the benefits of second-look measures and retroactive changes in the law that benefit those serving extreme sentences, we must ask why this movement is occurring now, and how sentencing theory can respond.

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147. *E.g.*, Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 CARDOZO L. REV. 59, 67–68 (2016) (explaining the development of extreme sentencing practices).

148. *See* Commonwealth v. Mattis, 224 N.E.3d 410, 415 (Mass. 2024) (holding that a mandatory term of life in prison without the possibility of parole is unconstitutional for eighteen to twenty-year-olds).

149. Emily Widra & Tiana Herring, *Appendix 2: Country Data States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/appendix_countries_2021.html [https://perma.cc/D5M5-YAJ8].

150. Unfortunately, this discomfort—and the second-look "fix"—comes with similar problems that have long existed with systems of probation and parole. Parole is a discretionary grant only available to some, and serves to legitimate the rest of the system of mass incarceration. As explored *infra* Part III, this Article's main argument is not that second-look proceedings should be expanded, but that the continual pendulum swings that have existed within the history of American sentencing demonstrate that the punishment system—and its justifications—require a more permanent and foundational solution.

***Federal Retroactive Changes in the Law.*** Although federal sentences have been widely criticized as overly lengthy and draconian by legal scholars,[151] in recent years, several federal retroactive changes in the law have allowed federal defendants to petition sentencing courts for resentencings or sentence reductions.[152] These have included where the Supreme Court has revised its interpretation of federal statutes, where Congress has explicitly allowed for certain categories of defendants to apply for sentencing relief, and where the federal Sentencing Commission has amended its guidance for who can apply for a sentence reduction. For example, in 2015, the Supreme Court invalidated one prong of a federal recidivist statute, the Armed Career Criminal Act (ACCA), requiring judges to review and resentence thousands of people convicted of federal crimes.[153] This watershed decision was followed by a string of similar Supreme Court cases resulting in resentencings of people who had previously been serving mandatory minimum sentences for gun-related crimes.[154]

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151. *See, e.g.*, Butler, *supra* note 34, at 1455 (criticizing harsh sentencing laws that adversely impact Black Americans); Hamilton, *supra* note 147, at 67–68 (explaining the gravity of the American carceral system's "exclusionist ideology" in the context of lifetime sentences).

152. A full-blown resentencing hearing is warranted when a prior sentence is rendered invalid. *See* 28 U.S.C. § 2255(b) (providing for resentencing as a remedy for an improper sentence). But, in many circumstances, upon a motion of a defendant, a judge is permitted to simply impose a new sentence in the form of a sentence reduction without a full resentencing hearing. 18 U.S.C. § 3582(c)(1)(A).

153. *See* Johnson v. United States, 576 U.S. 591, 597 (2015) (holding that the "residual clause" of 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), was unconstitutionally vague and invalidating thousands of federal sentences imposed under the ACCA recidivist firearm statute); *see also* Stephen R. Sady & Gillian R. Schroff, Johnson*: Remembrance of Illegal Sentences Past*, 28 FED. SENT'G REP. 58, 58–59 (2015) (discussing the implications of *Johnson* for ACCA residual clause sentences).

154. *See, e.g.*, Wooden v. United States, 142 S. Ct. 1063, 1067 (2022) (holding that crimes committed in a single "spree" only qualified as a single prior offense or prior conviction under the ACCA recidivist gun possession statute); Borden v. United States, 141 S. Ct. 1817, 1821–22 (2021) (holding that a criminal offense cannot qualify as a "violent felony" ACCA predicate if it only requires a mens rea of recklessness—a less culpable mental state than purpose or knowledge); United States v. Davis, 139 S. Ct. 2319, 2336 (2019) (holding that the "residual clause" of 18 U.S.C. § 924(c) was unconstitutionally vague and invalidating federal sentences under that firearm prohibition statute).

Then, in 2018, Congress enacted the First Step Act, the most widespread legislative reform to federal sentencing law in decades.[155] Among other major reforms, the First Step Act permitted people sentenced under the aforementioned draconian and racist crack cocaine sentencing provisions of the 1980s and 1990s to move the courts for resentencing relief.[156] As explained above, while mandatory minimum sentences applied to both powder and crack cocaine, the quantity of *powder* cocaine required to trigger the same mandatory minimum as for *crack* cocaine was one hundred times higher.[157]

Finally, and most significantly, the First Step Act also ushered in an expansive new vehicle for people incarcerated in the federal system to petition courts to review old sentences: filing motions for sentence reductions or early release under 18 U.S.C.

155. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; *see also* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 8–9 (2019) (summarizing the First Step Act's sentencing reforms, particularly those involving mandatory minimum sentences); Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. 791, 795 (2019) (describing reforms to federal prison and sentencing contained in the First Step Act, which included increasing available rehabilitation programming within federal prisons, placing incarcerated people within 500 miles of their families, and reducing statutory punishments for those convicted of crack cocaine offenses).

156. These laws were passed at a time when nationwide anxiety about drug-related crimes was at its height. *See, e.g.*, Hyser, *supra* note 139, at 507–08 (describing the media panic around crack cocaine in the 1980s). But it targeted crack cocaine, prevalent in predominantly poor and Black neighborhoods. *See id.* at 508–10 (recounting the sentencing disparity and its disproportionate effect on Black Americans). Congress had tried to address this issue under the Fair Sentencing Act of 2010, which reduced (but did not eliminate) the disparity to a ratio of approximately 18-to-1, and raised the amounts of crack required to trigger mandatory minimum sentences. *Id.* at 513. But this change did not apply retroactively to people who had already been sentenced. *See id.* at 514–15 (explaining the Fair Sentencing Act's lack of retroactivity with respect to mandatory minimum sentences). The First Step Act finally made the Fair Sentencing Act's changes to crack sentences retroactive, and, consequently, permitted those convicted and sentenced prior to 2010 to seek resentencing. Hopwood, *supra* note 155, at 795.

157. *See* Hyser, *supra* note 139, at 509–10, 512 (describing criticism of the sentencing disparity).

§ 3582(c).[158] Indeed, this new vehicle for early release is a watershed change to federal sentencing law.[159]

A court generally "may not modify a term of imprisonment once it has been imposed."[160] But now, instead of being at the mercy of the Bureau of Prisons (BOP) Director, who was the gatekeeper of compassionate release motions until 2018,[161] movants can file for early release directly to their sentencing judge after they satisfy a largely ministerial exhaustion requirement.[162]

***The United States Sentencing Commission's endorsement of expansive early release categories.*** The passage of the First Step Act was a significant development, and was a Congressional acknowledgment that federal sentencing had gone too far.[163] Close on the heels of this change, the United States

158. Although the statute speaks in terms of "reducing" sentences, *see* 18 U.S.C. § 3582(c)(1)(A), motions filed under this section have generally been called "compassionate release" motions. But courts and legislators have repeatedly pointed out that the phrase "compassionate release" is somewhat of a misnomer. *See, e.g.*, United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) ("It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions. A district court could, for instance, reduce but not eliminate a defendant's prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place."). Although courts and practitioners still frequently use the "compassionate release" terminology, this Article uses the terms "sentence reduction" or "reduction in sentence" to refer to motions filed under § 3582(c).

159. Until the First Step Act, early release in the federal system was nearly impossible to obtain, no matter what grounds were advanced as a justification. This is because only the Director of the Bureau of Prisons (BOP) was able to recommend release to a sentencing court—neither a prospective movant nor their advocate could petition for early release. *See* 18 U.S.C. § 3582(c)(1)(A) (2017) (granting only the Director of the BOP discretion to move for early release). Instead, the BOP was in charge of deciding whether or not early release was warranted. *Id.*

160. Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. § 3582(c)).

161. *See generally* U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, BOP PROGRAM STATEMENT 5050.49, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) (2015) (detailing the BOP procedures surrounding the Director's previous gatekeeping function).

162. 18 U.S.C. § 3582(c)(1)(A).

163. *See* H.R. REP. NO. 115-699, at 22 (2018) ("The federal prison system needs to be reformed through the implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system . . . .").

Sentencing Commission recently endorsed expansive new early release categories that enable federally incarcerated people to petition for release.

The origin of the sentence reduction categories is notable and important to underscore. Under the First Step Act's new rules for sentence reduction motions, a movant must put forth one or more "extraordinary and compelling" reasons that warrant relief.[164] And if the movant succeeds in demonstrating that "extraordinary and compelling" reasons exist, they must convince a judge that release is warranted under the traditional federal sentencing factors.[165]

But in the years immediately following the passage of the First Step Act, the U.S. Sentencing Commission lacked a quorum.[166] This led to a period of silence during which the Commission was unable to define the critical term "extraordinary and compelling"—the gateway to a sentence reduction.[167] The question of what rose to the level of "extraordinary and compelling" was largely left to the discretion of district courts.[168] So,

164. 18 U.S.C. § 3582(c)(1)(A)(i). There are additional steps that bear on the ripeness of a sentence reduction motion. First, the statute authorizes an incarcerated person to file a motion with their sentencing judge after exhausting administrative remedies or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." *Id.* § 3582(c)(1)(A). In practice, this means that compassionate release motions are "ripe" for review 30 days after a request by the warden is made, whether BOP opposes or fails to respond to an incarcerated individual's request. *Id.* § 3582(c)(1)(A).

165. *See* 18 U.S.C. § 3582(c)(1)(A) (requiring consideration of "the factors set forth in section 3553(a) to the extent they are applicable" in reducing sentences); *Id.* § 3553(a) (listing the traditional sentencing factors for courts to consider).

166. United States v. Kramer, No. 23-1246, 2024 WL 313389, at *3 (3d Cir. Jan. 26, 2024) (Restrepo, J., concurring) ("From 2018 to 2022, the Sentencing Commission lacked a quorum of voting members and was unable to carry out its statutorily assigned duties, including producing a policy statement regarding prisoner-initiated motions for compassionate release under the First Step Act.").

167. *See id.* (observing that the Sentencing Commission provided "no updated guidance" regarding the "extraordinary and compelling" reasons for sentence reductions).

168. *See, e.g.*, United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021) (giving district courts discretion to decide 18 U.S.C. § 3582(c)(1)(A) motions filed by a defendant); United States v. McCoy, 981 F.3d 271, 284 (4th Cir. 2020) ("[D]istrict courts are 'empowered . . . to consider *any* extraordinary and compelling reason for release that a defendant might raise.'" (quoting United States v. Zullo, 976 F.3d 228, 230 (2d Cir. 2020))); United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020) (finding that district courts have discretion absent

courts conducted their own "extraordinary and compelling" analyses.[169]

As a result, judges were called upon to define for themselves the "extraordinary and compelling" reasons that could warrant a sentence reduction.[170] While the vast majority of motions granted were for pandemic-related reasons,[171] a great many other reasons emerged as well. These included acts of heroism in prison,[172] youth at the time of the offense,[173] the possibility of expectant mothers being separated from their children,[174]

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an "applicable" policy statement from the Sentencing Commission); United States v. Jones, 980 F.3d 1098, 1111 (6th Cir. 2020) ("In cases where incarcerated persons file motions for compassionate release, federal judges . . . have full discretion to define 'extraordinary and compelling' without consulting the policy statement § 1B1.13.").

169. *See Kramer*, 2024 WL 313389, at *4 (highlighting "the myriad of extraordinary and compelling reasons that that [sic] district courts have used to justify sentence reductions prior to updated guidance from the Sentencing Commission").

170. *See* Erica Zunkel & Jaden M. Lessnick, *Putting the "Compassion" in Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 35 FED. SENT'G REP. 164, 164 (2023) ("The last four years have functioned as proof of concept for why the Commission should codify broad discretion for judges and reject the categorical limitations imposed by various federal circuits in the absence of an updated policy statement. Since the FSA's passage, judges have released federal prisoners for reasons not covered by the Commission's outdated policy statement . . . .").

171. *See, e.g.*, United States v. Martinez Encinias, 682 F. Supp. 3d 993, 1003–04 (D.N.M. 2023) (holding that the unanticipated harshness of pandemic-era incarceration is a potentially "extraordinary and compelling" reason); *see also Compassionate Release: The Impact of The First Step Act and COVID-19 Pandemic*, U.S. SENT'G COMM'N 37 (Mar. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf [https://perma.cc/P43W-35JY] (noting the discrepancy in sentences served between incarcerated individuals who cited COVID-19 as a ground for release and individuals who cited a different reason).

172. *See* United States v. Meeks, No. 1:97-cr-00169-4, 2021 WL 9928774, at *3 (N.D. Ill. Dec. 15, 2021) (considering the defendant's extraordinary acts of character, including saving the life of a fellow prisoner, in reducing the defendant's sentence).

173. *See* United States v. Golding, No. 05-cr-538 (JSR), 2022 WL 2985014, at *2 (S.D.N.Y. July 27, 2022) (considering the defendant's youth at the time of the offense in reducing his sentence).

174. *See* United States v. Rodriguez, No. 19-CR-4693-GPC, 2023 WL 1486147, at *4 (S.D. Cal. Feb. 2, 2023) (reducing an expectant mother's federal sentence to avoid separating a newborn child from his mother).

suffering abuse while incarcerated,[175] and long-term solitary confinement.[176]

Litigation also arose in the circuits as to whether lengthy sentences—ones that would not be imposed today because of non-retroactive changes in federal sentencing law—could be considered "extraordinary and compelling" circumstances warranting relief.[177]

Following this period of silence, in November 2023, the Sentencing Commission passed new Guidelines, largely codifying many of the grounds for release that district courts had been endorsing without Commission guidance.[178] This point bears emphasis. Left to their own devices, many district court judges found ways—sometimes creative ways—to let people out of

175. *See* United States v. Herrera, No. 17 Cr. 415 (PAC), 2023 WL 3614343, at *5 (S.D.N.Y. May 24, 2023) (considering sexual assault by a correctional officer in reducing the defendant's sentence).

176. *See* United States v. Marshall, 604 F. Supp. 3d 277, 288 (E.D. Pa. 2022) ("[An] unconstitutional state sentence, long-term solitary confinement, and significant rehabilitation are together an 'extraordinary and compelling' circumstance under the FSA.").

177. *See, e.g.*, United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022) (holding that the non-retroactive amendments to mandatory minimum penalties may constitute an "extraordinary and compelling reason" on a case-by-case basis); United States v. McCoy, 981 F.3d 271, 285–87 (4th Cir. 2020) (holding that district courts may consider the severity of defendants' sentences, and the disparity between those sentences and present-day sentences, in the "extraordinary and compelling" inquiry); United States v. McGee, 992 F.3d 1035, 1048 (10th Cir. 2021) (holding that a mandatory life sentence imposed prior to the First Step Act, combined with other unique circumstances, can "constitute 'extraordinary and compelling reasons'"). *But see, e.g.*, United States v. Crandall, 25 F.4th 582, 586 (8th Cir. 2022) ("The views of a present-day Congress . . . about the appropriate punishment for a present-day offense do not establish an 'extraordinary and compelling reason' for reducing a sentence imposed years ago."); United States v. Andrews, 12 F.4th 255, 261–62 (3d Cir. 2021) (declining to read the non-retroactive sentencing changes as "simultaneously creating an extraordinary and compelling reason for early release"); United States v. Thacker, 4 F.4th 569, 576 (7th Cir. 2021) ("We take the opportunity here to answer squarely and definitively whether the change to § 924(c) can constitute an extraordinary and compelling reason for a sentencing reduction. It cannot."); United States v. Jarvis, 999 F.3d 442, 444–45 (6th Cir. 2021) (holding that the non-retroactive sentencing changes could not constitute "extraordinary and compelling" reasons, "whether by themselves or together with other factors").

178. *See* U.S. SENT'G GUIDELINES MANUAL §§ 1B1.13(b)(1)–(6) (U.S. SENT'G COMM'N 2023) (listing grounds such as care for immediate family members, abuse during imprisonment, and unusually long sentences as "extraordinary and compelling" reasons for sentence reduction).

prison.[179] And the Sentencing Commission listened to these judges in the enactment of the recent Guideline Amendments.

The Sentencing Commission's new amendments include a broad category for when a "defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death."[180] There is also an "extraordinary and compelling" reason that references "an outbreak of infectious disease."[181]

Responding to anxieties about excessive federal sentencing, the Sentencing Commission also defined "extraordinary and compelling" to include circumstances in which

> [A] defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law . . . may be considered . . . where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.[182]

The Commission also adopted a category of "extraordinary and compelling" reasons for incarcerated people who are the victims of abuse "by, or at the direction of" a BOP officer involving either a "sexual act" or resulting in "serious bodily injury."[183]

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179. *See* Zunkel & Lessnick, *supra* note 170, at 164 (describing the categories of extraordinary and compelling reasons that judges endorsed during the period when the Commission lacked a quorum); United States v. Kramer, No. 23-1246, 2024 WL 313389, at *3 (3d Cir. Jan. 26, 2024) (Restrepo, J., concurring) (collecting cases).

180. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)(C) (U.S. SENT'G COMM'N 2023). Congress directed the Commission to promulgate general policy statements regarding the appropriate use of 18 U.S.C. § 3582(c). 28 U.S.C. § 994(a)(2)(C). Technically speaking, the Sentencing Commission's adopted amendments to section 1B1.13 are that policy statement. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. background (U.S. SENT'G COMM'N 2023) ("This policy statement implements 28 U.S.C. § 994(a)(2) and (t)."). But for ease of reading, this Article will refer to the policy statement as adopted amendments or guideline amendments because they function as such.

181. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)(D)(i)(I) (U.S. SENT'G COMM'N 2023).

182. *Id.* § 1B1.13(b)(6).

183. *Id.* § 1B1.13(b)(4). This enumerated reason could be viewed as a direct response to high-profile prison sexual assault scandals that have been the subject of Senate hearings, press inquiries, and ongoing federal civil lawsuits. *See, e.g.*, *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. 1 (2022) (statement of Sen. Jon Ossoff, Chairman,

Moreover, the Commission adopted a "catch-all" category of "extraordinary and compelling" reasons: those that are "similar in gravity" to reasons already enumerated.[184]

The key takeaway from this period is that both the Sentencing Commission and many district courts were eager to find ways to let people out of prison. Further signaling this momentum for change, many appellate courts did not stand in their way. In many ways, this momentum that encompassed both the legislative and judicial branches could be viewed as a corrective measure to excessive sentencing and an implicit recognition that many prison sentences are causing unnecessary harm.

***The Rapid Expansion of State Second-look Measures.*** Although federal law and sentencing is often viewed as a bellwether of public opinion around sentencing in legal scholarship, only a fraction of those incarcerated in the United States were sentenced in federal court.[185] The vast majority of people serving criminal sentences are serving state sentences.[186] Yet most state systems, too, have some mechanism for early release whether through parole, compassionate or medical release, or other means.[187] And, as in the federal system, such avenues for second-look advocacy are increasing in state systems as well as the District of Columbia. A flagship second-look measure in the District of Columbia, for example—the Incarceration Reduction

S. Comm. on Homeland Sec. & Governmental Affs.) ("Our findings are deeply disturbing and demonstrate, in my view, that the BOP is failing systematically to prevent, detect, and address sexual abuse of prisoners by its own employees.").

184. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(5). The catch-all provision could potentially encompass arguments regarding, for example, prison conditions and their relationship to sentence reductions, family circumstances, solitary confinement, or other novel arguments that were being made from 2018 until 2023. *See generally* Meredith Esser, *Extraordinary Punishment: Conditions of Confinement and Compassionate Release*, 92 FORDHAM L. REV. 1369 (2024).

185. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/9SJ2-TQ6Y] (indicating that only about eleven percent of incarcerated individuals in the United States are in federal facilities).

186. *See* E. ANN CARSON, U.S. DEP'T OF JUST., NCJ 305125, PRISONERS IN 2021 – STATISTICAL TABLES 6 (2022) (indicating that the number of people in state prisons vastly exceeds the number in federal prisons).

187. *E.g.*, CAL. PENAL CODE § 1170(d) (2024); WASH. REV. CODE § 36.27.130 (2020).

Amendment Act (IRAA)—now allows those who committed a crime before the age of twenty-five to have their sentences reviewed and gain early release, provided certain additional criteria are met.[188] This groundbreaking law has already led to many individuals being released for wrongdoing that occurred when they were juveniles or just a few years older.[189]

In just the past few years, many other bills expanding the ability of incarcerated people to gain early release have been passed in the states.[190] For example, in California, a bill was passed in 2023 that allows people to ask their original sentencing judges to release them early if they are serving a sentence under laws that have changed since the original sentencing.[191] Colorado passed a bill enabling "habitual offenders" to petition courts for resentencing after two years.[192] Also in 2023, Minnesota passed an omnibus crime bill[193] that contained several second-look provisions including one for prosecutor-initiated resentencing in the interests of justice, as well as changes to commutation and second chances for some convicted of felony murder.[194] Additional such bills are being considered and lobbied for in state legislatures nationwide, reflecting a growing consensus that too many people are being sent to prison for far too

188. Press Release, D.C. Corr. Info. Council, DC Council Passes Second Look Amendment Act of 2019 (May 19, 2021), https://cic.dc.gov/release/dc-council-passes-second-look-amendment-act-2019 [https://perma.cc/9CHP-UVS3].

189. *See Voices for Reform in D.C.: Recommendations for Improving Reentry Following Long Prison Terms*, JUST. POL'Y INST. 1 (July 2021), https://justicepolicy.org/wp-content/uploads/2021/07/Voices-for-Reform-in-DC-2021.pdf [https://perma.cc/AY9M-DGYF] (noting that, as of July 19, 2021, sixty-five people had been released under the law).

190. *E.g.*, Current Operations Appropriations Act of 2023, H.B. 257, Gen. Assemb., Reg. Sess., pt. XIX-C (N.C. 2023) (enacted) (making changes to eligibility for geriatric and medical release and changing the required public safety finding from "no risk" to "low risk"); An Act to Amend Section 1172.1 of the Penal Code, Relating to Criminal Procedure, ch. 446, 2023 Cal. Stat. 5415, 5415 (allowing someone to request early release if serving a sentence under laws that have changed since sentencing).

191. Ch. 446, 2023 Cal. Stat. at 5415.

192. Act of June 1, 2023, ch. 297, 2023 Colo. Sess. Laws. 1778, 1780.

193. Act of May 19, 2023, ch. 52, art. 6 § 10, 2023 Minn. Laws 810, 919.

194. Press Release, For the People, Minnesota Passes Prosecutor-Initiated Resentencing Law, Enabling Prosecutors to Revisit Past Cases in the Interest of Justice (May 19, 2023), https://static1.squarespace.com/static/64542f9c9a51d00223da291b/t/6470ea2f9158416f660b2e1c/1685121584045/Minnesota%2BPress%2BRelease%2B2023.pdf [https://perma.cc/T2QK-PXTH] (discussing the effect of Minnesota's Prosecutor-Initiated Resentencing Law).

long.[195] And the National Association of Criminal Defense Lawyers (NACDL) recently released model second-look legislation that states can use to bolster their legislative and lobbying efforts.[196] As several practitioner-scholars concluded in a report drafted to accompany NACDL's model text, "[o]ur nation has reached a moment of reckoning" and "America's astronomical incarceration rates are unjust and unsustainable."[197]

Even unlikely stakeholders are beginning to reflect a change in attitudes. For example, some former corrections officers are pushing for a new mode of thinking about incarceration and corrections, with a focus on decreasing harms.[198] A 2022 report authored by a team of former corrections officers remarked that, "reducing prison populations can both increase public safety and decrease the harms experienced by officers, incarcerated people, and all of their families and communities."[199]

***The Increasing Momentum of the Prison Abolition Movement.*** Other indicators of incarceration fatigue and the growing movement toward prison abolition have grown increasingly apparent in the American zeitgeist.[200] Community

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195. Families Against Mandatory Minimums (FAMM), a criminal legal reform oriented nonprofit that focuses on second chance advocacy, keeps a running list of second chance legislation currently being considered by state legislatures, which is publicly available at Families Against Mandatory Minimums, *Second Chances*, FAMM.ORG, https://famm.org/our-work/second-chances [https://perma.cc/2WMC-D5T4]. As of this writing, forty-one such measures have been proposed nationwide. *Id.*

196. *Model "Second Look" Legislation*, NAT'L ASS'N OF CRIM. DEF. LAWYERS (Dec. 10, 2020), https://www.nacdl.org/getattachment/4b6c1a49-f5e9-4db8-974b-a90110a6c429/nacdl-model-second-look-legislation.pdf [https://perma.cc/E5GT-3S6N].

197. Murray et al., *supra* note 28, at 341.

198. *See generally Blue Ribbon Commission Report,* ONE VOICE UNITED (2022), https://onevoiceunited.org/wp-content/uploads/2022/10/BRC-Report-2022.pdf [https://perma.cc/7WCJ-V78Y] (recounting a conference of correctional officers, experts on correctional wellness, and other leaders that discussed the need for a new approach to incarceration).

199. *Id.* at 2.

200. *See, e.g.*, Roberts, *supra* note 49, at 262–63 (discussing the radical changes needed to rid the American criminal justice system of racial bias); Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 862 (2021) (discussing the author's recent scholarship on the radical imagination of abolitionist organizing); Reznik, *supra* note 22, at 124 ("Prison abolitionism is increasingly garnering scholarly attention and theoretical articulations.").

members and organizers,[201] public health officials,[202] politicians,[203] and even former prosecutors,[204] have begun to voice concerns about how criminal legal issues are addressed in this country. Legal scholarship around prison and policing abolition has flourished,[205] with many academics and commentators questioning the racist and capitalist foundations of these institutions.[206] Indeed, it is no exaggeration to say that prison abolition theory is now mainstream—at least within legal academic circles.[207] And it is clear that the abolition movement—grounded in deep historical roots[208]—has tentacles in all aspects of thinking around sentencing and prison policy. The racial reckoning of

201. Cullors, *supra* note 43, at 1684 ("[O]nly through an abolitionist struggle will we repair our communities and undermine the systems of oppression we know have facilitated devastation, from the transatlantic slave trade through the prison industrial complex.").

202. Julian Adler & Caitlin Flood, *Prison Decarceration and the Mental Health Crisis: A Call to Action*, 34 FED. SENT'G REP. 233, 234 (2022) ("[S]econd-look mechanisms like compassionate release may be the only way to meaningfully redress the pathogenic effects of incarceration—be it the exacerbation of preexisting mental illness or the psychological toll of imprisonment, including the extreme harms of solitary confinement.").

203. James Kilgore, *AOC Is Talking About Prison Abolition. Will She Take Action?*, TRUTHOUT (Oct. 8, 2019), https://truthout.org/articles/aoc-is-talking-about-prison-abolition-will-she-take-action [https://perma.cc/54JD-MDDZ] (discussing Representative Alexandria Ocasio-Cortez's comments in defense of prison abolition).

204. The Political Scene Podcast, *What Would a World Without Prisons Be Like?*, NEW YORKER (Jan. 27, 2020), https://www.newyorker.com/podcast/political-scene/what-would-a-world-without-prisons-be-like [https://perma.cc/2AEZ-EB3M] (interviewing former prosecutor and prominent legal scholar Paul Butler).

205. Frampton, *supra* note 93, at 2014 ("Over the last half-decade, legal scholars have begun grappling with the challenges and promises of prison abolition.").

206. *See, e.g.*, Roberts, *supra* note 23, at 14 ("[P]risons are part of a larger system of carceral punishment that legitimizes state violence against the nation's most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite.").

207. Frampton, *supra* note 93, at 2015–16 (noting the "small flood" of abolition-based legal scholarship and that, in recent years, "[b]oth the *Harvard Law Review* and the *UCLA Law Review* have dedicated symposia to furthering abolitionist perspectives").

208. Jamelia N. Morgan, *An Abolitionist Critique of Quality-of-Life Policing*, 69 UCLA L. REV. 1624, 1630 (2023) ("As abolitionist thinkers and organizers have argued, the prison industrial complex (PIC) must be understood as part of a historical context that both shapes its contours and explains its expansive growth over the past several decades.").

2020, in direct response to the murder of George Floyd, Breonna Taylor, and Ahmaud Arbery, further catapulted calls for prison and police abolition into the mainstream political discourse.[209]

Since that time, some critics have lamented that few concrete changes have emerged from that brief moment of public questioning and upheaval.[210] But at least within the legal scholarly community, abolitionist critiques have flourished,[211] and been applied to many areas of law.[212] Indeed, the movement against mass incarceration[213] has reached a critical and necessary tipping point. A reformulation of the punishment purposes has the potential translate abolitionist theories—grounded in the history of racial and class subordination that is perpetuated

209. Morgan, *supra* note 38, at 1199 ("During the uprisings that followed the police killings of George Floyd and Breonna Taylor, abolitionist organizers and groups across the country seized the moment and set forth public demands to end the systems of policing and punishment."); Ailsa Chang et al., *The Summer of Racial Reckoning*, NPR (Aug. 16, 2020), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit [https://perma.cc/8VUC-HZ7K] ("George Floyd, Breonna Taylor and Ahmaud Arbery all became part of a rallying cry in cities and towns across the country, forcing the United States to confront the racism of its past and present."); Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/H5R7-2CW3] ("Four recent polls . . . suggest that about 15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others in recent weeks."); Richard Fausset, *Before Breonna Taylor and George Floyd, There Was Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), https://www.nytimes.com/2021/02/28/us/ahmaud-arbery-anniversary.html [https://perma.cc/WE62-ZW45] ("[T]ogether with the subsequent police killings of Breonna Taylor and George Floyd, [Ahmaud Arbery's] death has contributed to the national furor over shooting deaths of Black people and the wave of protests against systemic racism.").

210. Wesley Lowery, *Why There Was No Racial Reckoning*, ATLANTIC (Feb. 8, 2023), https://www.theatlantic.com/ideas/archive/2023/02/tyre-nichols-death-memphis-george-floyd-police-reform/672986 [https://perma.cc/YFX6-FZME] (explaining that, although the summer of 2020 was a "breaking point" for many Americans, it did not lead to any "Great Reckoning in American policing").

211. Morgan, *supra* note 38, at 1200 ("The summer of 2020 ushered in a flurry of attention on these systems and the concept of abolition, capturing the eyes of not only the public but also the legal community.").

212. *See generally, e.g.*, *id.* (discussing what abolitionist methodology has to offer for legal analysis); McLeod, *supra* note 19 (discussing prison abolition); Roberts, *supra* note 23 (same).

213. *See* ALEXANDER, *supra* note 116, at 8 (discussing the prison abolition movement); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1957–58 (2019) (discussing the "crisis" of mass incarceration).

by imprisonment—into concrete action. Perhaps a necessary prerequisite to the "gradual project of decarceration,"[214] then, is updated theorizing around why we punish.

## II. PUNISHMENT PURPOSES AND SENTENCE REDUCTIONS

As the above Parts show, there is an urgent need to examine the bedrock principles of sentencing in light of both academic and practical movements toward decarceration. This Section sets up some of the key differences between second-look sentencing and conventional sentencings. This Section also argues that the second-look context can provide an important window into sentencing more generally for several important reasons, and that through an examination of the second-look context, dominant ideas about sentencing and the utility of incarceration should be revised.

First, the purposes of punishment in many contexts are not suited to the second-look context, partially because the purposes generally point in the direction of more incarceration rather than less. With the possible exception of rehabilitative purposes, judges, when determining whether to grant a sentence reduction, are stuck with punishment purposes that reinforce the default mode of incarceration.[215]

Second, second-look decisionmakers have scant guidance about how to account for the severity of conditions of confinement, or any other aspect of prison life or "prisons cruelties."[216] When carceral harms happen in prison, these harms did not happen for the purpose of punishment, so applying the concepts of deterrence, incapacitation, retribution, and rehabilitation to a resentencing decision based on carceral harm seems at odds with traditional sentencing theory. Furthermore, calculating a sentence has the sterile feeling of solving a complex mathematic equation. Prison, by contrast, is messy, violent, visceral, trauma-inducing, and utterly dehumanizing. Judges confronting these

214. McLeod, *supra* note 19, at 1161 (characterizing the movement toward prison abolition not as "an immediate and indiscriminate opening of prison doors" but as "a gradual project of decarceration").

215. *See infra* Part II.A.

216. *See, e.g.*, Hanan, *supra* note 17, at 1190 (discussing the problem of how to account for harsh conditions in sentencing determinations).

realities face an uphill battle in finding theoretical grounding to account for prison's cruelties when deciding to decarcerate.[217]

Finally, the punishment purposes are focused on the idea of individual accountability and often don't make sufficient space for the ways in which punishment decisions impact children, families, and communities of those who are sent to prison—especially those who are sent away for excessive periods of time.[218]

Accordingly, this Section probes some of the ways in which the punishment purposes fail to provide decisionmakers with an adequate framework for decarceration decisions—despite often being incorporated into second-look statutes and frameworks. This Section also touches upon the ways in which the second-look context can provide a window into how initial sentencings or prospective sentencings might look different if the realities of prison and carceral harm were more fully taken into account in sentencing theory.

### A. MITIGATION AND DECARCERATION

Second-look proceedings differ from initial sentencings in key ways, but both rely on the infirm punishment purposes as justification for sentencing or sentence reductions. At initial, prospective sentencings, judges consider many factors but often chiefly rely on applicable sentencing statutes, guidelines, and the punishment purposes to guide their sentencing discretion.[219] In the second-look context, a number of factors can come into play but, in general, a movant or person seeking a sentence reduction must satisfy some basic legal threshold in order to have their case heard, and then decisionmakers again consider the punishment purposes in light of that threshold finding.[220]

However, both initial sentencings and second-look proceedings rely heavily on the presentation of mitigating information about the individual seeking early release. Although sentencing mitigation already frequently relies on aspects of a person's history (personal trauma, work history, health, collateral

217. *See infra* Part II.B.

218. *See infra* Part II.C.

219. *See, e.g.*, 18 U.S.C. § 3553(a) (incorporating punishment purposes into sentencing decision).

220. See *Model "Second Look" Legislation*, *supra* note 196, for an example of second-look legislation illustrating this general process.

consequences),[221] one goal of this Article is to explicitly tie these considerations to an abolitionist reframing of the punishment purposes in order to have a clearer theoretical grounding for why mitigation intuitively matters.

Indeed, in an initial or prospective sentencing proceeding, presentation of sentencing mitigation—the process by which defense counsel and their clients present reasons to courts for leniency in sentencing—is now an important part of many sentencings, both federal and state.[222] Judges often consider both "offense characteristics" (what the crime was and what were the circumstances under which the crime was committed, who—if any—were the victims, etc.)[223] and so-called "offender characteristics" (what are the personal traits of the person being sentenced) in making a sentencing determination.[224] Because most criminal proceedings (over ninety-five percent) end in plea rather than trial, the sentencing phase of a criminal process has become the focus of many criminal proceedings;[225] much litigation—at least in the federal system—similarly occurs at the sentencing rather than the pretrial or trial phase of a criminal case.[226] The modern federal sentencing, for its part, is dominated

221. *See, e.g.*, John B. Meixner Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1426 (2022) (describing different factors considered in sentencing mitigation).

222. *See id.* at 1395 ("[M]itigation is a central predictor of sentencing outcomes . . . .").

223. *See id.* at 1426–27 (discussing offense characteristics as a mitigating factor).

224. *See id.* at 1427–28 (discussing offender characteristics as a mitigating factor).

225. *See id.* at 1395 ("Sentencing has become the most important part of a criminal case."); Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 218 (2012) ("[F]or many if not most defendants, the period from arrest to verdict (or plea) is only a preamble to an extended period under state control, whether on probation or in custody."); Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Study Finds*, NPR (Feb. 22, 2023), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/U7UQ-ZNP9] (explaining that most criminal cases are resolved with plea bargains).

226. *See* Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 99 (2018) ("[T]he sentencing hearing has replaced the trial as the paramount proceeding in most criminal cases . . . .").

by mitigation which, in turn, is driven in large part by the punishment purposes.[227]

Second-look proceedings, too, are primarily focused on presenting information to judges that provide a framework for granting a sentence reduction or immediate release. More accurately, second-look sentencing mitigation tries to convince a decision-making body that a sentence already served is sufficient or that a person is deserving of some measure of sentencing relief.[228] But the mitigation presented at a second-look proceeding is often focused on an individual's experience of incarceration—whether the conditions were too harsh, if they were mistreated or neglected, or whether the sentence imposed was too severe in light of changed attitudes toward what an appropriate sentence should be.[229] Furthermore, the very idea of second-look mitigation is at times incongruent with the punishment purposes for the simple reason that the punishment purposes tend toward the default of *more* incarceration.

In *Towards a Theory of Mitigation*, Professors Carissa Byrne Hessick and Douglas A. Berman argue that because "imposition of criminal punishment [involves] state inference in the lives of individuals" the theories of punishment are necessary "to justify that interference."[230] Conversely, because "mitigation does not involve the imposition of punishment" but rather "involves a choice not to punish," there is no corresponding obligation for the state to justify its decision to mitigate.[231]

Although this conceptual understanding of punishment and lack of punishment (leniency) makes ample theoretical sense for

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227. Meixner, *supra* note 221, at 1405 (explaining that judges have broad discretion at federal sentencings to impose sentences based on the Section 3553(a) factors).

228. *See* Families Against Mandatory Minimums, *supra* note 195 ("Second look laws allow decision-makers such as courts or parole boards to reevaluate a person's sentence after a sufficient period of time served in prison and determine if that sentence is still necessary.").

229. See *Model "Second Look" Legislation*, *supra* note 196, for an example of factors to be considered in re-evaluating someone's sentence, most of which focus on the individuals experience with incarceration.

230. Hessick & Berman, *supra* note 4, at 206. Before the state can punish a person, for example, it must afford certain rights, including procedural rights. *Id.* (noting that the "the right to counsel, the right to confront witnesses and the right to a jury trial" all attach if the state intends to punish a person with incarceration).

231. *Id.*

an initial sentencing, the criminal legal system's default stance is that, once a punishment is imposed, it is unreviewable unless certain prerequisites are met.[232] In light of this reality, a decision to reduce a sentence post-hoc *requires* some justification.[233] In federal sentence reductions, for example, there is a high bar for justifying a sentence reduction: "[A] movant must both articulate an extraordinary and compelling reason for relief that is consistent with applicable policy statements from the Sentencing Commission" and satisfy the concerns of the federal sentencing factors.[234] How to square the default of no punishment with the requirement to justify decarceration then becomes the central theoretical question in the sentence reduction context.

Berman and Hessick lament "[t]he failure to reconceptualize mitigation since the collapse of the rehabilitative ideal."[235] One downstream consequence of this gap in mitigation theory is that, where sentence reductions are concerned, the already-muddled punishment purposes available to judges—a framework embodied in the federal sentencing factors, for example—is rendered further infirm when *most* of a decision to decarcerate is based on mitigation. Consequently, a theory that encompasses and even encourages decision-making based on a decarcerative valence is needed to account for the ways in which mitigation is central to the second-look resentencing project. Updating the punishment purposes with a decarcerative aim—grounded in harm reduction—would give judges greater impetus and legitimacy in making decarceration decisions in a more widespread, coherent and considered way.

Presentation of mitigation in pursuit of individualized mercy is central to the project of seeking sentence reductions, but this project relies on the "polarity between the terrifying possibility of ruinous punishment and the hope that the [court] will

232. For example, a federal court generally "may not modify a term of imprisonment once it has been imposed." Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. § 3582(c)).

233. The true abolitionist argument here may be that each day of incarceration would require some justification. But an exploration of this question is beyond the scope of this Article's current inquiry.

234. United States v. Kramer, No. 23-1246, 2024 WL 313389, at *3 (3d Cir. Jan. 26, 2024).

235. Hessick & Berman, *supra* note 4, at 217.

bestow mercy."[236] Instead, a wholesale re-envisioning of the punishment purposes with a decarcerative or abolitionist valence could both give judges the tools they need to make better and more widespread decarcerative decisions while also preventing some of the pitfalls and entrenchment that can accompany discretionary grants of leniency.[237] At the same time, such a reformulation of the punishment purposes could lead decisionmakers to make different punishment decisions in the first instance.

### B. PRISON'S CRUELTIES

Another problem with the punishment purposes as currently conceived—one that is particularly visible in the second-look context—is that they fail to account for the ways in which punishment is experienced by people who are incarcerated. Largely because of the increased awareness of "prison's cruelties,"[238] the enduring reliance on the punishment purposes has begun to fracture. The serious harms that people experience while incarcerated can include untreated medical conditions,[239] physical or sexual abuse at the hands of other incarcerated individuals[240] or prison guards,[241] exposure to lengthy periods of

236. M. Eve Hanan, *Terror and Tenderness in Criminal Law*, 45 CARDOZO L. REV. 582, 585 (2023).

237. *Id.* at 582–85 ("[A]lthough reforms relying on discretionary leniency provide needed relief for some, their rhetoric and structure entrenches the excessiveness of criminal legal systems in at least three ways.").

238. *See* Hanan, *supra* note 17, at 1190 (discussing the harms that incarcerated people suffer in prisons).

239. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (concluding that "deliberate indifference" to a prisoner's medical needs can violate the Eighth Amendment).

240. *See generally* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1258 (2011) (describing the sexual abuse that incarcerated people often face).

241. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 734–35 (2002) (describing how an incarcerated person was handcuffed to a hitching post for prolonged periods of time without water or breaks while the sun burned his skin and was taunted with water but not provided any); Payne v. Parnell, 246 F. App'x 884, 887 (5th Cir. 2007) (holding that an unprovoked electric shock from a cattle prod applied to an incarcerated person presented a factual question about whether the officer who used the cattle prod acted maliciously and sadistically); Blake v. Ross, 787 F.3d 693, 695 (4th Cir. 2015) (describing how a prison official wrapped a key ring around his fingers and then punched an incarcerated person at least four times in the face in quick succession), *vacated*, 578 U.S. 632 (2016).

time in solitary confinement,[242] extreme overcrowding,[243] and other adverse conditions.[244] Part of an abolitionist reframing of punishment purposes, then, requires decisionmakers to "confront what prisons do" rather than simply "to imagine we have addressed interpersonal violence, theft, and other problems by depositing certain people in prison."[245] Moreover, no judge sentences a person to prison for the *purpose* of prolonged isolation, for the *purpose* of being abused or for the *purpose* of suffering medical neglect—although these types of harms are foreseeable.[246] Thus, applying the punishment purposes to a sentence reduction based on prison's cruelties presents an obvious theoretical challenge, and new sentencing principles for thinking about sentence reductions are required.

As the Supreme Court has declared, "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[247] What this means in practice is that historically, after sentencing, a judge's role in a person's experience of incarceration is over. In the federal system, for example, the original sentencing judge would not have jurisdiction over prison conditions (except via a separate civil suit) and could not modify an already-imposed sentence based on

242. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 354 (2006) ("[E]ven those inmate[s] who are more psychologically resilient inevitably suffer severe psychological pain as a result of such confinement, especially when the confinement is prolonged, and especially when the individual experiences this confinement as being the product of an arbitrary exercise of power and intimidation."); *see also* Davis v. Ayala, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) ("[T]he penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.").

243. *See* Brown v. Plata, 563 U.S. 493, 545 (2011) (upholding a three-judge lower court decision ordering the release of prisoners to alleviate overcrowding in California's state prisons).

244. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 35–36 (1993) (holding that the risk of exposure to environmental tobacco smoke in prison may support an Eighth Amendment claim).

245. McLeod, *supra* note 19, at 1211.

246. *See, e.g.*, *Davis*, 576 U.S. at 288 (Kennedy, J. concurring) ("Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary.").

247. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

harsh sentencing treatment.[248] Indeed, federal judges can barely control the designation of a defendant that they sentenced to a particular prison facility.[249] In this way, the Eighth Amendment's treatment of sentencing concerns has traditionally been confined to the realm of whether a sentence was excessive in the constitutional sense, as distinct from the Eighth Amendment's treatment of harms that befall a person in prison.[250]

Theorists of sentencing and punishment have long grappled with the problem of how to account for conditions of confinement in sentencing. These critiques have highlighted that the severity of a person's conditions of confinement could run afoul of the parsimony principle, or indeed the proportionality principle.[251] For instance, a ten-year sentence of incarceration imposed without foreknowledge of prison conditions could end up being far more punitive than a court intended if the conditions under which a person serves that sentence are particularly harsh, or if they experience harmful events such sexual or physical abuse that tilt the punitive force of their sentence.[252] And Eighth Amendment jurisprudence has made clear that the word "punishment" when used as a legal term of art requires some kind of intentional "infliction" on the part of either a judicial sentencing body or a prison guard or prison official in either an intentional or

248. A court generally "may not modify a term of imprisonment once it has been imposed." Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. § 3582(c)).

249. *Id.*

250. Dolovich, *supra* note 14, at 884 ("To the extent that the Supreme Court has considered what makes a punishment cruel, it has done so primarily in assessing criminal sanctions. In some cases, the Court has found the use of certain penalties to be per se unconstitutional, something the state may never do to anyone as punishment.").

251. *E.g.*, Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1578–79 (2012) (explaining how an Eighth Amendment constitutional floor could justify release of people being subject to unconstitutional prison conditions).

252. Kolber, *supra* note 86, at 1159 ("There has to be some way of aggregating the severity of different aspects of incarceration, otherwise it would be extremely difficult to assess sentence severity and have confidence that offenders receive proportional harsh treatment."); *see also Farmer*, 511 U.S. at 855 (Blackmun, J., concurring) (noting the practical and theoretical problem that "conditions of confinement, whatever the reason for them" can result in "differing punishment" for different people).

criminally reckless manner.[253] This means that unforeseen adverse circumstances in prison that occur post-sentencing generally do not count as "punishment" in the jurisprudential sense, and can often be impossible to redress.[254] Yet the person who is incarcerated does experience adverse consequences as punishment.[255]

As Alexander Reinert and Sharon Dolovich have repeatedly explained, the meaning of the word "punishment" in American law and Eighth Amendment doctrine is wholly dependent on context.[256] The practical reality of sentencing and corrections is that "[s]entencing decisions are usually made by judges while decisions about conditions of incarceration are usually made by prison bureaucrats."[257] Thus, while the Eighth Amendment "prohibits . . . sentences that are disproportionate to the crime committed,"[258] this proportionality principle has only cabined what judges can do at an initial sentencing. But even that limitation

253. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments *inflicted*." (emphasis added)); Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("The infliction of punishment is a deliberate act intended to chastise or deter." (quoting Duckworth v. Franzen, 780 F2.d 645, 652 (7th Cir. 1985))); *see also* Dolovich, *supra* note 14, at 890 ("[P]rison conditions not explicitly authorized by the statute or the sentencing judge qualify as punishment only if some prison official actually knew of and disregarded the risk of harm."); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 385 (2018) (lamenting the Eighth Amendment's scienter requirement and noting that "the conditions-of-confinement/use-of-force case law . . . suffers from a glaring doctrinal problem, introduced by Justice Scalia when, in his opinion for the Court in *Wilson*, he centered the entire formal apparatus around a claim that 'punishment' definitionally requires the subjectively culpable intent of a punisher").

254. Shapiro & Hogle, *supra* note 14, at 2022 ("[A] combination of interrelated legal and situational barriers dooms many prison-conditions suits from the start.").

255. *See generally* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 196–218 (2009) (discussing how incarcerated people uniquely perceive the punishment they are subjected to).

256. *E.g.*, Reinert, *supra* note 251, at 1578 (noting that the term "punishment" within the Eighth Amendment "means different things in different contexts"); Reinert, *supra* note 78, at 54 (describing how the two meanings of "punishment" within the Eighth Amendment "have increasingly diverged in the past forty years"); Dolovich, *supra* note 14, at 884 (distinguishing between punishment's imposition and punishment's administration and explaining that "in the existing system, the crime determines only the length of the prison sentence, not the conditions under which that sentence will be served").

257. Kolber, *supra* note 255, at 195.

258. Solem v. Helm, 463 U.S. 277, 284 (1983).

has been narrowly interpreted. Instead, courts have given legislators broad discretion over what punishments are constitutionally proportional.[259] At the same time, theorists have lamented the fact that sentencing decisions generally do not account for the harms that could befall a person once they are sentenced to prison.[260] So even if a person experiences severe medical treatment, sexual trauma, prolonged solitary confinement, or other forms of incarceration-based harms, those experiences are not primarily the subject of sentencing proceedings.[261]

One significant phenomenon in the second-look context, however, is that decisionmakers are now directly faced with the impact of incarceration on the people that they sentence. In this way, the bifurcation between the administration and imposition of punishment has become more of an urgent problem.[262] When people come back in front of sentencing courts, judges get an explicit window into what the experience of incarceration is like for people that they previously sentenced, and are sometimes able to partially remedy carceral harm through releasing people from

259. *See, e.g.*, Ewing v. California, 538 U.S. 11, 20 (2003) (upholding California's "three-strikes" law); Harmelin v. Michigan, 501 U.S. 957, 996, 1021 (1991) (upholding a sentence of life without parole for a first-time offender who was found guilty of possession of 650 grams of cocaine); Rummell v. Estelle, 445 U.S. 263, 276, 285 (1980) (upholding a sentence of mandatory life imprisonment for obtaining $120.75 by false pretenses under a Texas recidivist statute); Hutto v. Davis, 454 U.S. 370, 371–72 (1982) (per curiam) (upholding a sentence of forty years for possession with intent to distribute nine ounces of marijuana). *But see Solem*, 463 U.S. at 296–97, 303 (finding the Eighth Amendment prohibited imposition of life imprisonment without possibility of parole for a non-violent recidivist whose crimes were minor).

260. *See* Hanan, *supra* note 17, at 1190 (discussing the need for lawmakers to think critically about prison's cruelties when they enact criminal statutes).

261. Of course, some proceedings and some judges take some so-called "offender characteristics" into account anyway, either explicitly or implicitly. This can often be to the detriment of someone facing sentencing. Racial bias creates disparities in sentencing; smaller, whiter, people facing sentencing may get less time than larger or darker-skinned people, etc. *See* Esser, *supra* note 184, at 1395 & n. 199 (describing judicial discretion in sentencing as "a mixed bag with a checkered history of inequitable and racist sentencing outcomes" and collecting sources); Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. 1391 (2016). The point here is that incarceration-based harms take center stage in a second-look proceeding in a way that they do not in initial sentencings. *See generally* Kolber, *supra* note 255, at 196–218 (discussing the many harms incarcerated people suffer in prison).

262. *See* Esser, *supra* note 184, at 1375–76 (discussing how the federal compassionate release statute has revealed the Eighth Amendment's inability to protect incarcerated people).

prison.[263] This has many beneficial effects: historically, judges were walled off not just from dealing with conditions of confinement in sentencing, but even from the need to understand the realities of prison in the first instance.[264] Second-look proceedings confront decisionmakers with the realities of the carceral experience. In other words, second-look motions bring people who are "marked" by conviction back into the locus of "moral (and constitutional) concern" because judges are forced to confront the consequences of their sentencing decisions.[265]

Although judges have long been called upon to consider personal characteristic like historical trauma as part of sentencing mitigation,[266] there is an additional nuance to the analysis of post-sentencing mitigation that centers around the trauma of incarceration. Judges and defendants would be better equipped to account for "prison's cruelties"[267] if an endorsed sentencing principle were available related to harsh prison conditions. If the over-arching sentencing goals of harm prevention or reduction were more readily accepted by decisionmakers, sentence reductions that accounted for particularly horrific conditions of confinement, especially those that are ongoing or could be mitigated by treatment or other non-carceral solutions, would be more easily justified.[268] Further, judges may be more motivated to release people to seek treatment for incarceration's harms, or elect not to sentence them to harsh terms of imprisonment in the first

263. *See* Reinert, *supra* note 251, at 1576 (arguing that release from prison should be a remedy for excessive punishment).

264. *See* Driver & Kaufman, *supra* note 11, at 576 ("[I]t almost goes without saying that courts know too little about American penal institutions.").

265. *See* McLeod, *supra* note 19, at 1216 ("An abolitionist ethic promises, too, to increase all of our discomfort, shame, and conflict over ignoring the claim to humanity of those who stand convicted, whether or not they are innocent or sentenced to die.").

266. *See* Meixner, *supra* note 221, at 1430 (describing how a defendant's "unfortunate upbringing, abuse, or other prior trauma" is a factor often presented in federal sentencing proceedings).

267. *See* Hanan, *supra* note 17, at 1190 (discussing the need for a deeper consideration of "prison's cruelties").

268. *See* Meredith Esser, *Who Bears the Burden When Prison Guards Rape?*, 109 IOWA L. REV. ONLINE 188, 190–91 (2024) (discussing eligibility for sentence reductions for incarcerated people who are victims of sexual assault while incarcerated, and the onerous burden of proof placed on incarcerated people in proving their abuse).

instance, rather than stringently adhering to established sentencing norms.[269]

### C. EXTREME SENTENCES AND SOCIAL IMPACT

Extremely long sentences such as life or those spanning multiple decades have an aggregate negative impact on society, as well as individual communities and family structures.[270] As Dorothy Roberts has argued, "[t]he empirical evidence of community-level damage caused by the spatial concentration of mass imprisonment supports a radical rethinking of dominant justifications for prison policy and related crime control and sentencing reforms."[271] And yet, the punishment purposes as applied are almost single-mindedly focused on the individual person being sentenced; there is little room to consider the impact of mass incarceration on children, families, or communities of those who are caged[272]—nor, for that matter, of the social causes of "crime."[273] This focus on individual culpability, responsibility, and punishment ignores the vast research that shows mass incarceration is, in fact, criminogenic rather than deterrent—that mass incarceration is actually counterproductive to any project

269. *See generally* Kolber, *supra* note 83 (discussing how unintentional punishment should be examined in the same way as intentional punishment).

270. Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 CALIF. L. REV. 683, 685 (2023) ("[A]s mass incarceration has become the new normal of punishment practice, the cost to communities has become dire.").

271. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1300 (2004).

272. Russell M. Gold, *Jail As Injunction*, 107 GEO. L.J. 501, 545 (2019 ("In the criminal law context, employment, marital attachment, costs to families, and costs to communities are precisely the sorts of costs that criminal law is likely to overlook without cost-benefit analysis."); *see generally* Miriam Hinds, *Shadow Defendants*, 113 GEO. L.J. (forthcoming 2025) (on file with Minnesota Law Review) (detailing how family members of incarcerated individuals, particularly Black women, also suffer collateral financial and social consequences—"secondary criminalization").

273. *But see* KABA, *supra* note 38, at 135 ("[A]bolitionists, however, consider the larger social, economic, and political context in which the harm occurs.").

related to reduction in crime.[274] And yet, excessive sentencing at the federal and state levels persists.[275]

One notable effect of the watershed expansion of second-look measures is that courts are more fully able to see not just the effect of prisons cruelties on the individuals that they sentenced, but also the effect of extreme sentences designed to incapacitate. Indeed, a large number of extreme and life sentences have been reduced as a result of the First Step Act's changes to both the crack cocaine[276] and sentence reduction provisions after being deemed unnecessary by sentencing courts.[277] A simple and relatively uncontroversial example of the impact of mass incarceration and lengthy incarceration is that children of incarcerated people suffer economic and psychological hardships at a greater rate than kids without incarcerated parents.[278] Indeed, in the

274. Roberts, *supra* note 271, at 1297 ("[T]he anemic incapacitative and deterrent effects of current prison policy are far outweighed by its criminogenic effects in neighborhoods where incarceration is concentrated.").

275. In one study from 2016, for example, there were an estimated 200,000 people serving life or virtual life sentences in the United States. *See* MARK MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES 13 tbl.1 (2018) (displaying sentencing data for all jurisdictions).

276. *E.g.*, United States v. Mothersill, 421 F. Supp. 3d 1313, 1319 (N.D. Fla. 2019) (reducing a sentence from mandatory life to time served based on retroactivity of First Step Act crack cocaine amendment); United States v. Hadley, 389 F. Supp. 3d 1043, 1044 (M.D. Fla. 2019) (reducing a sentence from mandatory life to time served based on retroactivity of First Step Act crack cocaine amendment); United States v. Dodd, 372 F. Supp. 3d 795, 800 (S.D. Iowa 2019) (reducing a sentence from mandatory life to fifteen years based on retroactivity of First Step Act crack cocaine amendment).

277. *E.g.*, United States v. Parker, 461 F. Supp. 3d 966, 982–83 (C.D. Cal. 2020) (reducing a life sentence to time served in part because of documentation of rehabilitation during incarceration and recognition that the sentencing scheme that an incarcerated person had been sentenced to was no longer valid); United States v. Gray, 416 F. Supp. 3d 784, 790 (S.D. Ind. 2019) (granting compassionate release to a person who served "nearly two decades" of a life sentence); United States v. Wong Chi Fai, No. 93-CR-1340, 2019 WL 3428504, at *4 (E.D.N.Y. July 30, 2019) (granting compassionate release to a terminally ill person who served 26 years of his life sentence); United States v. Pickard, No. 00-40104-01-JTM, 2020 WL 4260634, at *5 (D. Kan. July 24, 2020) ("Pickard's offenses were serious, but having spent two decades in prison he has been seriously punished.").

278. *See, e.g.*, Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. JUST. J., May 2017, at 1, 1 ("[R]esearch suggests that the strength or weakness of the parent-child bond and the quality of the child and family's social support system play significant roles in the

sentence reduction context, courts have already cited the risk of harm to pregnant people and unborn children when new parents are separated from their children by incarceration, and have weighed these factors in favor of early release—even where the sentencing guidelines counseled a much higher sentence.[279] As with other forms of carceral harm, the impulse to ensure that a pregnant person and their unborn child are together during the child's infancy is not particularly tied to retribution, deterrence, incapacitation, or rehabilitation. This example thus exposes the need for a rethinking of punishment purposes that considers the consequences of—in particular—excessive sentencing on communities and American society as a whole. In addition to prisons cruelties, cruelties happen outside of prison as a result of mass incarceration. These include births not witnessed, funerals not attended, children who must parent themselves, partners torn apart for life, and a fundamental tear in the fabric of society: "Mass imprisonment damages social networks, distorts social norms, and destroys social citizenship."[280]

Although judges are *permitted* to incorporate new information in sentence reduction proceedings,[281] they have no *mandate* to incorporate new information into the decision-making process. Neither is there any explicit guidance to courts about what aspects, if any, of a person's carceral experience must be considered at the sentence reduction phase. In general, federal

child's ability to overcome challenges and succeed in life."); RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 47 (2019) ("The families of incarcerated individuals suffer great economic hardships from incarceration, ranging from lost wages from the incarcerated individual to the costs of prison visits and calls, which can be crushing for families already living on the edge of subsistence.").

279. *See, e.g.*, United States v. Rodriguez, No. 19-CR-4693-GPC, 2023 WL 1486147, at *5 (S.D. Cal. Feb. 2, 2023) (reducing an expectant mother's federal sentence in order to avoid separating a newborn child from his mother); *see also* United States v. Pardo, No. 1:14-CR-376, 2021 WL 5447658, at *4 (E.D. Va. Nov. 22, 2021) (granting a sentence reduction for an individual that demonstrated her incarceration and high-risk pregnancy posed significant risks to her and her unborn child); United States v. Schneider, No. 14-CR-30036, 2020 WL 2556354, at *8 (C.D. Ill. May 20, 2020) (granting a sentence reduction for an individual who had underlying health conditions and was due to give birth in two months).

280. Roberts, *supra* note 271, at 1281.

281. United States v. Pepper, 562 U.S. 476, 504 (2011) (district courts can consider post-sentencing rehabilitation and other factors upon resentencing).

judges fall back on the ill-fitting federal sentencing factors and, by extension, a rote recitation of punishment purposes.[282]

Further complicating matters, the burden of persuading a judge that a person should be released early is placed upon a movant.[283] First, a statutory presumption that the original sentencing stands weighs heavily against people seeking early release.[284] In many jurisdictions, including the federal system, sentences are presumed final unless some exception is present.[285] Further, sentence reduction determinations are ultimately discretionary and largely unreviewable on appeal.[286] Thus, while excessive and extreme sentences are indeed being undone, powerful forces serve to maintain the status quo, even in cases where people have served lengthy terms of incarceration already.

For this reason, the punishment purposes need a critical update, and theorists concerned with excessive sentencing should give judges a theoretical grounding for avoiding extreme sentences.

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282. *See* Meixner, *supra* note 221, at 1467 (discussing the need for explicitly articulated standards for felony sentencing).

283. One potential fix to these problems would be to shift the burden to the government to establish a person's ineligibility for release once the applicable legal threshold has been met. In the sentence reduction motion context, for example, then-district-judge Ketanji Brown Jackson suggested that "[i]f the defendant makes [a] showing [of extraordinary and compelling circumstances], the presumption then effectively shifts in favor of his release, and the court must determine whether any of the purposes of punishment set forth in section 3553(a) require keeping the defendant incarcerated nevertheless." United States v. Greene, 516 F. Supp. 3d 1, 27 (D.D.C. 2021). The wisdom of Justice Jackson's proposal is self-evident: the extraordinary and compelling hurdle is high. If a person's circumstances meet this high threshold, then there are already forceful reasons in their favor warranting release.

284. Renagh O'Leary, *Early Release Advocacy in the Age of Mass Incarceration*, 2021 WIS. L. REV. 447, 456 (2021) ("[E]arly release advocacy always occurs in the shadow of the original sentencing proceeding.").

285. A court generally "may not modify a term of imprisonment once it has been imposed." Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. § 3582(c)).

286. *See, e.g.*, United States v. Dotson, 849 F. App'x 598, 601 (7th Cir. 2021) ("When we review the denial of a motion for compassionate release, we do not replace our judgment for that of the district court; we ask only whether the district court abused its discretion."); United States v. Brooker, 976 F.3d 228, 234 (2d Cir. 2020) (denying a motion for compassionate release because doing granting would have required an additional motion from the Bureau of Prisons).

## III. REIMAGINING THE PUNISHMENT PURPOSES

This Part of the Article returns to the main project at hand: re-imagining the purposes of punishment in light of the need for a more robust theory of decarceration and, in so doing, rethinking the punishment purposes in the first instance. This Part re-addresses some critiques of the punishment purposes and proposes a reframing of each of the purposes based on those critiques and real world-examples of decarceration decisions in the second-look context.

There is a problem, however, that abolition-centered theorists will no doubt point out against this rethinking of the punishment purposes. As scholar Jamelia Morgan has emphasized, "[c]entral to abolitionist praxis is the decoupling of social responses to harm and conflict from the criminal legal system and toward non-punitive and non-carceral systems of accountability and care."[287] If, in her words, "justice cannot come from the criminal legal system,"[288] critics may object that a rethinking of the four punishment purposes—so central to the stagnation of sentencing and incarceration policy—is inherently at odds with any abolitionist critique of prisons and criminal regulation.[289] Such a criticism is fair. After all, many have persuasively pointed out that "reformist reforms" often further entrench, rather than alleviate, the ills of the carceral state.[290]

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287. Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 608 (2021).

288. *Id.* at 609.

289. *See* Akbar, *supra* note 49, at 1815–17 (describing the abolitionist critique of policing).

290. *E.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 101 (2020) (non-reformist reforms require a "modification of the relations of power," in particular "the creation of new centers of democratic power" (internal citation omitted)); *Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE (Feb. 27, 2024), https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing [https://perma.cc/35DM-FREY]; Roberts, *supra* note 23, at 42 ("Efforts to fix the criminal punishment system to make it fairer or more inclusive are inadequate or even harmful because the system's repressive outcomes don't result from any systemic malfunction."); Morgan, *supra* note 287, at 614 ("Abolitionists oppose reforms that invest additional resources into the carceral state or otherwise extend the longevity of carceral institutions, policies, and practices.").

There is a danger that second-look measures are merely this kind of "reformist reform."[291] Grants of clemency and compassionate release can—perversely—serve to legitimize court-sanctioned overincarceration and other forms of prison-backed social control.[292] Wide disparities in granting sentence reductions are present, and the majority of federal sentence reduction motions, for example, have been denied.[293] Granting second-look motions to a few people deemed worthy by individual judges may be transformative to an individual person, but on a wide scale there is a danger that "discretionary-based reforms shore up rather than call into question the vast power of criminal-legal actors."[294] But the counter-argument to this criticism is that a fundamental probing, questioning, and reframing of the punishment—in lieu of piecemeal legislation—would more appropriately account for all societal harm—including harms that are felt by incarcerated people, their families, communities, and loved ones.

Incorporating new perspectives into the punishment purposes could—instead—spur more decisionmakers to internalize a new, less violent, less dehumanizing vision for sentencing theory. Thus, instead of focusing on individual reforms, this project furthers the abolitionist aim by encouraging theorists, practitioners, and decisionmakers to rethink the goals of punishment altogether.[295] As noted, above, this work is already beginning.[296] This Article seeks to advance the abolitionist goal by providing

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291. *See, e.g.*, *id.* (discussing concerns with continued investment in carceral systems).

292. *E.g.*, Hanan, *supra* note 236, at 584 (noting the "danger of the sentimentalism embodied in the rhetoric and structure of reforms that champion discretionary decision-making"); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 15 (2022) ("[C]riminal courts themselves function as institutions of punitive social control, both in their everyday courtroom practices and in 'the violence of legal acts.'" (quoting Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986))).

293. *U.S. Sentencing Commission Compassionate Release Data Report*, U.S. SENT'G COMM'N tbl.1 (Dec. 19, 2022) [hereinafter *Compassionate Release Data Report*], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf [https://perma.cc/AQC2-CT5S] (compiling data regarding compassionate release motions and outcomes during fiscal years 2020 and 2021).

294. Hanan, *supra* note 236, at 586.

295. *See also* McLeod, *supra* note 19, at 1161 (discussing how to reframe the thinking and goals of abolitionism).

296. *See supra* Part I.C.

decisionmakers with a theoretical grounding for making necessary decarceration decisions and, relatedly, encouraging new ways to address social harm that counters the default mode of incarceration at criminal sentencings writ large.

Although this Article does not attempt a comprehensive rewriting of the punishment purposes, this Part suggests some frameworks for beginning to think about a project of incorporating abolition theory into the punishment purposes and gives practical examples of how this reimagining could work in real cases.

### A. REDUCING HARM NOT DETERRING "CRIME"

The first way in which this Article proposes a shift in the punishment purposes is to reframe the idea of deterrence as a means to reduce aggerate societal harm—rather than simply reduce the future incidence of "crime." Critiques of deterrence theory as it is currently applied are many. First, "punishment is not an inevitable consequence of crime," as there are many lawbreakers who are never punished and thus go undeterred.[297] In this sense, the purpose of deterrence is frustrated and its utility for reducing crime in the first instance is questionable. And researchers have found that the effect of criminal sanctions have widely different effects on different people and communities.[298] Still others have criticized deterrence theory on the rationale that—at a very granular level—it is difficult to measure incremental deterrence that may flow from incrementally harsher punishment.[299] Finally, while the efficacy of harsher punishments in deterring crime has not been established, studies actually show that harsher punishments can actually have an anti-

297. ANGELA Y. DAVIS, ABOLITION DEMOCRACY 112 (2005).

298. Alex R. Piquero et al., *Elaborating the Individual Difference Component in Deterrence Theory*, 7 ANN. REV. L. & SOC. SCI. 335, 338 (2011) (noting that research shows "threats and punishments have varying effects across the sanctioned population").

299. *See, e.g.*, United States v. Craig, 703 F.3d 1001, 1003 (7th Cir. 2012) (Posner, J., concurring) ("The social costs of imprisonment should in principle be compared with the benefits of imprisonment to the society, consisting mainly of deterrence and incapacitation. A sentencing judge should therefore consider the incremental deterrent and incapacitative effects of a very long sentence compared to a somewhat shorter one.").

deterrent effect.[300] Each of these criticisms of deterrence may lead to the conclusion that its continued use as a justification for incarceration is misguided.

Similarly, many deterrence theorists view the criminal law through a capitalist or quasi-capitalist lens where "what is forbidden is a class of inefficient acts" that impose economic costs.[301] As Dorothy Roberts reminds us, "[t]he purpose of carceral punishment [has been] to maintain a racial capitalist order rather than to redress social harms."[302] Punishment justified by a deterrence rationale is purportedly consequentialist in nature: the harsher the punishment, the less likely someone is to commit a particular crime (or to commit that crime again). And yet, deterrence theory in its abstract form does not actually translate into practical, tangible outcomes when utilized as a rationale for sentencing.

But there are deeper, more fundamental problems with deterrence theory as currently conceived. Although the efficacy of deterrence-based sentencing policies is questionable, abstract deterrence theory simply does not account for the broad range of acts that are covered by the criminal law, nor does it take into account who decides which acts are criminalized.[303] Indeed, the idea of "crime" is imbued with contextual meaning that can

300. *E.g.*, Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, FED. PROBATION, Dec. 2016, at 33, 34 (explaining that some research has shown "that people who had been punished more severely actually engaged in more crime."); Daniel S. Nagin, Francis T. Cullen, & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 125–26 (2009) ("Although intended to prevent crime, this unique experience in social segregation is argued to have the unintended consequence of increasing exposure to crime-inducing influences and of decreasing exposure to prosocial influences."); Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LIT. 5, 32 (2017) (suggesting that recent trends toward greater punishment have not actually led to greater deterrent effects).

301. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985); *see also* Peter N. Salib, *Why Prison?: An Economic Critique*, BERKELEY J. CRIM. L., Fall 2017, at 111, 114 ("Scholars of law and economics often simply assume that prison is the best criminal punishment for achieving optimal deterrence.").

302. Roberts, *supra* note 23, at 34.

303. Karakatsanis, *supra* note 39, at 854 ("Choices about what is a crime and what is not are made by politicians and within the economic, social, and racial systems in which politicians exist. As a result, for better or worse, these choices reflect the logic of, promote the legitimacy of, and protect distributions of power within those systems.").

change over time or be dependent on the proclivities of those in power, including legislators and lawmakers.[304]

If, instead, this theory was re-envisioned to look at social harm in a more holistic manner, decisionmakers might be less likely to punish culpable harms with prison, but might instead look to other forms of harm reduction and avoidance. For example, instead of pitting a "defendant" against "society," and measuring the utility of reducing "crime"—itself a social construct—a rethinking of the punishment purposes would include every person's experience, as well as that of their families and communities, within the measure of societal benefits or harms that may flow from a punishment decision.[305] Further, the social "utility" of a punishment decision would include an accounting of all of "the harms inflicted by carceral punishment"[306] as well as the potential social good flowing from a decision not to punish. Accordingly, it may not be necessary to entirely dispense with utilitarian or consequentialist aims in reconceptualizing punishment if a reduction in aggregate harm—rather than, for example, inefficiency in economic terms—is the over-arching goal of the reconceptualization.

Some commentators have pointed out that a pure consequentialist view of criminal punishment should already be taking these carceral harms into account.[307] After all, "[u]tilitarian justifications for imprisonment already depend on measuring punishment's social impact."[308] But this pure consequentialism is rarely applied in practice. What is necessary is a revisiting of

304. *Id.* (noting that while wagering over dice is "a 'crime' in most of America," "[w]agering over international currencies, entire cities' worth of mortgages, the global supply of wheat needed to avoid mass starvation, or ownership of public corporations is accepted behavior").

305. *See, e.g.*, Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 250 (2019) ("The customary case caption in criminal court, '"The People v. Defendant,"' pits the local community against one lone person in an act of collective condemnation."); Mariame Kaba, *Free Us All: Participatory Defense Campaigns as Abolitionist Organizing*, NEW INQUIRY (May 8, 2017), https://thenewinquiry.com/free-us-all [https://perma.cc/K9JN-U7BW] (explaining why Kaba and other activists engage in participatory defense campaigns).

306. Roberts, *supra* note 23, at 118.

307. *See*, *e.g.*, KOLBER, *supra* note 56, at 13–14 (contrasting pure consequentialism with the retributive idea that deserved punishment somehow has intrinsic social value).

308. Roberts, *supra* note 271, at 1301.

the kind and quality of social impact that utilitarian or consequentialist theories seek to address, and translating these ideas into concrete sentencing and re-sentencing decisions.

By shifting the focus of sentencing away from deterrence of breaking the criminal law and redirecting their efforts towards a reduction in overall harm, judges and other decisionmakers may look at the aggregate utility and harm involved in their punishment decisions (or decarceration decisions) and perhaps approach these decisions differently (even if still from a largely utilitarian or consequentialist standpoint). Analogizing to specific and general deterrence, a balancing of specific harm reduction might involve a judge or decisionmaker looking at the impact of continued incarceration on an individual, while general harm reduction might involve the impact of continued incarceration of one person on a community, or the impact of overincarceration generally on American society. Ideally, a punishment decision would not include a decision to incarcerate at all, but something more transformative and positive in lieu of prison. Although "[m]easuring harms at the community level is more complex than aggregating prison's collateral consequences for individual[s],"[309] taking into account community-based harms is necessary to fully embrace a utilitarian stance that centers around the reducing harm rather than deterring what society counts as "crime."

This kind of calculation is already beginning to surface in second-look proceedings. The lack of adequate medical care in prisons, for example, is widely known, and has been a primary reason for the release of many incarcerated people over the last several years, particularly in the era of COVID-19.[310] In fact, the

309. *Id.* at 1281.

310. *See, e.g.*, United States v. English, No. 2:19-CR-20164-TGB-EAS-1, 2022 WL 17853361, at *5 (E.D. Mich. Dec. 22, 2022) ("[E]ven if it is not clear that English's medical conditions alone are life-threatening, the record here demonstrates that the mismanagement of these conditions creates extraordinary and compelling circumstances warranting compassionate release."); United States v. Burr, No. 1:15-CR-362-1, 2022 WL 17357233, at *6 (M.D.N.C. Dec. 1, 2022) ("Inadequate medical care may be a relevant factor in finding extraordinary and compelling reasons under § 3582(c)(1)(A) [(the factors for compassionate release)]."); United States v. Edwards, No. CR 03-234 (JDB), 2022 WL 2866703, at *5 (D.D.C. July 21, 2022) ("[P]ersistent inadequate medical care can constitute an extraordinary and compelling reason warranting sentence reduction if the defendant's medical needs require release."); United States v.

availability of sentence reduction motions has exposed the gross inadequacies prison medical care across the country, including in and (ironically) *especially* in those facilities specifically designated as medical care facilities.[311] Medical neglect is such a recurrent problem that judges have repeatedly admonished prison administrators for the failure to address the medical concerns of the people it incarcerated.[312] And yet, this ground for release has no particular theoretical origin in the established punishment purposes. No amount of retributive impulse should lead a decisionmaker to conclude that someone should suffer unnecessarily for untreated medical needs. Nor would the rationale of deterrence seem to specifically justify years of medical neglect as a matter of sound sentencing policy. And while rehabilitation may nod in the direction of attending to medical needs, the more common understanding of rehabilitation is oriented toward the addressing of a person's criminogenic traits rather than toward holistic care.

Instead, people suffering severe medical neglect have been released so that their medical conditions could be treated and so that the harm that they suffered could ultimately be lessened.[313] But far more people have been denied medical compassionate

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Derentz, 608 F. Supp. 3d 189, 193 (E.D. Pa. 2022) ("Courts have also found that . . . delays in treatment[] may qualify as an extraordinary and compelling reason for compassionate release.").

311. *See, e.g.*, Frank Egan, *FCC Hazelton Is the Second Deadliest Prison in the Country, New Report Says*, WDTV (Feb. 15, 2024), https://www.wdtv.com/2024/02/15/fcc-hazelton-is-second-deadliest-prison-country-new-report-says [https://perma.cc/B7YH-CJ63].

312. *E.g.*, United States v. Belin, No. 10-CR-2213 MV, 2023 WL 3867751, at *5 (D.N.M. June 7, 2023) ("[T]he BOP has displayed a striking lack of responsiveness to symptoms that carry potentially life-threatening significance."); *Burr*, 2022 WL 17357233, at *7 ("In the face of three orders by medical professionals for this test, the BOP did nothing, in reckless disregard of Mr. Burr's health."); United States v. Verasawmi, No. CR 17-254 (FLW), 2022 WL 2763518, at *8 (D.N.J. July 15, 2022) ("[T]he BOP either neglected to provide urgent treatment its own healthcare professionals had recommended or repeatedly delayed for months in providing scheduled care.").

313. *See, e.g.*, United States v. Almontes, No. 3:05-CR-58, 2020 WL 1812713, at *6–7 (D. Conn. Apr. 9, 2020) (finding extraordinary and compelling circumstances when the BOP was indifferent to an incarcerated person's serious spinal issue by delaying treatment and surgery for years); United States v. Robles, No. 19-CR-4122, 2022 WL 229362, at *2 (S.D. Cal. Jan. 26, 2022) (granting compassionate release when BOP failed to provide urgent medical treatment for incarcerated person's various serious medical conditions including arteriovenous malformations and hereditary hemorrhagic telangiectasia).

release, even in the face of severe medical consequences for continued incarceration.[314] A probing of the punishment purposes, and endorsement of a purpose that accounts for harm reduction, may lead judges to release more people earlier, and to avoid incarceration for people whose medical circumstances may be exacerbated by prison.[315]

Similar entrenchment is present when judges have been called upon to consider changed family circumstances of people in prison. Although the Sentencing Commission's 2023 Amendments, for example, endorse a category of early release that permits "family circumstances" to be taken into account as a reason for sentence reduction or immediate release,[316] judges are often reluctant to override their original sentencing decisions based on the punishment purposes when, for example, a spouse or primary caregiver of an immediate family member becomes sick and unable to care for minor children.[317] Given what we know about the impacts on children of having an incarcerated parent, this stubbornness seems misplaced and fails to consider broad harms that could be prevented if people were released to care for their children. If judges were, instead, encouraged to consider the aggregate harm caused by prison, or the reduction in harm that would result if they were released—including to families and communities, including the permanent harms that could come from medical neglect—the shadow of the original

314. *Compassionate Release Data Report*, *supra* note 293, tbl.15 (compiling data regarding compassionate release motions reasons for denial of such motions during fiscal years 2020 and 2021).

315. "American carceral institutions routinely burden prisoners' fundamental liberties and fail to provide even minimally safe and healthy living conditions." Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 302–03 (2022).

316. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(3) (U.S. SENT'G COMM'N 2023).

317. *See, e.g.*, United States v. Knuckles, 614 F. Supp. 3d 534, 537 (E.D. Mich. 2021) (finding that the disability of the defendant's fiancée, the primary caregiver of the couple's three children, was not reason enough to warrant early release from five year drug distribution offense); United States v. White, No. 1:12-CR-309, 2023 WL 5510306, at *3 (E.D. Va. Aug. 24, 2023) (holding that family circumstances, based on the mental stress on his children and his desire to care for his mother, should not warrant release from sentence related to drug distribution and possession of a firearm).

sentencing[318] may not loom quite so large over sentence reduction proceedings. Similarly, incorporating harm prevention and reduction into sentencing practice may induce judges to refrain from sentencing a person altogether if they are facing the potential for life-threatening or otherwise severe medical deterioration in prison, or if other circumstances outweigh the perceived utility of prison.

In sum, this Article proposes a rethinking of deterrence to focus on avoidance of harm rather than simply deterrence of crime. In both the second-look and initial sentencing contexts, this reframing is likely to result in a reduction in overall incarceration.

### B RESTORATION AND REPAIR, NOT RETRIBUTION

The second way in which this Article proposes a shift in the punishment is purposes is to ask whether there are non-punitive, non-carceral ways to repair harm as an alternative to carceral retribution. At their core, both retributive and restorative justice theories are concerned with how to properly account for injury or harm done to people or society. Retributive punishment involves the idea that it is morally right to do harm to someone who has harmed because that is the best way to account for culpable harm.[319] Restorative justice principles, on the other hand, are focused on repair, and seek to provide "more holistic remedies to address harm, conflict, and crime" than the simplistic sanction of criminal punishment.[320] When culpable harm occurs, the social fabric suffers, and each of these theories propose, albeit opposing, ways to address culpable harm.

Retributivist theorists are primarily concerned with the ideas of proportionality and desert and often believe that a punishment should fit the crime in an abstract sense.[321] A principle understanding of this conception of retributive justice is that a harm or deprivation must be done to the wrongdoer in order for

318. Renagh O'Leary, *Early Release Advocacy in the Age of Mass Incarceration*, 2021 WIS. L. REV. 447, 456 (2021) ("Early release advocacy always occurs in the shadow of the original sentencing proceeding.").

319. HART, *supra* note 1, at 25.

320. Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1028 (2019).

321. Hanan, *supra* note 17, at 1204 ("Retribution involves the intentional infliction of pain, but no more pain than deserved for the crime, meaning that retribution should be limited by the principle of proportionality.").

the retributive aim to be complete, and that this in itself is morally good.[322] But, like deterrence theory, there are a host of common critiques that makes retributive justice as a goal of sentencing seem unsatisfying, unfair, and ineffective.

First, retributivist sentencing often "ignores the social causes of crime."[323] Similarly, retribution tends to downplay the inequality inherent in the project of criminal punishment—including what is criminalized and who gets punished.[324] For example, there is an inherent risk in the retributive project that a greater amount of responsibility for social harm will be placed on certain supposed "offenders" than may be warranted, or that decisionmakers will impose harsher punishment on certain social or racial groups more harshly than others.[325] Importantly, scholars have criticized the tendency for *both* retributivist and deterrence theory to justify punishments that disproportionately criminalize crimes more often committed by Black men—and to punish those crimes more harshly.[326]

Retributive principles also overstate the degree to which "fairness to the victim and the victim's family (whose right to seek vengeance is supplanted by the criminal law)"[327] justifies criminal punishment. Retributive punishment is often justified either "as an attempt to express the community's moral outrage" or "as an attempt to right the balance for the wrong to the

322. *See, e.g.*, Frase, *Punishment Purposes*, *supra* note 1, at 75 (discussing the "common morality" inherent in retributive punishment theories); Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 604 (1978) (discussing the "nature of punishment").

323. Driver & Kaufman, *supra* note 11, at 558 (citing Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 UC DAVIS L. REV. 839 (2019)).

324. Levinson et al., *supra* note 323, at 887 ("[T]he retributive urge [may] occur because of fear and anger, and the process of dehumanization creates a frenzy that interrupts our ability to assess the level of punishment necessary.").

325. *Id.* at 888.

326. Matthew C. Altman & Cynthia D. Coe, *Punishment Theory, Mass Incarceration, and the Overdetermination of Racialized Justice*, 16 CRIM. L. & PHIL. 631, 632 (2022) ("Narratives about the relative wrongness of crimes that are more often committed by African Americans, along with a focus on their dangerousness, have combined to produce discriminatory social policies around punishment.").

327. Frase, *Punishment Purposes*, *supra* note 1, at 73.

victim."[328] But the aim of retribution rests on a false dichotomy between victims of crime and perpetrators of crime.[329] Indeed, in many communities, societal harm may be so widespread or so difficult to disaggregate from the harm of capitalist, colonialist, or racist social structures that talking about victims and perpetrators no longer makes sense.[330] Finally, many harms—including some drug crimes that are harshly punished by draconian criminal regulation—don't involve immediate victims. Thus, the very idea of retribution in those contexts is misguided.

Restorative justice, by contrast, suggests that there are alternative ways to address culpable harms and to create dialogue and healing between people who have been harmed and those who have caused harm.[331] Similarly, transformative justice seeks to reduce harm by dismantling the racist, capitalist, and colonialist structures that harm communities as a whole.[332] In this way, thinking expansively about repairing culpable harm rather than inflicting carceral harm—which is the default stance of retribution—incorporates a broader vision for achieving justice.[333] Reformulating the idea of retributive justice with a restorative or transformative goal may thus achieve the same type of moral result put forth by proponents of retributive theory—

328. Roper v. Simmons, 543 U.S. 551, 571 (2005); *see also* McLeod, *supra* note 19, at 1232 (describing how "[r]etributive justice requires that any wrongful and illegal act be followed by state-imposed punishment" so as to "counteract the harm done by the offender to the victim").

329. *See* McLeod, *supra* note 19, at 1206 (discussing the "forms of violence" that perpetrators and their families experience); Levinson et al., *supra* note 323, at 871 (discussing the psychological effects of retribution).

330. Roberts, *supra* note 271, at 1300 (calling for a "radical rethinking" of sentencing justifications).

331. Although the dichotomy between "victim" and "offender" is often used in restorative justice frameworks, such an artificial division has been rejected by legal scholars who argue that these terms are stigmatizing and fail to recognize the cycles of harm that often plague communities. *See, e.g.*, Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1451–54 (2021). Indeed, in many communities, people who are impacted by harm and those who cause harm are nearly impossible to disaggregate. Thus, this Article steers away from the artificial dichotomy described, in favor of a more holistic framework for describing harms.

332. Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 640–41 (2021) (discussing the need to concurrently address other types of "structural injustice").

333. Cullors, *supra* note 43, at 1694 ("Abolition seeks to repair the damage done to a person or a people.").

accounting for harm—but could instead lead to positive, nonviolent transformation rather than the imposition of additional prison-based harm.[334]

If a purported causer of harm is able to account for their harm through positive acts instead of through the infliction of punishment on them by state actors, there can still be a kind of accounting of harm.[335] Providing opportunities for people to repair in this way, or by participating in "counseling and other interventions"[336] in lieu of incarceration and community surveillance would be far less destructive than the current system we have that only serves to perpetuate harm and violence.[337]

The second-look context has illuminated the importance of focusing on transformation and restoration over retribution. In particular, judges have already begun to think about proportionality in the second-look context as a natural corollary to retribution—when someone's carceral harm is so great that it outweighs the retributive weight associated with an underlying crime, early release may be warranted. For example, some judges have justified reducing peoples' sentences on the theory that pandemic lockdowns, resulting in restrictive conditions and prolonged periods isolation, made the experience of prison "more punitive" than the courts had originally intended at the time of sentencing.[338] The proportionality principle—tied to retribution—is certainly in play here, with judges recognizing that adverse conditions of confinement can in fact be taken into consideration when justifying a sentence reduction.

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334. *See* González, *supra* note 320, at 1035; Reznik, *supra* note 22, at 125–27.

335. For example, "demand[ing] concrete restitution that supports survivor and community healing." KABA, *supra* note 38, at 135.

336. *Id.*

337. Lanni, *supra* note 332, at 641 (emphasizing "healing and reintegration rather than punishment").

338. *See, e.g.*, United States v. Russo, 643 F. Supp. 3d 325, 333 (E.D.N.Y. 2022) ("[T]he restrictions at FCC Allenwood during the pandemic have made Russo's incarceration much more punitive than originally contemplated at the time of sentencing."); United States v. Rodriguez, 492 F. Supp. 3d 306, 311 (S.D.N.Y. 2020) ("[T]he pandemic, aside from posing a threat to Rodriguez's health, has made Rodriguez's incarceration harsher and more punitive than would otherwise have been the case."); United States v. Mel, No. TDC-18-0571, 2020 WL 2041674, at *3 (D. Md. Apr. 28, 2020) ("The fact that Mel has been incarcerated at FCI-Danbury during a serious outbreak of COVID-19 inside the facility sufficiently increased the severity of the sentence beyond what was originally anticipated that the purposes of sentencing are fully met . . . .").

But the specific carceral harm at issue (prolonged isolation) served no retributive purpose; instead, the purpose of such isolation was ostensibly to contain the virus.[339] And by extension, a reduction in a person's sentence because of their prolonged isolation or restrictive lockdowns could not be justified by applying the punishment purposes as currently conceived. Some new theoretical framework is instead required.

A similar lack of theoretical grounding has arisen in cases involving the rampant institutional sexual abuse of federally incarcerated people that has become "an egregious stain"[340] on the federal prison system.[341] There is no penological purpose that justifies the carceral harm of sexual abuse, but the punishment purposes still loom over sentence reduction proceedings that are based on that type of harm.

One federal district court judge concluded that a sentence reduction was warranted for a sexual abuse victim who was abused by a prison guard because "sexual assault . . . is far beyond the ordinary 'derelictions on the part [of] prison officials' that a defendant (or the sentencing judge) can anticipate at the time of sentencing."[342] That judge concluded that "failing to take [defendant's] sexual assault into account risk[ed] 'enhanc[ing], to a disproportionate degree, the level of punishment contemplated to be experienced by' [her] as a sentence for her crimes."[343] To be sure, this judge explicitly linked the proportionality and parsimony principles to the movant's experience of incarceration—her abuse at the hands of prison guards—and concluded that the abuse she suffered could be, in essence, applied toward the numerical calculation of her sentence.[344] But that is not the

339. See sources cited *supra* note 338.

340. United States v. Herrera, No. 17 Cr. 415 (PAC), 2023 WL 3614343, at *5 (S.D.N.Y. May 24, 2023).

341. Most notoriously, the federal prison, FCI Dublin, became the locus of an enormous sex scandal involving the Warden, chaplain, and at least six other high-ranking BOP officers who abused women in that facility. *See generally* Esser, *supra* note 268.

342. United States v. Brice, No. 13-cr-206-2, 2022 WL 17721031, at *4 (E.D. Pa. Dec. 15, 2022) (quoting United States v. Mateo, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004)).

343. *Id.* (quoting United States v. Mateo, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004)).

344. *Id.* (considering abuse suffered in prison as an "extraordinary and compelling reason" to reduce a defendant's sentence).

same as linking the punishment purposes to her sentence reduction.

Theoretically, a sentence reduction based on sexual assault could be linked back to the idea of retribution because this movant experienced punishment that had a greater retributive *effect* than the sentencing judge could have foreseen. And, indeed, in this particular case, instead of mandating immediate release so that the movant could seek treatment for her traumatic experiences while in the custody and care of prison officials, the judge concluded that a just a thirty-month reduction in sentence was warranted as a result of the assault.[345] But instead of relying on their original sentencing decision as the anchor for the just result, this particular judge could have elected to release this movant to advance a goal of healing rather than continuing to incarcerate this survivor based on an abstract notion that the original sentence was appropriate.[346] Further, those who committed culpable harms against incarcerated people could be required to account for the harms they inflicted in ways other than through incarceration: by apology, by service, by advocating against the harms of carceral punishment, or by other restorative or transformative means.[347]

It is not just carceral *harm* that should be accounted for through transformation and repair, however. Good acts should also serve to promote the idea of restoration. Second-look decisionmakers have recognized that positive acts can also contribute to sentence reductions. In one case a sentence reduction was granted to a person serving a life sentence who rendered life-saving aid to a correctional officer.[348] In sum, by looking at sentencing through more of a repair-focused lens, retributive theory could be reimagined in a way that embraces the potential for

345. *Id.* at *5–6 (reducing the defendant's sentence to 155 months from an original sentence of 185 months).

346. *See, e.g.*, Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 497 (2014) (describing the problem of cognitive anchoring in sentencing determinations).

347. *See* DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM (2021) (describing the ways in which incarceration of correctional and police officers fails to deliver relief or justice to those harmed by such carceral actors).

348. United States v. Ramos, No. 03-cr-315, 2023 WL 1766279, at *1 (E.D.N.Y. Feb. 3, 2023) (reducing the defendant's sentence from life imprisonment to 420 months).

every person who has done harm to also be the doer of good and recognizes that the current punishment system we have in place does not reduce harm or violence.[349] In sum, while retribution and punishment have long been synonymous with incarceration, this framework need not endure.[350]

### C. REHABILITATION AND INCAPACITATION AT A CROSSROADS

A final proposal of this Article is to rethink our overreliance on incapacitation as a legitimate goal of punishment, and, relatedly, to interrogate how the idea of rehabilitation is being applied. The chief criticism of incapacitation is that "we may incapacitate people long after they pose a threat to public safety."[351] But rehabilitation as an alternative to incapacitation has entrenched ideas of individual responsibility, social control and alternative actors in the carceral state: risk assessment tools, parole boards, probation officers, and technological forms of social surveillance.[352] And rehabilitative aims, while seemingly worthwhile, can in practice drive disparities in who is deemed "rehabilitated."[353] Problematically, the ideas of rehabilitation and incapacitation often work together to entrench existing ways of thinking about the role of carceral punishment.[354] Rehabilitation and incapacitation are concepts that are both rooted in the idea

349. KABA, *supra* note 38, at 59 ("Transformative justice is not a flowery phrase for a court proceeding that delivers an outcome we like. It is a community process developed by anti-violence activists of color, in particular, who wanted to create responses to violence that do what criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.").

350. Reznik, *supra* note 22, at 126 ("If retribution can be imagined as a just and humanistic social force, and prisons can be recognized as the destructive and dehumanizing enterprise that they are, then it becomes clear that we need to broaden our punitive vocabulary rather than seek alternatives to punitiveness.").

351. M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151, 156 (2019); *see also* Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1 (2017) (discussing critiques of incapacitation in the age of mas incarceration).

352. Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 224 (2013) (describing neorehabilitation's "heavy reliance on evidence-based programs and actuarial tools").

353. *Id.* at 214.

354. *Id.* at 222–24 (explaining the interrelation between incapacitation and rehabilitation in modern sentencing).

that some people are inherently criminal and must be controlled for the benefit of "society."[355]

This Article proposes the wholesale rejection of carceral incapacitation as a legitimate punishment goal. "The argument for incapacitation reveals the disregard for the humanity of incarcerated persons that is inherent in the basic structure of U.S. penal discourse."[356] Many scholars have pointed out that incapacitation has become a central tenet of sentencing policy and indeed has "taken center stage in recent years."[357] An abolitionist revisioning of incapacitation theory is impossible because the very idea of incapacitation must be rejected in favor of the notion that all persons are valuable, redeemable, and that incapacitation is simply not a legitimate way to address societal harm. Further, "incarceration does not necessarily reduce or incapacitate the commission of crime"—or the perpetration of harm—"but rather changes its location."[358]

While incapacitation fails to account for the harm that ensues when people are warehoused in inhumane conditions for extreme periods of time, rehabilitation fails to account for the ways in which people are still subjected to prison-backed forms of social control even after they are deemed "rehabilitated."

Moreover, the assumption that prison can rehabilitate is misguided.[359] Although rehabilitation is a theoretically attractive goal of punishment, studies of the rehabilitative efficacy of incarceration are inconsistent and often inconclusive.[360] The very concept of rehabilitation suffers from a fundamental weakness: nobody can agree on how to achieve rehabilitation within

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355. *Id.* at 222 (describing neorehabilitation and incapacitation as "two sides of the same coin").

356. McLeod, *supra* note 19, at 1204.

357. Dolovich, *supra* note 82, 271–72; *see also, e.g.*, Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of Life Without Parole* (describing the current dominant penal theory as "total incapacitation"), *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 282, 293 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); Eaglin, *supra* note 352, at 199 (explaining "the dominance of incapacitation as the leading penal theory").

358. McLeod, *supra* note 19, at 1204.

359. *See* Driver & Kaufman, *supra* note 11, at 560 ("The abandonment of rehabilitation is . . . widely recognized.").

360. *See* McLeod, *supra* note 19, at 1204 (suggesting that "there is no persuasive evidence that rehabilitative incarceration is more likely to produce desired results than an alternative array of interventions not organized around imprisonment").

the context of the carceral system.[361] One particularly persuasive accounting of the inconsistent aims of rehabilitation is contained in Justin Driver's and Emma Kaufman's expansive and comprehensive article, *The Incoherence of Prison Law*.[362] As these authors explain, "[t]he country's first penal institutions were built around competing theories of rehabilitation."[363] And this confusion persists: the law governing the rights of incarcerated people is replete with conflicting rehabilitative rationales put forth by prison administrators—but nearly all of these rationales are ultimately deemed legitimate by the courts.[364] Although a judge cannot sentence a person to incarceration or lengthen a term of incarceration for the sole purpose of rehabilitation,[365] once imprisoned, a person is subject to the whims of prison administrators who have broad discretion to determine what may serve the aim of rehabilitation.[366] Harsh treatment such as prolonged solitary confinement—to this day—is sanctioned in the name of rehabilitation despite decades of evidence that isolation leads to madness and is akin to torture.[367] Rehabilitative aims justify depriving people of the basic human need to interact with another human.[368] As Driver and Kaufman emphasize, rehabilitation has also been used to justify the restriction of visits, book bans in prison, and the restriction of religious freedoms.[369] Thus, one question to consider is whether incarceration, with its attendant inconsistencies and blatant

361. *Id.* at 1189 (describing the rehabilitative aims that pointed early prison reformers toward "solitude and discipline").

362. *See generally* Driver & Kaufman, *supra* note 11.

363. *Id.* at 558.

364. *Id.* at 564.

365. Tapia v. United States, 564 U.S. 319, 328 (2011).

366. Driver & Kaufman, *supra* note 11, at 561–66; *see also* Beard v. Banks, 548 U.S. 521, 524–25 (2006) (plurality opinion) (upholding denial of reading materials to incarcerated people in solitary confinement and the "deprivation theory of rehabilitation"); Turner v. Safley, 482 U.S. 78, 89 (1987) (creating a deferential standard for prison regulation constitutionality and holding that regulations that impinge on an incarcerated person's constitutional rights are valid so long as the regulation is "reasonably related to legitimate penological interests," including rehabilitation).

367. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 508–10 (1997) (surveying the literature comparing prolonged solitary confinement to torture).

368. *See Beard*, 548 U.S. at 524–25 (plurality opinion).

369. Driver & Kaufman, *supra* note 11, at 539.

disregard for basic logic and sociological inquiry, can ever actually achieve the purported aims of rehabilitation.

Still, despite the questionable role of rehabilitation rhetoric in contemporary sentencing, sentence reduction decisions relying on rehabilitation as a rationale for release show that total incapacitation should be abandoned.[370]

There is an enormous cost associated with warehousing vast swaths of the population. "[I]ncarceration produces a set of destructive consequences for both the incarcerated and their communities, consequences that may tend to increase rather than decrease crime."[371] Instead, there needs to be a new framework that supplants both rehabilitation and incapacitation. This new vision could include justice reinvestment, decriminalization of certain kinds of crimes, and other broad changes to the way that crime is approached.[372] But more fundamentally, the ideas of rehabilitation and incapacitation presuppose the efficacy approaching social problems through prison-backed policing, the default mode of incarceration, and community supervision. A more fundamental ideological shift is required to change attitudes toward rehabilitation and incapacitation, those that include "modes of collective care and social provisioning to ensure that 'no one is disposable.'"[373] The idea that prisons can protect "society" from the worst of the worst or that they can rehabilitate

370. *E.g.*, United States v. Brown, 457 F. Supp. 3d 691, 701, 704 (S.D. Iowa 2020) (finding that "rehabilitation cuts in favor of [compassionate] release" where a person "has not had a single disciplinary incident."); United States v. Decator, 452 F. Supp. 3d 320, 325 (D. Md. 2020) (finding that Section 3553(a)(1) factor favored compassionate release because, *inter alia*, "[w]hile incarcerated, Decator has participated in extensive educational and rehabilitative programming; he has participated in over 1,500 hours of programming and has completed more than 70 courses" and "has a minimal, non-violent disciplinary record"); United States v. Redd, 444 F. Supp. 3d 717, 729 (E.D. Va. 2020) (finding that evidence of rehabilitation favored sentence reduction because a person "has demonstrated a commitment to self-improvement, devoting hundreds of hours to vocational programs, assisting others in their rehabilitative efforts, exhibiting solid work habits, [and] caring for mental health inmates . . ."); United States v. Perez, No. 88-10094-1, 2020 WL 1180719, at *3 (D. Kan. Mar. 11, 2020) (finding that rehabilitation favored compassionate release).

371. McLeod, *supra* note 19, at 1203.

372. *See id*. at 1224–32.

373. Akbar, *supra* note 49, at 1844 (citing *No One Is Disposable: Everyday Practices of Prison Abolition*, BARNARD CTR FOR RSCH. ON WOMEN, http://bcrw.barnard.edu/event/no-one-is-disposable-everyday-practices-of-prison-abolition [https://perma.cc/W8N7-ZJBD]).

must be supplanted with more fundamental understandings of the ways in which "institutions of carceral control" have "hollowed out modes of social provisioning," creating a climate in which individuals are expendable to the carceral system.[374]

## CONCLUSION

This Article ends with a hopeful goal: that reforming the ways in which sentencing is addressed in a second-look posture can, reflexively, shed light on how sentencing generally should be conceived and reformed. In other words, what motions for sentence reduction tell us—in part—is the very story of how violent, disproportionate, and disconnected to these theories the actual experience of incarceration and the suffering involved in incarceration has become (and always was).[375]

If judges and policymakers have no conceptual tools to counter the default of incarceration, then stagnation and the status quo will remain. If second-look advocacy centers around mitigation in various forms, but second-look mitigation has no decarcerative conceptual framework of its own through which to be mapped, judges and decisionmakers will be at a loss for how to proceed with the work of decarceration. If, on the other hand, punishment theorists and advocates begin to embrace broader frameworks centered around harm prevention and reduction[376]—if they begin to re-conceptualize the aim of the criminal law as reducing harm rather than punishing "crime"—then the "gradual project of decarceration" might truly begin.[377]

Indeed, the practice of sentencing needs to undergo a more radical shift. Significantly, "sentencing authorities should make punishment decisions assuming that the worst of prison's

374. *Id.* at 1842.

375. *See* Hanan, *supra* note 17, at 1192 ("[S]entencing authorities should not make punishment decisions based on the assumption that prison is a neutral space where occasional injustice occurs. Prison is defined by its experienced cruelties, and these cruelties must be accounted for in sentencing. No other approach ensures that sentencing policy will be based on a realistic assessment of the damage inflicted by incarceration.").

376. Morgan, *supra* note 287, at 613 ("[L]awyering in support of abolitionist groups . . . is . . . focused primarily on harm reduction.").

377. McLeod, *supra* note 19, at 1161 (characterizing the movement toward prison abolition not as "an immediate and indiscriminate opening of prison doors" but as "a gradual project of decarceration").

cruelties may befall any person sentenced to prison."[378] Judges should assume that incarceration will cause a host of unspeakable ills both for the person being sentenced, as well as their families and communities. Stakeholders in the criminal justice system such as judges, prosecutors, and legislators should do more to recognize that the sterile moment of sentencing—so critical in our modern criminal legal system—is inextricably linked to the messiness and horror of imprisonment.

To that end, judges and sentencing theorists should think about the over-arching goal of reducing societal harm when making initial sentencing decisions. In so doing, decisionmakers may begin to understand that sentencing itself is a harmful act and may ultimately rethink approaches to sentencing more broadly.

378. Hanan, *supra* note 17, at 1192.

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