CHANGING THE SENTENCE WITHOUT HIDING THE TRUTH: JUDICIAL SENTENCE MODIFICATION AS A PROMISING METHOD OF EARLY RELEASE

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ABSTRACT

Last year, as the State of California struggled with a $42 billion budget deficit, its financial inability to correct constitutionally deficient prison conditions led a federal court to order the release of 40,000 state prisoners. In Oregon, Michigan, Connecticut, Vermont, and Delaware, spending on corrections now exceeds spending on higher education. Across the nation, more than one of every one hundred Americans is behind bars. When the financial crisis of 2008 dealt its blow, state correctional budgets were already nearing a breaking point. Now, in the wake of unprecedented budget shortfalls, state governments have been forced to confront a difficult reality: the ever-increasing prison population has come at too high a price. The question is no longer whether to reduce the number of prisoners, but how.

Reversing years of ever-harsher sentencing policies, jurisdictions throughout the United States are trying to cut costs by expanding good time credit, increasing parole eligibility, and authorizing new forms of early release. This Article examines judicial sentence modification, an often overlooked ameliorative mechanism that has potential benefits many other forms of early release lack. For states wishing to promote early release in a manner that is both transparent and publicly accountable, judicial sentence modification is a

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promising, and potentially sustainable, new mechanism for sentence reduction.

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INTRODUCTION

From the early 1980s through the beginning of the twenty-first century, U.S. state and federal crime policy was characterized by increasingly harsh custodial penalties. "Tough on crime" was the rhetoric of the day: the number of criminal sanctions increased and the length of custodial sentences soared.[1] Public demand for "truth in sentencing" and accountability for offenders and criminal justice administrators led to the abolition of parole in many jurisdictions and limited early release in still more.[2] Mandatory minimum sentences, penalty enhancements, and determinate sentencing schemes became key tools in the law enforcement arsenal, all designed to get—and keep—criminals off the streets.[3] Yet despite significant drops in the rate of violent crime throughout the 1990s, the growth in imprisonment continued unabated.[4]

As a result of the move toward more punitive policies, the number of persons confined in U.S. jails and prisons increased substantially —from just over 1.1 million in 1990 to 2.3 million in 2008.[5] The United States now imprisons its residents at a rate seven times higher than Western European nations.[6] Though scholars have

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1. *See generally* MARC MAUER, RACE TO INCARCERATE (2d ed. 2006).

2. *See, e.g.*, PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/tssp.pdf (describing abolition of parole in fourteen states).

3. MAUER, *supra* note 1, at 45-48.

4. The U.S. Crime Index Rate rose gradually from 1960 to 1980, dropped significantly from 1980 to 1984, and then rose again until 1991, when it went into steady decline. LEONARD A. MAROWITZ, CRIMINAL JUSTICE STATISTICS CTR., WHY DID THE CRIME RATE DECREASE THROUGH 1999? (AND WHY MIGHT IT DECREASE OR INCREASE IN 2000 AND BEYOND?) 3 (2000), *available at* http://ag.ca.gov/cjsc/publications/misc/why/rpt.pdf. FBI crime statistics show that after a brief uptick in crime from 2005 to 2006, crime rates are once again declining and have reached near record lows. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2009), *available at* http://www2.fbi.gov/ucr/cius2009/index.html.

5. *Compare* ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994, at 2 (1995), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/Pi94.pdf, *with* WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008, at 8 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

6. Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 857 (2009); *see also* Alfred Blumstein, Michael Tonry & Asheley Van Ness, *Cross-National Measures of Punitiveness*, 33 CRIME & JUST. 347, 358-60, 375 (2005) (describing differences between U.S. and European rates of imprisonment

posited many possible explanations for this disparity, no single theory appears to capture the causes of "American exceptionalism," and the reasons for its persistence remain a source of much debate.[7]

What is not debated is the fact that America's growing prison population has come at a cost. The human costs of incarceration have led to widespread critiques of America's overreliance on incarceration as a tool of social control.[8] In recent years, however, it is the financial consequences of current penal policy that have drawn the most attention from policymakers. As the number of inmates has burgeoned, correctional budgets have been strained by many factors. Larger prison populations have led to the construction of more prisons with associated staffing and overhead expenses.[9] More prisoners has also meant higher costs for basic necessities, along with increased costs for "optional" programming, such as GED instruction, vocational training, and drug and alcohol rehabilitation.[10] Significant, too, has been the rapidly rising cost of delivering even rudimentary health care—a cost states bear in full for those within their custody.[11]

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with respect to various crimes).

7. *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC'Y 377, 377-79 (2009) [hereinafter Tonry, *Explanations*].

8. *See infra* Part I.C.

9. SARAH LAWRENCE & JEREMY TRAVIS, URBAN INST., THE NEW LANDSCAPE OF IMPRISONMENT: MAPPING AMERICA'S PRISON EXPANSION 8 (2004), http://www.urban.org/UploadedPDF/410994_mapping_prisons.pdf ("During the last quarter of the twentieth century, state prison systems grew from 592 prisons to 1,023 prisons—an increase of 73 percent.").

10. In some jurisdictions, programs once thought to be central to achieving institutional objectives, such as internal order maintenance and preparation for successful release, were reduced or even eliminated altogether as a result of fiscal and capacity constraints. *See, e.g.*, RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 11-15 (2002), *available at* http://www.sentencingproject.org/doc/publications/inc_statesentencingpolicy.pdf (describing correctional cost reduction measures such as cuts in education and drug treatment programming).

11. *See* 42 U.S.C. § 1396d(a)(28)(A) (2006) (prohibiting states from receiving federal reimbursement for the medical costs of inmates of public institutions); Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV. 921, 936 n.76 (1977) (discussing fiscal ramifications of the inmate exception on the provision of prison health care); *infra* note 130.

State correctional costs are now estimated to exceed $50 billion annually.[12] That sum would be burdensome in the most affluent of times, but in the wake of the financial crisis of 2008, it has become unsustainable. Spurred to action by funding deficits, many states began to pass legislation and implement administrative measures designed to reduce incarceration rates, increase public safety, improve successful re-integration for former offenders, and, ideally, alleviate the financial burdens of the "tough on crime" policies that defined the period from 1980 to 2000.[13] Some of these measures have focused on reducing the number of people entering prison as a result of conviction or revocation from community supervision. Many others, however, have focused on reducing the number of people in custody following conviction by authorizing early release.[14]

Although some of these back-end legislative reforms have already delivered a modicum of short-term relief in the form of reduced sentences and their associated cost-savings,[15] there are reasons to question long-term sustainability of many new early release laws.[16] With rare exception, new legislation places the release decision in the hands of prison administrators or parole boards that are unaccountable to the communities in which offenders have been sentenced and to which they will often return. By failing to grapple with concerns about transparency and public accountability, these new legislative reforms leave themselves vulnerable to the criticisms that led to the dissolution of prior forms of early release.[17]

This Article examines the recent proliferation of early release legislation and highlights judicial sentence modification—until now a largely overlooked ameliorative mechanism—as an additional, and potentially more sustainable, tool for states wishing to promote early release in a manner that is both transparent and publicly accountable. Part I reviews in some detail the policy concerns and legislative changes that led to the abolition or restriction of early

12. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 11 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf [hereinafter ONE IN 31].

13. *See infra* Part II.

14. *See infra* Part II.A.

15. *See infra* Part II.A.

16. *See infra* Part II.B.

17. *See infra* Part II.B.

release in most jurisdictions from 1980 to 2000. Part II examines a variety of common legislative responses to the mounting correctional crisis, analyzing the ways in which they work and exploring questions about their long-term sustainability. Part III then introduces judicial sentence modification as an additional and currently underutilized mechanism for early release. After examining the mechanism's unique history and characteristics, the Article concludes that judicial sentence modification merits greater attention, not only because of its ability to reduce sentence lengths, but also because of its potential for enhancing the public legitimacy of the early release decision.

I. HOW WE GOT HERE

A. Shifting Sensibilities

At the turn of the twentieth century, reformers schooled in the emerging field of criminology began to champion a new model of incarceration. They asserted that the prison ought to be more than a place of detention: it should be a state-of-the-art facility designed to reform the criminally deficient through "correctional" programming.[18] In order to promote and facilitate rehabilitation, reformers urged states to transition away from the short, determinate sentences favored in the eighteenth and nineteenth centuries to a model of indeterminate sentencing in which release was tied directly to successful rehabilitation.[19] Unlike the old determinate

18. Criminologists such as William White argued that "degeneracy" was a disease and that criminals "should be sent to reformatories as patients, to remain until cured and not for a fixed time, and criminals should know that this is the course and that liberty depends on themselves." *Criminality a Disease*, N.Y. TIMES, Oct. 18, 1895, at 1; *see also The Medical Aspects of Crime*, 2 BRIT. MED. J. 100, 100 (1899) (reporting on the 1899 meeting of the American Medical Association at which one of the keynote speakers advocated "that inebriates should be kept in prolonged confinement under treatment[;] ... that all sentences should be indeterminate pending reformation or cure; and lastly, that there should be penitentiaries for the lifelong incarceration of those who are incapable of reformation").

19. As one scholar of the period explained:

> A madman or a person afflicted with a dangerous disease is prevented, for his own interests as well as the interests of the community, from freely moving about until he is restored to health; so the criminal, for his own interests as well as the interests of society, is prevented from moving freely about until he is cured from his criminal proclivity; and as in the first case so in the second, it is

sentencing system, which required judges to set firm release dates for defendants, the indeterminate sentencing model required judges to impose a range of permissible punishment. Parole boards then decided when to authorize any given offender's release based on the board's subjective assessment of the offender's personal rehabilitation.[20]

Advocates of the indeterminate sentence saw it as a humanitarian reform that would bring much needed treatment to those whose criminal deficiencies led them to pose risks to society at large.[21] They hailed the dawn of a new era of reform that would end the perceived brutality of retributive sentencing and would convert prisons into places of healing and reconciliation.[22] So successful were these arguments that by mid-century, all states and the federal government had adopted some form of indeterminate sentencing.[23]

> impossible to fix beforehand the date when the restoration to a normal condition will be effected. Therefore ... the sentence must not be for a certain period, but for a certain purpose*, i.e.*, until reformation is effected.

Alexander Winter, *The Modern Spirit in Penology*, 8 POL. SCI. Q. 445, 454 (1893).

20. For example, New York's criminal code instructed:

> When it appears to the board of parole that there is a strong reasonable probability that any inmate will remain at liberty without violating the law, and that his release is not incompatible with the welfare of society, they shall issue to such inmate an absolute release or discharge from imprisonment.

N.Y. CODE CRIM. PROC. § 93 (1920). Several other states' parole statutes used nearly identical language. REPORT OF THE PENNSYLVANIA STATE PAROLE COMMISSION TO THE LEGISLATURE 123 (1927).

21. *See* Edward D. Duffield, *Criminal Law Reform (Report of the Committee of the American Prison Association)*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 193, 195 (1918) (asserting that "[b]y common consent those interested in prison reform have reached the conclusion that [indeterminate sentencing] furnishes the best method of fixing the extent of punishment it is necessary for society to inflict in order to produce the result sought" and arguing that "[i]t should be the purpose of this Association to see that it is universally adopted"); Eugene Smith, *The Old Penology and the New*, 184 N. AM. REV. 80, 83-86 (1907) (describing a shift from the old penology, focused on retribution and sentences fixed in advance, toward the new penology, characterized by indeterminate sentences and efforts to reform prisoners).

22. *See, e.g.*, Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 20 (1899) ("The principle of the reformatory sentence, in its completeness, implies the conversion of the prison into an institution combining the means and aims of hospital, school and church, for the healing and culture of body, mind and will.... [I]t is to be held in view as the standard by which our partial and tentative reforms must be measured; and just in the degree that it is approached will the possible beneficence of the principle be realized.").

23. "By 1925, forty-six out of the forty-eight states of the union had parole laws," and the

Throughout the first six decades of the twentieth century, rehabilitation was considered the chief purpose of sentencing and the indeterminate sentence served increasingly as its primary tool.[24] During the 1970s, however, new research gave rise to doubts about the effectiveness and fairness of the rehabilitative model. In a number of influential studies and articles, prominent academics questioned whether then-existing correctional programs were capable of achieving their stated goals.[25] In 1974, Robert Martinson famously wrote that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[26] Although Martinson himself left open the possibility that the failure of programs might be more attributable to poor execution than to the impossibility of success, he did question whether it was true that "we haven't the faintest clue about how to rehabilitate offenders and reduce recidivism."[27] In the wake of his seminal work, many commentators began to assert that the rehabilitative ideal was unachievable: "Nothing works" became the motto of the day.[28]

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laggards (Mississippi and Virginia) "fell into line by 1942." LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 304 (1993); *see also* MICHAEL TONRY, SENTENCING MATTERS 6 (1996) [hereinafter TONRY, MATTERS] (noting that in 1970, every state in the United States had an indeterminate sentencing system).

24. *See* AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 36-38 (1971) ("The individualized treatment model ... has for nearly a century been the ideological spring from which almost all actual and proposed reform in criminal justice has been derived. It would be hard to exaggerate the power of this idea or the extent of its influence.... [T]he movement toward the individualized treatment model is unmistakable. Every state has some form of parole, which provides a core indeterminancy.").

25. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 22-23 (1974); *see also* DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 6-8 (1975) (conducting a seminal review of 231 studies of rehabilitative prison programming and concluding that there was no correlation between programming and actual rehabilitation); David F. Greenberg, *The Correctional Effects of Corrections*, *in* CORRECTIONS AND PUNISHMENT 111, 140-41 (David F. Greenberg ed., 1977) (reviewing various studies and concluding that many rehabilitative programs fail to reduce recidivism).

26. Martinson, *supra* note 25, at 25 (emphasis omitted).

27. *Id.* at 48 (emphasis omitted).

28. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 18 (1976) (asserting that while "[i]t would be an exaggeration to say that no treatment methods work .... in the more commonplace instances where no successful treatments are known, the rehabilitative disposition is plainly untenable"); JAMES Q. WILSON, THINKING ABOUT CRIME 43-63 (1975) (arguing that rehabilitative policies have derived from criminologists' opinions

Further undermining the theoretical soundness of the rehabilitative ideal were scholars who questioned whether it was the right of the state to interfere with an offender's motivations and thoughts —indeed, with his very soul—through coercive programming.[29] To some, the problem with state-sanctioned rehabilitation was that it impermissibly imposed on the moral autonomy of the criminal offender.[30] For others, the rehabilitative ideal reduced to a form of covert class warfare that threatened undeserved punishment on those whose lifestyles and mores differed from those favored by the governing elite.[31] Regardless of the form the critique assumed, there was a growing skepticism among observers that penal rehabilitationism was either as effective or humane as previously assumed.

Practical and philosophical doubts regarding the validity of the practice of indeterminate sentencing were bolstered by other systemic concerns. Unlike sentencing decisions made in open court, release decisions in the indeterminate system were made privately, always outside public view, often without input from victims or other interested parties, and ordinarily without explanation.[32] Statewide parole boards were typically composed of political appointees who often lacked knowledge about the local conditions to which offenders would return upon release.[33] Moreover, board

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rather than any evidence that the policies work).

29. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 18 (Alan Sheridan trans., Pantheon Books 1977) (1975).

30. *See, e.g.*, VON HIRSCH, *supra* note 28, at 17.

31. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 39 (1981) (describing "what has come to be known as the social control school" of criminology, in which "an effort is made to incorporate social deviance and the repressive responses of the bourgeois society into a much broader theory of social dynamics"); AM. FRIENDS SERV. COMM., *supra* note 24, at 85 ("An important force in the reform movement was the mixture of hatred, fear, and revulsion that white, middle-class, Protestant reformers felt toward lower-class persons.... These difficult feelings were disguised as humanitarian concern for the 'health' of threatening subculture members. Imprisonment dressed up as treatment was a particularly suitable response for reformers' complicated and inconsistent feelings.").

32. *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 15 (1972) ("Whatever the qualities of prison life itself ... parole officials carry on for the most part the motif of Kafka's nightmares. It has been expressed by the United States Board of Parole almost as a matter of pride that the judgment whether or when a prisoner will be released is inscrutable." (footnote omitted)); Robert W. Kastenmeier & Howard C. Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U. L. REV. 477, 481 (1973).

33. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing To*

members acted with nearly unfettered discretion: their decisions were usually unreviewable and were often made in reliance on institutional factors that bore only a tenuous connection to public safety.[34] Judge Marvin Frankel criticized the system thusly:

> As things stand in most jurisdictions ... and have long stood, parole boards, subject to no precise criteria and offering no explicit clues as to why particular decisions go as they do, exercise secretly the power to decide within broad ranges the actual number of years of confinement.... Decisions based upon secret reasons bear no credentials of care or legitimacy.[35]

The insular and unexplained nature of these release decisions led many critics, inside and outside the academy, to assert that the practice of parole undermined accountability, thwarted judicial sentencing decisions, and lacked legitimacy.[36] Similar criticisms

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Admit Guilt at Parole Hearings, 93 IOWA L. REV. 491, 504 & n.59 (2008) (collecting authorities).

34. Robert M. Garber & Christina Maslach, *The Parole Hearing: Decision or Justification?*, 1 LAW & HUM. BEHAV. 261, 261-63, 278-80 (1977) (suggesting that parole hearings may not have any effect on the parole release decision based on a study of parole hearings in California); Edward A. Gargan, *Has Parole Run out of Time in New York?*, N.Y. TIMES, Feb. 19, 1984, at E8 (quoting Lawrence T. Kurlander, criminal justice coordinator for Governor Mario Cuomo, stating, "Right now we have judges supposedly doing the sentencing.... But the real sentencing is being done by the Parole Board within the confines of prison walls, by what criteria we don't know.").

35. Frankel, *supra* note 32, at 15-16. One commentator described the attacks on parole in this way:

> At the heart of the attack on the discretionary power of parole boards was not only the essential arbitrariness of many of their decisions but also a general lack of concern to articulate the principles and criteria underlying them. At times, parole authorities appeared to take pride in the indecipherability of their work. Even when parole authorities did have explicit criteria and principles, this did not necessarily resolve the problem, as they never really have clarified the process by which decisions to grant or deny parole were made.

A. Keith Bottomley, *Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s*, 12 CRIME & JUST. 319, 338 (1990) (citations omitted).

36. *See* Kastenmeier & Eglit, *supra* note 32, at 494 (asserting that now-discredited rehabilitative considerations drove the "diminution of the role of the judiciary in determining the length of incarceration to be served by a convicted offender"); Wendell Rawls Jr., *Pennsylvania Shapes Prison Law To Cut Crime*, N.Y. TIMES, July 8, 1982, at A1 (discussing new laws abolishing parole and quoting a member of Pennsylvania Governor Dick Thornburgh's administration as stating, "The public is ... often misled by the news media into thinking that a person sentenced to two to 10 years is going to serve as much as 10 years .... What we are looking for is greater accountability in sentencing and release and more

were leveled against the use of sentence credits, which allowed prison officials to shorten sentences administratively to control overcrowding and reward compliance with institutional rules.[37] As a result of these concerns over the unguided and opaque manner in which ameliorative mechanisms were being used, many scholars and politicians began to advocate for the adoption of more certain durations of confinement, with a severely circumscribed role for all mechanisms governing early release.[38]

As reformers began calling for a shift away from indeterminate sentencing based on doubts about its efficacy and fairness, other phenomena pushed public sentiment away from the humanistic principles that had animated the rehabilitative ideal.[39] With a few short-lived exceptions, the U.S. Crime Index rose steadily from 1960 to 1991,[40] and fear of crime rose with it. Polls conducted in the mid-1970s and early 1980s found that roughly half of all American adults felt uncomfortable walking alone, and that two of every five Americans were "highly fearful" of falling victim to violent crime.[41] The rising crime rates attracted considerable attention,[42] and

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responsible sentencing by judges.").

37. *See, e.g.*, James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 221 (1982) (arguing for the abolition of good time credit in favor of "more open practices beyond the control of prison authorities" that are "less prone to abuse").

38. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 138-39 (3d ed. 1994) [hereinafter ABA: SENTENCING] (proposing determinate sentence with limited good time as the only method of sentence reduction); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 3-4 (1976); VON HIRSCH, *supra* note 28, at 98-102; *see also* George F. Cole, *A Return to Punishment*, N.Y. TIMES, Feb. 19, 1978, at CN20 ("During the last five years ... [r]ehabilitation as the goal [of imprisonment] has given way to calls for a simpler, fairer and more open form of justice. Not only has there been an accumulating literature pointing to the ineffectiveness of rehabilitative programs, the disparity of sentences and the often whimsical nature of the parole decision, but also the pervasiveness of the discretion required by the treatment model has been of mounting concern to scholars, prisoners, practitioners and politicians.").

39. For a more detailed and nuanced description of the reasons underlying shifts in public sentiment during this period, see Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1238-39 (2005).

40. MAROWITZ, *supra* note 4, at 3.

41. MARK H. MOORE & ROBERT C. TROJANOWICZ, U.S. DEP'T OF JUSTICE, POLICING AND THE FEAR OF CRIME 2 (1988), *available at* http://www.ncjrs.gov/pdffiles1/nij/111459.pdf.

42. Barbara Basler, *Serious Crimes Nearing Record in New York*, N.Y. TIMES, Nov. 18, 1980, at B1 (describing a sharp rise in crime in New York City as part of national trend); Linda Greenhouse, *Burger Urges Plan of 'Damage Control' To End Cities' Crime*, N.Y. TIMES, Feb. 9, 1981, at A1 (reporting on the Chief Justice of the U.S. Supreme Court's call for a new

contributed to public and academic calls for reform in policing, prosecution, sentencing, and imprisonment.[43]

B. Legislative Responses

Although states responded in various ways to changing public attitudes toward crime and sentencing following the collapse of the rehabilitative ideal, the general legislative trend was toward sentences that were both longer and more rigid.[44] Newly passed legislation increased maximum penalties, added new penalty enhancers, adopted determinate sentencing schemes, and abolished traditional forms of early release.

In the states, legislatures raised maximum sentences for standard offenses,[45] created mandatory minimum sentences,[46]

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ambitious program to address rising crime rates, and his description of urban crime as "terrorism" and "warfare").

43. The rising crime rate alone does not explain the massive shift toward more punitive sanctions, however. Other developed nations saw similar increases in crime throughout the same period, and none revised their sentencing policies as swiftly or as harshly as did the United States. Tonry, *Explanations*, *supra* note 7, at 379. Moreover, many of the most punitive reforms to come would be enacted after 1990, when crime rates began to fall precipitously. *See id.*

What explains the change in public sentiment that began in the 1970s? Scholars have suggested causes ranging from "conditions of late modernity," GARLAND, *supra* note 7, at 193 (including globalization and increased public fear about crime and society more generally), to the American political structure and style, to racial tensions, and to "a Manichean moralism associated with Protestant fundamentalism." Tonry, *Explanations*, *supra* note 7, at 379. Whatever combination of complex causes best explains the phenomenon, this much is clear: by the early 1980s, legislators, prosecutors, judges, and ordinary citizens alike began pressing for greater and more certain punishment for criminal offenders.

44. For further discussion of this phenomenon, see MICHAEL TONRY, U.S. DEP'T OF JUSTICE, THE FRAGMENTATION OF SENTENCING AND CORRECTIONS IN AMERICA 2 (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/175721.pdf.

45. In Wisconsin, for example, the maximum term of imprisonment for a Class B felony increased from twenty years imprisonment to forty years in 1994 and then to sixty years in 1999. *Compare* WIS. STAT. § 939.50(3)(b) (1990), *with* WIS. STAT. § 939.50(3)(b) (1994), *and* WIS. STAT. § 939.50(3)(b) (2000).

46. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (1991), *available at* http://www.ussc.gov/ r_congress/MANMIN.pdf ("Today there are approximately 100 separate federal mandatory minimum penalty provisions located in 60 different criminal statutes."); TONRY, MATTERS, 23, at 146 ("By 1983, forty-nine of the fifty states ... had adopted mandatory sentencing laws for offenses other than murder or drunk driving.").

and enacted three-strikes provisions.[47] Hate crime statutes[48] and repeat offender enhancements[49] also contributed to sentences of increasing duration. Lawmakers do not bear sole responsibility for the incarceral trends of the period, however. When exercising charging discretion, prosecutors began seeking convictions under newly enacted criminal legislation and demanding penalties in accordance with the enhanced sentencing provisions. Judges followed suit and began sentencing offenders to sentences of longer and more certain durations of confinement. And even in those

47. *See, e.g.*, 18 U.S.C. § 3559(c) (2006) (providing for a mandatory life sentence for those convicted of serious violent felonies on three separate occasions, first passed in 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1982 (1994)); CAL. PENAL CODE § 667 (West 2010) (codifying California's three-strikes law, passed in 1994 both through the legislative process and by Proposition 184, establishing lengthy sentences, often twenty-five years to life, for those convicted of three separate felonies); N.M. STAT. § 31-18-23 (1996) (statute first taking effect in 1994, establishing mandatory life sentence with possibility of parole after thirty years, for those convicted of three violent felonies); 42 PA. CONS. STAT. § 9714 (2001) (statute first taking effect in 1995, establishing sentences of twenty-five years to life for those convicted of three crimes of violence); TENN. CODE ANN. § 40-35-120 (1995) (statute first taking effect in 1994, providing for a sentence of life without parole for those convicted of three felonies); WASH. REV. CODE § 9.94A.555 (2010) (statute first taking effect in 1993, establishing sentences for defendants convicted of three most serious offenses).

48. *See, e.g.*, MONT. CODE ANN. § 45-5-222 (2009) (statute first passed in 1989, providing that offenders committing any crimes because of the victim's "race, creed, religion, color, national origin, or involvement in civil rights or human rights activities" may receive a sentence from two to ten years in addition to and consecutive to the penalty for the offense itself); TEX. PENAL CODE ANN. § 12.47 (Vernon 2010) (statute first passed in 1993, increasing the penalty to the next higher offense category when motivated by bias or prejudice regarding "race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference" (quoting by reference TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon 2010))); WIS. STAT. § 939.645 (2009) (statute, first passed in 1987, allowing for increases in fines and prison sentences for offenders targeting victims based on their "race, religion, color, disability, sexual orientation, national origin or ancestry"). At the federal level, the Violent Crime Control and Law Enforcement Act of 1994 specified that sentences be enhanced at least "3 offense levels for offenses that ... are hate crimes." Pub. L. No. 103-322, 108 Stat. 1796, 2096 (1994) (codified at 28 U.S.C. § 994 note).

49. *See, e.g.*, COLO. REV. STAT. § 16-13-101(2) (1996) (stating that any person with three separate prior felony convictions who is convicted of another felony will be adjudged an habitual offender and must receive a sentence four times the maximum range of the felony classification of the offense); GA. CODE ANN. § 17-10-7(a) (1994) (mandating that anyone with a prior felony conviction who commits another felony punishable by a prison sentence must be sentenced to the maximum for the offense); LA. REV. STAT. ANN. § 15:529.1(A)(1)(a) (1996) (establishing that anyone convicted of a second felony may be sentenced for a term of as much as twice the longest term available for the first conviction); WASH. REV. CODE § 9.92.090 (1996) (providing that every person convicted of a felony who has one prior felony conviction must receive a sentence of at least ten years).

jurisdictions where parole remained legally available, executive branch officers—often at the direction of politically accountable state officials—became more reluctant to exercise their release authority.[50]

In the federal system, the desire for harsher and more certain punishment was expressed through several major legislative acts. First and most notable was the Comprehensive Crime Control Act of 1984 (CCCA), which abandoned indeterminate sentencing in the federal system and adopted mandatory penalty guidelines for use in all federal criminal sentencings.[51] Ten years after the CCCA was passed, Congress acted again to toughen criminal penalties and encourage the widespread adoption of determinate sentencing legislation. Described by President Bill Clinton as "the toughest, largest, and smartest Federal attack on crime in the history of the United States of America,"[52] the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) resurrected the federal death penalty and introduced three-strikes legislation.[53] The Act and its 1996 amendments also provided prison-building grants to all states that required violent prisoners to serve longer portions of their sentences.[54]

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50. *See* Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority, in* THE FUTURE OF IMPRISONMENT 199, 227 (Michael Tonry ed., 2004) (noting that "most parole boards in the 1980s and 1990s became stingier in their release decisions").

51. Pub. L. No. 98-473, 98 Stat. 1976, 1991-92 (1984). The Federal Sentencing Guidelines remained mandatory until 2005, when the United States Supreme Court held that mandatory application of the Sentencing Guidelines violated the Sixth Amendment. United States v. Booker, 543 U.S. 220, 226-27 (2005). Since *Booker*, federal judges have continued to anchor their sentencing decisions in the Sentencing Guidelines, but retain discretion to vary from them. Federal sentences continue to be determinate.

52. Remarks on Anticrime Legislation at the Department of Justice, 1 PUB. PAPERS 1324 (July 28, 1994).

53. Pub. L. No. 103-322, 108 Stat. 1796, 1959-60, 1982 (1994) (codified at 28 U.S.C. § 994 note).

54. WILLIAM J. SABOL ET AL., URBAN INST., INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 1-3 (2002), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/195161.pdf (citing Department of Justice Appropriations Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996)). The Violent Offender Incarceration and Truth-in-Sentencing Incentive Formula Grant Program authorized by the original and amended legislation provided federal funds to help states increase their prison capacity by funding the building and expansion of correctional facilities and jails. 42 U.S.C. § 13702 (1996). The funds have not, however, covered the ongoing cost of maintaining new facilities. Although more than $2.7 billion in grant funds were awarded to states between 1996 and 2001, Congress has since ceased to appropriate additional funds. *See*

Although twenty states and the District of Columbia modified their sentencing laws following passage of the VCCLEA, in reality the legislative incentive played a minor role in the move to determinate sentencing. By the time the VCCLEA amendments took effect, a majority of states had already begun to adjust their sentencing practices in accordance with new sensibilities. In 1984, the State of Washington became the first to enact so-called "truth-in-sentencing" legislation,[55] and Utah, Oregon, Delaware, and others soon followed suit.[56] Following passage of the VCCLEA, twenty additional states and the District of Columbia modified their sentencing practices to a degree that qualified them for funding under the VCCLEA; however, survey findings suggested that federal incentive grants were the primary motivating factor in the enactment of tougher sentencing laws in only four states.[57] In the remaining sixteen states, the move to determinate sentencing was a response to mounting public pressure from within each state to provide for more certain punishment.[58] By the end of the 1990s, determinate sentencing was at its height with 84 percent of states placing firm limits on the amount of time prisoners were required to serve before becoming eligible for release.[59] The vast majority of these states required prisoners to serve more than 85 percent of their sentences.[60]

At the same time jurisdictions were adopting determinate sentencing, many also moved to restrict or eliminate traditional mechanisms for early release. The CCCA abolished parole for

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BUREAU OF JUSTICE ASSISTANCE, VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING INCENTIVE FORMULA GRANT PROGRAM 1-2 (2005), *available at* http://www.ojp.usdoj.gov/BJA/pdf/VOITISreport.pdf.

55. *See* Sentencing Reform Act of 1981, WASH. REV. CODE § 9.94A (2010) (implementing determinate sentences for all offenses committed after July 1, 1984); DITTON & WILSON, *supra* note 2, at 2.

56. SABOL ET AL., *supra* note 54, at 11 tbl. 1.5.

57. U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES 6-8 (1998), *available at* http://www.gao.gov/archive/1998/gg98042.pdf (reporting survey findings indicating that truth-in-sentencing grants were a key factor in the enactment of tougher sentencing laws only in Louisiana, Maine, New York, and Oklahoma); *see also* SABOL ET AL., *supra* note 54, at 18 (explaining that the truth-in-sentencing grant program was a major motivating factor for the move to determinate sentencing in only a few states).

58. U.S. GEN. ACCOUNTING OFFICE, *supra* note 57, at 7-8.

59. SABOL ET AL., *supra* note 54, at 7.

60. *Id.* at 8 tbl. 1.4.

federal defendants beginning in 1987,[61] and by 2000, sixteen states had eliminated the possibility of parole for all newly convicted prisoners.[62] Several other states restricted parole eligibility to certain classes of offenders, such as those convicted of nonviolent crimes.[63] In addition to restricting or eliminating discretionary parole release, many jurisdictions also reduced opportunities for early release by imposing restrictions on prisoners' ability to reduce the length of their sentences through the accrual of so-called "good time" and "earned time" credits.[64] By the turn of the century, the "truth-in-sentencing" movement, with its emphasis on minimizing the discretion of prison officials and parole boards, had succeeded in restricting or eliminating early release in a majority of states.

C. Consequences of Increased Incarceration

The decision to imprison more people for longer and more certain periods of time has had significant consequences. Between 1970 and 2005, the number of people in prison increased more than sevenfold.[65] More than one of every one hundred Americans is now behind bars and one of every thirty-one is under some form of pre- or post-sentence correctional supervision.[66]

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61. Pub. L. No. 98-473, 98 Stat. 1976, 2032 (1984) (repealing 18 U.S.C. § 5041).

62. These states included Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. DITTON & WILSON, *supra* note 2, at 3; ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE, 1990-2000, at 2 (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/tsp00.pdf.

63. DITTON & WILSON, *supra* note 2, at 3 (listing Alaska, New York, Tennessee, and Virginia among the states restricting parole eligibility).

64. Notable examples include Texas and North Carolina, in which prisoners served less than 20 percent of their sentences on average before public outcries led the states to dramatically reduce the availability of sentence reduction credits. Nora V. Demleitner, *Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777, 781-82 (2009).

65. PEW CHARITABLE TRUSTS PUB. SAFETY PERFORMANCE PROJECT, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011, at 1 (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf [hereinafter PUBLIC SAFETY, PUBLIC SPENDING] (relying on data from Bureau of Justice Statistics correctional surveys and adult resident population data from the U.S. Census Bureau).

66. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), *available at* http://pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. At year end 2007, the number of persons under correctional control and

Imprisonment is no longer an experience reserved for a deviant few: it has become "a pervasive event in the lives of poor and minority men"[67] and is an experience increasingly shared by women.[68] For those who have been imprisoned, the experience has lasting implications for labor prospects, lifetime earnings, and educational and housing opportunities.[69] Large scale imprisonment has also had well-documented adverse effects on the larger community, altering traditional family structures and contributing to the destabilization of impoverished neighborhoods.[70] A growing body of research suggests that the numbers of persons confined in prison has profound effects on the distribution of political power, as well.[71]

Although the social and moral costs of mass imprisonment have drawn serious criticism in academic circles, it is the rapidly escalating financial cost of imprisonment that has captured the attention of policymakers. And with good reason: between 1985 and

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supervision ranged from one of every eighty-eight persons in New Hampshire to one of every thirteen in Georgia. ONE IN 31, *supra* note 12, at 7.

67. BRUCE WESTERN, MARY PATTILLO & DAVID WEIMAN, IMPRISONING AMERICA 3 (2004); *see also* SIMON, *supra* note 7, at 141 ("The odds of an African American man going to prison today are higher than the odds he will go to college, get married, or go into the military."); Donald Braman, *Families and Incarceration*, *in* INVISIBLE PUNISHMENT 117, 117 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("Under current conditions, well over 75 percent of African-American men in the District [of Columbia] can expect to be incarcerated at some time in their lives.").

68. *See* PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005, at 4 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p05.pdf (noting a 57 percent growth in female population from 1995 to 2005 compared to a 34 percent increase for men during the same period); PUBLIC SAFETY, PUBLIC SPENDING, *supra* note 65, at 10.

69. *See generally* AMY L. SOLOMON ET AL., URBAN INST., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY (2004), *available at* http://www.urban.org/uploadedPDF/411097_From_Prison_to_Work.pdf (discussing obstacles to employment faced by persons leaving prison); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 541-42 (2002).

70. JEREMY TRAVIS ET AL., URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 7-10 (2005), *available at* http://www.urban.org/UploadedPDF/310882_Families_Left_Behind.pdf (discussing ways social service agencies can help former prisoners surmount barriers to family reunification following imprisonment).

71. Pamela S. Karlan, *Conviction and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1148-49 (2004); Marc Mauer, *Mass Imprisonment and the Disappearing Voters, in* INVISIBLE PUNISHMENT, *supra* note 67, at 50, 57; David Hamsher, Comment, *Counted Out Twice—Power, Representation & the "Usual Residence Rule" in the Enumeration of Prisoners: A State-Based Approach To Correcting Flawed Census Data*, 96 J. CRIM. L. & CRIMINOLOGY 299, 300-04 (2005) (discussing the Census Bureau's method of counting prisoners and its ramifications for political representation).

2008, national annual correctional expenditures from general funds alone[72] increased from $6.7 billion to more than $47 billion dollars —an increase of 700 percent.[73] Incarcerating a federal prisoner for one year averages $25,900,[74] a figure roughly commensurate with the annual cost of incarcerating a state prisoner.[75] The cost of incarceration is significantly higher for elderly prisoners, whose ranks have swelled as a result of lengthening sentences.[76] Corrections now consumes one of every fifteen state general fund dollars, making it the second-fastest growing category of general fund expenditures, outpaced only by the growing cost of Medicaid.[77]

The still-unfolding financial crisis of 2008 has exacerbated concerns about the growing cost of incarceration. High unemployment, combined with plummeting real estate values and declining corporate profits, has resulted in substantial decreases in state tax revenue over the past three years.[78] Diminishing resources have

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72. Total state corrections expenditures for fiscal year 2008 totaled $52 billion. NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 54 (2009).

73. *Compare* KAREN M. BENKER & MARCIA A. HOWARD, NAT'L ASS'N OF STATE BUDGET OFFICERS, THE STATE EXPENDITURE REPORT 8 tbl. 2 (1987), *with* NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 54 (2009). These figures do not adjust for inflation.

74. Annual Determination of Average Cost of Incarceration, 74 Fed. Reg. 33, 279 (July 10, 2009) (reporting average cost of incarceration for federal inmates in Fiscal Year 2008 as $25,895).

75. JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001, at 1 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf (reporting a difference of less than $20 between the average annual cost of incarcerating a state prisoner versus a federal prisoner in 2001); *see also* JUSTICE POLICY INST., PRUNING PRISONS: HOW CUTTING CORRECTIONS CAN SAVE MONEY AND PROTECT PUBLIC SAFETY 20 (2009), *available at* http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf (citing American Correctional Association figures showing an average annual cost of $24,655 per prisoner in 2006).

76. Geriatric inmates are the fastest growing age group within federal and state prisons, and their numbers are expected to continue rising at a rapid rate. CARRIE ABNER, COUNCIL OF STATE GOV'TS, GRAYING PRISONS: STATES FACE CHALLENGES OF AN AGING INMATE POPULATION 9 (2006), *available at* http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf. On average, elderly inmates cost states three times more than their younger counterparts. *Id.* at 10.

77. CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), *available at* http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf (citing data compiled by the National Association of State Budget Officers).

78. NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 23 (2009), *available at* http://www.nga.org/Files/pdf/FSS0906.PDF.

forced states across the country to cut back on social services, eliminate jobs, and lower salaries for state workers.[79] And the worst may be yet to come: as of this writing, state budget deficits are predicted to last well into the new decade.[80]

California has possibly been the state hit most heavily by the recent financial crisis. As a result of the state's harsh sentencing laws, which include one of the most draconian three-strikes laws in the country,[81] and high rates of parole revocation, California's prisons were overcrowded long before its current budget woes began. In 2005, the state's prison health care system was placed under federal receivership as a result of constitutionally deficient conditions in its prisons, which were found to be causing the deaths of more than one inmate a week.[82] In 2006, as crowding in the prison system worsened, Governor Arnold Schwarzenegger declared a "State of Emergency."[83] Proclaiming that "immediate action" was essential "to prevent death and harm caused by California's severe

79. NICHOLAS JOHNSON, PHIL OLIFF & ERICA WILLIAMS, CTR. ON BUDGET & POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS 5-6 (2010), http://www.cbpp.org/ files/3-13-08sfp.pdf (describing recent cuts in services and jobs and listing pending proposals for additional cuts).

80. According to Vermont Governor Jim Douglas, Chairman of the National Governors Association, "State revenues continue to deteriorate, as most states are witnessing monthly totals lower than their recent forecasts, which have been revised downward." Robert Pear, *States Have Not Yet Seen the Worst of Economic Times, Governors at Meeting Say*, N.Y. TIMES, Feb. 21, 2010, at A16. That assessment is consistent with more formal surveys of the effect of the budget crisis on state governments. CTR. ON BUDGET & POLICY PRIORITIES, RECESSION CONTINUES TO BATTER STATE BUDGETS 1 (2010), http://www.cbpp.org/files/9-8-08sfp.pdf (reporting that forty-one states faced budget shortfalls for fiscal year 2011 and predictions suggest larger shortfalls for fiscal year 2011); PEW CTR. ON THE STATES, BEYOND CALIFORNIA: STATES IN FISCAL PERIL 2 (2009), *available at* http://downloads.pewcenteronthestates.org/BeyondCalifornia.pdf (noting that "states historically have their worst years shortly after a national recession ends, as they cope with higher Medicaid and other safety-net expenses at the same time revenues lag because of stubborn unemployment").

81. The California statute does not require that a defendant's third felony offense be violent in order to earn him a mandatory indeterminate sentence of life imprisonment. CAL. PENAL CODE § 667(e)(2) (2009). The provision has been applied to third-offense cases involving offenses as minor as the theft of $153 in videotapes. Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 309 (2008).

82. *See* Plata v. Schwarzenegger, No. C01-1351, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005) (declaring the California Department of Corrections and Rehabilitation's medical care system "broken beyond repair" and ordering it placed under receivership).

83. Governor Arnold Schwarzenegger, Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), *available at* http://gov.ca.gov/proclamation/4278.

prison overcrowding," the Governor sought to transfer inmates to out-of-state prisons.[84] His efforts ultimately proved unsuccessful, however, and as a result of the state's continued failure to remedy the unconstitutional condition of its prisons, in August 2009 a federal court ordered the state to produce a two-year plan for reducing the state prison population by approximately 43,000 inmates.[85] Facing an unprecedented $26 billion budget shortfall, the state is now struggling to alleviate overcrowding while at the same time reducing its correctional budget.

Although California presents an extreme example, it is far from the only state being forced to reduce correctional spending in the face of increased correctional costs. Facing unprecedented financial pressures, forty-two states reduced their budgets in 2009 through both targeted and across-the-board cuts.[86] Confronted with the necessity of cutting funds for higher education and social services to fund more prison beds, correctional budgets are now being reduced in some states—even as the cost of maintaining inmate populations continues to grow. Twenty-five states made cuts in their correctional programs in 2009.[87] Absent significant and as yet unforeseeable changes in the economy, that number is likely to increase over the next several years.

II. WHAT STATES ARE DOING NOW

Practical concerns over managing current correctional costs and long-term worries over the future of the criminal justice system have caused many states to begin reexamining the ways in which criminal cases are handled at every stage, from arrest to punishment. A number of states have formed criminal justice councils

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84. *Id.*

85. Coleman v. Schwarzenegger, No. CIV S-90-0520 LKK JFM, 2009 WL 2430820, at *115-16 (E.D. Cal. Aug. 4, 2009); *see also* Carol J. Williams, *State Gets Two Years To Cut 43,000 from Prisons*, L.A. TIMES, Aug. 5, 2009, at A1. The United States Supreme Court has agreed to review the validity of the release order during its October 2010 term. *See* Orders in Pending Cases, Schwarzenegger v. Plata, No. 09-1233 (U.S. June 14, 2010), *available at* http://www.supremecourt.gov/search.aspx?FileName=/docketfiles/09-1233.htm.

86. NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 78, at 1.

87. *Id.* at 3 tbl. 1-A.

tasked with recommending legislative and administrative reforms.[88] Others have commissioned outside reviews and sought advice on how best to manage growth in their prison populations.[89] Regardless of the method of reexamination, the end result is often the same: across the country, jurisdictions are beginning to agree that less is more when it comes to incarceration, particularly when nonviolent or first-time offenders are at issue.

Although the methods by which states are attempting to control burgeoning correctional populations vary tremendously, they can be divided into two rough categories. First are front-end diversion efforts, designed to keep low-level, nonviolent defendants out of the formal criminal justice system or, at the very least, out of custody. These efforts, which often involve cooperation among law enforcement, prosecutors, defense counsel, and community service providers, offer an alternative means of managing offenders, usually by connecting them to important services, ranging from drug treatment and mental health care to employment services and parenting classes. Front-end efforts vary in scope and structure, encompassing community service sanctions, electronic monitoring, day reporting centers, problem-solving courts, and restorative justice initiatives. Because these efforts are designed to increase the community's imagination and capacity for noncustodial penalties and interventions, they hold great promise for breaking the cycle of overreliance on imprisonment as a primary means of social control. This Article focuses, however, on developments occurring at the back end of the criminal justice system. These new efforts, designed to reduce costs and relieve overcrowding by allowing inmates to leave prison early, have rapidly gained popularity in the wake of the current fiscal crisis.

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88. SCOTT-HAYWARD, *supra* note 77, at 10.

89. The Justice Reinvestment Initiative administered by the Council of State Governments is one example of a sophisticated outside resource available to state governments. Program researchers map prison admissions data in participating states, suggest options for managing prison growth that are tailored to the operation of the state's criminal justice system, propose ways in which costs saved on incarceration might be invested elsewhere with better public safety returns, and help create accountability by designating outcome measures for the state to track. So far, Arizona, Connecticut, Kansas, Michigan, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, and Wisconsin have all obtained varying levels of assistance from the program. For more information, see Council of State Governments Justice Center, Work in the States, http://justicereinvestment.org/states (last visited Oct. 13, 2010).

A. Methods of Early Release

In order to obtain more immediate cost savings and relief from overcrowding, many states have begun to question the necessity of long, predictable prison sentences. Through new legislation, many states have begun to ameliorate the effects of harsh prison sentences by reintroducing old forms of early release and developing new methods as well. The most common early release mechanisms in use today fall into three general categories: increased parole eligibility, reinstatement or expansion of sentence credit, and creation of infirmity-based release for geriatric and seriously ill prisoners.

1. Expansion of Parole Eligibility

It is important to remember that the move to determinate sentencing, while widespread, was not complete. Only fourteen states abolished parole entirely during the twentieth century.[90] The rest have retained parole eligibility in one form or another, often constrained by truth-in-sentencing requirements that make prisoners eligible only after serving significant portions of their sentences.[91] In recent years, many of these states have been able to mitigate the effects of incarceration by scaling back the time in custody inmates must serve before becoming parole-eligible.

One notable example is Mississippi. Beginning in 1995, the state moved from an indeterminate sentencing system to one in which all offenders were required to serve 85 percent of their sentences before gaining parole eligibility.[92] This change was heightened by low rates of parole for eligible inmates.[93] As a result, the state's prison population and correctional budget rapidly grew. Motivated by growing resource concerns,[94] in 2001 the state reauthorized parole for most first-time nonviolent offenders who had served 25 percent or more

90. *See* DITTON & WILSON, *supra* note 2, at 3.

91. *Id.*

92. MISS. CODE ANN. § 47-5-138 (2009).

93. JFA INST. & MISS. DEP'T OF CORR., PEW CTR. ON THE STATES, REFORMING MISSISSIPPI'S PRISON SYSTEM 1-2 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/initiatives/PSPP/MDOCPaper.pdf?n=8407.

94. *Id.* at 4 (referencing Mississippi's "past low parole grant rates" of 26 to 32 percent).

of their sentences.[95] This did not solve the problem, however, and by 2007 the state's correctional budget was more than twice what it had been in 1994.[96] In 2008, therefore, the state expanded early parole eligibility to all nonviolent offenders.[97] These newly implemented changes, designed to eliminate all growth in the prison population over the next decade, so far appear to be working. Since 2008, the prison population has actually seen a decline, and it is on track to stabilize with no further growth within the next several years.[98]

There are signs that other states may follow Mississippi's lead. Early in 2010, West Virginia Governor Joe Manchin proposed increasing parole eligibility for low risk offenders as part of his 2010-11 budget,[99] and the Massachusetts State Senate recently voted in favor of a bill that would make drug offenders eligible for parole after serving two-thirds of their mandatory minimum sentences.[100]

2. Sentence Credit

Another common mechanism for accelerating release is sentence credit. Unlike parole, which requires the individualized consideration of each applicant eligible for release, sentence credit provides an administrative reduction in sentence that ordinarily applies automatically to any eligible offender.[101] Sentence credit tends to take one of three forms: good time credit, which applies to

95. MISS. CODE ANN. § 47-7-3 (2001).

96. JFA INST. & MISS. DEP'T OF CORR., *supra* note 93, at 2.

97. MISS. CODE ANN. § 47-7-3 (2008).

98. JFA INST. & MISS. DEP'T OF CORR., *supra* note 93, at 5.

99. Lawrence Messina, *Alternatives to Building Prisons Advised*, CHARLESTON GAZETTE, Jan. 28, 2010, at 1C.

100. *See* S. Res. 2210, 2009 Leg., 186th Sess. (Mass. 2009) (providing that eligible drug offenders "serving a mandatory minimum sentence ... shall be eligible for parole after serving two-thirds of the minimum term of the sentence if the sentence is to a state prison or after serving one-half of the minimum term of the sentence if the sentence is to a house of correction"). The bill has garnered the support of the Massachusetts State Bar Association, as well as the support of advocacy groups. *See* Memorandum from the Mass. Bar Ass'n on Senate Bill No. 2210 (Nov. 18, 2009), *available at* http://www.massbar.org/ legislative-activities/mba-memo-on-senate-bill-no-2210 (supporting the bill); Editorial, *Allow Parole for Drug Offenders*, BOSTON GLOBE, Jan. 1, 2010, at 14 (supporting the bill). As of this writing, the bill awaits further action in the State House of Representatives.

101. Jacobs, *supra* note 37, at 224-25.

inmates who do not violate institutional rules; earned release credit, which provides prisoners with a reduction in sentence proportional to time spent in designated programs or activities; or meritorious good time credit (also called extraordinary good time credit), which allows prison administrators to reduce prisoners' sentences for special reasons.[102] Originally designed to reward exemplary service to the institution, such as preventing escape or saving a guard's life, meritorious good time credit has long been used to address exceptional institutional needs as well, such as the alleviation of severe overcrowding.[103] All three varieties of sentence credit have been the subject of recent legislative expansions.[104]

Historically, good time credit has been awarded liberally in the states where it is authorized, making its loss more a punishment than its application a reward.[105] In some jurisdictions, the amount of credit available varies based on an offender's crime of conviction or length of sentence. In New Mexico, for example, violent offenders receive no more than four days credit for every thirty days served, but most other prisoners receive day-for-day credit on their sentences.[106] In other states, the amount of available credit varies based upon an offender's institutional security classification.[107]

Changing the amount of good time available to inmates is an easy way to save money quickly, since even small changes in the amount of credit available have tremendous financial consequences when distributed across an entire custodial population. Consequently, in recent years, Delaware, Louisiana, and Washington have all increased the amount of good time available to persons in custody.[108]

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102. *Id.* at 221-22.

103. *See id.*

104. *See generally* Jennifer Steinhauer, *To Trim Costs, States Relax Hard Line on Prisons*, N.Y. TIMES, Mar. 25, 2009, at A1 (describing cost-saving prison reforms, including expansion of sentence credit in Kentucky and Michigan).

105. Demleitner, *supra* note 64, at 783.

106. *Id.* at 789. *See also* MD. CODE ANN., CORR. SERVS. § 3-704(b) (West 2002) (decreasing credit accrual opportunities for more serious felons). *But see* OR. REV. STAT. § 169.110 (2010) (awarding credit in increasing proportion to sentence length).

107. *See, e.g.*, IND. CODE § 35-50-6-3 (2010); TEX. GOV'T CODE ANN. § 498.003 (Vernon 2009); VA. CODE ANN. § 53.1-199 (2009).

108. *See* DEL. CODE ANN. tit. 11, § 4381 (2010) (increasing maximum monthly amount of good time for prisoners who have served more than one year in prison); LA. REV. STAT. ANN. § 15:571.3(B)(3) (2008) (increasing the maximum number of good time days per calendar month to thirty-five); WASH. REV. CODE § 9.94A.728(1)(b) (2010) (increasing maximum good

Even for states that abolished good time during the determinate sentencing era, the cost-savings associated with the mechanism have made it increasingly appealing. After repealing good time provisions as part of the state's move to determinate sentencing in 1999, last summer Wisconsin re-introduced good time credit, albeit under a new name: "positive adjustment time," which is now available to designated offenders who comply with institutional expectations.[109] In Michigan, the governor is currently backing legislation that would make good time credit available to inmates for the first time in more than twenty years.[110]

In addition to awarding credit for pure institutional compliance, many states also authorize prison officials to award sentence credit for time spent in vocational, educational, and therapeutic programs. Rehabilitative programs have begun to once again gain credibility among penologists as a way to reduce recidivism,[111] and an increasing number of states have been willing to reward voluntary program participation with sentence reduction. Today, at least thirty-one states authorize some form of earned release credit.[112] Nevada, Kansas, Pennsylvania, Colorado, and Mississippi have all recently expanded their earned release statutes, increasing the amount of credit available to inmates who successfully complete designated programs and expanding the number of qualifying programs.[113]

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time credit to 50 percent of an eligible offender's total sentence length).

109. WIS. STAT. § 302.113(2)(b) (2009) (providing that misdemeanants and minor nonviolent felony offenders "may earn one day of positive adjustment time for every 2 days served that he or she does not violate any regulation of the prison or does not refuse or neglect to perform required or assigned duties").

110. *Freeing Up Cash by Freeing Prisoners*, DETROIT FREE PRESS, Feb. 16, 2010, at A1 (describing plan to apply good time credit retroactively, making 5,600 state prisoners "eligible for release within six months").

111. In recent years, a growing body of research has debunked the idea that "nothing works" when it comes to criminal rehabilitation. The question, researchers emphasize, is "what works?" By engaging in sophisticated program evaluations and replicating only those with successful outcomes, they argue that successful rehabilitative programming can be developed both in prison and in the community. *See, e.g.*, Francis T. Cullen, *Rehabilitation and Treatment Programs*, *in* CRIME: PUBLIC POLICIES FOR CRIME CONTROL 253, 255 (James Q. Wilson & Joan Petersilia eds., 2002).

112. ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS 1 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Earned_time_report_%20NCSL.pdf?n=6022.

113. *Id.* at 3-4.

Other states have expanded the classes of credit-eligible prisoners[114] and removed limits on the amount of credit prisoners may accumulate.[115]

Finally, a number of states authorize a form of "meritorious good time credit."[116] Under these extraordinary sentence credit provisions, prison officials are accorded tremendous discretion to reduce inmates' sentences for reasons that in practice range from heroic service to relief from overcrowding.[117] Of all forms of sentence credit, meritorious good time provides prison officials with the most unguided discretion and therefore is most subject to abuse.[118]

3. Infirmity-Based Release

As higher numbers of prisoners serve increasingly longer sentences, the number who suffer from terminal conditions and chronic, degenerative illnesses is also increasing.[119] So too is the number of geriatric inmates, many of whom require extra physical assistance.[120] Because imprisonment prevents prisoners from seeking medical care on their own, the state is constitutionally obliged to

114. *Id.* at 2.

115. *Id.* at 4.

116. *See, e.g.*, CONN. GEN. STAT. § 18-98b (1992) (authorizing up to 120 days credit "as an outstandingly meritorious performance award ... for exceptional personal achievement, accomplishment and other outstandingly meritorious performance"); KY. REV. STAT. ANN. § 197.045(3) (West 2006) (allowing credit of up to five days per month "at the discretion of the commissioner ... for performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs"); NEV. REV. STAT. § 209.4465(5) (2009) (permitting up to ninety days credit annually for any offender "who engages in exceptional meritorious service").

117. *See* Jacobs, *supra* note 37, at 221-22, 267-68.

118. *See infra* notes 139-45 and accompanying text (discussing Illinois's "meritorious good time push" scandal).

119. Timothy P. Flanigan et al., *HIV and Infectious Disease Care in Jails and Prisons: Breaking Down the Walls with the Help of Academic Medicine*, 120 TRANSACTIONS AM. CLINICAL CLIMATOLOGICAL ASS'N 73, 73 (2009) (observing that prisoners are five times more likely to have HIV and seventeen to twenty-eight times more likely to suffer from hepatitis C than the general population).

120. TINA CHIU, VERA INST. OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 4 (2010), *available at* http://www.vera.org/download?file=2973/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf (reporting that from 1999 to 2007 the number of people age 55 or older in state and federal prisons grew 76.9 percent while the number of persons ages 45-54 grew 67.5 percent); *see also* ABNER, *supra* note 76, at 9 ("Elderly inmates represent the fastest growing segment of federal and state prisons.").

provide appropriate health care, including medication, doctor's visits, medical tests and procedures, durable medical equipment, physical therapy, and other forms of medical intervention.[121] In addition, when prisoners' care cannot be met in an institutional setting, prisons are responsible for securing appropriate community-based treatment and for providing necessary security on site. As health care costs rise at unprecedented rates, caring for ill and elderly inmates has imposed increasing financial burdens on the states.[122]

In response to these concerns and in recognition of the fact that elderly and seriously ill inmates often pose less of a threat to public safety than their younger, healthier counterparts, over the past decade an increasing number of jurisdictions have authorized parole for the elderly, the infirm, and the seriously ill.[123] In jurisdictions that have retained discretionary parole, these inmates may be released on a case-by-case basis, either as part of a traditional parole plan or under special provisions governing parole for inmates with serious medical conditions.[124] The appeal of medical parole, or "compassionate release," as it is often called, has caused even some nonparoling jurisdictions to develop special procedures authorizing limited early release for seriously ill prisoners serving determinate sentences.[125] Most jurisdictions that authorize medical parole make release contingent upon a showing that the inmate suffers from a "debilitating, incapacitating, or incurable medical condition" and that he poses no risk to public safety.[126] Some also include geriatric

121. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

122. CHIU, *supra* note 120, at 5, 9-10; Mike Mitka, *Aging Prisoners Stressing Health Care System*, 292 JAMA 423, 423-24 (2004).

123. As of 2008, at least thirty-six states authorized some form of early release for dying or seriously ill prisoners. Marty Roney, *36 States Offer Release to Ill or Dying Inmates*, USA TODAY, Aug. 14, 2008, at 4A.

124. *See, e.g.*, ALASKA STAT. § 33.16.085 (2005) (authorizing special medical parole for certain prisoners who develop severe medical or cognitive disabilities during their period of incarceration); D.C. CODE § 24-464 to -465 (2001) (authorizing medical or geriatric parole for parole-eligible prisoners who develop permanent disabilities or terminal illnesses, or who are over sixty-five years of age and chronically ill); MONT. CODE ANN. § 46-23-210 (2009) (permitting designated inmates with terminal conditions or those requiring extensive medical attention to be released on parole).

125. *See, e.g.*, D.C. CODE § 24-468 (2009) (providing for medical sentence reduction for nonparole-eligible inmates who develop permanent disabilities or terminal illnesses while incarcerated).

126. *See, e.g.*, N.H. REV. STAT. ANN. § 651-A:10-a(I) (2004); WYO. STAT. ANN. § 7-13-424

release provisions that allow older inmates to secure early release, often upon showing that they suffer from medical problems of lesser magnitude.[127] A few release provisions make cost an explicit consideration, with release contingent on a showing that providing a prisoner with necessary treatment is excessively costly.[128]

Because the cost of providing medical care for seriously ill prisoners far exceeds the cost of housing healthier prisoners,[129] infirmity-based release provisions promise to deliver substantial cost savings even if utilized on a lesser scale than other, more generally applicable early release provisions. This is true even in the case of indigent inmates, whose health care costs in the community will still be paid for with government dollars.[130]

Yet despite these potential cost savings, for a number of reasons, compassionate release is sparingly utilized. Delays in bureaucratic review make compassionate release inaccessible to many terminally ill prisoners who often die before completing the application

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(2008).

127. *See* D.C. CODE § 24-468 (implementing geriatric sentence reduction for nonparole-eligible inmates over sixty-five years of age with chronic illness). *See also* VA. CODE ANN. § 53.1-40.01 (2009) (permitting felony offenders to petition for conditional release upon reaching the age of sixty if the inmate has served at least ten years of his sentence or upon reaching the age of sixty-five if the inmate has served at least five years of his sentence).

128. N.H. REV. STAT. ANN. § 651-A:10-a(I)(b) (stating that medical parole is available only if "[t]he cost of medical care, treatment, and resources for the inmate is determined to be excessive"). Corrections officials in New Hampshire have touted the cost savings provided by the new medical parole provision. In a press release celebrating the first use of the new statute, Robert J. MacLeod, Administrative Director of the Department of Corrections Medical and Forensic Services, announced that the parole of inmate Brenda Hewitt would "save the state of New Hampshire a projected $40,000 in treatment costs," all of which would be paid by Hewitt's private health insurance. Press Release, N.H. Dep't of Corr., First State Prison Inmate Paroled Under New Medical Parole Law (Aug. 24, 2004), *available at* http://www.nh.gov/nhdoc/news/2004/082404.html. *See also* WASH. REV. CODE § 9.94A.728(4)(a) (allowing secretary of corrections to authorize extraordinary medical placement when, among other things, "[g]ranting the extraordinary medical placement will result in a cost savings to the state").

129. *See, e.g.*, Lisa Aleman-Padilla, *Chowchilla Inmate with Cancer Is Freed: "Compassionate Release" Called a Way To Cut Costs*, FRESNO BEE, Apr. 16, 2003, at B1 (describing a 1995 case in which the California Department of Corrections spent almost $900,000 to care for and guard a comatose inmate during the last six months of his life).

130. The indigent elderly and disabled ordinarily receive health care through Medicaid programs, which are funded jointly by the federal government and the states. Prison inmates, however, are not Medicaid eligible, and therefore states pay the full cost for medical care for incarcerated persons. *See* 42 U.S.C. § 1396d (a)(28)(A) (2006) (barring Medicaid payments on behalf of inmates of public institutions); 42 C.F.R. § 435.1009 (2009) (same).

process.[131] Another serious impediment to release is the inability of many prisoners to develop safe and appropriate release plans. Prison administrators and parole boards are appropriately wary of "kicking to the curb" seriously ill inmates who may be unable to access necessary medical and personal care without assistance.[132] As a result of these practical limitations, the use of compassionate release has thus far been limited despite the recent proliferation of authorizing legislation.

B. Preliminary Results

It is too early to say with any certainty whether the new legislation discussed in Part II.A will succeed in lowering inmate populations and reducing state correctional expenditures. Preliminary feedback has been limited and is more anecdotal than empirical.[133] Even assuming, however, that these popular early release mechanisms are capable of reducing costs in the short run to the degree state officials anticipate, their long-term sustainability can be fairly questioned.

With rare exception, the early release mechanisms share a common feature: they are controlled by departments of corrections or parole boards. Allowing executive officials to administer early release provides several obvious benefits. Prison officials are uniquely aware of institutional capacity constraints and are therefore well positioned to award sentence credit or grant early release in ways that are targeted to the needs of the institution. Consequently, insofar as new laws are designed to provide relief to prisons in the

131. *See* Cara Buckley, *Law Has Little Impact on Compassionate Release for Ailing Inmates*, N.Y. TIMES, Jan. 30, 2010, at A17 (reporting that since 2005, "at least 16 New York inmates have died while waiting for the parole board to decide their fate").

132. Placing qualified prisoners in community-based nursing homes is no easy task. As Dr. Lester Wright, chief medical officer for the New York State Department of Correctional Services has explained, "We're ... competing for beds. Some people think my patients aren't as valuable as other people in society." *Id.*

133. *See* JFA INST. & MISS. DEP'T OF CORR., *supra* note 93, at 5 (reporting that Mississippi's parole reforms have stabilized growth in what was previously a rapidly expanding prison population); LAWRENCE, *supra* note 112, at 5 (presenting Washington State officials' estimate that expansion of earned time has saved the state approximately $5500 per prisoner in prison costs based on a sixty-three-day reduction in sentence).

form of cost savings and extra bed space, allowing executive agencies to control release decisions makes sense.[134]

History demonstrates, however, that executive release decisions are subject to numerous criticisms. Their sensitivity to institutional concerns often comes at the expense of community worries about public safety and the legitimacy of sentencing decisions. Exacerbating lack of public trust is the absence of transparency in parole board and prison administrative decisions. As detailed above, these structural deficits strongly contributed to the abolition of parole and other forms of early release in the 1980s and 1990s.[135]

In the current move away from wholly determinate sentencing and toward limited early release, states have paid little attention to avoiding the mistakes of the past. There is good reason to believe, however, that the concerns that led to the repeal of early release legislation in earlier decades have not dissipated over time. In fact, there are already some indications that the public may not be eager to embrace the newest rounds of early release legislation.

For example, in December 2002, in response to cost concerns, Kentucky Governor Paul Patton ordered the early release of 833 minor felony offenders who were nearing release.[136] Only one month later, however, the program was suspended after four newly released offenders committed several violent crimes.[137] Despite the state's crushing budget shortfall, Kentucky lawmakers responded by calling for a swift end to early release—a move that suggests public safety concerns can quickly overcome support for cost-saving early release measures.[138]

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134. It should be remembered, however, that authorizing executive officials to release inmates early does not guarantee that they will do so. In fact, in several states that have authorized expanded early release, projected cost savings have been exaggerated because authorized officials have failed to fully utilize their enhanced discretion. *See, e.g.*, CHIU, *supra* note 120, at 6, 8 (describing the failure of authorities to utilize their powers under geriatric release provisions).

135. *See supra* notes 32-38 and accompanying text.

136. V. Dion Haynes & Vincent J. Schodolski, *Strapped States Turn to Prisons: Early Releases Among Saving Options*, CHI. TRIB., May 5, 2003, at A8; *Public Outrage Halts Release of Prisoners*, CHI. TRIB., Feb. 2, 2003, at A16.

137. *Public Outrage Halts Release of Prisoners*, *supra* note 136, at A16.

138. *See Release of Inmates To Stop; Lawmakers Must Find Funds*, CIN. POST, Feb. 1, 2003, at K1 ("[Although] [t]he release of 883 inmates has been roundly criticized by legislators, law enforcement and a number of gubernatorial candidates ... [f]ew of them have offered realistic alternatives for finding the money to pay to house the inmates.").

More recently, Illinois has experienced one crisis after another relating to its early release and meritorious good time programs. In late 2009, the Associated Press reported on a "secret program" being implemented by the Illinois Department of Corrections that allowed inmates to receive large amounts of meritorious good time credit immediately upon entering the prison system.[139] The practice, known as "meritorious good time push" (or MGT push) was responsible for the early release of more than 1700 inmates convicted of minor felony offenses, such as battery and drunken driving.[140] Many of these inmates were required to serve mere weeks of their sentences before being awarded sufficient credit to gain release—a divergence from the traditional state practice of awarding meritorious good time only to prisoners who had served at least sixty days of their prison sentences.[141] Designed to save the state $5 million a year, the practice quickly backfired. Within several months' time, nine releasees had been charged with new crimes, seventeen had been returned to prison on allegations of new violent criminal activity, and thirty-one had been taken into custody on allegations of nonviolent rule violations.[142] Public outrage was swift and vocal, leading to suspension of the program in December and new legislation shortly thereafter to restrict prison officials' ability to award meritorious good time credit.[143]

The fallout from Illinois's meritorious good time scandal spilled over into the state's new early release program, which placed inmates nearing their release dates in the community under parole-

139. John O'Connor, *Illinois Ends Secret Prison-Release Plan*, SEATTLE TIMES, Dec. 15, 2009, at A15 [hereinafter O'Connor, *Secret Plan*]; Press Release, Governor Quinn Signs Public Safety Initiative Law (Jan. 14, 2010), *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=8174 (describing new law requiring "prisoners in state custody to serve at least 60 days of their sentences before being eligible for meritorious good conduct credit").

140. Monique Garcia, *Quinn Admits Prison Error*, CHI. TRIB., Dec. 31, 2009, at A5.

141. John O'Connor, *Analysis: Questions Remain About Inmate Release*, ASSOCIATED PRESS, Jan. 2, 2010, http://mywebtimes.com/archives/ottawa/print_display.php?id= 394857 (noting that the "MGT Push" involved "a decision to abandon the Corrections Department's previous policy of requiring all inmates to serve at least 61 days before they could be considered for release").

142. *See* John O'Connor, *Scores Back in Prison After Ill. Parole Crackdown*, ASSOCIATED PRESS, Jan. 13, 2010, http://abcnews.go.com/US/wirestory?id=9550964. Following an intense enforcement effort by parole officials in January 2010, 130 more releasees were apprehended and charged with violating the rules of their supervised release. *Id.*

143. O'Connor, *Secret Plan*, *supra* note 139, at A15; Press Release, *supra* note 139.

like supervision.[144] First implemented in November 2009, that program was suspended "pending a review of all early release programs" in the wake of the MGT push scandal.[145]

The use of expanded good time and earned release credit in other states is subject to many of the same criticisms that have driven opposition to meritorious good time in Illinois. In Michigan, for example, where Governor Jennifer Granholm is seeking to re-introduce good time legislation, former prosecutor and current Oakland County Executive L. Brooks Patterson is leading the effort to block newly proposed good time legislation. The issue is not new to him: Patterson successfully led the charge to abolish good time credit in 1978.[146] Now, as then, he and others have objected to the practice on the ground that it allows criminals to revictimize the communities in which they were sentenced.[147] Whether the new measure will pass remains to be seen, but this much is clear: proponents of the proposed legislation have done little to assuage the long-standing worries that led to the repeal of good time only a generation ago.[148]

As these examples indicate, thus far new efforts to provide for early release are controlled by executive officials who for the most part continue to operate in a way that prizes large scale administrative efficiencies over visible, individually justified release decisions. However, unless early release practices begin to account for public concerns over the lack of accountability and transparent decision making that led to the repeal of earlier forms of back-end release,

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144. Cheryl Corley, *States Release Inmates Early To Cut Prison Costs* (Nat'l Public Radio Dec. 13, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=121338571 (describing the early release program and interviewing one of the program's first releasees).

145. Monique Garcia, *2nd Early Release Program Suspended*, CHI. TRIB., Jan. 6, 2010, at 8 (reporting suspension of early prison release program designed for nearly one thousand nonviolent offenders).

146. *Patterson: Good Time a Bad Idea*, DETROIT FREE PRESS, Feb. 16, 2010, at A2.

147. *Id.*

148. Outside Michigan, the practice of awarding good time credit has not been as widely criticized as has parole release, perhaps because the link between sentence credit and actual release is more attenuated. Nevertheless, good time and earned release are subject to many of the same criticisms insofar as the application of sentence credit turns on the unaccountable discretion of prison officials. "If anything, good time is conceptually less well grounded than parole and less susceptible to outside scrutiny. It is also subject to more abuse because prison officials cannot help but be tempted to use good time to reinforce their institutional authority and interests, as they define them." Jacobs, *supra* note 37, at 270.

it is likely that the newest generation of early release legislation will be short-lived.[149]

III. AN ALTERNATIVE MECHANISM: JUDICIAL SENTENCE MODIFICATION

Although the vast majority of early release mechanisms are implemented by parole boards and prison administrators, not all are. Judicial sentence modification is an early release mechanism that permits sentencing courts to reduce inmates' lawfully imposed terms of imprisonment when specified criteria have been met. Unlike a parole decision or the application of sentence credit, a judge's decision to modify a sentence is ordinarily made in open court and on the record in the jurisdiction in which the offender was originally sentenced.

While judicial sentence modification is a practice with deep historical roots, it does not exist in many jurisdictions and is authorized narrowly in most others. Where the mechanism does exist, it tends to take one of two forms. In a few jurisdictions, the power to modify a sentence is believed to arise from the sentencing court's inherent power over its own sentence. Although states that permit sentence modification under this model embrace an expansive concept of the sentencing court's jurisdictional authority, all have imposed strict common law limits on courts' ability to exercise that power when altering legally imposed sentences.[150] A more common, though still rare, approach permits judicial sentence modification when the legislature has authorized the practice by statute. This modern variation on common law sentence modification allows legislatures to define the circumstances under which judges may modify sentences that have already commenced. Although a number of states and the federal government have enacted such provisions, most statutes provide only a brief window

149. *See* Monica Davey, *Safety Is Issue as Budget Cuts Free Prisoners*, N.Y. TIMES, Mar. 4, 2010, at A1 (describing recent problems with public tolerance of new early release legislation in Illinois, Oregon, and Colorado). It is worth noting that infirmity-based release mechanisms are less subject to backlash than are sentence credit provisions or parole because the persons granted compassionate release are ordinarily too ill to pose any risk to public safety and few will live long enough to garner much attention.

150. *See infra* Part III.A.

during which legal sentences may be altered, thereby limiting their utility as a means of providing for early release.[151]

Despite the limited authorization of judicial sentence modification in modern practice, in the jurisdictions where courts possess authority to reexamine sentences, there are indications that they exercise that power with some regularity. Part III reviews the history and modern practice of judicial sentence modification before examining the potential strengths and limitations of the mechanism as it is, and might be, employed.

A. Historical Roots

In its earliest form, sentence modification can be traced back to English common law. In the days when trial courts did not hold session year-round but instead divided their work into terms, as many courts of last resort do to this day, the rule was simple: when a court imposed sentence, or entered any other judicial order, for that matter, it retained unlimited power to change the disposition throughout the term in which the order was entered.[152] So long as the term remained in session, the defendant's sentence could be altered.[153] Once the term expired, however, the court lost jurisdiction over the sentence and could no longer modify any of its lawfully imposed provisions for any reason.[154]

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151. *See infra* notes 162-63 and accompanying text.

152. In 1861, the Massachusetts Supreme Court observed, "It seems to have been recognized as one of the earliest doctrines of the common law, that the record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered." Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144, 145 (1861). The court went on to quote Lord Coke for the proposition that

> during the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct; but when that term is past, then the record is in the roll, and admitteth of no alteration, averment or proof to the contrary.

Id. (citing EDWARD COKE, COMMENTARY UPON LITTLETON 260 (1797)).

153. *See* Dist. Attorney v. Superior Court, 172 N.E.2d 245, 247-49 (Mass. 1961) (summarizing the common law cases on this topic); *Inter* the Inhabitants of St. Andrew's Holborn & St. Clement Danes (1704) 91 Eng. Rep. 514, 515 (K.B.) ("The Court at the Old Bailey have altered and set aside their judgments ten times at the same sessions.... [T]he sessions as well as the term is but one day in law.").

154. Fine v. Commonwealth, 44 N.E.2d 659, 662 (Mass. 1942). When a sentence was unlawful, different rules applied. Then, as now, nearly all jurisdictions permitted modification

Over time, some jurisdictions abandoned the practice of holding terms at the trial court level.[155] In jurisdictions where the practice of holding terms persisted, many courts began to modify the strict time limits traditionally associated with the common law rule, allowing trial courts to rule on timely filed motions for sentence modification even after the term had come to an end.[156] In some cases, courts held these timely filed motions indefinitely, delaying modification until years after a defendant had begun serving his sentence. This practice, which was known colloquially as "bench parole," was criticized by prison officials and others who believed it constituted a judicial interference with the release power of executively controlled parole boards.[157]

In 1946, the federal government enacted the first version of Federal Rule of Criminal Procedure 35(b), a rule that would later become the model for many state sentence modification provisions. In its original form, the rule provided that a court could reduce a

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at any time to correct an illegal sentence. Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 10 (2003).

155. Although the practice of holding terms at the trial court level has mostly vanished in modern times, a few southern states retain the practice and consequently adhere to the common law rule or variations thereof. *See, e.g.*, Hall v. State, 662 S.E.2d 753, 755 (Ga. Ct. App. 2008) ("A sentencing court has power to modify a valid sentence only during the term of court in which it was imposed or for up to one year (or 120 days after affirmance following appeal) under OCGA § 17-10-1(f)."); White v. State, 22 So. 3d 378, 381 (Miss. Ct. App. 2009) (upholding a judge's exercise of her "'inherent authority' to alter a sentence until the regular term of court expires").

156. This practice appears to have grown out of worries that the common law rule gave unfair advantage to defendants sentenced at the beginning of a court's term, who had much longer to file their motions and receive favorable rulings from the court than did defendants sentenced at the term's end. *See* B. Carole Hoffman, Note, *Rule 35(b) of the Federal Rules of Criminal Procedure: Balancing the Interests Underlying Sentence Reduction*, 52 FORDHAM L. REV. 283, 289-90 (1983).

157. In 1946, the Director of the Federal Bureau of Prisons publicly announced his support for limiting the amount of time in which courts could alter imposed sentences, explaining that rules enforcing such limits

> protect[] the judge from continual importunities while the man is in the institution. There is a rule to the effect that if the counsel for the defendant files a petition for a reduction of sentence and that petition is not acted upon, the judge can act on it any time, regardless of the expiration of the term of court, and that has resulted in a good deal of importunities to the judge. It amounts sometimes to a sort of bench parole, whereby the judge retains the authority to reduce the sentence after the man has been committed.

Id. at 285 n.8 (citing remarks of James Bennett in proceedings on the enactment of Federal Rule of Criminal Procedure 35(b) held at the New York University School of Law).

sentence for any reason within sixty days of its imposition, either on motion by the defense or *sua sponte*.[158] After sixty days, the court lost jurisdiction over the sentence entirely and could no longer change its length or conditions, regardless of whether the court's term had ended.[159] At the time the law was enacted, legislators and prison officials alike expressed support for the provision, contending that it would "limit the time within which a court could exercise control over its judgments, reduce the potential for court infringement on Parole Commission authority over release determinations, and eliminate the overloading of court dockets with superfluous Rule 35(b) motions."[160] Later, the statute was revised to expand the time for filing motions for sentence reduction from 60 to 120 days and to clarify that courts were required to rule on motions "within a reasonable time" after their filing.[161]

Beginning shortly after Rule 35(b)'s original enactment, state courts around the country started to adopt versions of Rule 35. Like the original federal rule, these state analog statutes provided short time limits within which sentences could be reduced.[162] Even after the federal system abandoned the original Rule 35(b) as part of its move to determinate sentencing in the 1980s, most states retained their analog statutes. As a result, most state courts are authorized to exercise jurisdiction to modify lawfully imposed sentences for a brief period ranging from thirty days to one year after a sentence is lawfully imposed.[163]

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158. FED. R. CRIM. P. 35(b) (1946).

159. Hoffman, *supra* note 156, at 291.

160. *Id.*

161. FED. R. CRIM. P. 35(b) (1966) (increasing the time within which the court may act from 60 to 120 days); FED. R. CRIM. P. 35(b) (1983) (making clear that so long as a defendant's motion is filed within 120 days, the court may rule on it within a reasonable time thereafter). The rule remained substantially static until changes prompted by the Sentencing Reform Act of 1984 led to substantial revisions in the statute, making sentence reduction solely a means of rewarding defendants for offering the United States substantial assistance in criminal prosecutions. *See* FED. R. CRIM. P. 35(b) (1991).

162. According to a 2003 survey, five states impose a time limit of 30 to 75 days on motions for sentence modification, five others impose a 90-day limit, ten states impose a 120-day limit, and eight states permit modification for a period between 180 days and 1 year. *See* Grossman & Shapiro, *supra* note 154, at 11 nn.78-81 (surveying state statutes).

163. *Id.* at 11. These time limits are consistent with the American Bar Association's Criminal Justice Standards, which advocate providing trial courts with the opportunity to reduce sentences "for a specific restricted time" after sentence is imposed "to rectify those judgments that it realizes were excessive" or to respond to "new factual information ... that

B. Modern Use

Within the states that utilize Rule 35(b) analog statutes, data on the number of motions filed and granted is extremely difficult to obtain.[164] There is no evidence that such motions are granted with any regularity, and it is easy to hypothesize why motions filed under Rule 35 analogs would rarely be successful. Given the brief amount of time between the original sentencing and the expiration of the trial court's jurisdiction to modify under these statutes, it is difficult to imagine circumstances in which relevant facts or circumstances would change in a way that would justify a principled alteration in the original sentence. In fact, the reasons for modifying a sentence so quickly would seem largely illegitimate. One possible use would be the mitigation of a sentence in response to public pressure from supporters of powerful or popular defendants. Another might be the covert correction of a too-harsh punishment imposed in response to pressure from victims or media at the time of the original sentencing. Neither practice should be tolerable: one because it permits injustice after the fact of sentencing, and the other because it encourages injustice in the original sentencing decision. In any event, because decisions granting modification under these analog statutes are not widely reported, legal scholars have traditionally overlooked provisions authorizing judicial sentence modification as a matter of any consequence.

Although it is true that early versions of Federal Rule of Criminal Procedure 35(b) and its later state analogs represent the most traditional form of judicial sentence modification, they are not the only form of the mechanism. While judicial sentence modification remains a fairly unusual phenomenon, courts and legislatures across the country have found ways to permit courts to retain jurisdiction over their sentences beyond the strict time limits provided by traditional Rule 35(b) statutes. The jurisdictions profiled

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alters materially the information base on which sentence was imposed." ABA: SENTENCING, *supra* note 38, § 18-7.1.

164. Because sentence modification under Rule 35(b) analogs is wholly discretionary, rulings on such motions are rarely appealable and therefore leave no record in appellate case law. Throughout the country, local counties and parishes maintain their own records of trial court level proceedings. Most do not track either filings or outcomes related to motions for sentence modification.

in Parts III.B.1-3 have widely varying sentencing policies, statutory authority, and common law traditions, yet each has chosen to use a form of judicial sentence modification as one means of providing for early release.

1. The Rule 35 Motion Extended: Modification in Maryland

The State of Maryland is in many ways traditional, conferring jurisdiction on trial courts to modify sentences through its own Rule 35(b) analog, Maryland Rule of Court 4-345. As amended in 2005, the rule provides that

> [u]pon a motion filed within 90 days after imposition of a sentence ... the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.[165]

The rule further specifies that a court may modify a sentence "only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard."[166] The rule leaves the grounds for modification wholly to the trial court's discretion.

Like most Rule 35 analog statutes, the Maryland rule limits the power of the court to modify an imposed sentence unless the defendant files a motion within a limited time period—in this case, ninety days.[167] However, as the rule itself suggests, Maryland explicitly condones the practice of "bench parole" by permitting judges to hold timely filed motions in abeyance for up to five years.[168] Commentators have observed that Maryland's willingness to allow judges to act on sentence modification motions "years after [they are] filed based on facts that were not in existence—or perhaps even contemplated—at the time of the motion, makes the Maryland procedure unique" in the modern era.[169] Equally unique

165. MD. CT. R. 4-345(e)(1).
166. MD. CT. R. 4-345(f).
167. MD. CT. R. 4-345(e)(1).
168. *Id.*; *see also* Grossman & Shapiro, *supra* note 154, at 5.
169. Grossman & Shapiro, *supra* note 154, at 9.

is the broad discretionary authority enjoyed by Maryland judges who can, and often do, modify sentences for a wide range of reasons.[170]

Unlike most states, in which judicial sentence modification is a little known obscurity of sentencing law even to those within the criminal justice system, in Maryland the practice of judicial sentence modification has been a topic of ongoing public evaluation.[171] Politicians, judges, district attorneys, and victims' advocates have publicly debated its merits and drawbacks, and its continued existence has been the result of hard-won political battles.[172] Several years ago, as a result of political compromise between those who favor more certain punishment and those who support the expansive use of judicial sentence modification, the state amended Rule 4-345, for the first time placing a limit on the time in which judges may rule on motions for sentence modification.[173] That limit was not expected to have any significant practical effect on sentence modification, however, since a survey of state judges demonstrated that the vast majority of modifications were made within five years of the original sentencing hearing.[174]

Since the amendment took effect in 2004, Maryland trial judges have continued to exercise broad discretion to modify sentences. Although counties are not required to track "motions for sentence reconsideration," as they are colloquially known, the Maryland Sentencing Commission does collect data on cases in which judges reduce the sentences of violent felons.[175] Given the fact that

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170. In Grossman and Shapiro's 2003 survey, state trial judges reported modifying sentences for the following reasons: the offender's participation in alcohol and drug treatment or educational programs; payment of restitution; completion of probation; exemplary institutional conduct; cooperation with law enforcement; performance of community service; successful rehabilitation; or illness or age. *Id.* at 39-40. Several judges also indicated that they had modified sentences to ameliorate the impact of changing parole guidelines. *Id.* at 40.

171. *Id.* at 37.

172. *Id.* at 1-2.

173. *Compare* MD. CT. R. 4-345(e)(1) (2004) (placing a five-year limit on decisions), *with* MD. CT. R. 4-345(b) (2003) (placing no time limits on decisions). *See generally* David P. Kennedy, *The End of Finality*, 37 MD. B.J. 24, 26 (2004) (asserting that the new time limit would "serve the interest of finality" in sentencing).

174. Grossman & Shapiro, *supra* note 154, at 43 (reporting survey indicating "that a clear majority of the motions for sentence modification that are granted occur within one year of the time that the motion is filed" and that "[a]n overwhelming majority of those granted occur within the first five years after the motion is filed.").

175. MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, ANNUAL REPORT 39 (2009),

Rule 4-345 only permits modifications within a five-year window, violent felons seem unlikely candidates for relief since their sentences are generally lengthy, their crimes serious, and their odds of rapid "rehabilitation" often dim.[176] It is therefore surprising that Commission data reveals that Maryland judges granted reconsideration on more than 200 sentences involving 110 prisoners between 2005 and 2009.[177] Although this limited data fails to reveal the degree of sentence reduction or the reasons for modification, it does demonstrate that prisoners serving sentences for crimes as serious as first-degree murder, first-degree rape, child sexual assault, and first-degree assault have successfully obtained sentence modifications.[178] While these statistics do not provide any concrete sense of how prevalent or widespread the practice of sentence modification is in cases involving less serious offenses, they suggest that Maryland judges may be utilizing the mechanism with some regularity in such cases.[179] As of this writing, no further effort has

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available at http://www.msccsp.org/Files/Reports/ar2009.pdf (discussing state law that requires judges to submit worksheets to the Commission for rulings on motions for sentence modification related to defendants convicted of crimes of violence and indicating the Commission's belief that these modifications have been historically underreported).

176. Of course, a judge granting a motion for sentence modification need not authorize the prisoner's immediate release. As outlined above, under Maryland law a judge could reduce a twenty-year sentence to a sentence of ten years, for example, if within the first five years following sentencing, the prisoner demonstrated that such a reduction in sentence was deserved.

177. Although Maryland judges are required to report only modifications involving violent felons, the Commission report includes all judicial sentence "reconsiderations" for which a worksheet was submitted. While the vast majority of these cases do involve violent felonies, in each year a limited number of the reported modifications involve crimes that are not obviously crimes of violence. In the interest of accurate reporting, the figures reported in the text are those reported by the Commission. Interested readers may wish to examine the Commission's reports to see in greater detail the breakdown of offenses for which modifications were granted and reported. *See* MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, *supra* note 175, at 40; MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, ANNUAL REPORT 33 (2008), *available at* http://www.msccsp.org/Files/Reports/ar2008.pdf; MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, ANNUAL REPORT 29 (2007), *available at* http://www.msccsp.org/Files/Reports/ar2007.pdf; MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, ANNUAL REPORT 30 (2006), *available at* http://www.msccsp.org/Files/Reports/ar2006.pdf; MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, ANNUAL REPORT 21 (2005), *available at* http://www.msccsp.org/Files/Reports/ar2005.pdf.

178. MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, *supra* note 175, at 40; MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, *supra* note 177, at 33.

179. *See also* Grossman & Shapiro, *supra* note 154, at 3 (concluding, based on the authors' 2003 survey of Maryland judges, "that the overwhelming majority of cases in which the

been made to circumscribe judges' authority to modify sentences under Rule 4-345, and by all appearances, the continued use of judicial sentence modification in Maryland remains secure.

2. Inherent Jurisdiction: The Wisconsin Approach

In sharp contrast to Maryland and other states that premise ongoing trial court jurisdiction on state statutory authority, Wisconsin is one of the very few states that recognizes sentencing courts' inherent power to change and modify their own legally imposed sentences, even after those sentences have commenced.[180] Although Wisconsin statutes provide that defendants must move for sentence modification within ninety days of sentencing when contending that their sentences are "unduly harsh," Wisconsin courts have held that their statutory time limits govern only the defendant's *right* to be heard by the court—not the court's discretionary power to hear the defendant's claims and to modify the sentence.[181] In Wisconsin, therefore, a defendant may move for sentence modification at any time following the commencement of his sentence. When the defendant's motion is filed within the ninety-day time limit prescribed by statute, the court is obliged to entertain the motion. After those ninety days have passed, it is within the trial court's discretion to deny or hear the motion for modification.[182]

In Wisconsin, motions for sentence modification can be made on two grounds: (1) that the sentence is unduly harsh, or (2) that the emergence of a "new factor" justifies modification of the original sentence.[183] Modifications based on an alleged "new factor" must

practice is used are for nonviolent drug and theft offenses").

180. *See* Hayes v. State, 175 N.W.2d 625, 628 (Wis. 1970), *overruled on other grounds*, State v. Taylor, 210 N.W.2d 873 (Wis. 1973). Nevada is also included in this minority group of states. The Nevada Supreme Court has held that district courts possess inherent authority to modify a sentence in the limited context of a sentence "based on a materially untrue assumption or mistake of fact that has worked to the extreme detriment of the defendant," such as when a mistaken sentence "is the result of the sentencing judge's misapprehension of a *defendant's criminal record*." Edwards v. State, 918 P.2d 321, 324 (Nev. 1996) (quoting State v. Dist. Court, 677 P.2d 1044, 1048 (Nev. 1984)).

181. State v. Noll, 653 N.W.2d 895, 897-98 (Wis. Ct. App. 2002) (citing WIS. STAT. § 973.19(1)(a) (1998)).

182. State v. Wuensch, 230 N.W.2d 665, 672 (Wis. 1975).

183. WIS. STAT. § 973.19 (2008); *Noll*, 653 N.W.2d at 897-98.

conform to strict common law rules governing what may and may not, as a matter of law, be considered a new factor.[184] If a new factor can be shown to exist, it then falls within the discretion of the trial court to grant or deny modification of the sentence.[185] Often the dispositive question is based on whether the new factor "frustrates the purpose of the original sentence."[186] The trial court's decision to modify is subject to review for abuse only.[187]

Over time, Wisconsin courts have identified specific categories of fact that may or may not constitute new factors. Facts that do not qualify include institutional compliance, the completion of rehabilitative programming, sentencing disparities between codefendants, and changes in maximum criminal penalties and classification of crime severity.[188] As a result of these restrictions, the court's ability to modify a sentence is more restricted in Wisconsin than Maryland, even though the court's jurisdictional authority is inherent and continuing. Facts that have justified sentence modification include the correction of "inaccurate or incomplete information" relevant to the sentence imposed, judicial misunderstanding of relevant law or

184. In order to have an imposed sentence modified under Wisconsin law, a defendant must show by clear and convincing evidence that a new fact or set of facts exist that constitute a "new factor." State v. Franklin, 434 N.W.2d 609, 611 (Wis. 1989). In order to qualify as a new factor, the fact or set of facts must (1) be considered "highly relevant" to the sentence imposed, (2) be unknown to the judge "at the time of [the] original sentencing," and (3) either not have been in existence at the time of sentencing or have been "unknowingly overlooked by all of the parties." Rosado v. State, 234 N.W.2d 69, 73 (Wis. 1975). Whether a new factor exists is a matter of law, which an appellate court determines de novo. State v. Hegwood, 335 N.W.2d 399, 401 (Wis. 1983).

185. *Hegwood*, 335 N.W.2d at 401.

186. State v. Michels, 441 N.W.2d 278, 280 (Wis. Ct. App. 1989).

187. *Franklin*, 434 N.W.2d at 611.

188. *See, e.g.*, *Hegwood*, 335 N.W.2d at 402 (holding that a reduction in the maximum penalty for an offense does not constitute a new factor); State v. Torres, 670 N.W.2d 400, 403 (Wis. Ct. App. 2003) (holding that a reclassification of a criminal offense that "would result in a shorter sentence if the defendant were convicted under the new classification" did not qualify as a new factor); State v. Champion, 654 N.W.2d 242, 243-44, 248 (Wis. Ct. App. 2002) (holding that participation in rehabilitative programming is not a new factor); State v. Toliver, 523 N.W.2d 113, 119 (Wis. Ct. App. 1994) (holding that disparity in sentencing between codefendants not a new factor); State v. Krueger, 351 N.W.2d 738, 741-42 (Wis. Ct. App. 1984) (holding that postsentencing factors relating to rehabilitation, including "remorse, repentance, cooperativeness and positive change," do not constitute new factors for modification purposes).

the collateral consequences of an imposed sentence, and a defendant's postconviction cooperation with law enforcement.[189]

Notably, Wisconsin appellate courts have long used "new factor" law as a conscious tool to regulate the separation of executive and judicial power. When the state employed an indeterminate sentencing system that permitted parole consideration for most prisoners, the courts excluded from consideration as "new factors" rehabilitative facts considered by the parole board.[190] After the state adopted truth-in-sentencing in 1999, the appellate courts continued to restrict trial courts' power to consider such facts on the ground that doing so "would turn circuit courts into parole boards, a result that would change the role of the circuit courts and be inconsistent with the legislature's intent" in enacting truth-in-sentencing legislation.[191] Although "new factor" law constrains the exercise of Wisconsin judges' "inherent power" in ways that prevent sentence modification from serving as a tool for early release in many cases, it may well be that the courts' sensitivity to legislative and executive sensibilities explains the long-standing political tolerance for the broad sentencing jurisdiction claimed by Wisconsin courts.

Neither filings nor grants of motions for judicial sentence modification are tracked in Wisconsin at either the state or county level; therefore, it is impossible to tell with any certainty the extent to which such motions succeed. Although now dated, a study conducted in 1989 by students working in the University of Wisconsin Law School Frank J. Remington Center's Legal Assistance to Institutionalized Persons Project examined the outcomes of more than one hundred motions for sentence modification filed by the

189. State v. Doe, 697 N.W.2d 101, 105-06 (Wis. Ct. App. 2005) (postsentencing cooperation with law enforcement may qualify as a new factor); Meredith Ross, *Sentence Modification and Early Release for TIS Inmates*, 13 WIS. DEFENDER 1, 3 (2005), *available at* http://www.wisspd.org/html/publications/WdefWinSpr05/SentModEarlyRel.pdf.

190. *See, e.g.*, State v. Ambrose, 510 N.W.2d 758, 761 (Wis. Ct. App. 1993) (explaining that "post-sentencing conduct is a factor that relates to parole and is properly within the consideration of the Department of Health and Social Services" (citing State *ex rel.* Warren v. County Court, 197 N.W.2d 1, 4-5 (Wis. 1972))); *see also* Katherine R. Kruse & Kim E. Patterson, Comment, *Wisconsin Sentence Modification: A View from the Trial Court*, 1989 WIS. L. REV. 441, 444, 455-56 (observing that in sentence modification motions brought by law school clinic from 1978-1987, a policy of noninterference with matter considered by the parole board "seemed to predominate").

191. State v. Crochiere, 681 N.W.2d 524, 532 n.13 (Wis. 2004).

clinic on behalf of Wisconsin prisoners.[192] The review examined facts that correlated with reductions of sentences and described almost twenty cases in which motions for modification alleging new factors were granted, on grounds ranging from family needs to illness to cooperation with law enforcement authorities.[193] A recent survey of supervising attorneys working in the same clinic suggests that Wisconsin judges may be even more willing to grant appropriate motions now than they were twenty years ago: the clinic director estimates that during the past three years, judges granted approximately half of all motions for sentence modification filed by the clinic.[194] That these motions were filed by a law school clinic with stringent screening standards, rather than by pro se litigants, may explain the relatively high grant rate; however, insofar as the study remains descriptive of Wisconsin practice, it suggests Wisconsin judges continue to exercise their power to modify sentences within the confines of "new factor" law.

3. Shared Decision Making: The Federal Model

Within the federal code, several statutes authorize judges to modify lawfully imposed sentences under certain conditions.[195] One of these, 18 U.S.C. § 3582(c)(1)(A), is an obscure provision that permits judicial modification of federal sentences for "extraordinary and compelling reasons."[196] Although the law places release

192. Kruse & Patterson, *supra* note 190, at 441, 444 & n.9.

193. *Id.* at 444-45, 457-59.

194. Telephone Interview with Meredith Ross, Clinical Dir. of the Univ. of Wis. Frank J. Remington Ctr. (Mar. 9, 2010).

195. *See, e.g.*, 18 U.S.C. § 3582(c)(2) (2006) (authorizing modification of a sentence "to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission"); FED. R. CRIM. P. 35(b) (permitting court to reduce sentence if the defendant has provided substantial assistance to the government).

196. Previously codified at 18 U.S.C. § 4205(g), this statute provides that although a court may not ordinarily modify a term of imprisonment,

> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that
>
> (i) extraordinary and compelling reasons warrant such a reduction.

18 U.S.C. § 3582(c)(1)(A). A court may also reduce a sentence under § 3582(c)(1)(A) if

decisions in the hands of sentencing courts, it puts a powerful constraint on the court's ability to exercise its discretion. Before a court may reduce a sentence under § 3582(c)(1)(A), the Bureau of Prisons must file a motion requesting sentence reduction and attesting to the extraordinary and compelling circumstances that justify the change in sentence.[197] A defendant may not initiate the motion himself, nor can a court reduce a sentence *sua sponte*.[198] Under this model, judicial sentence modification is the final step in a multibranch decision-making process that begins in the prison and ends in the courtroom.[199]

Traditionally, the Bureau of Prisons has exercised its authority to file motions under § 3582(c)(1)(A) only in rare instances involving inmates with less than one year to live.[200] Prompted in large part by pressure from advocacy groups that asserted the Bureau was abusing its discretion by interpreting the statute too narrowly,[201] in

> (ii) the defendant is at least 70 years of age [or] has served at least 30 years in prison ... for the [crime] for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community ... and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A)(ii). Finally, a court may modify an imposed term of imprisonment as provided by Rule 35 of the Federal Rules of Criminal Procedure or when appropriate following a retroactive change in the Sentencing Guidelines range. 18 U.S.C. § 3582(c)(1)(B), (c)(1)(B)(2).

197. 18 U.S.C. § 3582(c)(1)(A) (when prisoner meets specified conditions, "the court, *upon motion of the Director of the Bureau of Prisons*, may reduce the term of imprisonment") (emphasis added).

198. *See id.*

199. Between those two places, the request must surmount numerous hurdles. Under federal regulations, as outlined in Bureau of Prisons Program Statement 5050.46, requests for so-called "compassionate release" must be submitted to the warden of the institution where the prisoner is confined, either by the prisoner himself or by a third party. William W. Berry III, *Extraordinary and Compelling: A Reexamination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 862-64 (2009) (citing 28 C.F.R. § 571.61(a) (2008)). If, after investigating the request, the warden supports the application, he may refer it to the Regional Director of the Bureau of Prisons, who may then in turn refer it to the General Counsel of the Bureau of Prisons. *Id.* at 864. From the General Counsel's Office, the application travels to the Medical Director or Assistant Director of the Correctional Programs Division, and then to the Bureau of Prisons Director himself for a final decision. 28 C.F.R. § 571.62; Berry, *supra*, at 864-65. If the Director offers his approval, the U.S. Attorney's Office is then contacted and asked to file a motion for sentence modification in district court. 28 C.F.R. § 571.62.

200. Berry, *supra* note 199, at 852-53, 866.

201. *See Proposed Guidelines Amendment on Reduction of Term of Imprisonment Based on*

2007 the United States Sentencing Commission amended its guideline on the use of § 3582(c)(1)(A).[202] The amendment clarified the Sentencing Commission's understanding that "extraordinary and compelling reasons exist" not only in cases involving terminally ill patients, but also when a defendant "suffer[s] from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes [his] ability ... to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement."[203] The Commission also explained that extraordinary and compelling reasons exist when "the defendant's only family member capable of caring for the defendant's minor child or minor children" dies or becomes incapacitated.[204] The Commission made clear that these examples were not exhaustive, and that extraordinary and compelling reasons other than those delineated might warrant the filing of a motion for sentence modification.[205]

These recent developments suggest the possibility of an expanding role for judicial sentence modification in the federal system. Since the passage of the 2007 amendments, however, the Bureau appears to have steadfastly adhered to its prior use of the federal statute: it appears not to have sponsored any motions for sentence modification involving nonterminally ill inmates.[206] Even in cases involving seriously ill inmates, the Bureau has exercised its power sparingly. Of the cases that reached the Bureau's Central Office between 2000 and 2009, approximately thirty-five petitions each year were filed; an average of seven each year were denied and an average of five were never acted upon because the eligible inmate died while awaiting a decision from the Bureau.[207]

Bureau of Prisons Motion Under 18 U.S.C. § 3582(c)(1)(A)(I): Hearing Before the U.S. Sentencing Comm'n (Mar. 15, 2006) (statement of Margaret Colgate Love on Behalf of the American Bar Association), *available at* http://www.ussc.gov/hearings/03_15_06/ MargLove-testimony.pdf.

202. U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 cmt. (2007).

203. *Id.*

204. *Id.*

205. *See id.*

206. Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration*, 21 FED. SENT'G REP. 167, 168 (2009).

207. Statistics provided by Judi Garrett, Bureau of Prisons Deputy Assistant Director for

The Bureau's ability to effectively bar the courtroom door to the relief potentially afforded by § 3582(c)(1)(A) demonstrates the potential limits of the shared decision-making model. Although it would be highly desirable to achieve agreement among all three branches of government on the circumstances that justify judicial sentence modification, in practice shared decision-making provisions run the risk of allowing the executive branch to unilaterally block all access to the court. When executive branch officials are unwilling to exercise their discretionary power in accordance with the intent of the legislature, as Bureau of Prison officials appear to be doing with respect to § 3582(c)(1)(A), courts remain helpless to address the circumstances in which the legislature intended their judicial power to be exercised.[208]

4. A New Approach: The Draft Model Penal Code's "Second Look"

In addition to the working models of judicial sentence modification offered by jurisdictions such as Maryland and Wisconsin, and by 18 U.S.C. § 3582(c)(1)(A), another, more innovative, model may be forthcoming. The most recent discussion draft of the revised Model Penal Code: Sentencing, presented to the American Law Institute in May 2010, contains two judicial "second look" provisions that would authorize courts to reduce legally imposed sentences.[209] The first provision closely tracks the federal statute by authorizing sentence reduction at any time based on age, infirmity, or extraordi-

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Policy, and compiled by Margaret Colgate Love (August 2009) (on file with author).

208. Of course, while the Bureau of Prison's refusal to exercise its full authority to file petitions under § 3582(c)(1)(A) provides a cautionary lesson, it is possible that state correctional authorities would be willing to exercise gatekeeping authority more robustly than their federal counterparts. That assumption underlies the proposed inclusion of a gatekeeping clause in a new Model Penal Code provision currently under consideration by the American Law Institute. *See* MODEL PENAL CODE: SENTENCING § 305.7 note (Discussion Draft No. 3, Mar. 29, 2010) [hereinafter MPC: SENTENCING] ("[T]he MPCS provision assumes that departments of corrections in the states will exercise their authority more frequently than their federal counterpart. State correctional agencies experience budgetary pressures unknown in the federal system, have more diverse offender populations, and should be more willing to advocate for the release of inmates whose continued confinement serves no demonstrable purpose."); Part III.B.4.

209. MPC: SENTENCING, *supra* note 208, § 305.6-.7.

nary and compelling circumstances, upon recommendation of a gatekeeping correctional authority.[210]

The second, and more novel, provision is proposed section 305.6, which would allow a judicial decision maker or judicial panel to reduce the sentence of prisoners who have served fifteen or more years of any sentence of imprisonment when, "in light of current circumstances, the purposes of sentencing ... would best be served by ... a modified sentence."[211] In other words, rather than restricting use of this provision to a short window following sentencing using the old Rule 35(b) model, the Model Penal Code prohibits use of the provision until fifteen years *after* sentencing.[212] This restriction suggests that proposed section 305.6 is designed to be used in cases involving serious crimes that have drawn lengthy terms of confinement as a way of allowing the court to reassess the continued propriety of extended confinement.[213] Commenting on an earlier—but, in this respect, substantially similar—draft of proposed section 305.6, Professor Richard Frase has explained that justifications for reducing a sentence under the draft provision might range from success in treatment programs to advances in technology that might permit an offender's safe return to the community.[214] The proposed provision would also grant the judicial decision maker discretion to appoint counsel for indigent applicants and require that notice be provided to the prosecuting authority and to the victims of the offenses for which the offender is incarcerated.[215] Decision makers would be required to maintain an "adequate record of proceedings," along with "a statement of reasons" for all modification decisions.[216] Finally, applicants would have access to discretion-

210. *Id.* § 305.7(1).

211. *Id.* § 305.6(4). By inviting reconsideration of the purposes of sentencing, proposed section 305.6 appears to authorize de novo review of all sentences longer than fifteen years.

212. *Id.* § 305.6(1).

213. *Id.* § 305.6 note ("Proposed § 305.6, which has come to be known as the 'second-look' provision, has no close precedent in the existing legislation of any state. It expresses a policy view that, many years into a prisoner's service of an extremely long prison term—§ 305.6 selects the 15-year mark—there should be a mechanism to reassess and, potentially, to modify the prisoner's original sentence.").

214. Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 197 (2009).

215. MPC: SENTENCING, *supra* note 208, § 305.6(3), (6).

216. *Id.* § 305.6(7).

ary court review, although it is not clear what standard of review would apply on appeal.[217]

Given the degree to which proposed section 305.6, which the Institute designates "Principles for Legislation" rather than a model statute,[218] fails to take a position on fundamental matters such as the importance of a public hearing prior to modification, it would be overreaching to call it a new model for judicial sentence modification. Along with proposed section 305.7, it marks the first time the Model Penal Code has recognized the legitimacy of "second look" provisions that provide an opportunity to reassess the propriety of continued imprisonment. Although it is not clear whether this provision will be adopted in the final revision of the Model Penal Code as it is currently drafted, its mere inclusion demonstrates a new openness to judicial involvement in early release decision making. The Model Penal Code's inclusion of proposed sections 305.6 and 305.7, if ultimately adopted by the American Law Institute, may prove influential in prompting jurisdictions to pass new legislation authorizing the practice of judicial sentence modification.[219]

C. Advantages of Judicial Sentence Modification

As the models described in Part III.B demonstrate, jurisdictions wishing to provide a judicial forum for sentence modification may do so in a variety of ways. New legislation might differ among jurisdictions with respect to the offenders eligible for modification, the minimum or maximum time in which a motion must be entertained, the circumstances that might justify modification, and the degree to which the opinions of interested parties or correctional authorities might factor into the decision to grant modification. Beyond those basic differences, states might make different choices regarding

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217. *Id.* § 305.6(8).

218. *Id.* § 305.6 note ("It has not proven possible to couch the provision in model statutory language; rather, the current draft takes the form of 'principles for legislation.'").

219. *Cf.* Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297 (1998) (commenting on the persuasive force of the original Model Penal Code and noting that "[i]n the first two decades after its completion in 1962, more than two-thirds of the states undertook to enact new codifications of their criminal law, and virtually all of those used the Model Penal Code as a starting point" (citing Herbert Wechsler, *Foreword* to MODEL PENAL CODE AND COMMENTARIES xi (1985))).

whether to provide counsel—an unlikely but possible choice—and whether to permit appellate review of modification decisions. However the authorizing legislation is structured, certain fundamental features distinguish it from more traditional methods of early release. When discussing judicial sentence modification, this Article defines the mechanism by the following key characteristics: (1) the petitioner is required to seek modification in the original sentencing court; (2) interested parties are given notice and opportunity to be heard prior to any decision to modify; (3) before modification is granted, the court holds a public hearing in open court; and (4) the judge is required to provide a reasoned, on-the-record explanation for any decision to modify.

The possible advantages of judicial sentence modification are many. First, unlike the application of sentence credit or the decision to parole, judicial sentence modification decisions are transparent, occurring in open court and accompanied by an on-the-record explanation. Moreover, because the mechanism invites the original sentencing court to consider whether an offender may be safely returned to the community at a time earlier than originally anticipated, judicial sentence modification has the potential to enhance both offender accountability (by requiring the offender to justify his early release to the court and community that sentenced him) and judicial accountability (by checking the judge's original assessment of the proper sentence against the reality of the post-sentencing experience). Transparency and accountability are characteristics that respond directly to the concerns that led to the abolition of parole and other forms of early release in the 1980s and 1990s; therefore, to the degree they can be fully realized through the mechanism of judicial sentence modification, these advantages suggest the mechanism is worthy of greater consideration.

1. Transparency

One of the distinguishing features of judicial sentence modification is the transparency that accompanies a judge's decision to reduce a sentence. Although no jurisdiction that currently utilizes judicial sentence modification requires a hearing on every motion filed, when a court determines that a motion may have merit,

ordinarily a hearing will be scheduled.[220] Under most state laws, such hearings must be preceded by notice to the district attorney and to any victims who have requested notification of post-sentencing proceedings.[221] These parties are then given opportunity to voice their support for, or objection to, the motion for modification either in writing or in person at the hearing.[222]

It is easy to imagine cases in which a hearing will be merely perfunctory, such as when a request for modification of a victimless crime is unopposed by the local prosecutor. Other cases may involve more extended proceedings, with competing testimony from lay witnesses or even experts. Regardless of how simple or complex the hearing may be, its salient feature is its visibility. Unlike parole hearings, which are held within prison walls and are ordinarily closed to the public,[223] sentence modification hearings occur in open court, providing not only interested parties but any interested person with an opportunity to witness the decision-making process. Although there is no reason to believe that the public will necessarily avail itself of the opportunity to participate in sentence modification hearings, the openness with which proceedings are conducted provides a powerful contrast to the oft-criticized inaccessibility of traditional back-end release decisions.

Equally important to the transparency of judicial sentence modification is the requirement that judges explain any decision to modify. Requiring judges to give an explanation of the decision to modify provides the parties and the public with a measure of confidence that the decision is a deliberative one that rests on

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220. *See, e.g.*, MD. CT. R. 4-345(f) ("The court may modify ... a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present at the hearing.... If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.").

221. *See, e.g.*, ALASKA STAT. § 12.55.088(e), (g) (2010) (requiring notice to the victim and directing the court to "consider the victim's comments ... when relevant, and any response by the prosecuting attorney and the person filing the motion"); MD. CT. R. 4-345(e)(2) (requiring the state to notify victims of sentence reduction hearings); *see also* ABA: SENTENCING, *supra* note 38, § 18-7.1(b) (requiring notice to the parties prior to sentence reduction).

222. *See supra* notes 220-21.

223. There are a handful of states that permit members of the public to attend parole hearings assuming they meet security regulations for entering the prison. *See, e.g.*, Open Parole Hearings Act, TENN. CODE ANN. § 40-28-501 to -505 (West 2010).

legitimate considerations. Scholarship in the area of procedural justice teaches that individuals' perceptions of the legitimacy of government action are influenced more by the fairness of the procedures used by decision makers than by the outcome reached in any given case.[224] This line of research demonstrates that when individuals encountering the criminal justice system—or any system, for that matter—feel "heard" and perceive institutional decision makers as unbiased, trustworthy, and respectful, their perceptions of the legitimacy of the system tend to increase.[225] By analogy, interested parties witnessing a judge's transparent, reasoned decision to reduce a sentence may actually increase their respect for the court's legitimacy. Such a result has no analog among the prison-based forms of early release currently in vogue.

2. Public Accountability

Beyond transparency, judicial sentence modification has an additional advantage that traditional mechanisms for early release lack: if well-implemented, it has the potential to enhance accountability for both the offender and the sentencing court.

Placing the release decision in the jurisdiction where the offender's crime occurred not only allows interested parties and community members access to the proceedings; it also invites the offender to revisit in a concrete way his offense and the community in which he committed it. Although there inevitably will be some cases in which judges will be willing to reduce short prison sentences based solely on an assessment that the original sentence was unduly harsh, it is probable that in the vast majority of cases, the judge will require the offender to justify a modification of sentence. In such cases, an offender seeking early release must be prepared to do more than show that he meets any statutory prerequisites for release. He must also convince the court that he can return home

224. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 65-72 (1988); *see also* Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 461, 478-79 (2009) (drawing on Tyler's work to explain that offenders' respect for the law can be enhanced by requiring judges to give reasons for the sentences they impose).

225. Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 747-48 (2003).

safely in less time than originally deemed appropriate. To do so, he will have to confront practical questions about where he will live and how he will occupy himself following release, as well as more difficult questions about whether he has been punished sufficiently for his crime, and why the community should feel confident that, if released, he will be unlikely to return to prison soon thereafter. Preparing plausible answers to these questions requires a level of engagement from the offender that enhances his accountability to the community by requiring him to proactively develop a plausible plan for his safe return home.[226]

The potential for offender accountability is an important feature of judicial sentence modification, but even that advantage is minor compared to the mechanism's potential for enhancing judicial accountability. While most forms of early release allow paroling authorities with no connection to the community to make release decisions, motions for judicial sentence modification return the prisoner to the court that confined him, thereby connecting the release decision to the original decision to imprison. Judges reviewing potentially meritorious motions for modification will be forced to confront the reasons for the original sentencing decision: not only the offense itself, but also the purposes identified for the punishment imposed. Periodically, the court may discover that the assumptions underlying its rationale were faulty.

Imagine that a sentencing judge believes an offender is an incorrigible drug addict who can only be prevented from abusing drugs by being incapacitated in a custodial setting. While in prison, it is discovered that the defendant is not addicted to drugs at all; rather, he suffers from a mental illness and, when treated with

226. Although many offenders prepare parole release plans in advance of their parole hearings, such plans often lack specificity of the sort local judges may require. An offender's promise to secure treatment through a local charity may be well received by a statewide parole board but vigorously challenged by a local judge who knows the services the agency provides are not those the offender needs. Situating the release decision at the community level is likely to require the offender to make his case with a greater level of specificity. Ideally, of course, the offender would not be forced to devise such a plan unaided but would be able to secure assistance from social workers or reentry coordinators trained to work with inmates on issues of release planning. Such assistance is becoming increasingly common as federal funds are made available to assist in the development and implementation of reentry planning programs. *See generally* Second Chance Act of 2007, Pub. L. No. 110-199, § 3(a)(5)-(6), 122 Stat. 657, 658 (2008) (authorizing transitional services for prisoners reentering the community).

proper medication, he functions normally. Or perhaps the court rightly believes the offender is a drug addict and imposes a substantial sentence believing it will provide the defendant with time to receive intensive drug treatment in prison. In reality, however, the treatment slots have been cut in the wake of budget shortfalls and only those prisoners nearing their release date are being admitted to the drug treatment program. In either case, a court ruling on a motion for sentence modification will be confronted with a discrepancy between the assumptions on which its sentence was based and the reality that followed. By inviting the sentencing court to revisit the original sentencing decision in light of post-sentencing realities, judicial sentence modification provides the sentencing court with the opportunity to reassess, in light of more accurate information, whether the original sentencing decision was just and whether it entailed a prudent allocation of costly correctional resources.

Of equal if not greater importance, the accountability fostered by judicial reconsideration of sentences has great potential to spill over into front-end sentencing decisions. Ordinarily, the criminal justice system provides no feedback loop informing judges of what happens to defendants after sentencing. With limited exception, the pronouncement of sentence is the judge's last word on the matter; regardless what follows, there is no mechanism that later disabuses her of any misconceptions she may have with respect to a particular offender or to the operation of the prison system more generally. Judicial sentence modification therefore could provide a valuable way for judges to hear "the rest of the story." Information thus gained might well affect not only early decisions, but front-end sentencing decisions, too. Over time, these front-end effects could be significant, particularly for judges who find they have overestimated the amount of confinement necessary to accomplish the purposes for which a sentence was imposed. Because judicial sentence modification holds the potential to change durations of confinement for both those already sentenced and those whose sentences have yet to be imposed, it is a mechanism that legislatures wishing to expand early release options ought to consider seriously.[227]

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227. As Todd Clear and James Austin have emphasized, "[T]he total number of prisoners behind bars is purely and simply a result of two factors: *the number of people put there* and *how long they stay*." Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 308 (2009).

3. Sustainability

While more popular early release mechanisms such as good time credit and earned release are capable of providing immediate, large scale relief to overcrowded prison systems, phenomena such as Illinois's recent failed experiment with early release suggest that mechanisms that lack accountability are unlikely to maintain public support over time.[228] It would be naïve, of course, to suggest that judicial sentence modification is a panacea, capable of solving the problem of mass incarceration and impervious to public backlash. As a matter of political reality, all mechanisms for early release are vulnerable to repeal any time a releasee commits a new crime.[229]

Nevertheless, judicial sentence modification may have an advantage over other mechanisms in this regard. Because executively controlled release decisions provide no formal opportunity for public objection before a release decision is made, public outcry may be greater when the decision has unhappy consequences. Judicial sentence modification, on the other hand, provides the public with an opportunity to resist release before modification is granted.[230] For that reason, it is possible that judges—particularly those who are elected—may be hesitant to release large numbers of persons from custody early, especially in the absence of clear guidance regarding the circumstances the legislature believes would justify early release. For states eager to save large sums of money by lowering prison populations quickly, that may not be welcome news.

Yet the very factors that prevent judicial sentence modification from providing large-scale, rapid release are the same factors that suggest it may have more long-term sustainability than more popular early release mechanisms. Judges may hesitate to release

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Only by affecting one or both of these factors can the prison population be reduced. If the practice of judicial sentence modification were to alter judges' front-end sentencing decisions, then the mechanism could have direct (on the back end) and indirect (on the front end) effects on the length of confinement.

228. *See supra* notes 139-49 and accompanying text.

229. *See supra* notes 139-49 and accompanying text.

230. Availing the public of a forum in which to voice opposition before an offender's sentence is modified may not shield decision makers from later criticism should the released person commit new crimes. That is true even when no one voiced serious objections to modification at the time the decision was made. Such a fact would, however, provide a decision maker with a respectable response to any such criticism.

offenders whose crimes justified imprisonment in the first instance, but when they do, they are likely to do so after thoughtful deliberation, having weighed the individual characteristics of the offender and the nature of the crime for which he has been imprisoned, as well as having given due consideration to the likely effect of release on public safety. Such decisions, particularly when made on the record in open court, may well possess a legitimacy that executively controlled mechanisms for early release lack.

These differences may explain why states that have traditionally utilized sentence modification have done so consistently, even during the height of determinate sentencing when back-end forms of release were considered most suspect. Wisconsin is a good example: although it abolished parole and good time credit in 1999, it never abandoned the practice of sentence modification or imposed any legislative restrictions on its use.[231] To the contrary, so positive was the state's experience of judicial sentence modification that it has continued to experiment with legislative mechanisms that expand judicial sentence modification for prisoners meeting established criteria.[232] For states committed to using early release as a tool for reducing prison populations over the long run, judicial sentence modification is, at the very least, a promising mechanism worthy of greater consideration.

D. Potential Limitations of Judicial Sentence Modification

As Part III.C illustrates, the judicial character of the sentence modification mechanism distinguishes it from other forms of early release. That feature makes sentence modification in many ways more akin to resentencing than to parole, and gives rise to unique legal, practical, and structural considerations that merit further discussion.

1. Constitutional Constraints

The first question that must be answered is whether the mechanism is legal. Although neither federal nor state courts have held

231. *See supra* notes 62, 191 and accompanying text.
232. *See* WIS. STAT. § 973.195 (2008).

that constitutional considerations bar all forms of sentence modification, the practice does have important constitutional implications with which jurisdictions have been forced to grapple. First is the effect of the Fifth Amendment's guarantee against double jeopardy on the sentencing options available to modifying courts. Second is whether and how the separation of powers doctrine, particularly as enshrined in state constitutional law, affects the manner in which release authority is allocated between the judicial and executive branches.

a. Double Jeopardy

The Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[233] This clause has been held to guard not only against retrial for an acquitted offense, but also to "protect[ ] against multiple punishments for the same offense."[234] Although the Supreme Court has not had occasion to confront the double jeopardy implications of sentence modification directly, the Court has noted with seeming approval the common law practice of permitting modifications of any sort—that is, higher or lower—during the original term of court, prior to the commencement of sentence.[235] These modifications were not governed by protections similar to those attending the right to be free from retrial following acquittal.

The Supreme Court has not directly held that the Double Jeopardy Clause itself would bar an increase in the imposition of

233. U.S. CONST. amend. V.

234. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

235. In *United States v. DiFrancesco*, 449 U.S. 117, 133-34 (1980), the Court was asked to decide whether a new federal statute permitting the government to appeal a defendant's sentence violated the Double Jeopardy Clause by permitting an appellate court to vacate the defendant's original sentence and remand for imposition of a harsher sentence. In holding that "[t]he double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence," the Court relied heavily on the common law, which permitted trial courts to increase as well as decrease sentences during the same term of court. *Id.* at 133-34, 136 (citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 167 (1873); 3 EDWARD COKE, INSTITUTES § 438 (13th ed. 1789)). Indeed, the Court went so far as to note that the common law "accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve that sentence." *Id.* at 134.

a legal sentence that has already commenced; however, it has suggested as much in dicta.[236] In *United States v. Benz*, the Court cited a line of authority suggesting that a court loses power to *increase* a sentence once service has commenced even during the same term of court, and explained that the rule "is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense" in violation of the Double Jeopardy Clause.[237] Therefore, although "[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be,"[238] at the same time, most jurisdictions agree that once a legal sentence has commenced, increasing it would be improper.[239] What constitutes the commencement of the sentence varies widely, however, ranging from oral pronouncement of sentence by the court to arrival at the prison where a custodial sentence will be served.[240] In a few states, increases in sentence are permitted so long as they occur with "reasonable promptness"—usually interpreted to mean a time period within hours of the original sentence pronouncement.[241]

Notably, there appear to be no reported cases of any court increasing a sentence following a motion for modification, and for good reason: judicial sentence modification has traditionally been used solely as a means of reducing the term of a custodial sentence.[242] Although that fact substantially diminishes the risk of double jeopardy violations, it does not wholly eliminate them. As one commentator has observed, double jeopardy concerns might arise in the context of sentence modification if a term of imprisonment were modified to a term of release with extensive conditions

236. United States v. Benz, 282 U.S. 304, 306-07 (1931).

237. *See id.*

238. *DiFrancesco*, 449 U.S. at 137.

239. Lee R. Russ, Annotation, *Power of State Court, During Same Term, To Increase Severity of Lawful Sentence—Modern Status*, 26 A.L.R. 4th 905, § 3 (1983).

240. *Id.* §§ 7-8.

241. *Id.* § 4.

242. *See, e.g.*, ABA: SENTENCING, *supra* note 38, § 18-17.1(a) ("The rules should restrict the time *for reduction in severity of a sentence* to a specified period after imposition of a sentence.") (emphasis added); *id.* § 18-17.2(b) ("The rules should provide that any modification of the requirements or conditions of a sentence under this authority may not increase the overall severity of an offender's sentence.").

or, even more plausibly, if the terms of a conditional release sentence were changed in a way that appeared more onerous.[243] To avoid such problems, legislators would do well to specify that sentence modification be used only to reduce sentence length in the context of custody or to reduce the severity of conditional supervision, absent consent from the defendant to the imposition of more onerous requirements.[244]

b. Separation of Powers

A second constitutional consideration implicated by the practice of judicial sentence modification is the doctrine of separation of powers. Traditionally, in both the state and federal systems, the judiciary has been responsible for imposing sentences while executive branch agencies have had sole responsibility for implementing the sentences once imposed. Early challengers to the practice of sentence modification therefore contended that allowing the court to modify an already-imposed sentence impermissibly intruded on the executive powers of pardon and commutation, which determined the manner and degree to which a sentence would or would not be implemented.[245]

In 1931, the Supreme Court addressed that argument in *United States v. Benz*.[246] In that case, a defendant was sentenced to ten

243. Frase, *supra* note 214, at 199 (suggesting that if the "old and new sentence are not directly commensurate," to avoid double jeopardy problems it would be "necessary to devise equivalency scales covering different sentence types").

244. Of course, as students of penology have long noted, calculating the punitive weight of noncustodial penalties is extraordinarily difficult for many reasons, including subjective differences in the manner they are imposed by authorities and experienced by defendants. *See* NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 75-81 (1990) (proposing use of such scales in the original sentencing context).

245. United States v. Benz, 282 U.S. 304, 305-06 (1931).

246. *Id.* Today such an argument seems purely legalistic given the pinched way in which the President and most state governors exercise their commutation powers. *See generally* Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569874 (cataloging decline in the use of executive clemency). However, the clemency powers of the President were exercised with regularity until 1980. *Id.* at 27. In the states, the clemency powers were similarly exercised among the states throughout the early years of the twentieth century, after which they were gradually replaced by use of executively controlled parole. *Id.* at 21 n.59. Consequently, at the time *Benz* was decided, concern that the judicial and

months incarceration in federal court.[247] After his sentence commenced, but before the court's term had ended, the defendant moved for sentence modification.[248] The district court granted the motion, reducing the sentence to six months imprisonment. On appeal, the government argued that the court's reduction of a valid sentence after it had been partly served was an invasion of the executive's power under Article II, Section 2, Clause 1 of the United States Constitution.[249] The Court rejected that challenge, however, and declared:

> The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the *enforcement* of the judgment, but does not alter it *qua* judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.[250]

State courts ruling on challenges to Rule 35 analog statutes have ordinarily rejected separation of powers claims on similar grounds.[251] In at least one case, however, a state court found a separation of powers violation when a trial court held in abeyance a motion for sentence modification, failing to rule on it within a reasonable amount of time following the prescribed 120-day limit.[252]

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executive powers might conflict had more grounding in practice than it would today.

247. *Benz*, 282 U.S. at 306.

248. *Id.*

249. *Id.*

250. *Id.* at 311.

251. *See, e.g.*, People v. Smith, 536 P.2d 820, 822 (Colo. 1975) (holding that the 1970 version of Colorado Rule of Criminal Procedure 35(a) did not violate separation of powers doctrine or executive power of commutation).

252. State v. Chapman, 825 P.2d 74, 78-79 (Idaho 1992) (refusing to permit a judicial "invasion of the executive authority held by the Commission of Pardons and Parole" and holding that a trial court's failure to timely rule on a validly filed Rule 35 motion divested the court of jurisdiction); *see also* Brandt v. State, 796 P.2d 1023, 1025 (Idaho 1990) (holding that an attempt by the judiciary to use Idaho Criminal Rule 35 outside the statute's 120-day jurisdictional limit "would clearly violate the separation of powers, Idaho Constitution art. 2, by allowing the judiciary to encroach upon the pardoning and paroling authority of the executive branch, Idaho Constitution art. 4, § 7, and the power of the legislature to establish

Often, the invocation of the phrase "separation of powers" in the context of state sentence modification has been less about constitutional law than about good public policy.[253] In some jurisdictions, like Maryland, sentence modification by the trial court can arguably impinge on the executive branch power to implement the sentence by undermining the decision of the paroling authority.[254] This argument has influenced the development of the common law surrounding sentence modification in Wisconsin, where courts have self-imposed limits on their ability to consider factors that would ordinarily fall within the purview of the parole board. In modern sentencing practice, the shift of power between the judiciary and the executive has been fluid with respect to sentencing. Indeterminate sentencing with its emphasis on parole boards gave way to determinate sentencing with its emphasis on judicially imposed durations of confinement.[255] It is not surprising that new efforts to expand early release might permit a mixture of executively controlled release and judicially controlled sentence modification. Viewed in historical context, the potential coexistence of judicial sentence modification and executive controlled release mechanisms appears more a legitimate legislative policy decision than an unconstitutional usurpation of executive power by the judiciary. Not surprisingly then, *Benz* and the state cases that followed it have largely established that sentence modification does not violate the separation of powers doctrine per se.

A distinct separation of powers challenge has arisen, however, with respect to newly enacted, shared decision-making legislation. In *State v. Stenklyft*, a litigant challenged a new Wisconsin statute that gave district attorneys veto power over petitions for discretionary sentence reduction filed by qualifying state prisoners.[256] Under the terms of the statute, certain felony offenders could seek sentence reduction after serving a designated portion of their custodial sentences.[257] Before a judge could grant relief, however,

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suitable punishment").

253. *See, e.g.*, Grossman & Shapiro, *supra* note 154, at 27-36.

254. *See supra* note 170 (observing that some Maryland sentencing judges have admitted to modifying sentences in response to the parole board's unwillingness to grant release).

255. *See supra* Part I.A.

256. 697 N.W.2d 769, 773-75 (Wis. 2005).

257. The statute provided that any of the following grounds could justify a reduction in sentence:

the prosecuting attorney was entitled to notification.[258] If the prosecutor objected to the petition, the judge was obliged to deny the petition outright; if not, the judge retained discretion to either deny the motion or reduce the prisoner's sentence, if doing so was in the public interest.[259] While acknowledging that "[s]entencing a defendant is an area of shared responsibility" among the branches of government, the Wisconsin Supreme Court emphasized that "the power to decide an individual case is an exclusive core judicial power, and any invasion of the exclusive core constitutional powers of the judiciary violates the doctrine of separation of powers under our state constitution."[260] Because the statute permitted a party to the original criminal action to dictate the outcome of a sentence reduction case, the court held that the district attorney veto provision of the statute was unconstitutional.[261] Although the case law exploring the constitutionality of shared decision-making provisions is sparse, *Stenklyft* suggests that courts addressing constitutional challenges may be unwilling to cede too much gatekeeping

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> 1. The inmate's conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs since he or she was sentenced.
>
> ....
>
> 3. A change in law or procedure related to sentencing or revocation of extended supervision effective after the inmate was sentenced that would have resulted in a shorter term of confinement in prison or, if the inmate was returned to prison upon revocation of extended supervision, a shorter period of confinement in prison upon revocation, if the change had been applicable when the inmate was sentenced.
>
> 4. The inmate is subject to a sentence of confinement in another state or the inmate is in the United States illegally and may be deported.
>
> 5. Sentence adjustment is otherwise in the interests of justice.

WIS. STAT. § 973.195(1r)(b) (2003).

258. Specifically, the statute provided that the sentencing court could deny the petition upon receipt or hold it for further consideration. If the court held the petition, it was required to notify the district attorney, and in some instances the victim. *Id.* § 973.195(1r)(c)-(d).

259. The statute plainly provided: "If the district attorney objects to adjustment of the inmate's sentence within 45 days of receiving notification ... the court shall deny the inmate's petition." *Id.* § 973.195(1r)(c). If, however, the court received no objection to sentence adjustment from the district attorney and the court determined that sentence adjustment was in the public interest, the court was permitted to reduce the inmate's sentence if the court provided a written explanation. *Id.* § 973.195(f).

260. *Stenklyft*, 697 N.W.2d at 794, 796. *But see* Beanblossom v. State, 637 N.E.2d 1345, 1348 (Ind. Ct. App. 1994) (reaching the opposite conclusion with respect to a similar state statute).

261. *Stenklyft*, 697 N.W.2d at 797-98.

power to executive actors, be they prosecutors or even, perhaps, prison officials.

2. Practical Questions

Beyond constitutional considerations lie practical questions regarding the administrability of judicial sentence modification. First is a question of administrative capacity: will courts be overwhelmed by the process of adjudicating motions for judicial sentence modification? Second is a question of utility: will judges use the mechanism if given the opportunity? Third is a question of scale: are sentence modification decisions likely to respond adequately to the cost concerns that have motivated states' newfound willingness to provide for early release?

American courts are busy places, and judges often struggle to keep pace with their expanding dockets. We therefore need to question whether courts have the administrative capacity to reconsider large numbers of already-imposed sentences. While it is true that any new legislation authorizing judicial sentence modification would likely lead to a temporary surge in filings, it seems unlikely that such motions would clog dockets or otherwise impede the orderly administration of justice in the trial courts. Why not? First, experience demonstrates that courts routinely receive and review correspondence from prisoners seeking relief in various forms, whether authorized by law or not; thus, it is possible that the passage of laws would simply give new captions (and possible merit) to requests already being processed by the courts. Moreover, jurisdictions such as Wisconsin and Maryland that currently utilize sentence modification appear to do so efficiently and without detriment to the court's ability to manage other demands on its time.

Yet even if new legislation were to lead to a substantial increase in motions for sentence reduction, so long as courts remained free to deny motions without hearing, it is unlikely that the number of filings would present any serious threat to courts' administrative resources. Over the past twenty years, increases in pro se litigation have forced courts to develop administrative procedures for efficiently handling motions filed by unrepresented litigants in all

areas of law.[262] It is therefore likely that courts would be able to easily adapt current administrative processing procedures to handle motions for sentence modification. Court staff might screen motions from litigants who do not qualify for sentence modification, either because they did not file their motions on time, they do not fall within the class of litigants authorized to file for sentence reduction, or they have not alleged a proper ground for relief.[263] Even when a prisoner has met all relevant criteria, because sentence modification is a discretionary remedy, a judge would be permitted to deny hearing when the facts alleged to be true are insufficient to convince her that a reduction in sentence is warranted. Having thus screened out meritless and nonpersuasive motions, a much smaller and more manageable universe of cases would be left for full hearing and possible sentence modification.

The next question, then, is whether judges will want to hold hearings and modify sentences. Mechanisms for early release are only meaningful to the extent that they are utilized, and it is fair to ask whether judges would want to revisit sentencing decisions that may have been difficult to render in the first instance. Although the lack of empirical data on judges' use of sentence modification prevents more than educated speculation on this point, the limited information available suggests that the power to modify is one many judges do exercise when authorized to do so. Professors Grossman and Shapiro's 2003 study of the use of sentence modification in

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262. Federal and state courts have developed a variety of procedures that can assist them in sifting potentially meritorious cases from meritless ones. Examples of such procedures include the use of designated forms that allow screeners to quickly identify relevant information and the employment of specialized pro se or writ clerks to screen initial filings. *See, e.g.*, AM. JUDICATURE SOC'Y, REVISED PRO SE POLICY RECOMMENDATIONS 4 (2002), *available at* http://www.ajs.org/prose/pdfs/Policy%20Recom.pdf ("[Encouraging courts to] develop simplified court forms that are understandable to and easily utilized by the self-represented ... will not only serve to enhance the efficiency of the litigation process by saving time for court staff, litigants and judges, but also will enhance the fairness of legal proceedings."); *see also* FED. JUDICIAL CTR., RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION 12 (1996) (discussing screening of prisoner civil rights complaints by designated pro se law clerks in federal district courts).

263. The process of screening pro se litigation is a common one, sometimes required by statute, *see* 28 U.S.C. § 1915A (2006) (requiring pre-service screening of all *in forma pauperis* civil suits filed by prisoners to ensure litigants have stated a claim on which relief may be granted), and sometimes voluntarily undertaken. Administrative screening can streamline the judicial process, allowing judges to quickly assess whether a litigant meets statutory prerequisites for relief.

Maryland reports that the practice was strongly favored by state judges, prompting a unanimous vote in 2002 by the Maryland Conference of Circuit Judges to oppose legislation designed to limit judges' power to modify sentences.[264] Moreover, the fact that Maryland judges modified the sentences of more than one hundred violent felons between 2005 and 2009 suggests they may be modifying sentences with some frequency in cases involving less serious offenses.[265] In Wisconsin, informal examinations of sentence modification suggest that despite stringent common law restrictions, judges remain willing to modify sentences in at least some cases.[266] And while the Administrative Office of the United States Courts does not track outcomes in motions for sentence modification made pursuant to 18 U.S.C. § 3582(c)(1)(A), the U.S. Sentencing Commission recently reported that judges have been making robust use of their power to modify sentences under another federal sentence modification statute, 18 U.S.C. § 3582(c)(2), which permits judges to reduce sentences to give discretionary retroactive effect to changes in the Sentencing Guideline provisions for certain offenses.[267] These actions are consistent with the inference that, if authorized, the power to modify sentences is one the judiciary would be willing to exercise in at least some cases.

Yet even if judges are authorized to modify sentences and are amenable to doing so in some situations, the question remains whether judicial sentence modification is a mechanism well suited to deliver the cost savings states hope to obtain from early release legislation. Unlike sentence credit, judicial sentence modification cannot provide sentence reduction *en masse* through pure administrative action—however structured, judicial modification will always require individualized consideration of each application for relief. That does not mean, though, that the mechanism cannot serve as an important ameliorative device. Parole also requires individualized release determinations preceded by hearings, and as discussed in

264. *See* Grossman & Shapiro, *supra* note 154, at 28 & n.208.

265. *See supra* note 177 and accompanying text.

266. *See supra* note 190-94 and accompanying text.

267. *See* Brief for the United States Sentencing Commission as Amicus Curiae in Support of Respondent at 7, Dillon v. United States, 130 S. Ct. 2683 (2010) (No. 09-6338) (reporting that following a 2007 reduction in the guidelines for crack cocaine offenses, the district court ruled on 23,471 motions and granted 15,501, with an average sentence reduction of 25 months imprisonment).

Part II.A.1, many recent budget-conscious reforms have focused on expanding parole eligibility on the assumption that doing so will have measurable effects on correctional expenditures. Insofar as the mechanisms of parole and sentence modification both require individualized assessments of offenders, sentence modification has equal potential for providing relief in the form of early release. Both mechanisms require individualized release determinations and both rely on the willingness of decision makers to exercise their power to release offenders from prison to the community.[268] Therefore, setting aside the many unique benefits of the judicial mechanism discussed above, the judicially based mechanism has as much capacity to save states' money as more popular, prison-controlled methods of back-end release.

3. Additional Considerations

Apart from potential practical obstacles to the widespread use of judicial sentence modification are questions about the mechanism's theoretical soundness. First and most pressing among these is the question of whether judges are the best-positioned officials to render early release decisions. The idea of sentencer as sentence modifier creates an appealing conceptual symmetry; however, there are arguments to be made against allowing judges to control release decisions.

In an ideal case, an offender seeking sentence modification would return to the judge who sentenced him. That judge would be armed with reliable information about the offender, his crime, the local community from which he came and to which he would be returning,

268. Of course, it may be that the accountability that attaches to making a release decision in open court might lead judges to hesitate before granting prisoners any substantial reduction in sentence. Such hesitation might stem from any number of factors, including whether judicial sentence modification has an established tradition within the jurisdiction, whether judicial officials are elected or appointed, and the degree to which judicial release decisions are guided by statute. It is important to remember, however, that judicial officials are not the only decision makers subject to political constraints. Parole boards, as arms of the executive, are subject to many similar pressures that limit their willingness to provide for early release to the degree legislatures may desire. *See* SIMON, *supra* note 7, at 160 (reporting that the parole rate for eligible California prisoners dropped to 5 percent from 1983 to 1991, to 1 percent from 1991 to 1999, and then to almost zero through 2002); Reitz, *supra* note 50, at 227 (noting "the susceptibility of parole boards to political influence and a natural institutional drift toward severity in practice").

the kind of programs the offender had completed in anticipation of release and what, if anything, he had gained from them, along with a concrete plan for the offender's post-release living arrangements, employment, treatment, and community supervision. With that information in hand, the judge would then make a nuanced assessment of whether the offender might be able to return to the community earlier than provided by the original sentence without unduly diminishing the punishment appropriate for the crime or unreasonably compromising public safety.

In reality, given the volume of criminal cases processed by state courts, it is unlikely that most judges will remember any but the most notorious criminal offenders. Ironically, those are the offenders who would be least likely to qualify for early release due to the severity of their crimes. It is the low-level thieves, minor drug dealers, and drunk drivers who are most likely to be eligible for sentence modification;[269] they are also likely to be the least memorable. Compounding questions about the judge's personal knowledge of any given prisoner is the fact that oftentimes the judge who imposed the sentence will be unavailable to review an offender's request for sentence modification. The original judge may have changed jobs, retired, or moved on to a different rotation in the court system. In such cases, although the original "court" will hear the prisoner's petition, the sentencing judge, with her potentially unique knowledge of the offender and his crime, will not.

Personal knowledge of the offender and his offense is not the only information judges may lack. Insofar as judicial sentence modification is conceived as a direct descendant of traditional parole release under the rehabilitative model, there are good reasons to question reliance on judges as decision makers.[270] Not only may a judge's historical memory of any given offender and crime be fuzzy to nonexistent, but the judge's knowledge of the offender's post-sentencing conduct, program participation, and overall "institu-

269. *Cf. supra* note 179.

270. Commenting on the fact that the parole boards did not seek judicial input before rendering their release decisions, Judge Frankel once observed that "the idea of consulting the sentencing judge [in such an instance] is essentially nonsense anyhow." Frankel, *supra* note 32, at 16 n.54. Frankel explained: "The judge has had no opportunity for the kind of observation that is supposedly for the Parole Board. He knows nothing of the post-sentencing history. He is likely, in a word, to have nothing to contribute." *Id.*

tional rehabilitation" is likely to be poorly developed and based on limited information provided by the offender himself. Moreover, any documentation of institutional conduct that courts do receive will likely be of limited utility because, unlike parole boards, many judges do not possess any specialized knowledge of the difference between various correctional treatment programs or understand the seriousness or insignificance of different types of disciplinary infractions. Consequently, if release decisions are to be based upon post-sentencing institutional factors alone, there is something to be said for leaving release decisions in the hands of correctional officials.

But although release decisions must account for certain basic facts about post-sentencing conduct—for example, whether the offender committed further crimes while incarcerated—it remains true that institutional facts are imperfect predictors of successful reentry.[271] Local considerations such as the availability of community-based treatment options, the existence of informal social controls, and the perspective of crime victims may, depending on the particular case, be at least as relevant to the release decision as the number of institutional programs in which an offender has participated. With respect to these considerations, the judge may be far better informed than the statewide parole board, and her decisions may therefore be more attuned to public safety considerations. Support for that proposition draws strength from the growing popularity of reentry courts, which position judges as community problem solvers.[272] In these specialized courts, judges manage offenders immediately following incarceration, setting conditions with which offenders must comply and monitoring compliance through frequent court hearings, augmented by out-of-court community-based treatment programming.[273] The growing popu-

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271. *See, e.g.*, SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 10-14 (2001) (suggesting that desistance from crime derives from offenders' internal narratives); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 25 (2001) (connecting desistance to employment and marriage, both factors that are limited by institutional confinement).

272. *See* Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the "Reentry Court" Concept from a Strengths-Based Perspective*, 4 W. CRIMINOLOGY REV. 91, 91-92 (2003); Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 127-28 (2007).

273. Maruna & LeBel, *supra* note 272, at 92.

larity of these judicially administered programs suggests not only that judges may be capable of assessing whether and under what conditions offenders may be safely returned to their communities, but also that there is a degree of public tolerance for the judiciary's ability to do so.

Moreover, to the degree that the early release decision invites reexamination of the normative question of whether the offender has been sufficiently punished for his offense, courts—not parole boards—have traditionally been arbiters of justice with respect to the outer limits, at least, of the quantum of punishment merited in any given case.[274] It is courts that are thought to possess the moral authority to "pass judgment," and it is for that reason that the sentencing has traditionally been imposed by the court. Insofar as other forms of early release invite prison administrators and parole boards to second-guess the amount of punishment imposed by the judge, we may worry that their decisions will be driven by administrative concerns at the expense of offender accountability. Judges, therefore, possess some significant institutional advantages when it comes to deciding whether an offender should be given early release.

That leaves one more important question: will allowing judges to make release decisions unfairly exacerbate disparities already present in the criminal justice system, thereby making the practice intolerably unjust regardless of its potential expediency? Some have argued that the parole board's distance from local communities is actually one of its strengths, since unlike the local judge, the statewide parole board sees the "big picture" and can time release decisions in individual cases to correct for inequitable sentencing disparities.[275] Setting aside the question of whether parole boards

274. Grossman & Shapiro, *supra* note 154, at 32 (asserting that judges are better-positioned than parole boards to understand the nature and seriousness of an offender's crime, the offender's degree of personal culpability, and the effect of the crime on the victim and the community).

275. As Professor Albert Alschuler has put it,

> [t]he back-end agency is a jurisdiction-wide agency so it is in a much better position to eliminate disparities than sending it back to the sentencing judge. [Professor Richard] Frase says sentencing is a judicial function, but it has never been an exclusively judicial function. The back end is better able to take account of institutional needs.

Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT'G REP. 211, 221 (2009) (quoting Professor

are well positioned to decide what is inequitable, it is true that judicial release decisions have the potential to exacerbate preexisting disparities. This is true for several reasons. First, some judges will inevitably be more willing to reconsider sentences than will others, a difference that means some judges may deny all motions for sentence modification out of hand, while others hold hearings and grant relief in a substantial number of cases.[276] Second, even among judges who are open to exercising their discretionary power, worries about public safety may limit their willingness to reduce sentences for offenders in need of services in communities lacking the formal and informal resources that would permit safe return to the community. Such considerations suggest that offenders returning to disadvantaged communities might be less likely to secure early release than offenders returning to communities better able to meet their needs for supervision or community-based programming.

The fact that a release decision might turn on factors beyond the offender's desert and outside his control is troubling; however, it is important to distinguish between disparate effects that may flow from discretionary decisions and the disparate application of law itself. All can agree that it would be improper to apply different legal standards to different offenders in making release decisions. That is different, however, from recognizing that the application of identical standards—for example, whether the offender can be safely released to the community at this time given the available resources—may yield different answers in different cases.[277] Those who prefer harsh treatment for all prisoners to potential relief for some may conclude that judicial sentence modification will not pay its way. But insofar as too many prison sentences are exacting too much both fiscally and socially, a minor amount of increased

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Albert Alschuler, Statements at the American Bar Association Commission on Effective Criminal Sanctions Second Look Roundtable (Dec. 8, 2008)).

276. The data collected by the Maryland Sentencing Commission is consistent with this observation. The Commission's annual reports from 2005 to 2009 show that judges in the Third Circuit (composed of Baltimore and Harford counties) reported no sentence modifications, while judges in the equally urban Seventh Circuit (Prince George's, St. Mary's, Calvert, and Charles counties) modified sentences in 155 reported cases, making that district responsible for 75 percent of reported sentence modifications during the relevant five-year period. *See supra* note 177.

277. Parole decisions themselves may, of course, be subject to the same critique.

disparity may ultimately be more tolerable than maintaining the status quo. Judicial sentence modification offers willing judges a way to reduce sentences that appear unnecessarily punitive in a way that is open to public scrutiny. For that reason, despite its limitations, the mechanism has potential to bring greater legitimacy to the early release decision.

CONCLUSION

As states continue to struggle with the costs of mass incarceration in this time of financial crisis, they are likely to discover that the public's willingness to reduce prison populations is highly conditional. Early release mechanisms that enhance the legitimacy of the criminal justice system are therefore to be preferred over those that may be perceived as unaccountable or abusive.

Whatever form judicial sentence modification may take—whether time-limited or open-ended, permitted only for "extraordinary" reasons or for more mundane ones—it has the potential to transparently display the work of the criminal justice system and enhance judicial and offender accountability in ways that other, more common forms of early release cannot. For that reason, states seeking to cut correctional costs through the use of early release would do well to give serious consideration to making use of the mechanism's untapped potential. Given its unique attributes, judicial sentence modification promises to be the most legitimate, and hence the most sustainable, early release mechanism available today.