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Modifying Unjust Sentences

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I. INTRODUCTION

America's appetite for incarceration has exhausted state budgets, pushed prisons to dangerous levels of overcapacity, and decimated communities. In 2013, the United States confined over 1.5 million people in state and federal prisons[1] and thus continued its reign as the world's incarceration leader, both in the number of people it incarcerates and its rates of incarceration.[2] Since 1980, the national population has grown by approximately 40%,[3] but its incarceration rate has grown by nearly 800%.[4] In a 2013 speech to the American Bar Association, U.S. Attorney General Eric Holder decried widespread incarceration at the federal, state, and local levels as "both ineffective and unsustainable" and assailed the "significant economic burden" and "human and moral costs that are impossible to calculate" which result from this phenomenon.[5] Indeed, states now spend about $50 billion a year housing prisoners,[6] a figure second only to Medicaid spending.[7] As of 2008, more than 1 in every 100 adults—and more than 1 in every 15

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[1] E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 247282, PRISONERS IN 2013, at 2 tbl.1 (2014), *available at* http://www.bjs.gov/content/pub/pdf/p13.pdf.

[2] Roy Walmsley, International Centre for Prison Studies, *World Prison Population List* 1 (10th ed. 2014), http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf.

[3] *See Pop Culture: 1980*, U.S. CENSUS BUREAU, http://www.census.gov/history/www/through_the_decades/fast_facts/1980_new.html (last visited Oct. 19, 2014) (depicting the total U.S. resident population in 1980 as 226,542,199); *USA People QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last visited Oct. 19, 2014) (estimating the total U.S. population in 2013 at 316,128,839).

[4] Charlie Savage, *Justice Department Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?pagewanted=all. Between 1985 and 2010, the state prison population grew by 204%, and states' correctional spending rose by 674%. VERA INST. OF JUSTICE, THE CONTINUING FISCAL CRISIS IN CORRECTIONS: SETTING A NEW COURSE 4 (2010), *available at* http://www.vera.org/sites/default/files/resources/downloads/The-continuing-fiscal-crisis-in-corrections-10-2010-updated.pdf. The total prison population dropped each year between 2010 and 2012 but began climbing again in 2013. *See* CARSON, *supra* note 1, at 1.

[5] Savage, *supra* note 4 (quoting Attorney General Eric Holder).

[6] Carrie Johnson, *Budget Crunch Forces A New Approach To Prisons*, NAT'L PUB. RADIO (Feb. 15, 2011, 12:01 AM), http://www.npr.org/2011/02/15/133760412/budget-crunch-forces-a-new-approach-to-prisons.

[7] Adam Skolnick, *Runaway Prison Costs Thrash State Budgets*, FISCAL TIMES, Feb. 9, 2011, http://www.thefiscaltimes.com/Articles/2011/02/09/Runaway-Prison-Costs-Thrash-State-Budgets.

African American men[8]—had been incarcerated. Many prisons are operating significantly over capacity,[9] resulting in increased violence, idleness, and unrest, as well as decreased access to rehabilitative programs and medical and mental health care.[10] The severe overcrowding and resulting dire shortages in medical and mental health treatment in California prisons offer a snapshot into the conditions suffered by some inmates.[11]

In response to these staggering economic and human costs, liberals and "tough on crime" conservatives have joined together to

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[8] THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5, 7 (Feb. 2008), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf. Because male prisoners constitute 93% of the prisoner population in the United States, this Article will focus on male prisoners. HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 231675 PRISONERS IN 2009, at 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf. It is important to recognize, however, that female offenders also suffer from high rates of mental illness. *See* Shannon M. Lynch et al., *Women's Pathways to Jail: Examining Mental Health, Trauma, and Substance Abuse*, BJA POLICY BRIEF 3 (2013), http://www.bja.gov/Publications/WomensPathwaysToJail.pdf (finding that 32% of female participants in a multisite jail study met criteria for a serious mental illness in the past year). Indeed, any recommendation for sentence modification based on the negative impact of incarceration upon the mentally ill could impact a larger proportion of female offenders than male offenders. *See id.* at 1 (listing studies showing that female offenders report greater incidence of serious mental illness than male offenders). I am grateful to Professor Michelle Jacobs for this important insight.

[9] *See, e.g.*, NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 21 tbl.2 (2013), *available at* https://www.fas.org/sgp/crs/misc/R42937.pdf (showing that federal prisons operated at 38% over capacity in fiscal year 2012, with overcrowding at medium and high security male prisons at or near 50%); E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NC5243920, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 26 (2013), *available at* http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf ("Based on their reported custody counts, 18 states and the [Bureau of Prisons] were operating prison systems above 100% of their maximum reported facility capacity.").

[10] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-743 GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 18–19, 21 (2012), *available at* http://www.gao.gov/assets/650/648123.pdf; Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 272–73, 281 (2006); Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 336, 351 (1983).

[11] *See* Brown v. Plata, 131 S. Ct. 1910, 1923–26 (2011) (detailing the conditions of incarceration exacerbated by overcrowding and noting the resulting suffering of mentally ill inmates); Plata v. Schwarzenegger, No. C01-01351TEH, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005) ("By all accounts, the California prison medical care system is broken beyond repair. The harm already done in this case to California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action.").

call for significant criminal justice reform[12] Following the lead of trailblazers such as Texas,[13] Kansas,[14] and Missouri,[15] states have instituted various reforms to reduce prison populations and correctional spending, including increased use and diversity of early-release measures.[16] Specifically, recent reports show that states are expanding their use of good-time credits, enlarging parole eligibility, and authorizing the "compassionate release" of costly and low-risk ill or elderly inmates.[17]

Inspired by these measures and the need to ensure just and appropriate punishment, the American Law Institute has proposed two judicial sentence modification provisions in the revised sentencing articles of the Model Penal Code. The first, proposed at Section 305.6, would authorize prisoners who have served at least fifteen years of any sentence of incarceration to apply for sentence modification, which "should be viewed as analogous to a resentencing in light of present circumstances."[18] At a sentence modification hearing, the court should inquire as to "whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner's completion of the original sentence."[19] The revised Model Penal Code has embraced the sentencing theory of limiting retributivism,[20] which provides that

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[12] E. Lea Johnston, *Smoke and Mirrors: Model Penal Code § 305.7 and Compassionate Release*, 4 WAKE FOREST J.L. & POL'Y 49, 50 & n.7 (2014).

[13] Abby Rapoport, *Prison Reform: No Longer Politically Toxic?*, AM. PROSPECT (Aug. 26, 2013), http://prospect.org/article/prison-reform-no-longer-politically-toxic.

[14] *Id.*

[15] Emily M. Grant, Note, *Cost Conscious Justice: The Case for Wholly-Informed Discretionary Sentencing in Kentucky*, 100 KY. L.J. 391, 407–08 (2012).

[16] Johnston, *supra* note 12, at 50 & n.8.

[17] *Id.* at 50 & n.9.

[18] MODEL PENAL CODE: SENTENCING § 305.6(1), (4) (Tentative Draft No. 2, 2011) [hereinafter TD-2], *available at* http://www.ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf. TD-2 was approved at the May 17, 2011 Annual Meeting, subject to discussion at the Meeting and editorial prerogative. *See* Ellen S. Podgor, *The Sentencing Project*, ALI ANNUAL MEETING BLOG (May 17, 2011, 1:50 PM), http://2011am.ali.org/blog.cfm?startrow=11 (noting that the tentative draft was overwhelmingly approved). For purposes of variety, this Article uses the terms "judicial sentence modification," "sentence modification," and "resentencing" interchangeably. As indicated in the text, this Article envisions that a court at a sentence modification hearing would perform essentially a resentencing function. *See infra* note 285.

[19] TD-2, *supra* note 18, § 305.6(4).

[20] Professor Norval Morris was the progenitor of the theory of limiting retributivism, and his theoretical writings inspired the sentencing philosophy adopted by the revised Model Penal Code, as expressed in Section 1.02(2). MODEL PENAL CODE: SENTENCING § 1.02(2)

individual sentences should occur within the bounds of deserved punishment while allowing for the accommodation of a number of crime-control goals (such as rehabilitation, deterrence, and incapacitation) as well as restorative and reintegrative objectives.[21] The second measure, proposed at Section 305.7, would authorize judges to reduce a prison sentence at any time for any "compelling" reason that sufficiently affects the purposes of sentencing.[22] Commentary to this provision indicates that sentence modification may be particularly warranted as a response to the unjust punishment experienced by inmates with disabling mental disorders.[23]

This Article examines whether the dispositional options available for sentence modification suffice to address unjust punishment.[24] A judge's sentence modification options, under the proposed Model Penal Code provisions and in general, are typically limited to the alternatives that would have been available at an original sentencing.[25] Potential options often include immediate release, shortened terms of confinement with future release, and

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cmt. b, at 4 (Tentative Draft No. 1, 2007) [hereinafter TD-1], *available at* http://www.ali.org/00021333/mpc_2007.pdf. Morris's most important writings on the theory of limiting retributivism include NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990), NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (Sanford H. Kadish et al. eds., 1982), and NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (Sanford H. Kadish et al. eds., 1974). For a detailed analysis of Morris's work, see Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83 (Michael Tonry ed., 2004) [hereinafter Frase, *Limiting Retributivism*] and Richard S. Frase, *Sentencing Principles in Theory and Practice*, *in* 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 363 (Michael Tonry ed., 1997). This Article accepts, without evaluation or critique, the American Law Institute's determination that limiting retributivism is a sound approach to sentencing.

[21] *See* TD-1, *supra* note 20, § 1.02(2)(a) (listing the restoration of victims and the reintegration of offenders among the goals of the proposed sentencing system).

[22] TD-2, *supra* note 18, § 305.7(1), (7).

[23] *Id.* § 305.7 cmt. b.

[24] This Article endorses and incorporates the reasons outlined by the American Law Institute for entrusting judges, as opposed to other institutional actors, with central authority over sentencing. *See id.* § 305.6 cmt. d, § 305.7 cmt. c & app. B; *infra* notes 85–91 and accompanying text (arguing for expanding the use of sentence modification).

[25] Proposed provisions 305.6 and 305.7 authorize judges to impose any sanction or combination of sanctions that would have been available to the original sentencing judge. *See* TD-2, *supra* note 18, § 305.6(5), § 305.6(5) cmt. g, § 305.7(8), § 305.7(8) cmt. i. However, the provisions exempt judges at sentence modification hearings from complying with mandatory minimum sentencing provisions. *Id.*

parole or other forms of conditional release.[26] This Article explores the exercise of these alternatives as remedies for prisoners with serious mental illnesses,[27] a population especially likely to face certain forms of unjust punishment through poor conditions of confinement.[28] Narrowing the population at issue allows for a more nuanced examination of the various manifestations of unjustness and an easier identification of a gap in remedial coverage. The Article's analysis reveals that typical modification options, while appropriate and sufficient for many disordered offenders, do not permit judges to redress the unjust punishment of those prisoners who must remain incarcerated but for whom incarceration in current conditions constitutes a disproportionately severe or otherwise unjust punishment.

To remedy this shortcoming, the Article argues that legislatures should authorize an additional sentence modification option currently not permitted by law. Specifically, it proposes that states authorize judges, upon a finding of past and likely future unjust punishment, to modify a mentally disordered prisoner's conditions of confinement in order to ensure that continued confinement will be a just and appropriate sanction. Possible modifications could include improvements in mental health treatment, changes in housing, and even restricted disciplinary options. A finding that correctional officials were aware of past unjust conditions should not be a necessary condition before mandating such modifications since the focus of the inquiry would be on the dictates of proportionate punishment and the experience

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[26] *See, e.g.*, *id.* § 305.7 cmt. i (listing potential sentence modifications); *cf.* 24 C.J.S. *Criminal Law* §§ 2138, 2139 (2014) (explaining situations in which a court may modify a sentence and compiling relevant cases across jurisdictions); W.S.R., Annotation, *Power of Trial Court to Change Sentence After Affirmance*, 23 A.L.R. 536 (1923) (aggregating cases showing the trial court's limited power in most jurisdictions to modify a sentence after appellate review); Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 10–14 (2003) (compiling and summarizing state procedural rules on sentence modification).

[27] *See infra* note 32 (defining "serious mental illness").

[28] *See* E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 158–83 (2013) (detailing evidence of hardships experienced by prisoners with serious mental disorders); *infra* Part II.A & note 44.

of the inmate, and not on the establishment of a civil rights violation.[29]

The Article proceeds in three parts. Part II presents social science findings concerning how individuals with serious mental disorders experience imprisonment. It also identifies three forms of unjustness likely to be encountered by this prisoner population that may warrant sentence modification when a retributive notion of proportional punishment is an aim of sentencing.[30] Part III evaluates the capacity of typical sentence modification options to address various forms of unjustness. The assessment reveals that some prisoners suffering unjust punishment are currently without remedy. Finally, Part IV argues that legislatures should grant judges a limited power to modify conditions of confinement, outside the context of the Eighth Amendment, when certain conditions can be met. It elucidates rationales and justifications for this authority, identifies an analogous use of tailoring in the education context, and responds to possible objections.

II. THE EXPERIENCE OF UNJUST PUNISHMENT

While many forms of vulnerability exist,[31] individuals with serious mental illnesses are particularly prone to experience certain psychological and physical harms in prison.[32] This Part

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[29] *See infra* notes 60–63 and accompanying text (explaining why a sentence modification hearing should not require a demonstration of subjective awareness on the part of the correctional officers).

[30] This Article does not subscribe to a particular version of retributivism, but rather assumes that an offender's desert or blameworthiness serves at least a limiting purpose in allocating punishment. *See infra* note 93.

[31] *See* 28 C.F.R. § 115.41 (2014) (identifying risk factors for sexual assault in prison as including mental illness; physical or developmental disability; youth; diminutive size; a history of victimization; first, nonviolent, or sexual offender status; and perception as gay, bisexual, transgender, or gender-nonconforming); *see also* NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 7–8, 69–74 (2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf (discussing risk factors for sexual assault in prison).

[32] By "serious" mental illnesses or mental disorders, I refer to clinical syndromes such as schizophrenia, bipolar disorder, and depression, as well as chronic brain diseases that cause extreme distress and interfere with social and emotional adjustment. In the fourth edition of the Diagnostic and Statistical Manual, these disorders were categorized as Axis I disorders. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 13–24, 28 (4th ed. rev. 2000) [hereinafter DSM-IV-TR]. The fifth, current edition of the DSM eliminates the Axis system. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 16 (5th ed. 2013). In this Article, *serious*

surveys those harms and examines how they may impact the justness of an inmate's sentence.

A. INMATES WITH SERIOUS MENTAL ILLNESSES

Social science studies demonstrate that individuals with serious mental illnesses are especially likely to experience harm in prison.[33] The default rule followed by many state correctional agencies, as well as the Federal Bureau of Prisons, is to house inmates with mental disorders within the general prison population at the appropriate security level.[34] While the Eighth Amendment guarantees prisoners a right to reasonably adequate medical care,[35] prisons generally apply the principle of least eligibility and deliberately maintain the level of health care a step below the services provided by the government outside of prison.[36] Few inmates receive care beyond prescription to older psychiatric

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mental illness, *major mental illness*, and *major mental disorder* are used interchangeably; *mental illness* and *mental disorder* are used as shorthand for these serious conditions; and a *disordered* individual is assumed to have one of these serious conditions. I hasten to add that I do not intend to reduce an individual to his illness by referring to him as a "disordered" or "mentally ill" individual; rather, I sometimes use terms such as "mentally ill prisoner" or "disordered prisoner" as shorthand for the more cumbersome, but more respectful, denomination of "prisoner with serious mental disorder," which rightly conveys that an individual's illness is but one aspect of that person.

[33] *See infra* notes 39–43 and accompanying text.

[34] ALLEN J. BECK & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 188215, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000, at 1, 4 (2001), *available at* http://www.bjs.gov/content/pubs/pdf/mhtsp00.pdf; HUMAN RIGHTS WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 128 (2003), *available at* http://www.hrw.org/sites/default/files/reports/usa1003.pdf.

[35] *See* Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (establishing "the government's obligation to provide medical care for those whom it is punishing by incarceration" and concluding "that deliberate indifference to serious medical needs of prisoners" is "proscribed by the Eighth Amendment"); *see also* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." (citing *Estelle*, 429 U.S. at 103–04; Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982))). Circuit courts of appeals have extended this principle to psychiatric and psychological care. *See* Bowring v. Godwin, 551 F.2d 44, 47–48 (4th Cir. 1977) (holding that, under the Eighth Amendment, a prison inmate may be entitled to psychological or psychiatric treatment).

[36] FRANK SCHMALLEGER & JOHN ORTIZ SMYKLA, CORRECTIONS IN THE 21ST CENTURY 247 (5th ed. 2011).

medications, which often carry more burdensome side effects than newer medications,[37] and perhaps group therapy.[38] Moreover, recent studies demonstrate that prisoners with serious mental illnesses are prone to physical and sexual victimization by staff and other inmates, perhaps because of their inability to sufficiently assess danger and modify their behavior to ward off attacks.[39] In addition, studies confirm that prisoners with serious mental illnesses are more likely than non-disordered prisoners to violate prison rules[40] and to be punished or otherwise reside in isolation,[41] where they may be especially susceptible to

[37] *See* HUMAN RIGHTS WATCH, *supra* note 34, at 121–25 (examining the side effects of older antipsychotic medications and some prisons' failure to monitor side effects appropriately); CHRISTOPHER SLOBOGIN ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 29–31 (5th ed. 2009) (comparing the side effects of older neuroleptic medications with newer atypical antipsychotics); *see also* Joseph Menzin et al., *Treatment Adherence Associated With Conventional and Atypical Antipsychotics in a Large State Medicaid Program*, 54 PSYCHIATRIC SERVICES 719, 722 (2003) ("Our findings suggest that, compared with conventional treatment, the use of atypical therapies [i.e. newer medications] is associated with significantly less treatment switching and less use of concomitant anxiolytics [anti-anxiety] and, especially, anticholinergics."); M. Lambert et al., *Impact of Present and Past Antipsychotic Side Effects on Attitude Toward Typical Antipsychotic Treatment and Adherence*, 19 EUR. PSYCHIATRY 415, 420 (2004) (finding "that patients experiencing antipsychotic-induced side effects . . . are at risk to develop a (more) negative attitude toward these medications and therefore to be risk at risk [sic] for later non-adherence"). *But see* John Geddes et al., *Atypical Antipsychotics in the Treatment of Schizophrenia: Systematic Overview and Meta-Regression Analysis*, 321 BRIT. MED. J. 1371, 1374 (2000) (finding that atypical and conventional antipsychotic medications were equally tolerable and effective overall and recommending patients only be prescribed atypical medications if they do not respond to treatment with conventional medications or experience significant side effects with conventional medications).

[38] *See* E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 636–38 nn.83–89 (2014) (detailing inmates' access to medications and therapy).

[39] *See* Johnston, *supra* note 28, at 161–69 & nn.64–101 (discussing these studies and the factors that may have caused the results). A May 2013 study conducted by the U.S. Department of Justice's Bureau of Justice Statistics found that prisoners with serious psychological distress were nine times more likely to be sexually victimized by other inmates (6.3% versus 0.7%), and over five times more likely to be sexually assaulted by staff (5.6% versus 1.1%), than inmates without a mental health problem. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 24, 26 (2013), *available at* http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

[40] *See* Johnston, *supra* note 28, at 170–74 & nn.113–36.

[41] *Id.* at 175–76 & nn.146–50. A 2004 report by the National Institute of Corrections documented that 47% of states reported subjecting mentally ill inmates who are disruptive to the same maximum-custody policies as non-disordered inmates. JAMES AUSTIN & KENNETH MCGINNIS, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, NIC ACCESSION NO.

decompensation, psychotic break, and suicide ideation.[42] Mentally disordered prisoners may also experience greater levels of stress and physical danger—and be less likely to receive adequate mental health care—when prisons are overcrowded.[43]

Thus, inmates with serious mental illnesses provide fitting subjects with which to explore how conditions of confinement may produce disproportionate or inhumane punishment. The next section provides the theoretical grounding for certain notions of unjust punishment, a necessary precondition before examining the extent to which judges can ameliorate that unjustness with existing sentence modification tools.

B. UNJUST PUNISHMENT

A disordered offender's conditions of confinement may render his punishment unjust. Indeed, the American Law Institute acknowledged this likelihood by identifying inmates with mental illnesses as special candidates for sentence modification.[44] Before

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019468 CLASSIFICATION OF HIGH-RISK AND SPECIAL MANAGEMENT PRISONERS: A NATIONAL ASSESSMENT OF CURRENT PRACTICES 37 (2004), *available at* http://s3.amazonaws.com/static.nicic.gov/Library/019468.pdf. While the thrust of past research and expert commentary has concluded that solitary confinement exacts a significant psychological toll on severely ill inmates, a recent study found that confinement in administrative segregation does not induce significant cognitive or psychological decline in inmates with or without pre-existing mental disorders. *See* Maureen L. O'Keefe et al., *A Longitudinal Study of Administrative Segregation*, 41 J. AM. ACAD. PSYCHIATRY L. 49, 54–59 (2013) ("The results of this study were inconsistent with the hypothesis that inmates, with or without mental illness, experience significant psychological decline in [administrative segregation]."). More research is necessary to determine the extent to which the particular conditions of confinement in that study impacted its results. *Id.* at 59.

[42] Johnston, *supra* note 28, at 177–78 & nn.153–57. Seriously disordered offenders, identified as particularly vulnerable to attack, may also be housed in isolation as a means of protection. *Id.* at 202. In protective custody, inmates are often housed in highly restrictive conditions that resemble those in disciplinary isolation, with isolation for twenty-one to twenty-four hours per day. *Id.* at 202–03 & nn.257–58.

[43] Haney, *supra* note 10, at 272–73, 281–82.

[44] *See* TD-2, *supra* note 18, § 305.7 cmt. b ("The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to . . . a prisoner whose physical or mental condition renders it unnecessary, counterproductive, or inhumane to continue a term of confinement. . . . Often, effective treatment is unavailable in prison [for the substantial percentage of prisoners who suffer from mental illnesses], conditions of the institution may exacerbate the inmate's condition, and the inmate's impairment may make it impossible to navigate the daily life of the penitentiary."). The few commentators who have remarked upon the theoretical rationale of proposed Model Penal Code Section 305.7 have characterized the measure as allowing a court to correct an unjust,

probing trial judges' abilities to remedy unjust punishment through sentence modification, it is necessary to appreciate three ways in which an offender's sentence, as experienced, may become unjust. In particular, his conditions of confinement may render his punishment inhumane[45] or disproportionate,[46] or may infuse it with otherwise unjustifiable features.[47] These notions of unjustness are grounded in moral principles of retributive punishment and thus extend beyond the cramped confines of the Eighth Amendment as interpreted under current law.[48]

1. Inhumane Punishment. First, sentence modification may be necessary to address inhumane conditions of confinement.[49] As a theory premised upon respect for the moral dignity and personhood of the offender,[50] retributivism cannot tolerate

excessive, unwise, inappropriate, or inhumane sentence. *See* Richard F. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 196 (2009) (observing that "advanced age or serious infirmity would justify early release if . . . [those conditions made] . . . incarceration . . . much more onerous for such an offender, making continued custody disproportionate or even cruel"); Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 455 (2011) (endorsing Section 305.7 for permitting the correction of injustices that come to light after the commencement of a sentence); Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 861, 869, 871 (2011) (suggesting that early release would be appropriate if changed circumstances rendered a sentence "unwise or unjust" and identifying, in passing, "mercy" and "compassion" as animating forces of the sentence modification provisions).

[45] *See infra* notes 55–59 and accompanying text.

[46] *See infra* notes 65, 67 and accompanying text.

[47] *See infra* notes 73–75 and accompanying text.

[48] Johnston, *supra* note 28, at 212–13 n.314.

[49] *See* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1047 (1978) ("[I]t appears that retributivist systems define dignity coextensively with permissible punishment, with the result that all violations of human dignity are inherently excessive."). Under a *lex talionis* perspective, however, some would argue that punishments can be proportionate yet inhumane. *See* Hugo Adam Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 17–18 (noting that, traditionally, *lex talionis* punishment, punishment which is modeled after the crime, was understood to require corporal and capital punishment). In this situation, moral principles of humane treatment would serve as an external constraint on proportionality. *See id.*

[50] *See, e.g.*, BARBARA A. HUDSON, UNDERSTANDING JUSTICE 51 (2d ed. 2003) (discussing the moral theory of Immanuel Kant and characterizing it as resting "on a model of the human as someone whose actions are the result of moral choice"); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 224–31 (1973) (outlining Immanuel Kant's theory of punishment with an emphasis on its manifestation of respect for dignity, autonomy, rationality, and rights).

punishments that violate human dignity,[51] fail to recognize the personality of offenders,[52] or "approximate a system of sheer terror in which human beings are treated as animals to be intimidated and prodded."[53] However, discerning the point at which a mode of punishment or conditions associated with a particular sanction cross the line from harsh to inhumane is a difficult contextual question that ultimately reflects the sensitivities and values of a particular society.[54]

While the meaning of "inhumane" could be tethered to understandings of cruel and unusual punishment under the Eighth Amendment, it need not—and perhaps should not—be so limited.[55] The objective aspect of the cruel and unusual inquiry prohibits conditions that "involve the wanton and unnecessary infliction of pain," are "grossly disproportionate to the severity of the crime warranting imprisonment," or "deprive inmates of the

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[51] JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY 233 (1979). *See generally* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005) (discussing and critiquing the relevance of dignity to retributivism).

[52] *See* MURPHY, *supra* note 51, at 233 (decrying "a punishment which is in itself degrading, which treats the prisoner as an animal instead of a human being, which perhaps even is an attempt to *reduce* him to an animal or mere thing" as inconsistent with human dignity).

[53] Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 488 (1968); *see also* Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 958 (2010) ("To literally or psychologically break or destroy a person under the aegis of retributive punishment would violate the offender's dignity, and, in a democracy, our own.").

[54] *See, e.g.*, JOHN KLEINIG, PUNISHMENT AND DESERT 123 (1973) (proposing, as an alternative to unsuccessful attempts to mathematically equate punishment to crime, that punishment limitations be debated and decided based on normative considerations); David Garland, *Sociological Perspectives on Punishment*, 14 CRIME & JUST. 115, 143 (1991) ("Usually the boundary line has the unspoken, barely visible character of something that everyone takes for granted.").

[55] In addition to relying on the objective prong of the Cruel and Unusual Punishment test, a judge could draw upon more robust conceptions of humane punishment derived from human rights norms. *See, e.g.*, International Covenant on Civil and Political Rights art. 10(1), *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."); American Convention on Human Rights art. 5(1)–(2), Nov. 22, 1969, S. TREATY DOC. NO. 95-21, 1144 U.N.T.S. 123 ("Every person has the right to have his physical, mental, and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.").

minimal civilized measure of life's necessities."[56] In a case involving correctional officials' failure to prevent harm, an "inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."[57] Life-threatening conditions need not await a tragic event to warrant a remedy.[58] These notions of intolerable conditions could form the basis of an understanding of "inhumane" conditions for purposes of sentence modification.

In the context of Eighth Amendment violations, the U.S. Supreme Court has construed the word "punishment" as requiring an inmate to prove that a responsible correctional official acted with "deliberate indifference" towards the inmate's health or safety by knowing of the existence of conditions that pose a substantial risk of serious harm and failing to take reasonable measures to abate the risk.[59] However, authority to respond to inhumane conditions should not require a demonstration of subjective awareness on the part of correctional officials.[60] Demonstration of a culpable mens rea should be less necessary in the context of sentence modification, where the primary purpose of the hearing is not to establish a violation of a civil right but rather

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[56] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[57] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[58] *See* Helling v. McKinney, 509 U.S. 25, 33–36 (1993) (finding that an Eighth Amendment claim could derive from possible future harm to health from exposure to environmental tobacco smoke).

[59] *Farmer*, 511 U.S. at 834, 837; *see also* Estelle v. Gamble, 429 U.S. 97, 105–06 (1976) (explaining why an accidental or negligent deprivation of necessary medical care would not suffice to establish an Eighth Amendment violation).

[60] Other scholars have criticized the subjective requirement of the Eighth Amendment. *See, e.g.*, James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 429 (2001) (criticizing the knowledge requirement and proposing a liability standard based on the common law duty of care owed by landowners to invitees); Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 167–69 (2006) (criticizing the focus on the "intent" of complex penal institutions as an incoherent parsing of the concept of punishment that simply allows the state to avoid liability); Jason D. Sanabria, Farmer v. Brennan: *Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1152 (1995) ("[L]ooking into the state of mind of prison officials is simply irrelevant in determining if a prisoner has been subjected to cruel and unusual punishment."); Matthew J. Giacobbe, Note, *Constitutional Law-Eighth Amendment-A Prisoner Must Prove that Prison Officials Acted with Deliberate Indifference to Confinement Conditions for Such Conditions to Constitute Cruel and Unusual Punishment*—Wilson v. Seiter*, 111 S. Ct. 2321 (1991)*, 22 SETON HALL L. REV. 1505, 1528 (1992) (arguing for an objective approach to appraising cruel and unusual punishment).

to respond to an inmate's present circumstances and, if necessary, structure a sentence to better achieve the purposes of punishment.[61] In a sentence modification hearing, a judge can only determine whether the purposes of the sentence are being served by examining the inmate's actual experience of punishment, including his current and likely future conditions of confinement. These conditions are part and parcel of the actual, lived term of confinement, are now "known" by an agent of the state (the judge), and typically will have been caused by the state.[62] Hence, in this setting, conditions of confinement can rightly be considered part of an offender's punishment for which the state should be held responsible.[63] If a judge believes that those conditions pose a substantial risk of serious harm or otherwise fail to respect the humanity of the offender, and that they are likely to continue, then she should be able to respond to the conditions through sentence modification. Such modification would be necessary to restore, safeguard, and advance the retributive purposes of punishment, premised on respect for the dignity and autonomy of offenders.

2. Unjustified Conditions of Confinement. Second, sentence modification could be necessary to address correctional conditions that are not justified by the purposes of sentencing. Inhumane conditions would be one example of illegitimate and unjustified conditions, but this category extends beyond that example. If an offender's correctional program or conditions of confinement are inconsistent with, or not rationally related to, the purpose of an inmate's sentence,[64] the correctional conditions could subvert the

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[61] *See* TD-2, *supra* note 18, § 305.7(7) ("The trial court may modify a sentence if the court finds that the circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other conferring reasons, justify a modified sentence in light of the purposes of sentencing . . . .").

[62] *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 939 (2009) (observing in the context of incarceration that "there will likely be few cases in which harm to prisoners is *not* traceable to official conduct").

[63] *Cf. id.* at 897–908 (arguing that all state-created prison conditions constitute punishment for Eighth Amendment purposes).

[64] *Cf.* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS § 5.9 cmt., at 173–74 (1973), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/10865NCJRS.pdf [hereinafter NAT'L ADVISORY COMM'N] ("The sentence imposed by the court is binding on two parties, the offender and the correctional agency. The offender is required to serve the sentence imposed. The correctional agency should be required to execute the sentence the sentencing court envisioned.").

purpose of the original sentence or render the sentence harsher than intended. Indeed, the need to respond to unjustified, harsh prison conditions has, in the past, led policy bodies to advocate that sentencing courts maintain jurisdiction over prisoners.[65] As the National Advisory Commission on Criminal Justice Standards and Goals has argued, only through a second look or continuing jurisdiction mechanism can a sentencing court ensure that "[t]he correctional agency [executes] the sentence the sentencing court envisioned," with its implicit "stipulations that the inmate will receive decent medical treatment, fair nutrition, and equitable handling of his complaints and grievances."[66]

3. Disproportionate Punishment. Third, sentence modification may be necessary to address disproportionate punishment. There are numerous variants of retributivism,[67] but a common tenet

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[65] *See infra* notes 238–244 and accompanying text.

[66] NAT'L ADVISORY COMM'N, *supra* note 64, § 5.9 cmt., at 173–74; *see also* Am. Bar Ass'n, *Criminal Justice System, Project on Standards Relating to the Legal Status of Prisoners*, 14 AM. CRIM. L. REV. 377, 408–09 (1977) (advocating that, as a means to ensure that prisoners' sentences are carried out consistently with the purposes and intents of their sentences, "[j]udges should not sentence defendants to confinement unless correctional authorities have certified in writing that facilities, programs, and personnel are available to reasonably carry out the purpose and intent of each sentence").

[67] *See* Mitchell N. Berman, *Rehabilitating Retributivism* 1 (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Research Paper Series No. 225, 2012), *available at* http://ssrn.com/abstract=2117619 ("Even if we limit consideration to those central or paradigmatic forms of retributivism that would justify punishment in terms of an offender's negative desert, particular accounts espouse different positions regarding, for example, just what it is that offender's [sic] deserve, in virtue of what [sic] they deserve it, and what justifies the state in endeavoring to realize those deserts."); Mitchell N. Berman, *The Justification of Punishment*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 146–47 (Andrei Marmor ed., 2012) (discussing various forms of retributivism); John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238–45 (1979) (delineating nine distinct retributivist theories); Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1059–64 (2011) (providing a taxonomy of retributive theories). A traditional variant of retributivism theorizes that deserved punishment, justified by the moral culpability and desert of the offender, is an intrinsic good. *See* Michael Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179 (Ferdinand Schoeman ed., 1987) (distinguishing this pure theory of retribution from theories that use goods beside the offender's desert to justify punishment); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 127 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (clarifying that the value of punishment is that the offender deserves it). Other retributivists, however, view punishment as an instrumental good and suggest that it may promote crime control or provide pleasure or utility. *See* Michael T. Cahill, *Punishment Pluralism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 31–34 (Mark D. White ed., 2011) (describing punishment as an instrumental good that reduces crime, promotes utilitarian character, and "simply feels good"). For recent scholarship complicating the

dictates allocating punishment according to a proportionality equation that considers blameworthiness and severity of penalty.[68] Just desert theory,[69] for example, holds that the severity of an offender's punishment should reflect the offender's culpability and the harm that he inflicted through his criminal act.[70] While many scholars measure the severity of a particular method of punishment by reference to deprivations as experienced by a typical offender,[71] some influential commentators have recognized that sanctions such as incarceration have a foreseeable, disparate impact on vulnerable classes of offenders.[72] To achieve proportionality and parity, these scholars have argued that it may be necessary in extreme cases to adjust ordered sanctions so that vulnerable defendants receive penalties of roughly equivalent severity as non-vulnerable individuals.[73] As argued in prior work,

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dominant understanding of retributivism and challenging the strict divide between retributivist and consequentialist theories of punishment, see Mitchell N. Berman, *Two Kinds of Retributivism*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (R.A. Duff & Stuart P. Green eds., 2011).

[68] *See* Ryan, *supra* note 67, at 1062–64 (distinguishing between harm-based and intent-based means of evaluating an offender's desert and asserting that, "[t]o the extent that American sentencing systems are retribution-based, they are often harm-based systems in a number of respects").

[69] Just desert theory rose to prominence in the late 1970s as a means of curtailing sentencing discretion and bounding the state's coercive power over offenders. *See* Frederic R. Kellogg, *From Retribution to "Desert": The Evolution of Criminal Punishment*, 15 CRIMINOLOGY 179, 186–87 (1977) (criticizing positivist individualization for "the element of disparity in administration" and explaining the new movement's "enlightened sense of fairness"). Just desert theory was developed and refined within an expressive framework by Professor Andrew von Hirsch over the course of four books: DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976), PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985), CENSURE AND SANCTIONS (1993), and, with Andrew Ashworth, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005).

[70] *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (2005) ("The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibleness (that is, the harmfulness and culpability) of the actor's conduct.").

[71] *See, e.g.*, *id.* at 41–42 (discussing and rejecting a subjectivist view of penal severity for an "interest-analysis" in which "severity is not made dependent on the preferences and sensitivities of particular individuals"); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1658 & n.195 (2010) ("[R]etributivism defines punishment as a restraint on liberty or other consequence that is determined and justified objectively by reference to a culpable offense.").

[72] *See infra* note 73.

[73] *See, e.g.*, VON HIRSCH & ASHWORTH, *supra* note 70, at 42–43, 172–73, 176 (suggesting that age, serious illness, and disability are factors that may make a punishment significantly more onerous for a particular offender and, therefore, under an "equal-impact"

this notion—known as the principle of *equal impact* and further detailed in Part III.A.*2*—implicitly assumes both that the punishment calculus should include the foreseeable, deleterious effects of incarceration and that these harms are susceptible to justification.[74]

Indeed, some jurisdictions authorize judges, in sentencing or early release decisions, to consider past or forecasted hardship in correctional institutions. A number of jurisdictions currently treat vulnerability to undue hardship in prison or jail—including the likely exacerbation of mental disorder, susceptibility to victimization, and housing in isolation—as a mitigating factor at sentencing.[75] In some of these jurisdictions, vulnerability to harm

principle, justify modification); Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment, and the Impact of Sanctions*, *in* FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 251, 254–61, 271 (Andrew Ashworth & Martin Wasik eds., 1998) ("[F]airness requires a recognition that the same sentence may have a disproportionately severe impact on certain offenders."); *see also* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 199–210 (2009) ("[A] justification of punishment must recognize that punishment experience matters.").

[74] *See* Johnston, *supra* note 28, at 191–207 (arguing that foreseeable, substantial risks of serious harm to offenders with major mental disorders should factor into sentencing decisions in order to avoid imposing disproportionate or inhumane punishment). The relationship of unintended hardship to just punishment is a matter of fierce debate. *Id.* at 184–85, 188–91. Traditionally, scholars have defined punishment as including only hardships or deprivations intended and authorized by a legitimate sentencing authority. *See, e.g.*, Hugo Adam Bedau, *Feinberg's Liberal Theory of Punishment*, 5 BUFF. CRIM. L. REV. 103, 111–12 (2001) (defining punishment as suffering inflicted by a recognized legal authority after due process); Johnston, *supra* note 28, at 188–89 nn.197–98 (collecting sources). The understanding of the equal impact theory expressed in this Article relies upon a broader conception of punishment that includes significant and foreseeable hardships proximately caused by the state. *See id.* at 186–88.

[75] *See, e.g.*, ARK. CODE ANN. § 5-4-301(c)(11) (2014) (directing trial courts to "accord[ ] weight in favor of suspension or probation" to whether "[t]he imprisonment of the defendant would entail excessive hardship to the defendant or to a dependent of the defendant"); D.C. SENTENCING & CRIMINAL CODE REVISION COMM'N, VOLUNTARY SENTENCING GUIDELINES MANUAL § 5.2.3(8) (2014) (allowing a judge to sentence outside the voluntary sentencing guidelines when "the court determines that the defendant, by reason of obvious and substantial mental or physical impairment or infirmity, cannot be adequately protected or treated in any available prison facility"); HAW. REV. STAT. § 706-621(2)(i) (2014) ("The court, in determining whether to impose a term of probation, shall consider [whether] . . . [t]he imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents."); 730 ILL. COMP. STAT. 5 / 5-5-3.1(a)(12) (2013) (providing that a sentencing judge should consider, as a factor in favor of withholding or minimizing a sentence of imprisonment, whether "[t]he imprisonment of the defendant would endanger his or her medical condition"); IND. CODE 35-38-1-7.1(b)(10) (2014) (authorizing a court to consider when a person's imprisonment will result in undue hardship to her or her dependents as a factor favoring suspension of the sentence and imposition of probation); LA.

may result in a reduced prison sentence.[76] Few published sentence modification orders exist,[77] but appellate opinions demonstrate that prisoners' mental illnesses have affected courts' evaluations of the severity of their sentences and have justified sentence

CODE CRIM. PROC. ANN. art. 894.1.B(31) (2014) (providing that courts, when deciding whether to suspend a sentence and impose probation, should consider whether "[t]he imprisonment of the defendant would entail excessive hardship to himself or his dependents"); MONT. CODE ANN. 46-18-225(2)(j) (2014) ("Prior to sentencing a nonviolent felony offender . . . to a term of imprisonment in a state prison, the sentencing judge shall take into account whether: . . . imprisonment of the offender would create an excessive hardship on the offender or the offender's family."); N.J. STAT. ANN. § 2C:44-1(b)(11) (West 2014) (authorizing the court to consider the mitigating factor of whether "the imprisonment of the defendant would entail excessive hardship to himself or his dependents" when determining an appropriate sentence); N.D. CENT. CODE § 12.1-32-04(11) (2013) (directing that whether "[t]he imprisonment of the defendant would entail undue hardship to himself or his dependents" "shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment"); UTAH SENTENCING COMM'N, 2013 ADULT SENTENCING AND RELEASE GUIDELINES 14–15, *available at* http://www.sentencing.state.ut.us/Guidelines/Adult/2013%20Adult%20Sentencing%20and%20Release%20Guidelines.final.combined.pdf (identifying whether "[i]mprisonment would entail excessive hardship on offender or dependents" as a mitigating circumstance that may justify departure from the guidelines); *see also* HENRY W. MCCARR & JACK S. NORDBY, 9 MINN. PRAC., CRIMINAL LAW & PROCEDURE § 36:41(F) (4th ed. 2012) (explaining that, under the Minnesota Sentencing Guidelines as interpreted through case law, a judge is required to consider a dispositional departure at sentencing if the defendant meets the mitigating factor of being vulnerable to victimization in a prison setting); Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1119–20 & n.284 (2009) (characterizing whether imprisonment would constitute a hardship for the offender as a mitigating factor that has been considered "particularly powerful in various jurisdictions" and listing some jurisdictions); *cf.* Johnston, *supra* note 38, at 655 nn.195–97 (listing and describing over a dozen statutes that classify an offender's need for treatment as a valid consideration at sentencing); *id.* at 650 n.170 (listing and describing key features of statues allowing judges to commit defendants for mental health treatment in lieu of incarceration).

[76] *See* Johnston, *supra* note 38, at 656. For a theoretical defense of such discounts, see Johnston, *supra* note 28, at 200–07, 221–26. Some commentators have argued that this practice is problematic in its effect of sanctioning harsher treatment. *See infra* notes 196–197 and accompanying text. Of course, reducing a sentence on the basis of harsher anticipated conditions of confinement is only morally acceptable if legitimate aims of punishment justify the foreseeable hardship. *See infra* notes 198–200 and accompanying text.

[77] *See* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 502, 508 (2010) (noting that decisions under sentencing modification statutes are not widely reported); *see also* Grossman & Shapiro, *supra* note 26, at 45 (remarking upon the difficulty of obtaining an accurate picture of the use of sentence reduction "due to inadequate record keeping at the county level" and urging judges to transmit, and counties to maintain, a record of each use of the sentence modification power).

reductions.[78] Courts have reduced sentences based on abuse, such as sexual assault, that occurred during confinement.[79] Finally, compassionate release decisions may also partially reflect the view that the continued incarceration of certain elderly, terminally ill, or infirm inmates, in light of their hardship in prison, exceeds the punishment merited by the seriousness of their offenses.[80]

III. SENTENCE MODIFICATION AS A RESPONSE TO UNJUST PUNISHMENT

Judicial sentence modification offers an attractive means to respond to unjust punishment as well as economic and social benefits.[81] In the past, jurisdictions relied on parole and executive clemency to release prisoners for whom incarceration was no

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[78] *See, e.g.*, People v. Walsh, 957 N.Y.S.2d 96, 97 (N.Y. App. Div. 2012) (stressing the appellate court's "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and ability to "reduce a sentence in the interests of justice, taking into account factors such as a defendant's age, physical and mental health, and remorse," and reducing the length of the defendant's sentence of incarceration by half, based in part on the offender's age and poor health (quoting People v. Delgado, 599 N.E.2d 675 (1992) (citing People v. Ehrlich, 574 N.Y.S.2d 325 (1991)))); People v. Mortimore, 466 N.Y.S.2d 491, 491 (N.Y. App. Div. 1983) (reversing the sentencing, remitting for resentencing, ordering an updated presentence report and a hearing "for the purpose of receiving testimony concerning the physical condition and medical history of defendant, and concerning the adequacy of treatment and care available at the jail," and indicating concern as to "whether defendant's physical condition is such that a sentence of imprisonment . . . is apt to affect his health"); People v. Randolphe, 494 N.Y.S.2d 142, 143 (N.Y. App. Div. 1985) (holding similarly); *see also* State v. Bradley, Nos. CR06139814S, CR06139635S, MV06309377S, 2008 WL 282746, at *4 (Conn. Super. Ct. Jan. 8, 2008) ("[T]he fact that [the defendant] suffers from a painful medical condition, which has deteriorated during his incarceration, is a factor that the court nonetheless considers.").

[79] *See* Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1628 & nn.229–31 (2012) (listing cases in which courts reduced or considered reducing sentences for abusive conditions of confinement, extremely restrictive conditions of confinement, and occurrences of sexual assault while awaiting sentencing).

[80] *See* Johnston, *supra* note 12, at 67 n.104 (citing commentators who have maintained that compassionate release can be consistent with the purposes of sentencing, including retribution); *id.* at 81–82 & nn.175–81 (exploring when compassionate release may be consistent with concerns of proportionality). Legislatures typically entrust compassionate release decisions to executive decisionmakers such as parole boards, not to judges. *See* TD-2, *supra* note 18, § 305.7 reporter's note c (recognizing that a majority of states grant ability to modify sentences to nonjudicial officials); Klingele, *supra* note 77, at 492–94 (discussing compassionate release for elderly and seriously ill inmates through parole boards).

[81] *See infra* notes 90–91 and accompanying text; Part III.A.*2.a*.

longer warranted.[82] Recent studies, however, document that states' use of those mechanisms has been in steep decline.[83] Scholars have attributed the ebbing of parole, in particular, to doubts about the legitimacy and validity of this mode of decision-making. Professor Cecelia Klingele has summarized the problems with parole in this way:

> 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. Statewide parole boards were typically composed of political appointees who often lacked knowledge about the local conditions to which offenders would return upon release. Moreover, board 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.[84]

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[82] *See* Johnston, *supra* note 12, at 63 (noting that Section 305.7's allocation of decisionmaking authority to judges distinguishes it from traditional compassionate release measures, which rely on parole boards and executive clemency).

[83] *See* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153–54 (2009) (noting that the number of clemency requests and pardons granted has dropped in recent decades); Molly Clayton, Note, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 772 (2013) ("[T]he actual use of executive clemency has steadily decreased from 1972 to the present day."); ALLISON LAWRENCE & DONNA LYONS, NAT'L CONFERENCE OF STATE LEGISLATORS, PRINCIPLES OF EFFECTIVE STATE SENTENCING AND CORRECTION POLICY: A REPORT OF THE NCSL SENTENCING AND CORRECTIONS WORK GROUP 9 (2011), *available at* http://www.ncls.org/documents/cj/pew/WGprinciplesreport.pdf ("With the rise of determinate and sentencing guidelines systems and the adoption of truth-in-sentencing provisions in the 1970s and 1980s, a number of states restricted or eliminated discretionary parole. Although parole boards still exist in most states, their function often has changed."). Recently, however, states have begun increasing their use of parole as a means to relieve over-congestion of prisons. *See* VERA INST. OF JUSTICE, THE CONTINUING FISCAL CRISIS IN CORRECTIONS: SETTING A NEW COURSE 4, 17–19 (2010), *available at* http://www.vera.org/sites/default/files/resources/downloads/The-continuing-fiscal-crisis-in-corrections-10-2010-updated.pdf (discussing expansions in parole eligibility as a method of reducing prison populations).

[84] Klingele, *supra* note 77, at 474–75.

Observing this decline, commentators have made the case for greater use of judicial sentence modification.[85] They have argued that the back-end modification of sentences constitutes an exercise of sentencing power that should properly reside with the judiciary.[86] In addition, judicial decisions, delivered in open court and accompanied by statements of reasons,[87] will be more transparent and legitimate than those of prison administrators or parole boards.[88] Offering inmates the opportunity to file motions for sentence modification would allow judges to respond to changed offender circumstances and, if relevant to a jurisdiction's purposes of sentencing, to benefit from improved risk-assessment methods and rehabilitative programming.[89] Releasing inmates for whom incarceration is no longer deserved or appropriate would carry societal benefits beyond freeing up precious correctional space and funding.[90] Relief of prison overcrowding could result in the filing of fewer suits alleging violations of civil rights under 42 U.S.C. § 1983, higher levels of inmate productivity, and lower levels of inmate victimization and unrest.[91]

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[85] *See, e.g.*, *id.* at 498–521 (discussing the advantages of judicial sentence modification over other mechanisms); Grossman & Shapiro, *supra* note 26, at 43–45 (arguing against attempts to restrict judicial sentence modification in Maryland); TD-2, *supra* note 18, § 305.6 & cmts. (suggesting giving judicial officials the power to modify sentences).

[86] *See* TD-2, *supra* note 18, § 305.6 cmt. d ("[T]he code firmly recommends that the sentence-modification authority should be viewed as a *judicial* function."); *see also* TD-1, *supra* note 20, § 1.02(2)(b)(i) & cmt. h (listing the preservation of judicial discretion as a general purpose of the Model Code revisions).

[87] Klingele, *supra* note 77, at 515 (noting that the transparency of judicial sentence modifications is advantageous).

[88] *See id.* at 470, 495, 515–21 (discussing how the transparency and legitimacy of judicial sentence modification makes the mechanism sustainable).

[89] TD-2, *supra* note 18, § 305.6 cmt. b. A judge could also potentially reassess the proportionality of an offender's punishment in light of evolving sensibilities about the gravity of his offense or his blameworthiness. *Id.*

[90] Conditional release is considerably less expensive than incarceration. *See* Amy Robinson-Oost, *Evaluation as the Proper Function of the Parole Board: An Analysis of New York State's Proposed SAFE Parole Act*, 16 CUNY L. REV. 129, 134 (2012) ("In fiscal year 2010, the average cost of incarceration for federal inmates was $28,284. In stark contrast, the average cost of community-based supervision, through parole or probation, is approximately one-tenth of that amount; probation costs approximately $1,250 per person annually, while parole costs $2,750."); PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 2 (2009), *available at* http://www.convictcriminology.org/pdf/pew/onein31.pdf ("[T]he daily cost of supervising a probationer in fiscal 2008 was $3.42; the average daily cost of a prison inmate, $78.95, is more than 20 times as high.").

[91] *See supra* note 10 (discussing how prison overcrowding results in increased violence and idleness, and limited access to rehabilitative services).

Nevertheless, the conversation around expanding the use of judicial sentence modification has thus far neglected to probe its potential for correcting unjust sentences. Commentators have identified the correction of unjust punishment as an important aim of sentence modification and have assumed that sentence modification would be effective in achieving that goal.[92] This Part scrutinizes that assumption and assesses the capacity of three common sentence modification options—immediate release, a shortened term of confinement with future release, and parole or another form of conditional release—to address various forms of unjustness. Examining when these remedies will be appropriate provides one means of illuminating a possible gap in remedial coverage. The analysis reveals that sentence modification, as currently conceived, will fail to address the unjust punishment experienced by some disordered prisoners, both in jurisdictions in which desert plays a defining or guiding function in allocating punishment and where its role is more limited.[93]

A. IMMEDIATE RELEASE

The remedy of immediate release, or at least a transfer to non-punitive civil confinement for treatment,[94] would be an

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[92] *See supra* note 44 (discussing the rationales scholars propose for sentence modification); Johnston, *supra* note 12, at 79–81 nn.170–74 (noting commentators who articulate the purpose of sentence modification as ensuring that the sentence is just).

[93] Theoretically, desert or blameworthiness could be a "defining" principle of punishment that specifies the "precisely appropriate" punishment, a "guiding" principle to be respected "unless other values . . . justify its rejection," or a "limiting" principle that, "though it would rarely tell us the exact sanction to be imposed, . . . would nevertheless give us the outer limits of leniency and severity which should not be exceeded." Norval Morris, *Punishment, Desert and Rehabilitation*, *in* SENTENCING 257, 259 (Hyman Gross & Andrew von Hirsch eds., 1981); *see* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1301–03 (2006) (explaining Morris's view of desert as neither a defining nor a guiding principle, but a limiting one).

[94] *See* R.A. DUFF, TRIALS AND PUNISHMENTS 27–28 (1986) ("[I]t is at least arguable that someone who is so disordered that he is not fit to be punished should . . . be subject only to the ordinary non-criminal provisions for 'compulsory admission' to hospital."). States typically permit the involuntary civil confinement of individuals whose mental disorders render them a significant danger to themselves or others. *See, e.g.*, FLA. STAT. § 394.467(1) (2014) (authorizing involuntary inpatient treatment when, because of an individual's mental illness, "[t]here is substantial likelihood that in the near future . . . he will inflict serious bodily harm on . . . himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm"); W. David Ball, *Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving*

appropriate response to unjust punishment in at least two situations. First, a court should release an inmate if his cognitive limitations render him an unfit subject for punishment. Second, release would be appropriate if the severity of the offender's punishment, considering his conditions of confinement, exceeds that warranted by his offense.[95] This section explores the justifications for immediate release within a retributive framework and their existing support under the law.[96]

1. Unfit Subject for Retributive Punishment. Communicative accounts of retributive punishment hold that an offender must be capable of understanding why he is being punished in order for the state to proceed with punishment.[97] Professors Dan Markel and Chad Flanders have argued that an offender "must be a fit interlocutor for the communicative message of retributive punishment" throughout the life cycle of the punishment process.[98] As they explain it, "the value of retribution lies in the criminal's ability to understand rationally the state's desire to repudiate his wrongful claim to be above the law."[99] If an individual is so mentally impaired that he cannot understand that he is being punished for his criminal act, "then the punishment is not retributive but merely a coercive deprivation whose condemnatory

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Treatment and Reducing Recidivism, 24 J. CONTEMP. HEALTH L. & POL'Y 1, 24–45 (2007) (describing coercive mental health treatment measures for persons with mental disorders who are released from prison). In addition, a handful of jurisdictions authorize a trial judge, prior to sentencing, to commit a defendant for mental health treatment, in lieu of incarceration, when certain criteria are satisfied. *See* Johnston, *supra* note 38, at 649–54 (exploring the relevant federal statute and listing state analogues).

[95] *See infra* Part III.A.*2* (discussing how to factor unintended hardships into the cost of punishment).

[96] *See supra* note 30 (noting that this paper does not subscribe to a particular version of retributivism). Of course, a thoroughgoing utilitarian might embrace these sentence modification approaches in order to ensure the optimization of outcomes and expenditures.

[97] *See infra* Part III.A.*1*. In addition to Professors Robert Nozick, Dan Markel, and Chad Flanders, all discussed in this section, Professor Antony Duff has theorized on the importance of an offender's ability to understand the meaning of his punishment. *See, e.g.*, DUFF, *supra* note 94, at 27 ("[W]hat is crucial here (apart from considerations of past deserts or of future consequences) is the offender's capacity to understand and respond to her imprisonment *as a punishment*: if she is now so disordered that she lacks this capacity she is not fit to be punished . . . . For punishment aims, and must aim, if it is to be properly justified, to *address* the offender as a rational and responsible agent: if she cannot understand what is being done to her, or why it is being done, or how it is related as a punishment to her past offence, her punishment becomes a travesty.").

[98] Markel & Flanders, *supra* note 53, at 910.

[99] *Id.* at 933.

character is lost on the offender."[100] Similarly, Professor Robert Nozick has observed that, when an offender becomes so mentally defective "so as to be incapable of learning or realizing that his act was wrong," the individual becomes an unsuitable object of retributive punishment because he is "incapable of being connected (at least by the act of punishment) to correct values qua correct values."[101] To continue to punish an individual in such circumstances would simply be "a harmful act" by the state.[102] Relatedly, at least two sets of commentators have referenced the importance of inmates' competence to be punished for compassionate release laws.[103]

Two decisions by the U.S. Supreme Court indicate the Court's possible subscription to the principle that an offender who is incapable of rationally understanding the purpose and meaning of his punishment is an unsuitable subject for retributive punishment. In *Ford v. Wainwright*, the Court held that the Eighth Amendment prohibits the execution of an "insane" prisoner in part because his execution would serve no retributive value.[104] Moreover, in *Panetti v. Quarterman*, the Court construed *Ford* to hold that an inmate may be "insane," and thus unfit for execution, when his severe delusions prevent him from possessing a rational understanding of his punishment.[105] Quoting the plurality and concurring opinions in *Ford*, the Court reasoned that offenders must have the ability to "comprehend[ ] the reasons for the penalty

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[100] *Id.* In this circumstance, an individual is probably a good candidate for non-punitive treatment. *Id.* at 953 & n.172. The American Bar Association's Criminal Justice Mental Health Standards require that a person who is "incompetent at time of sentence" receive appropriate treatment or habitation and, if restored, be allowed to allocute. *See* AM. BAR ASS'N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 269 (1989), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html#7-9.8.

[101] ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 372, 385 (1981).

[102] *Id.* at 372.

[103] *See* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1466 & n.135 (2004) (arguing that, as long as offenders are competent, leniency undermines retributivism's goal to impose just deserts); Brie A. Williams et al., *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 115 ANNALS INTERNAL MED. 122, 123 (2011), *available at* http://annals.org/article.aspx?articleId=747043 (stating that the justification for incarceration may be undermined by a change in the inmate's competency).

[104] 477 U.S. 399, 409–10 (1986). The Court failed to elucidate the meaning of "insane," however, and instead left this determination to the states. *Id.* at 416.

[105] 551 U.S. 930, 958–62 (2007).

[and] its implications"[106] and to be aware "of the punishment they are about to suffer and why they are about to suffer it."[107] Delusions, the Court held, may undermine this " 'comprehension' or 'awaren[ess]' if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution."[108] The Court observed:

> The potential for a prisoner's recognition of the severity of the offense . . . [is] called in question . . . if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.[109]

Professor Markel has argued that the rationale of *Panetti* and its requirement of mental competence should extend beyond the context of the death penalty to continued confinement in prison.[110] To date, however, it appears that no court has applied *Panetti* outside the confines of capital punishment to release or transfer a mentally disordered, incompetent prisoner.[111]

In addition, to the extent that the state "breaks" an offender through an egregious failure to provide basic necessities or humane conditions, the state may forfeit its right to punish that individual.[112] Professors Markel and Flanders have argued:

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[106] *Id.* at 957 (quoting *Ford*, 477 U.S. at 417 (plurality opinion)).

[107] *Id.* (quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring)).

[108] *Id.* at 958.

[109] *Id.* at 958–59. The Court indicated that mere unrepentance, callousness, "misanthropic personality," or "amoral character" will not suffice to meet this standard; rather a "psychotic disorder" will be required as a threshold matter. *Id.* at 959–60.

[110] *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1216–18 (2009) ("[T]here is no plausible basis for suggesting that someone who is mentally impaired enough to be spared execution should not also be spared from spending the rest of his life in a cage. The severity of the punishment is not the problem; it's the fact of punishment.").

[111] At least one court has applied the *Panetti* standard of competence outside the context of capital sentencing, however. *See* United States v. Wolfson, 616 F. Supp. 2d 398, 420 (S.D.N.Y. 2008) ("The principles that the Court explained in *Panetti* spring from the Court's interpretation of 'rational understanding' as applied to an execution for purposes of the Eighth Amendment. The same requirement of 'rational understanding' applies to the determination of competence [for a non-capital sentencing] under the due process clause.").

[112] Markel & Flanders, *supra* note 53, at 961 n.193.

> [I]f the state's . . . failure to discharge its carceral or punitive obligations in a humane and safe manner . . . led to the 'breaking' of the offender, . . . the state [may have] an obligation to try to repair or restore the offender to some normatively acceptable baseline condition before it can proceed with the initially intended and authorized justified punishment. . . . Indeed, we could imagine egregious and irreparable situations of 'breaking' an offender such that if the state did so, it loses its warrant to permissibly continue punishing that person.[113]

Similarly, Professor Alexander Reinert has observed that, "[i]f state-created conditions . . . are 'punishment,' then we should be willing to entertain the thought that some discrete forms of punishment are so horrific that they exhaust the State's authority or capacity to punish."[114] This concept of the state's "breaking" an offender through horrific acts or conditions suggests that inhumane conditions and a loss of competence could combine to form a particularly forceful rationale for immediate release.

2. Factoring Unintended Hardship into the Cost of Punishment. An additional justification for immediate release could involve a finding that the severity of an offender's punishment is disproportionate to his blameworthiness or the harm brought about by his criminal offense.[115] Depending on the variant of retributivist or mixed retributive/utilitarian theory that animates a jurisdiction's sentencing scheme, a judge could reach such a finding through a retributive equal impact analysis or a utilitarian ends-benefits evaluation.[116] These analyses differ in the inputs involved as described below.

a. Equal Impact Analysis. Under the equal impact theory, developed by Professors Andrew von Hirsch, Andrew Ashworth, and others,[117] a carceral punishment could become disproportionate

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[113] *Id.* (internal citation omitted).

[114] Reinert, *supra* note 79, at 1603.

[115] *See* Ryan, *supra* note 67, at 1062–64 (noting that, in American sentencing systems, the severity of an offender's punishment is typically based on the harm he caused).

[116] *See infra* Part III.A.*2.a–b*.

[117] *See* VON HIRSCH & ASHWORTH, *supra* note 70, at 172–73 (defining the equal impact theory); Ashworth & Player, *supra* note 73, at 252–53 (arguing for an equal treatment

when an offender develops a vulnerability to hardship—such as one stemming from serious mental disorder, advanced age, or physical infirmity—that would greatly increase the onerousness of incarceration.[118] In such circumstances, prison would hold a much greater "punitive bite"[119] for the vulnerable inmate than for equally blameworthy, non-vulnerable offenders. Sentence modification may then become necessary to avoid the vulnerable prisoner's experiencing a disproportionately severe and inequitable punishment.[120] The equal impact theory applies to objective harm[121] and may extend only to certain types of morally relevant vulnerability, such as that stemming from involuntarily assumed

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theory of punishment). The roots of the equal impact theory can be traced to Jeremy Bentham. See Jeremy Bentham, AN INTRODUCTION TO THE Principles of Morals and Legislation 182 (Hafner Press 1948) (1789) (proposing that, because the same punishment for two different persons might not produce the same effect, "the several circumstances influencing sensibility ought always to be taken into account").

[118] A necessary assumption of this view is that punishment extends beyond intended deprivations or hardships. *See supra* note 74.

[119] *See* VON HIRSCH & ASHWORTH, *supra* note 70, at 41–42 (defining "punitive bite" as "the extent to which those sanctions interfere with important interests that people have").

[120] *See id.* at 172 (describing the "equal-impact" principle); see also Ashworth & Player, supra note 73, at 253 (advocating "a general principle of equal treatment, by which we mean that a sentencing system should strive to avoid its punishments having an unequal impact on different offenders or groups of offenders"); *cf.* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 11 (1989) (asserting that adjustments to sentences may be appropriate on retributivist grounds "to relieve the punishment of an offender who has suffered enough, or one whose particular circumstances would make him suffer more than he deserves; or[ ] to prevent an unwarranted cruel punishment").

[121] *See* Malcolm Thorburn & Allan Manson, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning*, 10 NEW CRIM. L. REV. 278, 290–91 (2007) (reviewing VON HIRSCH & ASHWORTH, *supra* note 70) ("[W]here one offender will objectively suffer more from a particular punishment than would another—as, say, a disabled offender will suffer quantifiably more from life in prison than will a physically able offender—it would be unfair to impose the formally identical sentence on both."). Some sources of harm referenced in this paper, such as sexual and physical victimization, are clearly objective in nature. Others, however, such as the exacerbation or onset of serious mental illnesses, may be harder to clearly characterize as objective or subjective harms. While mental health professionals can detect mental disorder through clinical assessment, that assessment involves an evaluation of an inmate's internal feelings, perceptions, and patterns of thinking, in addition to his manifested behavior. *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 2 (2006), *available at* http://www.bjs.gov/conent/pub/pdf/mhppji.pdf (describing that an assessment of inmates for symptoms of mental disorders includes questioning the inmates about their feelings and thoughts).

sources.[122] As referenced previously, a number of jurisdictions appear to have employed an equal impact-type analysis in order to equalize the severity of punishments experienced by equally culpable vulnerable and non-vulnerable offenders.[123]

An example might prove useful to illustrate how the equal impact principle could operate in the context of sentence modification. Assume that an offender with bipolar disorder with psychotic features receives an original sentence of fifteen years in prison for his crime of armed robbery. Assume further that the judge imposes this sentence, at the top of the approved statutory range, in light of the offender's high degree of culpability. Assume that the judge does not factor into the severity of his sentence any foreseeable hardship related to the inmate's recognized mental illness.[124] Furthermore, assume that medication poorly controls the inmate's mental disorder in prison, and that correctional officials respond to his symptomatic behavior by identifying the inmate as particularly dangerous and placing him in administrative segregation. The conditions in his housing unit aggravate his disorder, resulting in psychotic delirium, hallucinatory confusion, disorientation, and intense agitation and paranoia.[125] After ten years in isolation, the prisoner moves for sentence modification.[126]

Upon the kind of resentencing contemplated in this Article, a judge could factor the inmate's harsh and injurious experience in prison into the retributive punishment equation and, employing an

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[122] *See* Johnston, *supra* note 28, at 194 & n.221 (drawing upon the work of Professor Uma Narayan to suggest the moral defensibility of limiting sentencing accommodations for foreseeable harm to certain vulnerabilities).

[123] *See supra* notes 75–76, 78–80 and accompanying text.

[124] *See supra* notes 73–80 and accompanying text (discussing sentence mitigation on the basis of anticipated vulnerability to harm or undue hardship).

[125] Assume that, when the inmate reaches a state of crisis, prison authorities remove the prisoner from segregation and transfer him to an acute crisis unit for inpatient mental health services. Upon stabilization, authorities return the inmate to segregation, where his deterioration begins anew. *See* Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 404 (2006) (noting this cycle); Sally J. MacKain & Charles E. Messer, *Ending the Inmate Shuffle: An Intermediate Care Program for Inmates with a Chronic Mental Illness*, 4 J. FORENSIC PYSCHOL. PRAC. 87, 88 (2004) (calling this cycle a "revolving door" that traps inmates with mental illness in a downward spiral of nonrecovery).

[126] *See infra* note 128 (noting that most jurisdictions would not currently entertain this kind of motion).

equal impact analysis,[127] decide that the ten years that the inmate served in isolation roughly equate to (or, perhaps, more than compensate for) fifteen years of incarceration experienced by a non-ill prisoner in the general population.[128] In essence, the judge would be treating the collateral effects of incarceration, proximately caused by the state, as units of punishment when assessing whether an offender has reached the quantum of punishment merited by his criminal act.[129]

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[127] *See supra* notes 73–74, 117–123 and accompanying text.

[128] Most jurisdictions grant judges only limited resentencing or sentence modification authority. *See* Klingele, *supra* note 77, at 498–509 (exploring the history and modern practice of judicial sentence modification, including the inherent authority approach of Wisconsin). A jurisdiction that adopts proposed MPC § 305.7 would greatly expand judges' authority to modify sentences, however, and could allow an equal impact analysis of the sort imagined here. *See* Johnston, *supra* note 12, at 89 & n.214 (articulating how an offender's vulnerability to harm could factor into the assessment of punishment severity). This analysis assumes that a judge could identify or, for purposes of this comparative inquiry, credibly hypothesize, the "typical" legitimate conditions experienced by a "typical" non-ill inmate in the general population at some security level. *See infra* note 137.

Moreover, the test and remedies outlined here would differ markedly from those available under the Eighth Amendment. First, to establish an Eighth Amendment violation for harsh conditions of confinement, an inmate must demonstrate that the responsible prison official acted with "deliberate indifference" towards his health or safety by knowing of the existence of conditions that pose "a substantial risk of serious harm" and failing to take reasonable measures to abate the risk. Farmer v. Brennan, 511 U.S. 825, 834, 838–42 (1999). Second, available remedies for past violations of the Eighth Amendment, which are typically litigated under 42 U.S.C. § 1983, include only injunctive relief and monetary damages. *See* Reinert, *supra* note 79, at 1601–02 & n.116 (noting the limitations on a court's authority to release a prisoner). Third, while early release is a possible remedy for ongoing violations, prisoner plaintiffs must first satisfy the requirements of the Prison Litigation Reform Act, and prison authorities must have been afforded ample opportunity to correct violations. *See id.* at 1600–01. In addition, in rare instances, habeas relief may be available to inmates experiencing horrendous conditions of confinement. *See, e.g.*, Fox v. Zenon, 806 P.2d 166, 168 (Or. Ct. App. 1991) (holding that a prisoner with alleged mental illness who attempted suicide multiple times and was denied psychiatric treatment despite numerous requests stated a claim for habeas relief); Schafer v. Maass, 858 P.2d 474, 477 (Or. Ct. App. 1993) (reversing the denial of habeas relief to a prisoner alleging "ongoing and periodical assaults"); Coffin v. Reichard, 143 F.2d 443, 444–45 (6th Cir. 1944) (reversing the denial of habeas relief to a prisoner alleging that he suffered "bodily harm and injuries" and that he was "subjected to assaults, cruelties and indignities from guards" and other inmates). *But see, e.g.*, Rodney v. Romano, 814 F. Supp. 311, 312–13 (E.D.N.Y. 1993) (holding that a pretrial detainee must seek relief for inadequate medical treatment under § 1983, not by a writ of habeas corpus).

[129] Admittedly, treating unintended, but foreseeable, side effects of incarceration as punishment is a controversial practice that contradicts traditional understandings of punishment. *See supra* note 74.

To date, discussions of the equal impact principle have primarily taken place in the context of original sentencing.[130] For instance, scholars have applied this theory to conclude that reduced terms of incarceration would be appropriate to effectuate proportionate punishment for mentally ill individuals,[131] the physically disabled,[132] and the elderly.[133] A key concern during original sentencing is how to account, if at all, for foreseeable harm to vulnerable defendants.[134] Judges could apply the equal impact principle more cleanly, however, in the context of resentencing. At the resentencing stage, judges could rely on a record of the individual's experience in prison, the conditions in which he has been confined, and the medical or mental health care that he has received, rather than merely attempt to forecast possible harm. A prisoner could establish, for example, his previous term of confinement in isolation, his declining mental health, his unmet need for mental health treatment, and any victimization by staff or inmates. While these conditions may establish grounds for an Eighth Amendment violation in a lawsuit brought under 42 U.S.C. § 1983,[135] they might also provide a basis for resentencing, to the extent that they made an inmate's carceral punishment cognizably

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[130] *See* VON HIRSCH & ASHWORTH, *supra* note 70, at 172 (discussing the equal impact principle as part of a proportionalist sentencing model); ANDREW ASHWORTH, SENTENCING AND PENAL POLICY 277 (1983) (arguing that the original sentence should strive for equal impact); Johnston, *supra* note 28, at 194 n.219, 221–28 (advocating for sentencing accommodation for substantial risks of serious harm to a particular offender); *see also* Kolber, *supra* note 73, at 199–210 (arguing that an offender's subjective experience of a punishment should be accounted for when assessing proportionality).

[131] *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 100 (5th ed. 2010) (suggesting that sentencing may be adjusted for offenders who have a "special mental or medical condition"); VON HIRSCH & ASHWORTH, *supra* note 70, at 173 (describing how the equal impact principle would work for "old, ill, or disabled defendants"); Ashworth & Player, *supra* note 73, at 255 (arguing that the equal impact principle can minimize disproportionate impact on certain offenders, e.g., the "mentally disordered"); Johnston, *supra* note 28, at 194 n.219, 221–28 (advocating this position).

[132] *See* VON HIRSCH & ASHWORTH, *supra* note 70, at 172 (applying the equal impact principle to a "disabled, wheelchair-bound offender" and concluding that the penalty should be "scaled down").

[133] *See id.* at 176 (arguing that, logically, the equal impact argument "hold[s]" in "cases where the offender is seriously affected by advanced age"); Ashworth & Player, *supra* note 73, at 260 (arguing that, under the equal impact theory, elderly offenders should have their sentences reduced to take account of their shorter life expectancy).

[134] *See* Johnston, *supra* note 28, at 199–200 n.242 (discussing the prudential concerns regarding the administration of sentences based on future harms).

[135] *See supra* note 128.

harsher than terms of the same length experienced by typical, hypothetical, less vulnerable inmates.[136] If, considering his conditions of confinement, an offender has already experienced his maximum deserved quantum of punishment, then his continued confinement would be unjust.[137]

b. Ends-benefits Proportionality. In a jurisdiction employing the sentencing theory of limiting retributivism,[138] immediate release could be appropriate when a punishment violates utilitarian notions of proportionality, even when it does not exceed the maximum deserved penalty.[139] Under this theory, desert and moral blameworthiness serve as a limiting principle, "a principle that, though it would rarely tell us the exact sanction to be imposed . . . would nevertheless give us the outer limits of leniency and severity which should not be exceeded."[140] Within the range of deserved penalties, a sentencing court may pursue utilitarian

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[136] The norm to be used in an equal impact analysis is difficult to identify and defend. A sizeable minority of prisoners, for instance, will have recognized vulnerabilities to harm, including mental or physical impairments, young age, first-offender status, or gay or bisexual orientation. *See, e.g.*, LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 221740, MEDICAL PROBLEMS OF PRISONERS (2008), *available at* http://www.bjs.gov/content/pub/pdf/mpp.pdf ("More than a third (36%) of state inmates and nearly a quarter (24%) of federal inmates reported having an impairment."); *Statistics: Average Inmate Age*, FED. BUREAU OF PRISONS (Sept. 27, 2014), http://www.bop.gov/about/statistics/statistics_inmate_age.jsp (reporting that, as of Sept. 30, 2014, there were 2,905 inmates age twenty-one or younger in federal prisons); THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1 (2006), *available at* http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf ("One-third [of the federal prison population] (34.4%) are first-time, non-violent offenders."); NAT'L INST. OF CORRS., POLICY REVIEW AND DEVELOPMENT GUIDE: LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX PERSONS IN CUSTODIAL SETTINGS 6 (2013), *available at* http://www.prearesourcecenter.org/sites/default/files/content/lgbtipolicyguideaugust2013.pdf (citing a 2008 government study finding that 8% of surveyed prisoners identified as a sexuality other than heterosexual). Correctional officials should confine all vulnerable inmates in a way that, to the extent possible, protects them from the collateral harmful effects of punishment.

[137] *Cf.* Reinert, *supra* note 79, at 1625 (arguing, in the context of the Eighth Amendment, "[i]f one believes that an abusive condition, in addition to the time already spent in prison, has imposed a total punishment that is disproportionate to an offender's crime of conviction, then the remedy of release is necessary not only to remedy the prior imposition of the abusive condition but also to prevent any further punishment. Additional punishment beyond that which is already disproportionate would quite clearly constitute a distinct constitutional injury that can be most directly remedied by release.").

[138] *See supra* notes 20–21 and accompanying text (explaining that the Model Penal Code proposed revisions have embraced the theory of limiting retributivism).

[139] *See infra* note 141 and accompanying text.

[140] Morris, *supra* note 93, at 259.

goals.[141] Limiting retributivism has proven to be quite popular among states that have recently revised their sentencing codes[142] and has been endorsed by the proposed Model Penal Code as well.[143]

As Professor Richard Frase has explained, the theory of limiting retributivism includes both utilitarian and retributivist notions of proportionality.[144] The utilitarian concept of ends-benefits proportionality, for instance, requires that the public and private costs of a punishment be proportionate to the seriousness of the crimes that the punishment hopes to avert.[145] While retributive theory generally limits its evaluation of a punishment's severity to the deprivations and hardships suffered by an offender,[146] the

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[141] *See id.* at 264–67 (giving examples of when utilitarian reasons justify unequal punishment of offenders, as long as all punishments are within the deserved range).

[142] *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76 & n.22 (2005) (noting that most United States jurisdictions have adopted some form of "limiting retributivism"); Frase, *Limiting Retributivism*, *supra* note 20, at 97–104 (detailing Minnesota's approach of limiting retributivism in its sentencing guidelines). *Contra* Michael Tonry, *Looking Back to See the Future of Punishment in America*, 74 SOC. RESERVE 353, 363 (2007) ("In this first decade of the twenty-first century, there is neither a prevailing punishment paradigm in practice nor a prevailing normative framework for assessing or talking about punishment in principle.").

[143] TD-1, *supra* note 20, § 1.02(2)(a) cmt.

[144] *See* Richard S. Frase, *Theories of Proportionality and Desert*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 131, 131–47 (Joan Petersilia & Kevin R. Reitz eds., 2012) [hereinafter Frase, *Theories of Proportionality and Desert*]; Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 40–49 (2008) [hereinafter Frase, *Limiting Excessive Prison Sentences*] (describing "limiting retributivism" as a more "modest" theory than pure retributive theories of punishment).

[145] *See* Frase, *Limiting Excessive Prison Sentences*, *supra* note 144, at 44 (providing utilitarian arguments for punishing in proportion to the seriousness of the crime). While retributive proportionality generally focuses on the harm caused or threatened by the offender's criminal act and his culpability at the time of that act, the utilitarian ends-benefits proportionality equation considers the harm threatened or inflicted by the offense—including the aggregate harm caused by all acts similar to the defendant's, and the difficulty of detecting and deterring such actions—"but only when and to the extent that such punishment will prevent future crimes by this offender or others." *See id.* at 44–45 (comparing utilitarian ends-benefits principles and retributive proportionality); *see also* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 594–95 (2005) (explaining the differences between utilitarian ends-benefits proportionality and retributive proportionality). An offender's culpability would only be relevant to the extent that it affects the likely future benefits of the punishment. *See* Frase, *Limiting Excessive Prison Sentences*, *supra* note 144, at 45.

[146] *See* Frase, *supra* note 145, at 595 (noting that retributive theory ignores the collateral consequences of imposing punishment).

"ends" portion of the ends-benefits proportionality equation considers costs borne by the offender (including unintended suffering),[147] his family,[148] and the public.[149] Public costs include a sanction's expense as well as "perverse incentives produced by harsh penalties . . . [and] the tendency for disproportionate penalties to undermine the public's sense of the relative gravity of different crimes, and cause a public loss of respect for, and willingness to obey and cooperate with, criminal justice authorities."[150]

Under the theory of limiting retributivism, ends-benefits proportionality could play a role in fine-tuning the offender's sentence within the broad bounds of deserved punishment.[151] Ends-benefits proportionality could result in immediate release when the costs exacted by a sanction have already exceeded its likely utilitarian benefits,[152] so long as the offender has already satisfied his minimum deserved punishment. The utilitarian proportionality analysis may also result in immediate release when—again, so long as requirements of minimal desert have been satisfied—any additional increment of the relevant sanction would impose costs in excess of likely future benefits and no alternative means of punishment exists with a more favorable proportionality ratio.[153]

B. PROPRIETY OF PAROLE

For competent, mentally ill prisoners[154] with a remaining punishment obligation,[155] parole or another form of conditional

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[147] *See id.* at 593–94; *see also id.* at 646–47 (detailing the many aspects of harm suffered by prisoners during and after confinement).

[148] Frase, *Limiting Excessive Prison Sentences*, *supra* note 144, at 44.

[149] *Id.* at 44–45; Frase, *supra* note 145, at 595.

[150] Frase, *Limiting Excessive Prison Sentences*, *supra* note 144, at 45.

[151] *See supra* notes 20–21, 140–141 and accompanying text.

[152] *See* Frase, *supra* note 145, at 594 ("Including publicly- as well as privately-borne costs and burdens, measures should not cost more than the benefits they are expected to produce.").

[153] *See* Frase, *Limiting Excessive Prison Sentences*, *supra* note 144, at 46–47 (discussing the interplay between ends-benefits and alternative-means proportionality).

[154] *See supra* Part III.A.*1* (concerning offenders rendered unfit subjects for retributive punishment).

[155] An offender may have a remaining punishment obligation because he has not reached the minimum threshold of deserved punishment. *See* TD-1, *supra* note 20, § 1.02(2)(a)(i)

release[156] may offer an attractive means to avoid the unjust punishment presented by continued imprisonment.[157] Parole, a period of conditional liberty dependent upon compliance with certain rules and restrictions, allows an offender the opportunity to reform under proper supervision and facilitates an offender's reintegration into society.[158] For offenders with serious mental health or medical issues, parole can provide for treatment in a more suitable environment than a correctional facility, such as a hospital, hospice facility, or inpatient or outpatient treatment facility.[159] While courts and scholars typically conceptualize parole

(requiring sentences to fall within a range of severity proportionate to the gravity of an offense, the harm done, and the blameworthiness of the offender). *But see* Frase, *supra* note 145, at 624 (observing that comparative sentencing scholarship and case law reveal a "much greater emphasis on avoiding disproportionately severe sentences than unduly lenient ones"). Alternatively, he may have surpassed this threshold but have a remaining increment of punishment justified by utilitarian ends. *See* TD-1, *supra* note 20, § 1.02(2)(a)(ii) (providing for the pursuit of utilitarian goals in sentencing under the revised Model Penal Code, including rehabilitation of offenders, restoration to victims, and eventual reintegration of offenders into society). Under the theory of limiting retributivism, the state cannot incarcerate an offender simply to incapacitate him or to deter others (or for any other utilitarian end) if the punishment would exceed the maximum quantum deemed deserved by his crime. *See* TD-1, *supra* note 20, § 1.02(2)(a)(i) (mandating that sentences "in all cases [fall] within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"); *id.* § 1.02(2)(a)(ii) (authorizing the consideration of utilitarian ends "provided these goals are pursued within the boundaries of proportionality").

[156] *See* United States v. Richardson, 483 F.2d 516, 519 n.6 (8th Cir. 1973) ("The essence of parole is a conditional release from prison before completion of sentence.").

[157] *See* HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS 75 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf ("While a prison term may have been proportionate at the time imposed, circumstances can arise that change the calculus against continued incarceration and in favor of some form of early release, even if under ongoing supervision.").

[158] *See* Morrissey v. Brewer, 408 U.S. 471, 477 (1972) ("[Parole's] purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed."); Zerbst v. Kidwell, 304 U.S. 359, 363 (1938) ("Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency—under guidance and control of the [Parole] Board.").

[159] *See, e.g.*, MORRIS & TONRY, *supra* note 20, at 186 (explaining the need for community-based intermediate punishments for offenders with addictions or mental illness because "prison is such an inappropriate place" for treatment); THOMAS E. FEUCHT & JOSEPH GFROERER, SAMHSA, NAT'L INST. OF JUSTICE, MENTAL AND SUBSTANCE USE DISORDERS AMONG ADULT MEN ON PROBATION OR PAROLE: SOME SUCCESS AGAINST A PERSISTENT CHALLENGE (2011), *available at* http://oas.samhsa.gov/2k11/NIJ_Data_Review/MentalDisorders.htm (finding that probationers and parolees are more likely than the general

as serving a rehabilitative function,[160] parole is a form of custody and thus may serve retributive ends as well.[161]

As the punitive value of a parole term will vary by its conditions and duration, parole could operate as a means of effectuating retributive, as well as utilitarian,[162] punishment. A sophisticated literature has developed regarding the punitive value and interchangeability of sanctions.[163] Commentators have generated principles of interchangeability and equivalency tables for various sanctions based on their relative impingement upon human interests or quality of life.[164] These scholars purport to identify and equate units of traditional and alternative penalties such as confinement in a jail or prison, intermittent confinement at a state-designated facility, home detention with electronic supervision, community service, mandatory outpatient or inpatient treatment, fines, and probation.[165] To inform and refine

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population to receive some mental health treatment, but are also more likely to report an unmet need for mental health services); *see also* Williams et al., *supra* note 103, at 125 (citing studies showing that only 75 of 1719 state correctional facilities and 6 of 102 federal facilities have hospices).

[160] *See, e.g.*, *In re* Grey, 522 P.2d 664, 665 (Cal. 1974) ("[T]his policy [of the parole system] reflects an emphasis on reformation of the offender. . . . The terms of incarceration and parole are to be fixed in accordance with the adjustment and social rehabilitation of the prisoner. . . .").

[161] *See* Bricker v. Mich. Parole Bd., 405 F. Supp. 1340, 1343 (E.D. Mich. 1975) ("The parole system is a part of the state correctional system in that parole is a form of custody whereby the prisoner leaves his place of incarceration while remaining in the legal custody and control of the Board of Parole until termination of his sentence."); *Morrissey*, 408 U.S. at 478 (observing that parole conditions "restrict [a person's] activities substantially beyond the ordinary restrictions imposed by law on an individual citizen"); *see also* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 100–02 (2001) (suggesting that probation, through its elements of supervision and conditions on an individual's liberty, may serve as a retributively appropriate sanction); *cf.* Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1753–66 (2012) (exploring the relationship between sentence severity and the possibility of parole).

[162] *See supra* note 160.

[163] *See infra* notes 165–166.

[164] *See infra* note 165.

[165] For early discussions of scaling principles and grids of sanctions of comparable severity see, for example, Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 55 (1987) (providing a sentencing grid that prescribes "sanction units" of comparative punitive bite); Andrew von Hirsch et al., *Punishments in the Community and the Principles of Desert*, 20 RUTGERS L.J. 595, 598, 604, 607 (1989) (applying principles of desert to the choice among noncustodial penalties and advocating for limited substitutability and the ranking of penalties based on the degree of intrusion on offenders' interests); Andrew von Hirsch & Martin Wasik, *Non-Custodial Penalties and the Principles of Desert*, 1988 CRIM. L. REV. 555,

equivalency tables, researchers have measured how offenders perceive and evaluate various sanctions.[166] Such principles and grids could be useful in identifying the period of parole and attendant conditions that would satisfy an offender's remaining

556, 561, 569 (same). For equivalency tables informed by offender perceptions, see sources listed at *infra* note 166.

[166] *See, e.g.*, David C. May et al., *Predicting Offender-Generated Exchange Rates: Implications for a Theory of Sentence Severity*, 51 CRIME & DELINQ. 373, 379–80 (2005) (explaining how 588 offenders currently serving various punishments were surveyed through an eight-page questionnaire that gauged respondents' perceptions of the severity level of nine alternative sanctions compared to a year in prison); Joan Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 PRISON J. 306, 316–17 (1994) (detailing how offenders in Minnesota rank the severity of common probation conditions, ranging from fines of $100 to a five-year prison term); William Spelman, *The Severity of Intermediate Sanctions*, 32 J. RES. CRIME & DELINQ. 107, 109 (1995) (describing a survey asking recently convicted offenders in Texas to rate how they perceived a range of punishments varying in time and mode of confinement in terms of severity). Research has consistently found that offenders perceive community sanctions, at some level of intensity, to be as punitive as incarceration. *See, e.g.*, Petersilia & Deschenes, *supra*, at 321 (finding that inmates considered one year in prison as equivalent in severity to three years of intensive probation supervision, and six months in jail equivalent to one year of intensive supervision); Spelman, *supra*, at 121 (finding that 75% of offenders rated a fine or intensive probation as more severe than the lightest carceral sanction); Peter B. Wood & David C. May, *Racial Differences in Perceptions of the Severity of Sanctions: A Comparison of Prison with Alternatives*, 20 JUST. Q. 605, 627 (2003) (finding that black probationers are more likely to choose prison over alternative punishments, but that white probationers were more willing to serve long durations of alternative sanctions to avoid prison). Offenders' race, age, marital status, and (to a lesser extent) sex influence their perceptions of sanction severity. *See, e.g.*, Beverly R. Crank & Timothy Brezina, *"Prison Will Either Make Ya or Break Ya": Punishment, Deterrence, and the Criminal Lifestyle*, 34 DEVIANT BEHAV. 782, 785 (2013) (finding that offenders who were married and had children viewed prison as more severe and preferred community-based sanctions); May et al., *supra*, at 387–91 (finding that males, African-Americans, older offenders, and offenders with prison experience were willing to serve less of a given alternative to avoid imprisonment); David C. May & Peter B. Wood, *What Influences Offenders' Willingness to Serve Alternative Sanctions?*, 85 PRISON J. 145, 161 (2005) (finding that married offenders were more likely to agree to probation but much less likely to agree to spend any time in boot camp, and that marital status had no bearing on the amount of time an offender was willing to serve an alternative sanction). Researchers have also explored, to a lesser extent, perceptions of sanction severity among judges, correctional officials, and the public. *See, e.g.*, Voula Marinos, *Thinking About Penal Equivalents*, 7 PUNISHMENT & SOC'Y 441, 447 (2005) (finding that members of the public who perceive expression of the community's disapproval of a crime as highly important for purposes of sentencing are more likely to oppose fines rather than prison, compared to members who find denunciation less important); Nathan T. Moore et al., *Offenders, Judges and Officers Rate the Relative Severity of Alternative Sanctions Compared to Prison*, 46 J. OFFENDER REHABILITATION 49, 63 (2008) (finding that judges, officers, and offenders commonly view twelve months in medium-security prison as equivalent to six months in boot camp).

punishment obligation,[167] assuming that incarceration is not the only sanction severe enough to communicate the degree of censure warranted for the offense.[168] When equally effective means exist for achieving a given set of utilitarian benefits, alternative-means proportionality calls for selecting the least costly sanction.[169]

In those states that recognize utilitarian and retributivist goals in sentencing, the perceived dangerousness of an offender with a serious mental illness will reduce his likelihood of securing parole.[170] Indeed, a typical statutory precondition of parole is that a decisionmaker must find—by evidence of the inmate's rehabilitation, good conduct in prison, family ties, job skills and prospects, or other evidence[171]—that the prisoner will abstain from violating the law and that his release will otherwise be compatible

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[167] *See* TD-2, *supra* note 18, § 305.7(7) (allowing a trial court to modify a sentence upon finding that the prisoner's circumstances, including age and family circumstances, justify a modification under the purposes of sentencing presented in § 1.02(2)); TD-1, *supra* note 20, § 1.02(2)(a)(i) (listing as an aim of sentencing to render a sentence whose severity is proportionate to the gravity of the offense, harm done to the victim, and blameworthiness of the offender).

[168] *See, e.g.*, ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 111 (1976) ("One reason for preferring incarceration is simply that we have not found another satisfactory severe punishment."); Robert E. Harlow et al., *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71, 86 (1995) (noting that survey respondents viewed eighteen months of intermediate sanctions as equivalent to six months imprisonment, but that "[n]o intermediate sanctions were seen as equivalent to prison terms of 2 years or more"). In addition, incarceration may be the only sanction likely to serve as an effective general or specific deterrent. *See* DAVID C. ANDERSON, SENSIBLE JUSTICE: ALTERNATIVES TO PRISON 19, 144 (1998) (noting that laws designed to reduce major violence inevitably sweep in lesser offenders, but that one reason given to justify incarceration is that "other sanctions have proved insufficient").

[169] *See* Frase, *Theories of Proportionality and Desert*, *supra* note 144, at 141 ("[A]mong equally effective means to achieve a given end, those that are less costly or burdensome should be preferred."); Frase, *Limiting Excessive Prison Sentences*, *supra* note 144, at 43, 45–46 (noting that utilitarian efficiency principles support imposing the least costly of two equally effective means).

[170] *See* TINA CHIU, VERA INST. OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 6–9 (2010) (identifying several state geriatric release statutes that provide for release only when the offender is not a threat to public safety).

[171] *See, e.g.*, DEL. CODE ANN. tit. 11, § 4347 (2012) (listing job skills, anger management, and conflict resolution among factors to consider in determining the placement of an offender on parole); VA. CODE ANN. § 53.1-155 (2012) (mandating investigation into a prisoner's physical and mental condition as well as employment and attitude while in prison before the Parole Board's determination).

with society's welfare.[172] States' compassionate release statutes similarly reflect the overriding importance of public welfare by restricting release to those terminally ill, seriously ill, or elderly inmates who pose no significant public safety threat.[173] When no set of post-release conditions reduces an offender's risk to tolerable levels,[174] conditional release is unlikely to be a feasible option.[175]

The centrality of offender dangerousness to parole decisions is significant because an offender's mental disorder will often not affect his likelihood of recidivism or violence.[176] While some studies have found a modest positive correlation between psychotic

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[172] *See, e.g.*, Pearson v. Muntz, 639 F.3d 1185, 1187 (9th Cir. 2011) (describing that public safety in relation to the inmate's current dangerousness is the primary concern in the California Parole Board's determination); N.Y. EXEC. LAW § 259-i(c)(A) (McKinney 2012) (stating that the decision to release an offender for parole requires a consideration of whether his release is "not incompatible with the welfare of society"). Of course, both ends-benefits and alternative-means proportionality would allow the consideration of offender dangerousness and the preventative benefits of a sanction.

[173] Klingele, *supra* note 77, at 492 (quoting N.H. REV. STAT. ANN. § 651-A:10-a(I) (2004), WYO. STAT. ANN. § 7-13-424 (2008)) ("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."); Laura Tobler & Kristine Goodwin, *Reducing Correctional Health Care Spending*, 21 LEGISBRIEF, Mar. 2013, *available at* http://www.ncsl.org/research/health/legisbrief-reducing-correctional-health-care-spend.aspx ("[A]t least 41 states allow medically incapacitated or terminally ill inmates to leave prison early if they do not pose a public safety risk.").

[174] In the case of medical parole, a board of pardons or other decisionmaker will often condition an offender's release on his placement in a hospital, hospice, or other venue capable of providing necessary health care. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-131d(a) (2013) (stating a parolee's release for medical parole is conditioned on the parolee's placement in a hospital, hospice, or other housing that can provide health care). These settings will often be in non-secure locations.

[175] *See, e.g.*, State v. Verducci, 489 A.2d 715, 716 (N.J. Super. Ct. App. Div. 1985) ("The humane objective of providing appropriate care and treatment for the mentally impaired must be balanced against the demands of public security. . . . Where the pathology from which the defendant suffers poses a serious risk to the public safety, the scale necessarily tips in favor of continued incarceration despite the possibility of adverse psychological effects that might well ensue. In that regard, we emphasize that primary among the hierarchy of governmental objectives is the obligation to protect the citizen against criminal attack."); State v. Bacuzzi, 708 So. 2d 1065, 1069 (La. Ct. App. 1998) (affirming the trial court's judgment where that court denied probation, despite evidence of bipolar and generalized anxiety disorders and medical testimony that the offender would be psychologically and physically damaged in prison, "due to the risk that the defendant would commit another crime . . . and that to place the defendant on a period of probation would depreciate the seriousness of the offense which he has committed").

[176] *See infra* note 178 and accompanying text.

symptoms and violence or criminal behavior,[177] the weight of the evidence suggests that mental disorder and clinical symptoms play a negligible role, if any, in recidivism.[178] Therefore, while most mental disorders appear not to significantly *increase* dangerousness (contrary to the widely held assumptions of the public,[179] judges,[180] parole officers,[181] and probation officers[182]),

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[177] *See* E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 565 n.257 (2012) (summarizing studies on the relationship of psychotic symptoms and violence); Seena Fazel & Rongqin Yu, *Psychotic Disorders and Repeat Offending: Systematic Review and Meta-Analysis*, 37 SCHIZOPHRENIA BULL. 800, 806 (2011) ("Our main finding is in contrast to an influential meta-analysis that reported an inverse association with the psychoses . . . ."); Jillian Peterson et al., *Analyzing Offense Patterns as a Function of Mental Illness to Test the Criminalization Hypothesis*, 61 PSYCHIATRIC SERVICES 1217, 1221 (2010) (finding that the criminal behavior of a small subset of offenders was driven by their hallucinations or delusions).

[178] *See* Johnston, *supra* note 177, at 564–68 & nn.274–79 (discussing meta-analyses and other studies finding that a major mental disorder was unrelated to recidivism); *see also* Donna L. Hall et al., *Predictors of General and Violent Recidivism Among SMI Prisoners Returning to Communities in New York State*, 40 J. AM. ACAD. PSYCHIATRY & L. 221, 229–30 (2012) ("An individual's psychiatric history, in contrast, did not add to the prediction of re-arrest. Diagnoses, level of mental health need before release from prison, or history of psychiatric hospitalization did not differentiate those re-arrested."); Arthur J. Lurigio, *Examining Prevailing Beliefs About People with Serious Mental Illness in the Criminal Justice System*, 75 FED. PROBATION 11, 15 (2011) ("[N]o pathogenesis between mental illness and crime has ever been established. The untreated symptoms of the three most serious mental illnesses (schizophrenia, bipolar disorder, and major depression) suggest either no or a weak casual pathway."). Relatedly, the provision of mental health treatment, without more, is not likely to reduce the likelihood of recidivism for mentally disordered offenders. Johnston, *supra* note 177, at 573; *see also* Peterson et al., *supra* note 177, at 1221 (finding that only a small percentage of offenders with mental illness are likely to engage in criminal behavior).

[179] *See* Johnston, *supra* note 177, at 528–29 & nn.51–52 (noting that the media's portrayal of individuals with mental health disorders and social stigmas about such individuals have created a false stereotype that these individuals are violent because of their condition).

[180] *See, e.g.*, *id.* at 561–62 (quoting mental health court judges); SLOBOGIN ET AL., *supra* note 37, at 653 (citing studies showing that unsuccessful insanity defenses and "evidence of 'extreme mental or emotional disturbance' correlates positively with death sentences"). The common misconception that mental illness renders an offender *more* dangerous may explain why most states do not include mental or cognitive dysfunction as grounds for early release in their compassionate release statutes. *See* TD-2, *supra* note 18, § 305.7 cmt. b & reporter's note b (noting that only a minority of state compassionate release statutes consider mental health).

[181] *See* Jason Matejkowski, *Exploring the Moderating Effects of Mental Illness on Parole Release Decisions*, 75 FED. PROBATION 19, 19 (2011) (noting that while mental illness is not a central factor in risk analysis by parole officers, individuals with mental health disorders are less likely to receive parole than non-mentally ill inmates).

[182] *See* Jennifer Eno Louden & Jennifer L. Skeem, *How Do Probation Officers Assess and Manage Recidivism and Violence Risk for Probationers with Mental Disorder? An*

they do not appear to *reduce* an individual's dangerousness, either. Even dementia, which some medical professionals have argued should serve as the basis for compassionate release,[183] may not lessen an individual's likelihood of committing crimes.[184] Since most mental disorders do not dampen recidivism, a mentally disordered individual typically will need some other condition or set of experiences to demonstrate that his release will cohere with public safety in order to satisfy statutory requirements for parole.

Second, courts may be unlikely to release an offender on parole when his underlying crime is serious. A number of scholars have argued that the sanction of incarceration, as opposed to an alternative sanction such as probation with mandatory treatment and supervision, is necessary to communicate the degree of censure warranted by some crimes.[185] Under the same logic, a judge could justify continued incarceration by stressing factors that affect the minimum proportionality of a sentence, namely the offender's culpability, the gravity of the offense, and the harm to the victim.[186] The fact that many states' compassionate release

Experimental Investigation, 37 LAW & HUM. BEHAV. 22, 31 (2012) (noting that probation officers view probationers with mental health disorders as high-risk).

[183] *See generally* Williams et al., *supra* note 103, at 125 (proposing national criteria for the compassionate release of three categories of seriously ill prisoners, including prisoners with dementia).

[184] In fact, individuals with dementia may be more likely to experience agitation or exhibit aggression. *See, e.g.*, Constantine G. Lyketsos et al., *Mental and Behavioral Disturbances in Dementia: Findings from the Cache County Study on Memory in Aging*, 157 AM. J. PSYCHIATRY 708, 711–12 (2000) (finding that 23.7% of patients with dementia experienced agitation or aggression compared to 2.8% of patients without dementia, and that rates of agitation and aggression increased with severity of dementia); Constantine G. Lyketsos et al., *Physical Aggression in Dementia Patients and Its Relationship to Depression*, 156 AM. J. PSYCHIATRY 66, 67–68 (1999) (finding that 15% of community-residing patients referred for evaluation to the Johns Hopkins Neuropsychiatry and Memory Group engaged in physically aggressive behavior and noting a link between depression and violence in persons with dementia); Rebecca Eastley & Gordon K. Wilcock, *Prevalence and Correlates of Aggressive Behaviours Occurring in Patients with Alzheimer's Disease*, 12 INT'L J. GERIATRIC PSYCHIATRY 484, 484 (1997) (finding that the presence of dyspraxia increased the likelihood of assaultive behavior in a sample of patients diagnosed as suffering from dementia and living in non-institutional settings); *cf.* Jeremiah Heinik et al., *Dementia and Crime: A Forensic Psychiatry Unit Study in Israel*, 9 INT'L J. GERIATRIC PSYCHIATRY 491, 492 (1994) (finding no significant differences among the crimes allegedly committed by persons with dementia, functional psychosis, and personality disorders).

[185] *See supra* note 168. Of course, under a retributive theory of punishment, continued incarceration would not be appropriate beyond an offender's desert.

[186] *See* TD-1, *supra* note 20, § 1.02(2)(a)(i), (ii) (listing "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" as factors to consider in

statutes disqualify individuals convicted of high-level felonies from relief reflects a determination to incarcerate those who commit the most serious crimes even when prisoners no longer pose a public safety threat.[187]

In summary, parole or conditional release may serve as an appropriate option for some offenders with serious mental illnesses who have not yet received their quantum of deserved or otherwise justified punishment but for whom prison poses a substantial threat of serious harm and whose mental health would benefit from treatment outside the correctional environment. Since mental disorder typically does not reduce an individual's threat of violence or likelihood of recidivism, however, offenders with mental illnesses may not satisfy the common statutory requirement of posing little or no threat to public safety. In addition, parole may not be available for those offenders who committed serious crimes. For these two categories of "dangerous" offenders, which may constitute a sizeable proportion of the mentally ill prisoner population,[188] a sentencing judge will often need to look beyond parole to remedy unjust carceral sentences.

C. PROPRIETY OF SHORTENED PRISON TERMS

A final remedial option available to judges in sentence modification hearings is early but non-immediate release. The

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sentencing); *cf.* HUMAN RIGHTS WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 157, at 59–61 (recounting how considerations of the seriousness of the crime and the number of years served impact prison wardens' evaluations of compassionate release petitions).

[187] *See, e.g.*, N.J. STAT. ANN. § 30:4-123.51c(3) (West 2012) (precluding medical parole for those convicted of certain crimes); ARK. CODE ANN. § 12-29-404(d) (2014) (proscribing parole leave for those convicted of certain sex crimes); CONN. GEN. STAT. § 54-131k(a) (2014) (allowing compassionate release to any inmate, except those convicted of a "capital felony"); Stacy L. Gavin, *What Happens to the Correctional System When a Right to Health Care Meets Sentencing Reform*, 7 NAELA J. 249, 257 (2011) ("Generally, medical parole is not available to inmates convicted of violent crimes or felonies.").

[188] *See* JAMES & GLAZE, *supra* note 121, at 7 ("Among State prisoners who had a mental health problem, nearly half (49%) had a violent offense as their most serious offense, followed by property (20%) and drug offenses (19%)."); PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 174463, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999), *available at* http://www.bjs.gov/content/pub/pdf/mhtip.pdf ("Based on information from personal interviews, State prison inmates with a mental condition were more likely than other inmates to be incarcerated for a violent offense (53% compared to 46%) . . . .").

equal impact theory,[189] described above in reference to immediate release,[190] would support the use of sentence modification statutes to shorten the prison term of a mentally ill offender who has experienced disproportionately harsh or otherwise unjust conditions of confinement.[191] In short, a resentencing judge, treating conditions of confinement or offender hardship as units of punishment, could reduce an offender's sentence in recognition that a shorter prison term under harsh conditions roughly equates to a longer term under gentle conditions.[192] Whereas immediate release could compensate only for past conditions, the option of early but non-immediate release could compensate both for harsh, past conditions and for harsh, anticipated conditions.[193]

Reducing a prisoner's sentence on the basis of *anticipated* harsh prison conditions (and attendant hardships), however, is more problematic than reducing a sentence in light of *past* harm from conditions of confinement.[194] In the latter situation, the hardship would already have been endured, and allowing that hardship to satisfy a portion of an offender's punishment obligation would not necessarily convey judicial acceptance of the conditions responsible for the hardship. Rather, shortening an offender's sentence could be one form of remedy, not necessarily the exclusive one,[195] for the inmate's hardship or disproportionately harsh experience in prison. The shorter sentence could even be coupled with a directive that the inmate serve the remainder of his sentence in

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[189] *See supra* notes 73–74.

[190] *See supra* Part III.A.*2*.

[191] *See* TD-2, *supra* note 18, § 305.7(7), (8), cmt. I (noting the broad discretion compassionate release statutes give judges and providing for that discretion in the proposed Model Penal Code revision).

[192] *See supra* note 74 (noting the controversial nature of this treatment of unintended consequences of incarceration).

[193] *See* MOORE, *supra* note 120, at 11 (arguing for sentence adjustment in response to inmate suffering or vulnerability).

[194] For a defense of sentence mitigation on the basis of anticipated hardship and an evaluation of criticisms of this approach, see Johnston, *supra* note 28, at 200–07 (considering likelihood of prison violence), 221–29 (considering reduced carceral terms on the basis of foreseeable, substantial risks of serious harm, proximately caused by the state).

[195] *Id.* at 205–06 (noting the possible availability of tort or criminal remedies for harm that occurs in prison); *cf.* Markel & Flanders, *supra* note 53, at 961 ("If an unconstitutional tort occurs during the punitive encounter, the state's obligation may reasonably take the form of compensation, apology, injunctive relief, or administrative reform. Such harm to the offender does not necessitate the remission of the offender's balance of punishment; there are other currencies the state can use.").

different or more gentle conditions. In the former situation, however, the judge would be shortening a sentence on the basis of future conditions that the judge expects will occur. In these circumstances, the reduced sentence would convey acquiescence in, and implicit approval of, the anticipated conditions.[196] Some critics have even suggested that, under this approach, if the expected conditions or hardships did not occur, a longer sentence would be necessary to effectuate proportionate punishment.[197] Critically, granting a reduced prison term on the basis of anticipated harsh conditions would be improper and immoral unless some valid penal aim suffices to justify the consequent harm.[198] As Professor Adam Kolber has observed, it is unlikely that a legitimate retributive aim can justify the most harmful side-effects of incarceration.[199] If this is true, then a judge should not grant early, but non-immediate, release due to anticipated harm from harsh prison conditions.[200]

Thus, under the equal impact theory, a judge should only reduce an offender's prison sentence, leaving a portion of the term to be served, when one of two conditions can be met. First, a sentence reduction for past, harsh conditions would be acceptable when a judge believes that an inmate's conditions will materially improve. Second, a reduction for both past and anticipated harm from prison conditions could be permissible when the foreseen future conditions and harsh treatment are morally justifiable.[201] To the extent that neither of these conditions is satisfied, a judge's ability to remedy unjust sentences for offenders who have not reached their quantum of deserved punishment, but do not qualify for conditional release, is limited.

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[196] *See, e.g.*, Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 573 (2006) (arguing that federal courts that reduce prison sentences for extreme vulnerability to victimization are, in practice, sentencing vulnerable defendants to prison terms "at rape").

[197] *See* E-mail from Dan Markel, Professor of Law, Fla. State Univ., to author (Feb. 6, 2012, 16:51 EST) (on file with author).

[198] *See* Johnston, *supra* note 28, at 204 n.262 (discussing the doctrine of double effect).

[199] *See* Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 22–23 (2012).

[200] Accordingly, some jurisdictions' practice of granting discounts to offenders' carceral terms on the basis of anticipated hardship may be morally unjustifiable. *See supra* note 75. Under this reasoning, it would also be morally unacceptable to allow a carceral sentence, carrying anticipated unjustified harm, to proceed to its full term.

[201] *See supra* notes 194–200.

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In summary, the typical options available to judges at sentence modification hearings offer appropriate remedies for only a subset of those mentally ill prisoners suffering an unjust punishment. Immediate release will be an appropriate response for those offenders who are unfit subjects for retributive punishment and for those who have reached their maximum quantum of deserved punishment. It may also be an appropriate response, so long as an offender has already satisfied his minimum deserved punishment, when the costs exacted by incarceration have already exceeded its likely utilitarian benefits, or when any additional increment of incarceration would impose costs in excess of likely future benefits and no alternative means of punishment exists with a more favorable proportionality ratio. Shortened terms of confinement will only be morally permissible when an inmate's conditions of confinement are likely to materially improve or if foreseen future, harsh conditions and harm are morally justifiable. Conditional release offers an appropriate and sufficient remedy for the unjust punishment of those mentally ill prisoners with a remaining punishment obligation, but this option often will not be available for those offenders who continue to pose a public safety threat or who committed serious crimes. These prisoners are currently left without remedy, as judges lack the means to ensure the justness of continued confinement.

IV. PROPOSAL: AUTHORIZE JUDICIAL TAILORING OF CONDITIONS OF CONFINEMENT

The preceding discussion demonstrates that typical sentence modification options may be unavailing for those mentally disordered prisoners who do not qualify for conditional or immediate release, and who are likely to experience unjustifiably harsh conditions if they continue to be incarcerated. This Part offers a solution: authorize judges to tailor prisoners' conditions of confinement, even in the absence of an Eighth Amendment violation. This remedy, ordered in response to a defendant's motion for sentence modification and upon a finding of past and likely future unjust punishment, would allow judges to ensure that incarceration constitutes a just and appropriate sanction. Because

the proposed authority would infringe upon prison officials' abilities to manage correctional affairs, judges' discretion should be limited to modifying conditions when an inmate's continued confinement would be inhumane or unjustifiably harsh, and when neither immediate nor conditional release is a feasible option. The sections below outline the scope of such power and how it might work in practice, discuss the benefits of such expanded authority, and respond to likely objections. Future work will explore the mechanics of implementation in more detail.[202]

A. THE SCOPE OF THE MODIFICATION POWER

A number of modifications to an offender's carceral sentence are possible,[203] and the necessity of a modification for the justness of a sentence will vary by the inmate's particular needs, vulnerability to harm, and experience in prison to date. Possible modifications differ in their efficaciousness, efficiencies, and degrees of intrusiveness to the administration of prisons. Prior work has detailed possible modifications that judges could order in the context of an original sentencing.[204] These conditions include directing that offenders receive—or not receive—certain treatment in prison, disqualifying sites of confinement particularly likely to exacerbate an individual's disorder, and designating facilities with certain treatment or protective options.[205] This section will offer an example to show how tailoring an inmate's conditions of confinement could offer an effective remedy to an otherwise unjust

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[202] One issue worthy of exploration is whether a mentally ill prisoner should have a right to a state-provided expert in establishing the harshness of his conditions of confinement, the effects of incarceration, and the suitability of conditional release. *See* Ake v. Oklahoma, 470 U.S. 68, 83–84 (1985) (holding that due process entitles an indigent defendant to expert assistance in the context of a capital sentencing proceeding when the state introduces psychiatric evidence of his future dangerousness).

[203] *See* Johnston, *supra* note 38, at Part IV.B–F (exploring a number of possible sentence modifications).

[204] *See id.* (exploring a number of possible conditions).

[205] *Id.*; *cf.* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-9.7 (1989), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html#7-9.7 (providing that "[s]everely mentally ill . . . sentenced offenders should be treated in a mental health or mental retardation facility, preferably under the supervision of the jurisdiction's department of mental health" and that "[m]ental health . . . services should be available within the adult correctional facility for offenders whose mental illness . . . is not severe enough to necessitate commitment to a mental health or mental retardation facility").

punishment. It will then suggest an existing statutory analogue from the education context that could be useful in guiding the implementation of this idea.[206]

1. Example. Let us return to the hypothetical prisoner with bipolar disorder and psychosis who has been confined in administrative segregation for ten years of his fifteen-year sentence. Assume that nothing suggests the prison's utilization of a more therapeutic housing arrangement in the future. Let us also assume that a judge, entertaining the inmate's motion for sentence modification, finds that the inmate deserves further punishment and that, because of the seriousness of the original criminal act or the inmate's current state of dangerousness, he is not an appropriate candidate for conditional release. Nevertheless, the judge also finds that the inmate's exacerbated disorder and the mental and emotional pain caused by his solitary confinement threaten the proportionality and perhaps humaneness of his sentence.[207] To reduce the harm caused by the inmate's confinement in this restrictive environment, the judge, if so authorized, could establish standards for the offender's treatment. For instance, the judge could order that any period spent in segregation must take place under conditions recommended by the American Psychiatric Association.[208] These conditions include receipt of maximal access to structured, clinically indicated, out-of-cell programming and therapeutic activities, treatment in appropriate, out-of-cell programming space, and regular, unstructured, out-of-cell recreation.[209]

Alternatively, a judge could find that more intrusive modifications are necessary to render continued confinement a just sanction. The judge may decide that the inmate's confinement in

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[206] I am grateful to Professors Rebecca Morrow, Adam Gershowitz, and Tim Holbrook for suggesting this analogy.

[207] Again, the meaning ascribed to these terms does not necessarily reflect their usage in Eighth Amendment jurisprudence. *See supra* Part II.B.*1*, *3*.

[208] *See infra* notes 209–210.

[209] Am. Psychiatric Ass'n, *Position Statement on Segregation of Prisoners with Mental Illness*, *in* APA OFFICIAL ACTIONS 35, 35 (2012), *available at* http://www.dhcs.ca.gov/services/MH/Docu me nts/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf [hereinafter APA, *Position Statement*]; *see also* AM. PSYCHIATRIC ASS'N, PSYCHIATRIC SERVICES IN JAILS AND PRISONS 5 (2d ed. 2000) (providing standards for the provision of care, regular assessment by qualified mental health professionals, and the removal from segregation of inmates "in current, severe psychiatric crisis").

isolation, given his severe mental illness and experience in isolation to date, exacts too great a psychological toll to continue indefinitely.[210] The judge could limit correctional authorities' ability to subject this particular inmate to that treatment by, for instance, requiring that any term in isolation exceeding some duration receive judicial approval. Another option could involve ordering that the inmate receive an alternative housing arrangement such as one in an intermediate care facility[211] or a secure mental health hospital, unless a qualified mental health professional deems such placement unnecessary for the inmate's

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[210] A number of courts have concluded that the prolonged confinement of inmates with preexisting serious mental illnesses in extremely isolated conditions constitutes cruel and unusual punishment under the Eighth Amendment. *See* Johnston, *supra* note 28, at 178 & n.156 (citing cases discussing confinement in supermax facilities); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 25–31 (2012) (discussing cases holding that prolonged supermax solitary confinement of mentally ill offenders violates constitutional standards); *see also* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 47 IND. L.J. (forthcoming 2014) (manuscript at 1), *available at* http://ssrn.com/abstract=2411845 (arguing that solitary confinement is cruel and unusual punishment and that extreme solitary confinement is counterproductive to public safety, institutional safety, prisoner welfare, and cost efficiency). Many professional organizations now recommend that penal institutions avoid the prolonged segregation of inmates with serious mental illnesses. *See* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 55 (3d ed. 2011), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf [hereinafter ABA STANDARDS: TREATMENT OF PRISONERS] ("No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing."); ABA, *Position Statement*, *supra* note 209, at 35 ("Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates."); AM. PUB. HEALTH ASS'N, SOLITARY CONFINEMENT AS A PUBLIC HEALTH ISSUE, Policy No. 201310 (2013), *available at* http://www.apha.org/policy-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue (calling on correctional authorities to "[e]xclude from solitary confinement prisoners with serious mental illnesses"); SOC'Y OF CORR. PHYSICIANS, POSITION STATEMENT, RESTRICTED HOUSING OF MENTALLY ILL INMATES (2013), *available at* http://societyofcorrectionalphysicians.org/resources/position-statements/restricted-housing-of-mentally-ill-inmates (acknowledging "that prolonged segregation of inmates with serious mental illness, with rare exceptions, violates basic tenets of mental health treatment" and that "[i]nmates who are seriously mentally ill should be either excluded from prolonged segregation status (i.e. beyond 4 weeks) or the conditions of their confinement should be modified in a manner that allows for adequate out-of-cell structured therapeutic activities and adequate time in an appropriately designed outdoor exercise area").

[211] *See, e.g.*, Johnston, *supra* note 38, at 670–73 (describing the prevalence and benefits of intermediate care facilities).

mental health.[212] Under these arrangements, the individual could continue his confinement and experience the full range of justified deprivations of liberty while avoiding a key source of documented, unjustified, and substantial harm.

2. Analogy for Implementation: Individualized Education Programs. The adoption of this proposal would, in essence, result in judicially created individualized incarceration plans for some subset of mentally disordered prisoners. Some inmates currently benefit from similar individualized treatment secured through injunctions ordered in response to successful litigation under 42 U.S.C. § 1983 for unconstitutional prison conditions.[213] Given how difficult it is to establish the subjective component of the Eighth Amendment test for intolerable prison conditions,[214] however, allowing resentencing judges to order individualized treatment in response to actual or foreseen objective harm would greatly expand those numbers. The example of individualized education programs, which are widely available across the United States, may provide useful guidance for how to achieve similar individualization in correctional settings.[215]

Under the Individuals with Disabilities Education Act (IDEA),[216] states accepting federal funds must provide a free, appropriate public education that is tailored to the unique needs of each child with a disability through an individualized education program (IEP).[217] Qualifying children include those suffering from

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[212] *See* ABA STANDARDS: TREATMENT OF PRISONERS, *supra* note 210, at 180 ("A correctional facility should provide prisoners diagnosed with mental illness, mental retardation, or other cognitive impairments appropriate housing assignments and programming opportunities in accordance with their diagnoses, vulnerabilities, functional impairments, and treatment or habilitation plans. A correctional agency should develop a range of housing options for such prisoners, including high security housing; residential housing with various privilege levels dependent upon treatment and security assessments; and transition housing to facilitate placement in general population or release from custody.").

[213] *See supra* note 128.

[214] *See supra* note 57 and accompanying text; *infra* notes 252–255 and accompanying text.

[215] *See supra* note 206.

[216] 20 U.S.C §§ 1400–1483 (2014).

[217] *See id.* § 1401 (defining "free appropriate public education"); *id.* § 1401(14) (defining IEP). While the IDEA only applies to children in elementary and secondary school, colleges must provide reasonable accommodations to make their programs accessible to students with disabilities under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. *See* Americans with Disabilities Act, Title II, 42 U.S.C. §§ 12131–12150 (2014), Rehabilitation Act, § 504, 29 U.S.C. § 794 (2014). For a pithy comparison of the

a serious emotional disturbance, autism, traumatic brain injury, intellectual disability, specific learning disability, or other health impairment, "who, by reason thereof, need[ ] special education and related services."[218] A parent or a teacher may refer a child for evaluation.[219] At that point, the school district must assess the child and determine whether he is eligible under the IDEA as a child with a disability.[220] Parents may seek an alternative evaluation of their child at state expense.[221] If a child qualifies as having a recognized disability, then the school, in consultation with the child's family, will create an IEP for the child.[222]

An IEP specifies the educational placement and services to be provided to the child, given his particular educational needs.[223] As Professor Mark Weber has explained:

> The IEP must contain a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals; a description of how the child's progress toward meeting the goals will be measured; a statement of the special education and related services and supplementary services to be provided the child and program modifications and supports; an explanation of the extent to which the child will not be participating with nondisabled children in general education classes; a listing of accommodations on state and district assessments; a statement of dates to begin services and their frequency, location, and duration; and a

responsibilities of educational institutions under the three statutes, see Amy G. Dell, *Transition: There Are No IEP's in College*, TECH-NJ (Jan. 20, 2010, 7:24 PM), http://www.tcnj.edu/~technj/2004/transition.htm.

218 20 U.S.C. § 1401(3)(a).

219 Mark C. Weber, *All Areas of Suspected Disability*, 59 LOY. L. REV. 289, 293 (2013).

220 *Id.*

221 34 C.F.R. § 300.502(b) (2014); Weber, *supra* note 219, at 296 (citing this provision and explaining that "[i]f the parent requests an independent evaluation, it is up to the school district either to file a due process complaint to show that its evaluation is appropriate, or to make sure that the independent evaluation is provided").

222 20 U.S.C. § 1414(d)(1)(B) (specifying that the child's parents are part of the IEP team); Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 424–25 (2011); Weber, *supra* note 219, at 297–98.

223 Romberg, *supra* note 222, at 424.

> specification of goals and services for post-secondary transition if the child is sixteen or older.[224]

The IDEA includes provisions governing the disciplinary measures that can be taken in relation to children with a disability.[225] The statute also requires notice to a child's parents of any changes to his IEP and allows participation in meetings regarding its content or implementation.[226] Parents may request a due process hearing if they are not satisfied with the IEP or other elements of the child's entitlement to a free, appropriate public education.[227] The appeal process includes an ultimate appeal to a state or federal court.[228]

Future work will probe the extent to which IEPs provide a useful example for the individualized incarceration of mentally disordered inmates, but a few preliminary observations are appropriate at this juncture. First, compelling similarities exist between both schools and prisons, and disabled students and mentally disordered inmates. Officials at both types of publicly-funded institutions are given broad discretion to maintain security and order and achieve their institutional missions,[229] yet these interests do not override an individual's interest in an appropriate

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[224] Weber, *supra* note 219, at 297; *see also* 20 U.S.C. § 1414(d)(1)(A) (defining IEP).

[225] 20 U.S.C. § 1415(k); *see also* Paolo Annino, *The Revised IDEA: Will It Help Children with Disabilities?*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2005) (noting that the IDEA disciplinary procedures include "diluted due process protections").

[226] *See* Gabriela Brizuela, *Making an "IDEA" a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U. L. REV. 595, 603 (2011) ("The IDEA also includes safeguards mandating that the child's parents participate in any meetings pertaining to their child's IEP and that they receive written notice of any proposed changes to the IEP.").

[227] *See* Salma A. Khaleq, *The Sanctioning Authority of Hearing Officers in Special Education Cases*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 4–5 (2012) (explaining the process for parents' requesting a due process hearing).

[228] 20 U.S.C. § 1415(i)(2)(A); *see also* Khaleq, *supra* note 227, at 4–5 (discussing the appeal process); Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L.J. 65, 68 (2007) ("The law afford[s] parents the opportunity to file for an impartial hearing at the local educational level, appeal that decision at the state educational level, and then file a civil action in either state or federal district court for a review of the state educational determination.").

[229] *See, e.g.*, Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 687–86 (commenting on the Court's decision to strengthen schools' rights to institutional discretion in the context of free speech).

education, health, or safety.[230] In addition, both IEPs and individualized incarceration would serve to protect members of a vulnerable population from harm. Both children and prisoners must rely on institutional officials to satisfy their needs.[231] Moreover, both disabled students and mentally disordered inmates may possess less developed cognitive facilities and less behavioral control than their non-ill peers.[232] Without the mandate of individualized treatment, these individuals would likely suffer neglect and some degree of harm as institutions cater to the needs of the more fully abled majority. This may be particularly true when disciplinary methods do not take disability into account.[233]

In addition, the process of creating and overseeing IEPs, though not without criticism,[234] appears to offer some useful lessons for the implementation of individualized incarceration. First, the process of identifying qualifying students demonstrates that third-party referrals will be important for recognizing individuals in need of tailored placement or services.[235] This is likely to be the case, as well, for inmates with mental disorders, who may find it difficult to understand their rights or utilize available grievance procedures. One potential option in a correctional setting would be to allow for the filing of anonymous reports to identify prisoners in need of special accommodation. As in the different (though not unrelated) context of the Prison Rape Elimination Act, these

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[230] *See id.* at 697 (observing that, even when balancing students' First Amendment interest against the schools' interests, the Court should favor the best educational outcome for students).

[231] *See* NAT'L ADVISORY COMM'N, *supra* note 64, at 173–74 (advocating for continuing jurisdiction over a prisoner's incarceration by invoking an analogy to guardianship law: "Although adult in the eyes of the law, prisoners are, in many senses, subject to the kind of control that parents and others exercise over children and for that reason are in need of a higher level of judicial supervision.").

[232] *Cf.* Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Students*, 75 WASH. L. REV. 1, 3–6 (2000) (introducing the controversial problems surrounding disciplining disabled students whose behavioral problems threaten the educational environment).

[233] *See supra* note 210 (discussing this neglect and harm with regards to solitary confinement).

[234] *See, e.g.*, Blau, *supra* note 228, at 74–75 (discussing the power imbalance between schools and parents in developing and implementing IEPs and how this imbalance creates "an almost insurmountable barrier to relationship building and true collaboration between the parties"); Romberg, *supra* note 222, at 417 (suggesting that "the IDEA's procedural protections are not effective in practice and are not particularly important, even in theory").

[235] *See supra* note 219 and accompanying text.

reports could go to correctional (or outside) authorities and trigger an official inquiry into the individual's plight and needs.[236] Legislatures should consider providing that defense counsel receive copies of third-party reports to facilitate motions for sentence modification.[237]

Second, the experience with IEPs demonstrates that successful accommodations often rely on collaboration between educational officials and a child's parents or guardian. Indeed, the involvement of school officials is critical to the discernment of educational goals and necessary and possible accommodations, as well as to the implementation of an IEP.[238] Likewise, once a broader right to just and humane conditions of confinement is established, inmates and their family members, friends, and defense attorneys should work with correctional officials to establish individualized treatment that is responsive to inmates' mental health needs and vulnerabilities throughout the course of an individual's confinement. At a sentence modification hearing, a judge should consider evidence presented by correctional officials on what modifications are necessary and possible at a relevant institution or within the broader correctional system. Finally, judges' experience in resolving disputes regarding IEPs suggests that they may be well-equipped to engage in the individualized fact-finding necessary for individualized incarceration.

B. RATIONALE AND JUSTIFICATION

Several reasons support authorizing courts to tailor prisoners' conditions of confinement when necessary to prevent unjust punishment. First and most fundamentally, particular conditions of confinement may be integral to a carceral punishment's humaneness or proportionality, and thus judicial control over those conditions may be necessary to ensure the accomplishment

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[236] *See* Nat'l Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,109 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf (summarizing standards and noting that they require that agencies provide multiple internal reporting avenues, at least one way to report abuse to an entity distinct from the agency, a means for reporting inmates to remain anonymous, and a way for third-parties to report abuse on behalf of an inmate).

[237] The reports could also be useful in establishing Eighth Amendment violations.

[238] *See* Romberg, *supra* note 222, at 424–25 (explaining that schools and parents collaborate to create an individualized IEP for each child's educational needs).

of sentencing objectives.[239] As Professor Alan Gluck has argued, "In determining appropriate sentences, judges consider the needs of both society and the convicted defendant. Accordingly, they should be able to ensure that the inmate's treatment is consistent with the purpose of the sentence."[240] Similarly, Professor Cheryl Kessler has maintained that courts' sentencing function engenders a "special judicial duty" to oversee the correctional process: "Control over the correctional process is a logical and necessary extension of the judicial concern that the nature and duration of confinement are reasonably related to its purpose. If this relationship does not exist, judicial sentencing to prison is pointless, arbitrary, and merely advisory."[241] Without the ability to respond to unjust conditions of confinement, courts merely possess a superficial power to determine just and appropriate punishment.[242]

Indeed, in the past, professional organizations have recognized the importance of courts' continuing authority to modify sentences in response to evolving conditions of confinement.[243] The American Bar Association in 1977 advocated that "[s]entencing courts should be authorized . . . to reduce a sentence or modify its terms whenever the court finds after an open hearing that the treatment of the prisoner or the conditions under which he lives are not related to the purpose of the sentence."[244] Similarly, the National Advisory Commission on Criminal Justice Standards and Goals proposed that "[c]ourts should retain jurisdiction . . . to determine whether an offender is subjected to conditions, requirements, or authority that are unconstitutional, undesirable, or not rationally related to the purpose of the sentence, when an

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[239] *See supra* Part II.B; *infra* notes 240–244.

[240] Alan H. Gluck, *Prisoners' Free Speech Rights: The Right to Receive Publications*, 1977 WASH. U. L.Q. 649, 672.

[241] Cheryl A. Kessler, *First Amendment Mailing Rights of Parolees and Prison Inmates: A Higher Standard of Judicial Protection*, 13 U.S.F. L. REV. 913, 941 (1979) (footnote omitted).

[242] *See* Johnston, *supra* note 38, at 643 (explaining how "[a]llowing judges to tailor disordered offenders' prison sentences in light of their vulnerabilities would enable judges to better fulfill their institutional function and achieve the goals of punishment").

[243] *See infra* notes 244–249 and accompanying text.

[244] Am. Bar Ass'n, *supra* note 66, at 409.

offender raises these issues."[245] The Commission recommended that sentencing courts receive authorization to reduce a sentence or modify its terms when they find that new factors dictate such modification or that the purpose of an original sentence is not being fulfilled.[246] The commentary explained the rationale underlying this authority in this way:

> The sentence imposed by the court is binding on two parties, the offender and the correctional agency. The offender is required to serve the sentence imposed. The correctional agency should be required to execute the sentence the sentencing court envisioned. The inherent power of a court continually to supervise its own orders should apply to the sentencing decision. Either party should be entitled to return to the court when the other party violates the order.[247]

The Commission specified that courts' power should extend beyond remedying constitutional violations to allow, for instance, review of "simple negligence in medical service and tort cases."[248] Only with this authority, similar to a court's continuing jurisdiction over equity decrees, could a court ensure that an inmate "will be treated as a human being with human and constitutional rights."[249] Thus, when a prisoner files a motion for sentence modification and a judge subsequently finds that the inmate's current and likely future confinement constitutes an unjust penalty—but that neither immediate nor conditional release is an appropriate option—then she should be authorized to remove apparent sources of disproportionality or inhumaneness through a sentence modification order. Without such a power,

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[245] NAT'L ADVISORY COMM'N, *supra* note 64, § 5.9, at 173; *see also id.* at 173 cmt. ("This standard substitutes the view that the sentence is analogous to decrees in equity cases, subject to further judicial scrutiny if the conditions of the decree are breached.").

[246] *Id.* § 5.9, at 173 & 174 cmt.

[247] *Id.* at 173 cmt.

[248] *Id.* at 174 cmt.

[249] *Id.*

judges will be unable to fulfill their institutional function, and the unjustness may continue unabated.[250]

Second, such a power could be useful in supplementing the anemic protection offered by the Eighth Amendment, which does little to guarantee humane and appropriate conditions of confinement.[251] As commentators have observed, the subjective prong of the Eighth Amendment effectively strips the Amendment of much of its force.[252] Especially in the context of neglect within an institution, it can be difficult, if not impossible, to identify a particular correctional official with the requisite knowledge of conditions that pose "a substantial risk of serious harm" to an individual prisoner.[253] In addition, as Professor James Park has reflected, "Knowing inaction is not the only source of inhumane prison conditions. It is apathy and an unwillingness to search out and prevent sources of harm that cause injury to prisoners."[254] Worse still, the Eighth Amendment standard essentially breeds passivity and inattention because the knowledge requirement incentivizes correctional officials to avoid gaining the requisite knowledge.[255] Allowing a judge to modify an inmate's sentence to

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[250] Products of the sentence modification process may prove useful in helping an inmate establish the subjective prong of the Eighth Amendment standard in a Section 1983 action for cruel and unusual prison conditions. Namely, the evidence adduced at the hearing or through the motions process could establish, later, that a correctional official knew of the existence of conditions that posed a substantial risk of serious harm and then failed to take reasonable measures to abate the risk. *See supra* note 59 and accompanying text.

[251] *See infra* notes 252–255 and accompanying text.

[252] *See, e.g.*, Park, *supra* note 60, at 441 ("By only requiring prison officials to act when they have knowledge of a substantial risk of serious harm, the knowledge requirement emasculates the duty to protect."); *supra* note 60.

[253] *See* Wilson v. Seiter, 501 U.S. 294, 310 (1991) (White, J., concurring) ("Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined . . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system."); *cf.* Ristroph, *supra* note 60, at 167–68 ("[P]arsing of the concept of punishment is arbitrary and incoherent. Contemporary punishment is a complex set of practices carried out by a number of official actors and institutions. The use of official intent to circumscribe the category of 'punishment' . . . denies both the complexity of punishment and its status as a set of practices." (footnote omitted)).

[254] Park, *supra* note 60, at 441.

[255] *See id.* at 443 (discussing the passivity of the substantial risk of the serious harm requirement); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS, at Pt. VIII (2001), *available at* http://www.hrw.org/reports/2001/prison/report8html#_1_50 (observing that the deliberate indifference standard and actual knowledge requirement "create

address conditions that meet some objective standard of harmfulness or that are otherwise unjustified by the purposes of punishment would serve as an effective counterforce to this deleterious incentive.

Finally, allowing a resentencing judge to modify conditions of confinement when necessary for the justness of a sentence would bring the treatment of seriously disordered prisoners to light and subject conditions of confinement to review and public debate. Currently, prison decisions regarding assessment, treatment, housing, and discipline receive little scrutiny.[256] The public nature of a sentence modification proceeding would impart a degree of transparency and accountability to the treatment of these vulnerable prisoners.[257] This attention may well prompt broader legislative and executive reform.[258]

C. RESPONSE TO POSSIBLE OBJECTIONS

While the benefits are substantial, a number of objections may be leveled against this proposal. One likely objection is that judges are incompetent to assess prisoners' mental health, identify harsh and unjust conditions of confinement, and modify conditions accordingly. Judges often assess individuals' mental health for

perverse incentives for authorities to ignore the problem" of prisoner-on-prisoner sexual abuse). Prison officials may also perceive the under-detection and treatment of mental disorders as offering valuable (short-term) cost-savings. Indeed, commentators have long complained that prison officials overlook the mental disorders of offenders who slip through the mental health screening process at intake and do not pose a security threat. *See* Johnston, *supra* note 38, at 633 n.45 (listing sources that note correctional officers' inability to distinguish between mentally ill and "disgruntled" inmates).

256 *See* Johnston, *supra* note 38, at 630–43.

257 *See* Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 689 (1993) ("[T]he judiciary is the discretionary point that is most accountable. Compared to any other discretionary point—prosecutors, corrections administrators, or parole boards—judicial decisions are public, as is the information on which they base their decisions (open at least to those involved with the case, if not to the public at large). Judges are expected to provide reasons for their decisions and there is a strong tradition of review for most decisions—although not for sentencing decisions.").

258 *See, e.g.*, Ira P. Robbins, *Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights*, 26 U. KAN. L. REV. 551, 562 (1978) ("[A]n activist trend of judicial supervision may induce legislative and administrative action to remedy undesirable conditions of prison confinement.").

purposes of guilt and sentencing,[259] however, and often structure probation conditions to respond to offenders' mental health needs.[260] Assessment of mental health also plays a key role in mental health courts and some civil proceedings, including civil commitment proceedings,[261] benefits cases,[262] and custody disputes.[263] Moreover, many judges are familiar with sites and conditions of confinement[264] and would presumably reach their findings after considering documentary evidence or testimony by mental health experts and correctional officials, much as they do in the context of Section 1983 suits challenging conditions of confinement as Eighth Amendment violations.[265] Indeed, judges are currently encouraged to—and do, in a substantial proportion of cases[266]—offer facility and treatment recommendations at

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[259] *See, e.g.*, Johnston, *supra* note 28, at 151–52 & nn.18–20 (explaining how a defendant's mental illness may be taken into consideration at sentencing); *supra* notes 75–76 and accompanying text (discussing state statutes that permit judges to consider the potential undue hardship to the defendant, sometimes due to mental illness, as a mitigating factor at sentencing).

[260] Typically, pretrial services will chronicle an accused's mental health history in the report it prepares for bail determination, and a probation officer will include a defendant's mental health history in the presentencing report created for the court. *See* Johnston, *supra* note 28, at 159 & nn.49–51 ("Many state statutes require probation officers to include an offender's mental health history in the presentencing report. . . .").

[261] *See supra* Part III.A & note 94.

[262] *See* C. Georffrey Weirich & Ashoo K. Sharma, *Tracking the Path to Parity Between Mental and Physical Health Benefits*, 17 LAB. LAW. 469, 474–78 (2002) (discussing common mental health benefits litigation issues).

[263] *See* Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgments*, 46 FAM. L.Q. 135, 154–61 (2002) (discussing the key role of mental health experts in child custody disputes).

[264] *See* Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 247 (3d Cir. 2005) ("Judges take their sentencing responsibilities very seriously and are familiar with the various [Bureau of Prisons] institutions and programs. Their recommendations as to the execution of sentences are carefully thought out and are important to them.").

[265] *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1931–35, 1947 (2011) (affirming the relief ordered by a three-judge panel to remedy an Eighth Amendment violation due to inadequate mental health care and detailing the expert evidence presented at trial).

[266] *See* Todd A. Bussert, *"Real Time" Designation, Proximity to Home and the Importance of Judicial Recommendations*, FEDERAL PRISON BLOG (July 12, 2012), http://www.federalprisonblog.com/2012/07/real-time-designation-proximity-to-home-the-importance-of-judicial-recommendations.html (relaying that, between June 2011 through March 2012, there were 40,563 judicial recommendations and 94,621 initial designations, meaning that judges offered recommendations for approximately 43% of sentences during that period); *see also* Sonya Cole & Todd A. Bussert, BOP Presentation at U.S. Sentencing Commission's Annual Federal Sentencing Guidelines Seminar 2 (June 12, 2009), *available at* http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2009/014a_BOP_Issues.

sentencing.[267] While these recommendations are not binding, evidence suggests that correctional authorities, at least at the federal level, honor judicial recommendations in the vast majority of cases, a strong indication of their feasibility and reasonableness.[268]

A second objection is that authorizing judges to interfere in individual inmates' conditions of confinement would wreak havoc on prison administration. The force of this concern is considerable. A number of compelling reasons support retaining prison administrators' control over carceral conditions.[269] As the U.S. Supreme Court has recognized, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[270] Moreover, ordering a costly change

pdf (identifying these common judicial recommendations: requests for specific programming (e.g., vocational training, drug abuse treatment, or work assignments), confinement in a specific facility or medical center, and sentence calculation).

[267] *See, e.g.*, 18 U.S.C. § 3621(b)(4)(B) (2012) (providing that the Bureau of Prisons may consider a judge's recommendation of a certain type of facility when designating a prisoner's place of confinement); FED. BUREAU OF PRISONS, DEP'T OF JUSTICE, PROGRAM STATEMENT, P5100.08, ch. 3, at 3, 4, 7 (2006), *available at* http://www.bop.gov/policy/progstat/5100_008.pdf (noting various ways in which the Bureau of Prisons uses judges' recommendations to classify and designate prisoners).

[268] *See* ALAN ELLIS & J. MICHAEL HENDERSON, FEDERAL PRISON GUIDEBOOK 33–34 (2005) (citing Bureau of Prisons statistics showing that the Bureau honors about 85% of judicial recommendations for facility placements when the defendant qualifies for the institution recommended); *Woodall*, 432 F.3d at 247 (noting that "the BOP follows judicial recommendations in approximately 85–90 percent of all cases"); Bussert, *supra* note 266 (reporting that the Bureau followed or partially followed 66% of judicial recommendations made between June 2011 and March 2012); Cole & Bussert, *supra* note 266, at 2 (reporting that the Bureau completely followed 62%, and partially followed 11%, of judicial recommendations). Common reasons for not accommodating a judicial request include conflicts between the recommended facility and the inmate's security level, the inmate's ineligibility for the recommended program, security concerns, and the unavailability of the requested program at the recommended facility. *Id.* at 3. While this evidence suggests that judges' recommendations are reasonable, it does not offer decisive proof of that fact. *See* Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2137–40 (2010) (arguing that an accumulation of experience does not necessarily warrant an assumption of competence).

[269] *See infra* note 269 and accompanying text.

[270] Turner v. Safley, 482 U.S. 78, 84–85 (1987); *see also* Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 126 (1977) (explaining that courts are ill-equipped to deal with prison reform because of the complexity of running a penal institution); Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (observing that overcoming the "Herculean obstacles" to effectively maintaining order and discipline, preventing unauthorized access or escape, and

may yield systemic effects that a court cannot anticipate.[271] This proposal could result in a misallocation of scarce resources, for instance, as correctional officials prioritize inmates with sentence modification orders and thus are unable to channel resources to the neediest and most vulnerable offenders. It also may result in designated offenders' receiving more costly treatment or housing than is necessary given their current mental health statuses.

Two safeguards may suffice to respond to these concerns and to minimize undue encroachment into correctional affairs. First, legislation could specify that a court must allow correctional officials to testify or otherwise offer evidence in response to any proposed carceral condition before its imposition. Second, courts should permit the government to move to reopen a sentence if it believes that an ordered condition is inappropriate, unreasonable, or infeasible.[272] This approach would allow correctional authorities to challenge those conditions that create intolerable security risks, become unnecessary in light of an offender's evolving mental health needs, or are impracticable due to resource constraints.

A third objection is that the pressures inherent in judicial elections may undermine the effectiveness of the proposal. Thirty-nine states elect at least some appellate or major trial court judges.[273] Since the *Citizens United v. FEC* decision in 2010,[274] money has been pouring into these elections, with an estimated

rehabilitating prisoners "require[s] expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government").

[271] *See Turner*, 482 U.S. at 91–93 (upholding a prohibition on correspondence between correctional institutions because the risk of dangerous correspondence threatened the order and security of multiple institutions and because the burden of checking every piece of mail was too costly an imposition on the system).

[272] *See* Johnston, *supra* note 38, at 660–61 (arguing for these safeguards in the context of an original sentencing).

[273] Debra Erenberg & Matt Berg, *The Dark Knight Rises: The Growing Role of Independent Expenditures in Judicial Elections After* Citizens United, 49 WILLAMETTE L. REV. 501, 502 (2013); *Competitive Elections*, JUSTICE AT STAKE, http://www.justiceatstake.org/issues/state_court_issues/competitive-elections/ (last visited Nov. 1, 2014).

[274] 558 U.S. 310, 365 (2010) (holding that, under the First Amendment, "the Government may not suppress political speech on the basis of the speaker's corporate identity").

$56.4 million spent on judicial races in 2011–2012.[275] Much of this money is used for advertising,[276] the most damning of which extrapolates from a candidate's involvement in a particular case to depict her as, for example, "sympathetic to rapists," "volunteer[ing] to help free a terrorist," or "protect[ing] . . . sex offenders."[277] This negative advertising generates political pressure to appear tough on crime (and criminals).[278] Multiple studies show that judges are more likely to rule against criminal defendants as elections approach,[279] and a 2013 study by the Center for American Progress reports that, "[a]s state supreme court campaigns become more expensive and more partisan, the fear of being portrayed as 'soft on crime' is leading courts to rule more often for prosecutors and against criminal defendants."[280]

However, the extent to which these forces would deter elected judges from altering conditions of confinement through sentence modification is unclear. While it seems likely that the fear of being depicted as "soft on crime" may engender reluctance to release offenders into the community, a judge's modification of

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[275] ALICIA BANNON ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS 2 (2013), *available at* http://newpoliticsreport.org/content/uploads/JAS-NewPolitics2012-Online.pdf.

[276] *Id.* at 1 ("The 2011–12 cycle saw $33.7 million in [television] spending, far exceeding the previous two-year record of $26.6 million in 2007–08.").

[277] *Id.*; *see also* BILLY CORRIHER, CRIMINALS AND CAMPAIGN CASH: THE IMPACT OF JUDICIAL CAMPAIGN SPENDING ON CRIMINAL DEFENDANTS 2–3 (2013), *available at* http://cdn.americanprogress.org/wp-content/uploads/2013/10/CampaignCriminalCash-4.pdf ("Most of these attack ads allege that a certain judge is soft on crime, telling voters that he or she ruled in favor of a violent criminal without any context or discussion of the legal issue at stake.").

[278] *See, e.g.*, Harris v. Alabama, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting) (warning of the danger that Alabama trial judges, who face partisan election every six years, "will bend to political pressures when pronouncing sentence in highly publicized capital cases" and remarking upon the "political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty").

[279] *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 247 (2004) (concluding from a study of 22,095 Pennsylvania criminal cases in the 1990s that elected judges will become more punitive as standing for reelection nears); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 623, 661 (2009) (demonstrating that, when judges face Republican retention agents in partisan reelections, they are more likely to vote against criminals in criminal appeals and concluding that "elected state supreme court judges routinely adjust their rulings to attract votes and campaign money").

[280] CORRIHER, *supra* note 277, at 1.

carceral conditions would allow an inmate to remain confined and thus would present no obvious public safety threat. Indeed, a judge may opt to modify conditions of confinement in lieu of conditional release, and thus could frame her decision as pro-state. If conditions of confinement were indisputably harsh or cruel, modification of conditions may even be the state's preferred remedy (as opposed to release). Thus, the phenomenon of judicial elections may increase the demand for modification of carceral conditions instead of decrease it.

A fourth objection involves other practical impediments such as caseload pressures and existing judicial loyalties. Trial courts already struggle under heavy caseloads[281] and thus may lack the capacity to handle droves of sentence modification motions.[282] This may be particularly true when modification of carceral conditions exists as a possible remedy since consideration of this option would presumably require a hearing and the taking of evidence. Additionally, trial judges may be unlikely to second-guess their own sentences or those imposed by their colleagues on the bench. For these reasons, were a legislature to adopt this proposal, it should consider appointing a slate of retired judges to review sentence modification motions.[283] These judges would be at least somewhat insulated from the political pressures referenced above (and thus be more likely to consider immediate and conditional release, when warranted); would develop expertise on prison facilities, treatment options, and conditions; could develop a uniform approach to handling these motions; and would avoid overtaxing existing trial court resources.[284] Retired judges also

[281] *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA, 2012 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 40 fig.2 (2012), *available at* http://www.courts.ca.gov/documents/2012-Court-Statistics-Report.pdf (depicting that the total number of filings per judicial position in California Superior Courts was over 4,500 in 2011); Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 327–28 (1994) (showing that the total civil and criminal filings per federal district judge steadily increased from 1970–1992); Jeanine Blackett Lutzenhiser, Comment, *An Open Courts Checklist: Clarifying Washington's Public Trial and Public Access Jurisprudence*, 87 WASH. L. REV. 1203, 1235 (2012) (noting that Washington trial courts "handle heavy caseloads with scarce resources").

[282] *See* TD-2, *supra* note 18, § 305.6 cmt. d (discussing this problem).

[283] The American Law Institute has recommended the creation of a panel of acting or retired judges to entertain "second-look" sentence modification motions filed by prisoners who have served fifteen years of any sentence of imprisonment. *See id.* § 305.6(1) & cmt. d.

[284] *Id.* § 305.6 cmt. d (listing these advantages of the retired judge panel).

may feel less personal loyalty to the judges who issued the original sentences, allowing them to consider offenders' sentences and prison experiences more objectively.[285]

The final objection involves the cost of this proposal and the absence of any clear limiting principle. Taking the latter point first, sound reasons may exist for limiting the power to modify conditions of confinement to inmates with serious mental disorders.[286] While other populations are also vulnerable to harm in prison,[287] inmates with serious mental illnesses have unique needs and encounter particular dangers. First, the stress of prison can exacerbate an individual's mental disorder and induce psychological degeneration.[288] In other words, the antitherapeutic environment of prison can make a mentally ill individual sicker, thus requiring special treatment.[289] Second, individuals with serious mental illnesses face, in addition to a host of physical dangers, the specific threat of a loss of cognitive function.[290] Preservation of cognitive function is necessary for maintenance of a defendant's hold on reality, personality, and autonomy, and is thus a particularly acute interest.[291] Third, mental disorder is often difficult to diagnose, and the nature of the screening system

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[285] *See id.* Under this proposal, sentence modification would function as a resentencing. Assessment of the actual purposes of punishment that motivated an original sentencing would be unnecessary. Rather, the court—upon finding the existence of past and likely future unjust punishment—would assess whether, to what extent, in what form, and under what conditions, further punishment is warranted. *Cf. id.* cmt. f (suggesting that a judicial decisionmaker in a sentence modification hearing should review a sentence de novo).

[286] Alternatively, however, sound reasons also support judges' ability to modify the carceral conditions for any offender who has experienced and will likely continue to experience unjustifiably harsh or inhumane conditions. Indeed, this stance is arguably more principled and would flow from the court's obligation to provide proportionate and humane punishment to all convicted offenders. *See supra* notes 239–255 and accompanying text.

[287] *See supra* note 31 (listing risk factors for sexual assault in prison).

[288] *See, e.g.*, Shelia M. B. Holton, *Managing and Treating Mentally Disordered Offenders in Jails and Prisons*, *in* CORRECTIONAL MENTAL HEALTH HANDBOOK 101, 108–10 (Thomas J. Fagan & Robert K. Ax eds., 2003) (discussing the impact of incarceration on seriously mentally ill inmates); Jamie Fellner, *A Conundrum for Corrections, A Tragedy for Prisoners: Prisons as Facilities for the Mentally Ill*, 22 WASH. U. J.L. & POL'Y 135, 140 (2006) (describing how prison conditions can "dramatically aggravate" the condition of a mentally ill inmate).

[289] This observation may also hold true for some medical conditions.

[290] *See* Johnston, *supra* note 38, at 629 (identifying the threat of loss of cognitive function that many mentally ill prisoners face).

[291] *See id.*

utilized at prison intake centers means that some disorders will be overlooked, leading to a delay in treatment and possible placement in an unsuitable environment.[292] Once confined, correctional officials may be prone to misinterpret symptoms of mental illness as disorderly conduct or malingering.[293] Courts can play an important corrective function in identifying individuals in need of particularized treatment through an evaluation of evidence and, if necessary, an adversarial hearing.[294] Fourth, prisons may rely on means of protection that actually endanger the health of individuals with major mental disorders. Prisons commonly protect offenders susceptible to physical abuse by placing them in protective custody or solitary confinement, but the prolonged confinement of a mentally disordered offender in isolated and extremely restrictive conditions may result in severe psychological damage.[295] Fifth, many prisons provide inadequate mental health treatment,[296] especially in solitary housing units,[297] leading to predictable psychological harm.

Therefore, it may be appropriate to confine the power to modify carceral conditions to the context of inmates with serious mental disorders, on the rationale that these inmates are especially at risk of experiencing disproportionately harsh or inhumane treatment in prison.[298] Researchers estimate that approximately

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[292] *See id.* at 631–36 (discussing the shortcomings of prison intake procedures).

[293] *See id.* at 633 & n.48, 635 (discussing how correctional officers can misinterpret symptomatic illness as disorderly conduct). Other vulnerabilities, such as physical disability, diminutive stature, and first-offender status, may be easier to identify and harder to feign. This observation does not necessarily apply to all vulnerabilities to serious harm in prison, such as gay or bisexual orientation. *See supra* note 31. For a sensitive and illuminating exploration of the segregation of gay and transgender inmates in a Los Angeles jail, see generally Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965 (2012).

[294] *See generally* Johnston, *supra* note 38 (articulating reasons for expanding judges' sentencing power to tailor conditions of confinement for mentally ill prisoners).

[295] *See* Johnston, *supra* note 28, at 174–78 & nn.147–57 (discussing the growing consensus that solitary confinement is particularly damaging for inmates with serious mental illness); *supra* note 210.

[296] *See* Johnston, *supra* note 28, at 161 & n.61 (discussing the inadequate mental health treatment in many prisons).

[297] *See id.* at 161 & n.62.

[298] On the other hand, some commentators have suggested that equalizing prison conditions between mentally ill and non-ill inmates ignores and stands in tension with disparities in treatment that exist outside of prison. For instance, Professor Kolber has argued that severity of punishment should be measured by deviance from subjects' baseline

16% of prisoners have a mental disorder,[299] but many inmates' mental disorders can be adequately controlled with medication.[300] One category of mentally disordered prisoners particularly in need of this proposal may be those who are housed for extended periods of time in isolation and who face a substantial risk of psychological harm.[301] While human rights groups and social scientists have reflected on the disproportionate presence of mentally disordered

states. *See* Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1573 (2009) (arguing that the severity of punishment depends on the extent of the change from the prisoner's baseline status); *see also id.* at 1594–1600 (arguing that punishment should include knowingly imposed negative subjective experiences, such as distress). This argument could be read to suggest that, if mentally disordered individuals suffer disproportionately outside of prison, then their greater suffering inside prison is appropriate to ensure that the actual punishment experienced by equally culpable ill and non-ill offenders is of equal severity.

Many studies confirm that individuals with serious mental disorders report higher victimization rates than non-ill individuals in the community. *See, e.g.*, Lisa A. Goodman et al., *Recent Victimization in Women and Men with Severe Mental Illness: Prevalence and Correlates*, 14 J. TRAUMATIC STRESS 615, 627 (2001) (demonstrating that men and women with serious mental illnesses are at a high risk of victimization); Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey*, 62 GEN. PSYCHIATRY 911, 911 (2005) (clarifying that persons with serious mental illnesses are eleven times more likely to be victimized than the general population). However, allowing these victimization rates to establish a permissible baseline for victimization in prison would serve both to normalize the intolerable predation of individuals with mental disorders in the community and to sanction the cruel treatment of mentally disordered prisoners. A state's failure to provide necessary care and protection to inmates should not be tolerated within a humane society, and indeed is not permissible under the Eighth Amendment. *See supra* note 35; Helling v. McKinney, 509 U.S. 25, 33 (1993) (holding that the Eighth Amendment protects against future harm to inmates and stressing that it "requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety' ").

[299] *See* Kenneth Adams & Joseph Ferrandino, *Managing Mentally Ill Inmates in Prisons*, 35 CRIM. JUST. & BEHAV. 913, 913 (2008) (discussing studies that establish that a substantial number of mentally ill persons are in state and federal prisons); HOLLY HILLS ET AL., NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, EFFECTIVE PRISON MENTAL HEALTH SERVICES 3 (2004), *available at* http://static.nicic.gov/Library/018604.pdf (discussing prevalence of mental illness in prison systems). This rate exceeds the incidence of mental disorder within the community. *See* JAMES & GLAZE, *supra* note 121, at 3 (reporting that around 11% of persons age eighteen or older in the U.S. general population satisfy DSM-IV criteria for symptoms of a mental health disorder).

[300] *See* HILLS ET AL., *supra* note 299, at 8 (noting evidence that medication, along with other treatment interventions, has helped prisons manage mentally ill inmates).

[301] *See generally supra* notes 41–42, 295. Indeed, a number of courts and professional organizations have concluded that the prolonged confinement of inmates with preexisting serious mental illnesses in extremely isolated conditions constitutes cruel and unusual punishment in violation of the Eighth Amendment or is otherwise intolerable. *See supra* note 210.

inmates in administrative segregation,[302] no reliable data exist on the number of mentally disordered defendants currently housed in extremely isolated environments.[303] Therefore, to the extent that focusing on mentally disordered inmates in this particular setting is appropriate, it is difficult to estimate the number of inmates the proposal might affect.[304]

Cost estimates are also elusive. Fact and expert discovery, motions practice, and sentence modification hearings are certainly all expensive, as would be the creation of a panel of judges to entertain these motions.[305] The largest possible expense, however, would stem from the mandate to increase the quantity and quality of mental health care provided to inmates. Compliance with court directives could require the construction of new facilities and certainly would necessitate increased staffing. It is impossible to concretize the cost of complying with potential sentencing orders and to determine how this figure might exceed the cost of care that

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[302] *See* Johnston, *supra* note 28, at 176 ("Estimates vary, but most researchers aver that inmates with preexisting mental illnesses comprise 20% to 50% of the total solitary population, which is two to three times their prevalence in the general prison population."). The vast majority of people who end up in solitary confinement are not "incorrigibly violent criminals; instead, many are severely mentally ill or cognitively disabled prisoners, who find it difficult to function in prison settings or to understand and follow prison rules." *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Const., Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 127 (2012) (written statement of the Am. Civil Liberties Union).

[303] Indeed, we lack reliable estimates of the total population currently confined in isolation. *See* Johnston, *supra* note 28, at 174–75 n.140 (listing estimates of the total population in maximum security prisons); *The Inhumane Practice of Solitary Confinement*, BLOOMBERG VIEW (Apr. 11, 2013, 6:00 PM), http://www.bloomberg.com/news/2013-04-11/solitary-confinement-makes-u-s-prisons-cruel-and-unusual.html ("The total number of prisoners held in solitary confinement in the U.S. is difficult to ascertain. According to the federal government, there were more than 81,000 prisoners in 'restricted housing units' in state and federal institutions in 2005. That number doesn't include prisoners held in local jails or immigration detention centers. (A more recent census isn't available.)").

[304] It is unclear why courts should be able to modify the sentences of those inmates housed in isolation but not those suffering disproportionately harsh or inhumane conditions in the general prison population for whom housing in isolation is not a humane protective response. If this observation has merit, then the number of individuals who may seek sentence modification may be much greater. *See, e.g.*, BECK ET AL., *supra* note 39, at 24, 26–28 (documenting the percentage of inmates reporting various mental health problems and types of sexual victimization perpetrated by staff and other inmates in prison).

[305] *See* TD-2, *supra* note 18, § 305.6 cmt. a (discussing costs associated with a second look provision for prisoners who have served at least fifteen years of any sentence of incarceration).

would likely be provided by prisons officials without courts' prompting. As a basic matter, it is certainly true that caring for inmates with serious mental illnesses is more expensive than confining inmates of average health.[306] This greater cost stems in part from the increased staffing needs of this population, as well as necessary examination, medication, and hospitalization expenses.[307]

Notably, however, any increased costs associated with a higher degree of care may be offset by several sources of savings. One reason mentally ill inmates tend to be more costly than non-ill inmates is their increased likelihood to violate prison rules, lose

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[306] *See, e.g.*, Steve Maynard, *Incarcerating the Mentally Ill Doesn't Help Them, and It's Expensive*, THE NEWS TRIB. (June 16, 2013), http://www.thenewstribune.com/2013/06/16/2640431_incarcerating-the-mentally-ill.html?rh=1 (reporting that the Tacoma Sheriff's Department charges around $90 a day to house an inmate, while "the county's budget and finance director said the cost of housing a seriously mentally ill inmate at the jail is estimated at $170 per day in chronic cases and $209 per day in acute cases"); Stephanie Mencimer, *There Are 10 Times as Many Mentally Ill People Behind State Bars as In State Hospitals*, MOTHER JONES (Apr. 8, 2014, 5:00 AM), http://www.motherjones.com/mojo/2014/ 04/record-numbers-mentally-ill-prisons-and-jails ("In Washington state, . . . in 2009, the most seriously mentally ill inmates cost more than $100,000 a year to confine, compared with $30,000 for others."); FRED OSHER ET AL., COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, ADULTS WITH BEHAVIORAL HEALTH NEEDS UNDER CORRECTIONAL SUPERVISION: A SHARED FRAMEWORK FOR REDUCING RECIDIVISM AND PROMOTING RECOVERY 8 (2012), *available at* https://www.bsa.gov/Publications/CSG_Behaviorial_Framework.PDF ("In Connecticut, the overall annual per-inmate health cost is estimated at $4,780, while health costs at the corrections facility for inmates with serious mental illness were $12,000. In Florida's Broward County Jail, the daily inmate cost is $78, but the cost rises to $125 per day for inmates with mental illness."); E. FULLER TORREY ET AL., TREATMENT ADVOCACY CENTER, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 10 (2010), *available at* http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf ("In Texas prisons 'the average prisoner costs the state about $22,000 a year,' but 'prisoners with mental illness range from $30,000 to $50,000 a year.' ").

[307] TORREY ET AL., *supra* note 306, at 9–10 (identifying increased staffing needs, psychiatric examinations, and medications as contributing to the high cost of confining seriously mentally ill inmates). One option for securing the necessary funds would be for state legislatures to guarantee parity in funding for mental health treatment in carceral facilities with funding provided for a comparative community-based population. *See* Prue Salasky, *Report: Virginia Jails Not Providing Appropriate Mental Health Treatment*, DAILY PRESS (Jan. 14, 2014), http://articles.dailypress.com/2014-01-14/health/dp-nws-mental-health-jail-report-0115-20140115_1_jails-mental-health-services-health-treatment (citing a report from the Office of the Attorney General calling for, among other things, parity in funding for mental health treatment in jails and the community). Allowing state funds to follow a patient—in essence, authorizing reimbursement regardless of who provides services—would permit better continuity of care and, potentially, higher quality care. *Id.*

good time, and serve their full sentences.[308] Providing a higher level of mental health care in a therapeutic environment could reduce those costs.[309] Studies indicate that providing high quality mental health treatment to offenders with serious mental disorders in therapeutic environments can lower rates of disciplinary infractions, victimization, seclusion, use of crisis care, and hospitalization, all of which convey significant cost savings.[310]

Additional benefits to the state, financial and otherwise, could emanate from increased mental health services. Providing adequate mental health care should result in less civil rights litigation alleging Eighth Amendment violations, and fewer expensive consent decrees and injunctions ordering the provision of mental health care to inmates.[311] Moreover, studies show a

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[308] *See, e.g.*, Donald W. Morgan et al., *The Adaptation to Prison by Individuals with Schizophrenia*, 21 BULL. AM. ACAD. PSYCHIATRY & L. 427, 427–33 (1993) (comparing the adaptation of prisoners with schizophrenia with that of a control group and finding that those with schizophrenia performed inferiorly to the control group for all outcome variables, including number of infractions, number of lockups, days in lockup, ability to obtain a job in prison, and ability to obtain release from prison; also, finding that prisoners with schizophrenia were less likely to earn good time and more likely to have longer terms of incarceration than non-mentally-ill inmates with similar offenses); TORREY ET AL. *supra* note 306, at 10 (discussing, and providing localized support for, the assertion that mentally ill inmates serve longer carceral terms than non-ill counterparts and "are often major management problems").

[309] *See* HILLS ET AL., *supra* note 299, at 8 (observing that special needs housing units for inmates with chronic mental illness who require a therapeutic environment "can reduce serious rule infractions, suicide attempts, correctional discipline, seclusion, hospitalization, and the need for crisis intervention").

[310] *See* Johnston, *supra* note 38, at 671–72 & nn.276–80 (reporting the results of studies showing that treatment in intermediate care facilities results in lower levels of mental disorder, disciplinary violations, and victimization, and may yield aggregate cost savings for prisons); Ward S. Condelli et al., *Intermediate Care Programs for Inmates with Psychiatric Disorders*, 22 BULL. AM. ACAD. PSYCHIATRY L. 63, 67–68 (1994) (finding, in New York intermediate care programs, significant reductions in use of crisis care, seclusion, and hospitalization of program inmates, and reporting significant reductions in very serious infractions and suicide attempts during the six months after admission to the program); HILLS ET AL., *supra* note 299, at 9 ("The effectiveness of specialized mental health units for the care of inmates with serious mental illness who are unable to cope with participating in daily activities with the general population but who are not in need of hospital-level care has been demonstrated in numerous prison systems. . . . These units have moderate costs, which are more than offset by the decrease in the use of inpatient psychiatric care and improvements in institutional safety and security.").

[311] *See, e.g.*, Editorial, *Mental Illness in California Prisons*, N.Y. TIMES (Apr. 10, 2013), http://www.nytimes.com/2013/04/11/opinion/mental-illness-in-california-prisons.html?_r=0 (chronicling the "more than 100 court orders in the past 17 years to improve the care after [an] inmate class-action suit was filed in 1995" and the continued federal oversight over

positive correlation between sexual and physical victimization and rates of recidivism,[312] suggesting that avoidance of victimization could lead to decreased recidivism. Finally, studies suggest that the provision of mental health treatment—especially if paired with treatment of criminogenic risk factors and continuing treatment in the community upon release—can also reduce recidivism.[313]

V. CONCLUSION

Judicial sentence modification has become popular as a possible means to save money, reduce prison overcrowding, and prevent unjust and inappropriate punishment. To remedy the unjust punishment endured by prisoners with mental illnesses, however, legislatures should consider expanding judges' arsenal of

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California prisons due to . . . inadequate mental health care); Michael S. Vaughn, *Civil Liability Against Prison Officials for Prescribing and Dispensing Medication and Drugs to Prison Inmates*, 18 J. LEGAL MED. 315, 318 (1997) ("[P]rison administrators who attempt to reduce health care expenditures by supplying inmates with inefficacious medication ultimately may cost their jurisdictions more money in legal fees and civil litigation than in medication if their cost-cutting attempts amount to deliberate indifference to the serious medical needs of inmates.").

[312] *See* SHELLEY JOHNSON LISTWAN ET AL., THE PRISON EXPERIENCE AND REENTRY: EXAMINING THE IMPACT OF VICTIMIZATION ON COMING HOME 74–75 (2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238083.pdf (finding that experiencing violent victimization in prison resulted in higher rates of recidivism).

[313] *See, e.g.*, OSHER ET AL., *supra* note 306, at 21–36 (discussing the "Risk-Need-Responsivity" model for how correctional authorities should identify and prioritize individuals to receive certain interventions, how mental illness affects an individual's responsivity to interventions targeting criminogenic risk factors, and proposing a framework "to reduce recidivism and advance public health and individual recovery"); Robert D. Morgan et al., *Treating Offenders with Mental Illness: A Research Synthesis*, 36 LAW & HUM. BEHAV. 37, 37 (2011) (synthesizing the results from twenty-six empirical studies and finding that programs "specifically designed to meet the psychiatric and criminal justice needs of offenders with mental illness . . . produce significant reductions in psychiatric and criminal recidivism"); Hall et al., *supra* note 178, at 230 (studying seriously mentally ill offenders in New York and finding an inverse relationship between participation in treatment and subsequent arrest, and stating that comprehensive services may help "some seriously mentally ill persons avoid re-arrest after release from prison"); Stanley Sacks et al., *Randomized Trial of a Reentry Modified Therapeutic Community for Offenders with Co-Occurring Disorders: Crime Outcomes*, 42 J. SUBSTANCE ABUSE TREATMENT 247, 247 (2012) (finding that participants in community treatment programs were significantly less likely to reoffend than offenders in the parole supervision system); Ronald J. Smith et al., *Forensic Continuum of Care with Assertive Community Treatment (ACT) for Persons Recovering from Co-Occurring Disabilities: Long-Term Outcomes*, 33 PSYCHIATRIC REHABILITATION J. 207, 207, 210 tbl.1 (2010) (finding positive results for offenders found not guilty by reason of insanity participating in a community treatment program including low levels of criminal recidivism); *cf. supra* note 178.

dispositional options. Immediate release, shortened sentences, and conditional release may be appropriate modification options for many offenders. These options, however, will not suffice to ensure just punishment for those offenders who face disproportionately harsh conditions of confinement but who are not candidates for immediate or conditional release. For these offenders, legislatures should consider authorizing judges to modify conditions of confinement. By permitting judges to remove proven and anticipated sources of unjust harm found behind prison walls, legislatures could equip judges with the tools they need to secure proportionate and humane sentences, ameliorate the unjust hardship of individual prisoners, and perhaps prompt systemic changes in the treatment of vulnerable inmates.