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Consideration of Rehabilitative Factors for Sentencing in Federal Courts: *Tapia v. United States*, 131 S. Ct. 2382 (2011)

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Note*

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TABLE OF CONTENTS

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I. INTRODUCTION

The United States has the highest rate of incarceration in the world.[1] In 2010, one in forty-eight adults were on probation or parole, and one in 104 adults were in correctional custody.[2] Once convicted, between 70%[3] and 89%[4] of criminal defendants are sentenced to imprisonment. Since 1986, the number of people imprisoned in the United States has grown from approximately 746,000[5] to more than 2.2 million in 2010.[6]

These exceedingly high numbers show a trend of increasing imprisonment, starting in the 1980s.[7] Frustrated by the perceived failure of the criminal justice system, the nation almost completely rejected rehabilitation as a goal of sentencing.[8] Congress passed the Sentencing Reform Act of 1984,[9] which implemented determinate sentencing and excluded rehabilitative goals from a federal judge's consideration when imposing a term of imprisonment.[10]

For a time after Congress passed the Act, the circuits split over rehabilitative factors being considered *after* imposing a term of imprisonment to influence the judge's determination of an appropriate sentence length.[11] The U.S. Supreme Court in *Tapia v. United States* held that considering rehabilitative factors to determine whether to

1. *Entire World—Prison Population Totals*, INT'L CENTER FOR PRISON STUD., http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Jan. 13, 2013).
2. Lauren E. Glaze, *Correctional Population in the United States*, *2010,* BUREAU OF JUST. STAT. BULL., Dec. 2011, at 1, 2, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf.
3. *Criminal Cases*, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=23 (last updated June 27, 2013).
4. *See Fed. Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/fjsrc/ (last visited Jan. 13, 2013) (select "Offenders sentenced: tables"; then "2010"; then "Type of sentence imposed"; then "Display as HTML").
5. *See* Corr. Statistics Unit, Bureau of Justice Statistics, *Correctional Populations in the United States*, *1996*, BUREAU OF JUST. STAT. BULL., Apr. 1999, at ii, iii, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cpius96.pdf.
6. Glaze, *supra* note 2, at 3.
7. China has the second highest number of people imprisoned at 1.6 million, and Russia has the third highest at 706,000. *Entire World—Prison Population Totals*, *supra* note 1.
8. *See* REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.
9. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3586 (2006).
10. *Id.* § 3582(a).
11. *See* discussion *infra* section II.D and Part III (discussing the circuit split and its resolution).

impose a sentence of imprisonment or the length of that sentence was impermissible.[12]

This Note will primarily focus on the policy implications of the Court's decision, as well as possible future directions. In Part II, this Note will outline the history leading up to the Sentencing Reform Act and its implementation. Part II also describes the prior circuit split, while Part III depicts the Court's holding in *Tapia*.[13] Part IV of this Note argues the outcome of the circuit split resolution is beneficial and necessary because it is both the correct interpretation of the statute and provides an opportunity for rehabilitation to be redefined by evidence-based principles,[14] not presumed as inherent to imprisonment. Finally, Part V concludes by emphasizing rehabilitation is not a hopeless aspiration for our criminal justice system if policy implementation is informed by scientific knowledge from psychological research.

II. BACKGROUND

A. The Decline of the Rehabilitative Model

There are four common justifications for punishment: retribution, incapacitation, deterrence, and rehabilitation.[15] Each theory has its own consistent proponents, while its national popularity has vacillated over time.[16] Retribution is the oldest theory and is often described as the "delivery of justice."[17] Proponents assert it is just to punish a person who has injured another.[18] While this theory is criticized as being retaliatory and, therefore, morally indefensible,[19] it also receives significant support as a means to engender respect for the law and prevent private citizens from engaging in acts of retaliatory violence.[20]

12. Tapia v. United States, 131 S. Ct. 2382 (2011).

13. *Id.*

14. "The usual criterion for classifying a modality as 'evidence-based' is that it has proven superior to a comparable alternative or 'treatment as usual' in at least 2 randomized controlled clinical trials conducted by different research groups." WILL SPAULDING, NEB. DEP'T OF HEALTH AND HUMAN SERVS., BEST PRACTICES 10 (2005).

15. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36–58 (1968), *reprinted in* JAMES VORENBERG, CRIMINAL LAW AND PROCEDURE 40, 40–47 (2d ed. 1981).

16. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 1.5 (4th ed. 2003).

17. *See id.* § 1.5(a)(6).

18. *Id.*

19. *Id.* (quoting Ledger Wood, *Responsibility and Punishment*, 28 J. CRIM. L. & CRIMINOLOGY 630, 636 (1938)).

20. *Id.* (citing JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 82–83 (1975); ARTHUR L. GOODHART, ENGLISH LAW AND THE MORAL LAW 92–93 (1953)).

The other three primary theories of punishment are often classified together as utilitarian justifications.[21] Incapacitation justifies society imposing imprisonment or execution to defend itself against future acts of persons who, through their criminal record, have shown a willingness to injure others.[22] This theory is criticized because future criminality is difficult to predict accurately and incapacitation is largely limited,[23] as most prisoners will be released eventually.[24]

There are two types of deterrence: specific and general.[25] The rationale underlying specific deterrence is that exposing a criminal to an unpleasant experience will deter that criminal from future criminal behavior.[26] Critics attack this theory by citing the high recidivism rate in our country.[27] However, the effect of specific deterrence is immeasurable; we have no way of knowing what the recidivism rate would be without punishment.[28]

General deterrence similarly reasons the public is deterred from engaging in criminal behavior after observing criminal punishment.[29] Critics of this theory claim deterrence is not possible for some crimes[30] and punishment is only one of many factors preventing law-abiding citizens from engaging in criminal conduct.[31] Empirical support for general deterrence is also nearly impossible to establish, as there is no way to control for all the factors influencing behavior and no comparable group without a system of punishment for criminal behavior.[32]

For the rehabilitative model, the offender is given treatment in hopes of reducing recidivism.[33] This ideology is less a justification for punishment, as the objective is not to inflict suffering, and more a theory of behavior modification.[34] Major criticisms include that this

21. *See* PACKER, *supra* note 15, at 41–47.
22. LAFAVE, *supra* note 16, § 1.5.
23. *Id.*
24. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME 3 (2003). "Ninety-three percent of *all* prison inmates are eventually released." *Id.*
25. LAFAVE, *supra* note 16, § 1.5(a)(1), (4).
26. *Id.* § 1.5(a)(1).
27. For example, of a selection of persons released from prison in 1994, an estimated 67.5% were re-arrested for a felony or serious misdemeanor within three years, 46.9% were reconvicted, and 25.4% were resentenced to prison for a new crime. *Recidivism*, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17 (last updated June 29, 2013). This "two-thirds rearrest rate" after three years has been a consistent finding for more than forty years. PETERSILIA, *supra* note 24, at 141.
28. LAFAVE, *supra* note 16, § 1.5(a)(1).
29. *Id.* § 1.5(a)(4).
30. For example, a rash crime of passion is unlikely to be prevented through deterrence.
31. LAFAVE, *supra* note 16, § 1.5(a).
32. *Id.* § 1.5(a).
33. *Id.* § 1.5(a)(3).
34. *Id.*

model treats offenders condescendingly by attempting to manipulate them[35] and is not successful overall.[36] Critics also assert it risks great injustice to offenders because effective methods of penal rehabilitative treatment are still relatively uncertain and the model requires they be treated differently based on their perceived needs, rather than their criminal conduct.[37] Proponents assert most management of offenders, even when labeled "rehabilitative," in actuality is not,[38] which likely accounts for its perceived lack of success.[39]

While each theory had its own proponents, and alternated in predominance for particular cases,[40] rehabilitation was generally favored for the majority of the twentieth century.[41] However, by the 1970s, the nation had developed growing concerns about the fairness and effectiveness of rehabilitative priorities.[42] Judges had wide discretion to address rehabilitative needs, which resulted in significant sentencing disparities that critics perceived as arbitrary and an abuse of state power.[43] With no noted change in recidivism rates,[44] the public also lost confidence in the rehabilitative capacity of the criminal justice system and "the ability of parole boards and correctional officers to determine when reformation ha[d] been achieved."[45] This left "the rehabilitationist rationale . . . and [its sentencing] differences . . . seen as irrational and indefensible."[46]

These concerns laid the groundwork for the sentencing reform movement of the 1970s, which included changes like sentencing guidelines, truth-in-sentencing, mandatory penalties, and a limited role for parole boards.[47] Proponents credit the greater deterrence and inca-

35. *Id.* (quoting PHILIP BEAN, PUNISHMENT, A PHILOSOPHICAL AND CRIMINOLOGICAL INQUIRY 194 (1981)).
36. *Id.*
37. *Id.* (quoting HERBERT L. PACKER, CONTEMPORARY PUNISHMENT, THE PRACTICAL LIMITS OF DETERRENCE 102, 105 (R. Gerber & P. McAnany eds., 1972)).
38. *Id.*
39. *Id.*
40. *Id.* § 1.5(b) (citing Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.")). *But see* Hopt v. Utah, 110 U.S. 574, 579 (1884) ("The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind.").
41. LAFAVE, *supra* note 16, § 1.5(b).
42. *Id.* (quoting Martin Gardner, *The Renaissance of Retribution*, 1976 WIS. L. REV. 781 (1976)).
43. *Id.* (quoting FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 67 (1981)).
44. *Recidivism*, *supra* note 27.
45. LAFAVE, *supra* note 16, § 1.5(b) (quoting FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 73 (1981)).
46. *Id.* (quoting FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 73 (1981)).
47. PETERSILIA, *supra* note 24, at 12–13. These changes vary by jurisdiction. *Id.*

pacitation from these major changes for the recent decreases in crime rates.[48] There undoubtedly has been an increase in incapacitation, as the number of prisoners in the U.S. has increased by more than 700%, from about 196,000 in 1970 to 1.4 million in 2001.[49]

B. Implementation of the Federal Sentencing Guidelines

In 1984, Congress passed the Sentencing Reform Act.[50] Previously, the sentencing of an offender involved all three branches of government: Congress set the maximum, the judge set a sentence within the statutory range, and the parole officials, representing the executive branch, could change the sentence by allowing an earlier release.[51] One of the major changes of the Act was to transfer the powers of the judicial and executive branches to the Sentencing Commission the Act created.[52]

The President, with the advice and consent of the Senate, appoints the Commission's seven voting members and one nonvoting member.[53] The Commission was to establish guidelines that reflect the aim of sentencing as retributivistic, deterrent, incapacitating, and rehabilitative, and to measure the guidelines' effectiveness in meeting those ideals.[54] The Act also charged the Commission to promote certainty and fairness by preventing sentencing disparities, unless justified by individual factors, and to incorporate "advancement in knowledge of human behavior as it relates to the criminal justice process."[55]

Within five years, the U.S. Supreme Court decided a constitutional challenge to the redistribution of power between the branches in *Mistretta v. United States*.[56] The Court held the creation of the Sentencing Commission was not an excessive delegation of legislative power because Congress gave more than sufficient guidance to the Commission in the Act.[57] The Court also held it was not a violation of the separation of powers doctrine because Congress can delegate the task

48. *Id.* at 13.
49. *Id.* Compare the increase in the number of prisoners to the increase in the U.S. general population, which grew from 203 million in 1970 (ECON. & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, MEASURING AMERICA App. A-1 (2002), available at *http://www.census.gov/prod/2002pubs/pol02marv.pdf*) to 308 million in 2000 (*U.S. Census Bureau Quick Facts*, CENSUS.GOV, http://quickfacts.census.gov/qfd/states/00000.html (last visited Oct. 28, 2012)).
50. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3586 (2006). Mistretta v. United States, 488 U.S. 361, 366 (1989).
51. *Mistretta*, 488 U.S. at 364–65.
52. *Id.* at 367.
53. 28 U.S.C. § 991(a) (2006 & Supp. V 2011).
54. *Id.* § 991(b).
55. *Id.*
56. *Mistretta*, 488 U.S. at 361.
57. *Id.* at 379.

of developing Sentencing Guidelines to an expert body within the judicial branch.[58]

The Act also made all sentencing determinate because it eliminated variance caused by parole boards.[59] "A prisoner is to be released at the completion of his sentence reduced *only by* any credit earned by good behavior while in custody."[60] Good behavior credit is available to inmates serving a sentence longer than a year[61] who "display[ ] exemplary compliance with institutional disciplinary regulations."[62] These inmates can reduce their sentences by up to fifty-four days per year.[63] The Act also substantially narrowed the range for a term of imprisonment. The maximum of the range cannot exceed the minimum of the range by more than twenty-five percent or six months, whichever is longer.[64]

The next major change of the Act was to make the Sentencing Guidelines binding on federal courts, but it preserved for judges the ability to depart from the guidelines for a factor the Sentencing Commission did not sufficiently take into account.[65] The judge must also make a statement describing the reasons for the specifics of the sentence and any deviation from the Guidelines.[66] The mandatory nature of the Guidelines stood for more than twenty years, until the U.S. Supreme Court struck it down as unconstitutional under the Sixth Amendment right to a jury in the 2005 decision *United States v. Booker*.[67]

Both defendants in *Booker* were convicted by a jury and later sentenced by a judge.[68] Booker was convicted of possession with intent to distribute at least fifty grams of crack cocaine, punishable by 210 to 262 months imprisonment under the Sentencing Guidelines.[69] The judge, in a sentencing proceeding, found by a preponderance of the evidence that Booker was also in possession of an additional 566 grams of crack cocaine and guilty of obstructing justice, mandating a sentence of 360 months to life.[70] Booker received a thirty-year sentence.[71]

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58. *Id.* at 412.
59. *Id.* at 367.
60. *Id.* (emphasis added) (citing 18 U.S.C. §§ 3624(a)–(b) (2006)).
61. The sentence must also be less than a life sentence. 18 U.S.C. § 3624(b)(1).
62. *Id.*
63. *Id.*
64. 28 U.S.C. § 994(b)(2) (2006).
65. 18 U.S.C. § 3553(b)(1).
66. *Id.* § 3553(c) (Supp. 2011).
67. United States v. Booker, 543 U.S. 220 (2004).
68. *Id.* at 226–27.
69. *Id.* at 227.
70. *Id.*
71. *Id.*

It is "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," and "such facts must be established by proof beyond a reasonable doubt."[72] The only exceptions are prior convictions or facts admitted by the defendant.[73] If the Sentencing Guidelines were simply advisory, the Sixth Amendment would not be involved.[74] Judges have wide discretion to apply a sentence within the range outlined by statute.[75] Defendants do not have a right to a jury for the finding of facts considered by the judge when delivering a sentence within the statutory range.[76]

The Court struck down the Sentencing Guidelines as unconstitutional because they required judges, rather than juries, to engage in an assessment of facts, potentially increasing the maximum penalty available.[77] To remedy this, the Court severed the mandatory provisions, making the Sentencing Guidelines advisory rather than mandatory.[78] Even without the mandatory provision, the Act still requires judges to take account of the Guidelines.[79]

The Sentencing Guidelines have varied in their application since their implementation. However, the Act's overall effects have been lasting. Most significantly, the Act has increased uniformity in sentencing[80] and placed an emphasis on not using imprisonment as a vehicle for rehabilitation,[81] although it is still a major goal of sentencing.[82]

C. Summary of Relevant Sections of the Sentencing Guidelines

1. 18 U.S.C. § 3553

Section 3553 of the Sentencing Act outlines the factors to be taken into account for all federal sentencing.[83] In general, the court should follow the Guidelines' recommended type of sentence and range for the type of offense and defendant, unless there is a circumstance not ac-

72. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (quoting Jones v. United States, 526 U.S. 227, 252–53 (1999)).
73. *Booker*, 543 U.S. at 244.
74. *See id.* at 249–51.
75. *Id.* at 233.
76. *Id.*
77. *Id.* at 249–51.
78. *Id.* at 222.
79. *Id.* at 224.
80. *Id.* at 253.
81. Mistretta v. United States, 488 U.S. 361, 366 (1989) (citing S. REP. NO. 98-225, at 38, 47–48, 65 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, 3230–31, 3248).
82. *See* 18 U.S.C. § 3553(a)(2)(D) (2006).
83. *Id.* § 3553 (2006 & Supp. 2011).

counted for by the Commission justifying a deviation.[84] To supplement the Guidelines' recommendation, courts should consider the following factors: "the nature and circumstances of the offense,"[85] "the history and characteristics of the defendant,"[86] "the kinds of sentences available,"[87] any policy statements issued by the Commission germane to the situation,[88] "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,"[89] "the need to provide restitution to any victims of the offense,"[90] and finally, that the sentence imposed symbolize the four common justifications for punishment[91]: retribution, deterrence, incapacitation, and rehabilitation.[92]

2. 18 U.S.C. §§ 3582–83

Section 3582 directs the court, when imposing a sentence of imprisonment and determining its length, to take into account the factors in 18 U.S.C. § 3553(a) "to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."[93] Similarly, 18 U.S.C. § 994 outlines the duties of the Sentencing Commission, instructing them to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purposes of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."[94]

Section 3583 enables the court to include a term of supervised release after imprisonment.[95] When deciding on the inclusion and length of a term of supervised release, the court is to consider most of the factors from 18 U.S.C. § 3553(a): the Sentencing Guidelines' recommendations or policy statements; characteristics of the offense and defendant; the need for deterrence, incapacitation, and rehabilitation; avoidance of sentencing disparities between similar defendants in similar situations; and restitution for victims.[96]

84. *Id.* § 3553(b)(1).
85. *Id.* § 3553(a)(1).
86. *Id.*
87. *Id.* § 3553(a)(3).
88. *Id.* § 3553(a)(5).
89. *Id.* § 3553(a)(6).
90. *Id.* § 3553(a)(7).
91. *See supra* section II.A for a discussion of these models.
92. 18 U.S.C. § 3553(a)(2)(A)–(D).
93. *Id.* § 3582(a).
94. 28 U.S.C. § 944(k) (2006).
95. 18 U.S.C. § 3583(a).
96. *Id.* § 3583(c).

3. 18 U.S.C. §§ 3562, 3572

Section 3562 directs the court to consider all of the factors from 18 U.S.C. § 3553, "to the extent that they are applicable," when considering a term of probation and its conditions.[97] Section 3572 applies when the court is considering the imposition of a fine.[98] In addition to the factors from 18 U.S.C. § 3553, the court is to consider the financial resources and the effect of the fine on the defendant and others.[99]

D. The Prior Circuit Split

Prior to *Tapia v. United States,*[100] the U.S. Supreme Court decision that resolved the circuit split, the Second, Third, Eleventh, and D.C. Circuit Courts of Appeal held that 18 U.S.C. § 3582 prohibited any consideration of rehabilitation when imposing a sentence of imprisonment, including when determining an appropriate length.[101] On the contrary, the Eighth, Ninth,[102] and Tenth Circuits[103] held that a court may not consider rehabilitative factors when determining whether to impose a term of imprisonment, but once imposed, the court may consider rehabilitative factors to determine the length of the sentence.[104] The Ninth Circuit reasoned if that were not Congress's intent, "it could have enacted a statute that admonished judges to recognize 'that imprisonment *or the length of imprisonment* is not an appropriate means of promoting correction and rehabilitation.'"[105]

United States v. Limon[106] articulates the Tenth Circuit position prior to *Tapia v. United States.*[107] It is also generally representative of the prior Eighth and Ninth Circuit positions.[108] In *Limon*, the defendant pled guilty to three charges of armed bank robbery and one count of brandishing a firearm during a crime of violence.[109] The applicable Sentencing Guidelines range for the robbery convictions was 188 to 235 months, with an additional eighty-four months for the firearm conviction.[110]

97. *Id.* § 3562(a).
98. *Id.* § 3572(a).
99. *Id.*
100. Tapia v. United States, 131 S. Ct. 2382 (2011).
101. United States v. Story, 635 F.3d 1241, 1245 (10th Cir. 2011).
102. *Id.* at 1245–46.
103. United States v. Limon, 273 F. App'x 698 (10th Cir. 2008), *abrogated by* United States v. Story, 635 F.3d 1241 (10th Cir. 2011).
104. *See Story*, 635 F.3d at 1245–46.
105. *Id.* at 1246 (quoting United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994)).
106. *Limon*, 273 F. App'x 698.
107. Tapia v. United States, 131 S. Ct. 2382 (2011).
108. *See generally* Tapia v. United States, 376 F. App'x 707 (9th Cir. 2010); United States v. Holmes, 283 F.3d 966 (8th Cir. 2002).
109. *Limon*, 273 F. App'x at 699.
110. *Id.* at 701.

The probation officer's presentence report included information about the defendant's extensive criminal record and history of mental illness, including depression, substance abuse, and bipolar disorder.[111] The report also documented Limon's tendency to discontinue his psychotropic medications when unmonitored, despite their effectiveness.[112] The probation officer recommended the full sentence of 319 months, minus the seventy-nine month decrease recommended by the government for the defendant's cooperation, for a total of 240 months.[113] The judge agreed but then delivered a sentence of 279 months, justifying the additional months to provide for "the safety of the community and provision of medical care for Mr. Limon."[114]

Limon appealed his sentence as unreasonable because it had been extended in reliance on his need for mental health treatment, which he claimed was prohibited under § 3582(a) as rehabilitative.[115] The Tenth Circuit held the prohibition of rehabilitative considerations outlined in § 3582(a) and § 994(k) applied solely when a court is deciding to *impose* a term of imprisonment.[116] The court reasoned the prohibitions were meant to prevent terms of imprisonment from being given exclusively for rehabilitative purposes.[117] In *Limon*, the court did not consider rehabilitative factors in the imposition of the sentence, but only in determining its length.[118] The increase in length was not only to provide medical care, but also to ensure the safety of the community.[119] Therefore, the prohibitions against considering rehabilitative factors did not apply to the facts presented in *Limon*.[120] The court upheld the sentence as statutorily permissible.[121]

United States v. Story[122] abrogated *United States v. Limon*[123] and demonstrates the Tenth Circuit's reversal to align itself with the Second, Third, Eleventh, and D.C. Circuits.[124] The defendant, Amber Story, pled guilty to unlawful possession of stolen mail.[125] She regularly stole mail and looked for checks, which an accomplice would alter so Story could then cash them and obtain drugs.[126] The Sentencing

111. *Id.* at 701–02.
112. *Id.* at 702.
113. *Id.*
114. *Id.* at 704.
115. *Id.*
116. *Id.* at 708.
117. *Id.*
118. *Id.* at 708–09.
119. *Id.*
120. *Id.*
121. *Id.* at 700.
122. United States v. Story, 635 F.3d 1241 (10th Cir. 2011).
123. *Limon*, 273 F. App'x 698.
124. *Story*, 635 F.3d at 1245.
125. *Id.* at 1243.
126. *Id.*

Guidelines specified a term of twelve to eighteen months imprisonment and the presentence report gave no grounds for a deviation.[127]

The district court sentenced her to twenty-four months, arguing it "was necessary to make her eligible for a residential drug abuse program available only for prisoners with sentences in excess of 24 months."[128] The court cited her addiction-related criminal record as the most persuasive factor for the deviation, asserting it was imperative she receive drug treatment in the controlled confines of a correctional setting.[129] Story objected to the longer sentence because the court could not ensure her participation in the program.[130] The program availability varied by facility and prison administration officials determined placement.[131] She was most likely not eligible since she had outstanding warrants.[132]

The appellate court used an argument from the D.C. Circuit to reject the distinction between the decision to *imprison* a defendant and the decision of *how long to imprison* a defendant: "If . . . imprisonment is not an appropriate means of promoting rehabilitation, how can *more* imprisonment serve as an appropriate means of promoting rehabilitation?"[133] Furthermore, the court rejected the reasoning of the Ninth Circuit that Congress should have included the phrase "or length of imprisonment" to prohibit consideration of rehabilitative goals equally for the imposition of the term itself and the length of the term: "[T]he phrase 'or the length of imprisonment' [would not] add anything that the term 'imprisonment' on its own doesn't already convey . . . . A sentencing court deciding to keep a defendant locked up for an additional month is, as to that month, in fact choosing imprisonment over release."[134]

Finally, the *Story* court recognized that permitting judges to make sentencing decisions based on the hopeful placement of the defendant in a prison-based program was imprudent.[135] While the court ultimately held the sentence was based on statutory error,[136] it also held the error was not plain, as the circuits were split on the issue, and previous Tenth Circuit Court of Appeals[137] cases actually held the

127. *Id.*
128. *Id.*
129. *Id.* at 1243–44.
130. *Id.* at 1244.
131. *Id.* at 1245.
132. *Id.* at 1244.
133. *Id.* at 1246 (quoting *In re* Sealed Case, 573 F. 3d 844, 849–51 (D.C. Cir. 2009)).
134. *Id.* at 1247 (alterations in original) (quoting *In re* Sealed Case, 573 F. 3d 844, 849–51 (D.C. Cir. 2009)).
135. *Id.* (citing United States v. Manzella, 475 F.3d 152, 158 (3rd Cir. 2007)).
136. *Id.* at 1248.
137. *See generally* United States v. Limon, 273 F. App'x 698 (10th Cir. 2008), *abrogated by* United States v. Story, 635 F.3d 1241 (10th Cir. 2011).

contrary.[138] The defendant's sentence was not vacated, and the judgment of the district court was affirmed.[139]

In a brief concurring opinion, Judge Hartz acknowledged significant overlap between the goals of rehabilitation and incapacitation.[140] Section § 3553(a)(2)(c) lists one of the factors to be considered in imposing a sentence as the need "to protect the public from further crimes of the defendant,"[141] a value recognized as incapacitation.[142] Judge Hartz asserted the longer sentence was most likely justifiable under § 3582 by reducing the threat of recidivism.[143] If the defendant were placed in the rehabilitative program, her chances of recidivism would be reduced, and if not, the longer sentence would protect the public from her recidivism a little longer.[144]

III. INTEGRATING 18 U.S.C. §§ 3553, 3582 IN *TAPIA V. UNITED STATES*

In *Tapia*, the U.S. Supreme Court held that the Sentencing Reform Act bars federal courts from considering rehabilitative factors when imposing a term of imprisonment or determining its length.[145] The defendant, Alejandra Tapia, was convicted of smuggling unauthorized aliens into the country.[146] Under the Sentencing Guidelines, Tapia was subject to a term of imprisonment between forty-one and fifty-one months.[147] The court sentenced Tapia to a fifty-one month term with three years of supervised release.[148] The district court stated the "number one" reason for the longer sentence was to make Tapia eligible for a drug treatment program.[149] On appeal, the defendant averred her sentence violated § 3582(a), but the Ninth Circuit Court of Appeals upheld her sentence.[150] The U.S. Supreme Court, however, reversed the lower courts' decisions.[151]

The Court began by recounting the history preceding the Sentencing Reform Act of 1984 to establish congressional intent for the Act overall.[152] Prior to the Act, the system of indeterminate sentencing

138. *Story*, 635 F.3d at 1248–49.
139. *Id.* at 1249.
140. *See id.* (Hartz, J., concurring).
141. 18 U.S.C. § 3553(a)(2)(c) (2006).
142. Tapia v. United States, 131 S. Ct. 2382, 2387 (2011).
143. *Story*, 635 F.3d at 1249 (Hartz, J., concurring).
144. *Id.*
145. *Tapia*, 131 S. Ct. at 2385.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. United States v. Tapia, 376 F. App'x. 707 (9th Cir. 2010).
151. *Tapia*, 131 S. Ct. at 2386.
152. *Id.* at 2386–87 (citing Mistretta v. United States, 488 U.S. 361 (1989)).

emphasized rehabilitation of the offender, predicating release on prison officials' determination of rehabilitation.[153] According to the Court, the purpose of the Act was to deemphasize rehabilitation and limit judges' discretion, thereby reducing sentence disparities and eliminating a failed system of sentencing.[154]

The Court's second point was based on the structure of the Act.[155] Several sections of the Act refer back to § 3553(a)(2) defining objectives to be considered for different types of sentences.[156] For example, courts are undisputedly not permitted to consider retributivistic motivations for a term of supervised release.[157] The prohibition of § 3582(a) also mirrors a section in the enabling statute of the Sentencing Commission requiring judges "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant."[158]

The Court also recognized that no section of the Guidelines gave courts the authority to assign prisoners to rehabilitative programs or specific prison facilities.[159] However, a court can gauge the rehabilitative need of an offender for probation or supervised release,[160] and Congress gave them authority to mandate participation in rehabilitative programs within those types of sentences.[161] This is the opposite of how participation in rehabilitative programs in prison is determined.[162] A sentencing court can make a recommendation, but the Bureau of Prisons has the discretion to administer all inmate placements and programs.[163]

Next, the Court focused on the text of the Act.[164] Section 3582(a) requires courts to "recognize" imprisonment as not "appropriate" for rehabilitative purposes.[165] "Recognize" is generally accepted to mean "to acknowledge or treat as valid," and "appropriate" is "suitable or fitting for a particular purpose."[166] Combined, this indicates courts "should acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation."[167] While the Court agreed Con-

153. *Id.*
154. *Id.* at 2387.
155. *Id.* at 2387–88.
156. *Id.*
157. *Id.* at 2388 (citing 18 U.S.C. § 3583(c) (2006)).
158. *Id.* (quoting 28 U.S.C. § 994(k) (2006)).
159. *Id.* at 2390.
160. *Id.*
161. *Id.*
162. *Id.* at 2390–91 (citing 18 U.S.C. § 3582(a) (2006)).
163. *Id.*
164. *Id.* at 2388.
165. 18 U.S.C. § 3582(a) (2006).
166. *Tapia*, 131 S. Ct. at 2388 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1611 (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed. 1987)).
167. *Id.*

gress could have used stronger language in this prohibition, the Court asserted none of the alternative meanings of "recognize" differ enough to allow a reasonable doubt as to congressional intent.[168]

The Court also addressed the distinction between the decision to imprison and the decision of the length of imprisonment by referring to the definition of imprisonment: "the state of being imprisoned."[169] Since the definition applies both to an original confinement and its prolongation, the Court saw no reason to differentiate between the decisions to apply different goals.[170]

Finally, the Court looked to the Senate Report of the Sentencing Reform Act to investigate how the legislative history could clarify congressional intent specific to these sections.[171] While the report explicitly noted Congress's skepticism toward prison-based rehabilitation,[172] it still stopped short of completely eliminating rehabilitation as a purpose of sentencing by only restricting rehabilitation to sentences other than imprisonment.[173] Since the district court decided Tapia's sentence considered rehabilitative goals and "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation," the U.S. Supreme Court reversed the lower court's judgment.[174]

IV. ANALYSIS OF THE CIRCUIT SPLIT RESOLUTION

The Court's decision in *Tapia v. United States*[175] demonstrated the correct integration of 18 U.S.C. § 3553 and 18 U.S.C. § 3582 by interpreting the Act in congruence with Congress's obvious intentions. However, the Court could have gone even further and bolstered its decision through consideration of the policy implications. The Court commonly considers factual policy outcomes to both elucidate intricate legal issues and to ensure its decisions benefit the public.[176]

168. *Id.* at 2388–89.
169. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1137 (Philip Babcock Gove et al. eds., 3d ed. 1993)).
170. *Id.* at 2389–90.
171. *Id.* at 2391 (citing S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182).
172. *Id.* (quoting S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221).
173. *Id.* (quoting S. REP. NO. 98-225, at 76–77 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3259–60).
174. *Id.* at 2393.
175. *Id.*
176. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (deciding the legal issue whether segregation violated the 14th Amendment after considering the emotional, psychological, and mental impact of segregation; overruling *Plessy v. Ferguson* as against public interest and unconstitutional); Plessy v. Ferguson, 163 U.S. 537 (1896).

While *Tapia* ostensibly should be read as an impediment to the rehabilitationist agenda, this Part will demonstrate that the factual policy outcomes from *Tapia* are consistent with rehabilitationist goals. *Tapia* not only affirmed that rehabilitation is appropriately considered for sentences other than imprisonment, it also placed rehabilitative prison programs firmly in the authority of prison administrative personnel, not judges. Prison is not inherently rehabilitative, and judges have no authority to incorporate rehabilitative programs into an inmate's imprisonment. Finally, as the statutory interpretation involved in *Tapia* was a simple legal analysis, this Part will primarily analyze factual evidence of the public policy outcomes to augment the assertion that *Tapia* should be read as an excellent opportunity to refocus on evidence-based rehabilitative options.

A. The U.S. Supreme Court's Interpretation Is Consistent with Congressional Intent

Utilizing foundational methods of interpretation, the U.S. Supreme Court's holding in *Tapia v. United States*[177] was correct. The overall purpose of the legislation, congressional intent specific to 18 U.S.C. § 3582, statutory text, and the structure of the statute all support the holding. The Court laid out a comprehensive explanation of the holding employing each of these principles.[178] Legislative intent is very clear in the Senate Report of the Sentencing Reform Act,[179] and the plain meaning of the statute's text does not allow for reasonable ambiguity.[180] Both the history of the sentencing system and the structure of other sections referring back to 18 U.S.C. § 3553(a) are consistent with this interpretation.[181]

While the application of the statute in *Tapia* was technically correct, Judge Hartz draws attention to a possible loophole in his concurring opinion in *Story*.[182] True rehabilitation will necessarily reduce recidivism, and by this mechanism, "protect the public from further crimes of the defendant."[183] "Protect[ing] the public from further crimes" is actually the statutory definition of incapacitation, which is a permissible purpose for a sentence of imprisonment under 18 U.S.C. § 3582.[184] Judge Hartz seems to be elucidating the overlap between incapacitation and rehabilitation, as they both keep the public safe from future crimes. It is possible Judge Hartz's reasoning could be

177. *See Tapia*, 131 S. Ct. at 2382.
178. *See supra* section III.
179. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.
180. *See supra* section III.
181. *See supra* section III.
182. United States v. Story, 635 F.3d 1241, 1249 (2011) (Hartz, J., concurring).
183. 18 U.S.C. § 3553(a)(2)(c) (2006).
184. *Id.*

applied in the future to collapse the analysis of this issue to only the wording used by the sentencing judge.

B. Rehabilitation Is Appropriately Considered in Sentencing Other Than Imprisonment

Despite the exclusion of rehabilitative motivations for imprisonment, rehabilitation has remained an important overall goal of sentencing. The Senate Report accompanying the Sentencing Reform Act outlined Congress's deliberate preservation of rehabilitation in certain contexts.[185] Instead of eliminating it entirely, as urged by some critics,[186] Congress chose to "retain[ ] rehabilitation and corrections as an appropriate purpose of a *sentence*, while recognizing, *in light of current knowledge*, that '*imprisonment* is not an appropriate means of promoting correction and rehabilitation.'"[187]

18 U.S.C. § 3583 directs courts, when including a term of supervised release after a prison sentence, to consider the Sentencing Guidelines' recommendations or policy statements, characteristics of the offense and of the defendant, the need for deterrence, incapacitation, and rehabilitation, avoidance of sentencing disparities between similar defendants in similar situations, and restitution for victims.[188] Unlike § 3582, which addresses sentencing of imprisonment, rehabilitation is included and retributivistic goals are omitted.[189] The imposing of a fine[190] or probation[191] are two rare areas where all factors from § 3553 can be considered.

Considering rehabilitative factors for sentences of a fine, probation, or a term of supervised release are all the correct application of the law and good policy. When appropriate and available, judges can pick evidence-based rehabilitation courts or problem-solving courts[192] over imprisonment or other sanctions. As of 2004, there were more

185. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

186. Tapia v. United States, 131 S. Ct. 2382, 2391 (2011).

187. S. REP. NO. 98-225, at 76 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3259 (emphasis added) (quoting 18 U.S.C. § 3582(a) (2006)).

188. 18 U.S.C. § 3583(c) (2006).

189. *Id.* §§ 3582–3583 (2006 & Supp. V 2011).

190. *Id.* § 3572.

191. *Id*. § 3562.

192. The term "problem-solving courts" is generally defined as those courts addressing specific crimes with high recidivism rates that also have specific treatment options available, such as drug- and alcohol-related crimes. The premise of these courts is to reduce recidivism by treating the underlying problem with evidence-based treatments through collaboration between attorneys, judges, defendants, and treatment professionals. *See Problem Solving Courts*, Minn. Jud. Branch, http://www.mncourts.gov/?page=626 (last visited Aug. 6, 2013).

than 2,500 problem-solving courts in the United States.[193] More than ten years ago, the Conference of Chief Justices and the Conference of State Court Administrators passed a resolution encouraging the use of problem-solving courts.[194] The support and funding for these courts continues to grow around the country.[195]

An initial justification for these alternative courts is they simply work better: they reduce recidivism rates, and the criminal justice systems work more effectively. Drug courts are the most cited, as they are the oldest form of alternative court and have the most data available.[196] While comprehensive drug court data on a national level is not yet available, individual states and funding sources often evaluate their own programs.[197] American University compiled data from these sources.[198] It demonstrated a consistent reduction in recidivism and costs associated with imprisonment, leading to a reduction in overall costs, despite increased treatment costs.[199]

For example, offenders from the Circuit Court in Maryland who participated in drug court, as opposed to those processed normally, had 44% fewer arrests overall, with 62% fewer drug arrests, 72% fewer property arrests, and 70% fewer arrests for crimes against persons, for a total of more than $10.2 million dollars saved over a three-year period.[200] In California, over 1,900 participants in seventeen

193. NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2007 41 (Carol R. Flango et al eds., 2007), *available at http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/980/rec/19*.

194. *Id.*

195. *Id.*

196. *Id.* at 50. The first drug court was in Miami in 1989, started collaboratively by Deputy Chief Judge Herbert Klein under the instructions of Chief Judge Gerald Wetherington and with the guidance of Dr. Michael Smith, director of the Substance Abuse Clinic at Lincoln Hospital. *Id.*

197. *Id.* at 52 (citing BUREAU OF JUSTICE ASSISTANCE DRUG COURT CLEARINGHOUSE, AM. UNIV., RECIDIVISM AND OTHER FINDINGS REPORTED IN SELECTED EVALUATION REPORTS OF ADULT DRUG COURT PROGRAMS PUBLISHED: 2000–PRESENT (2010)).

198. *Id.* (citing BUREAU OF JUSTICE ASSISTANCE DRUG COURT CLEARINGHOUSE, AM. UNIV., RECIDIVISM AND OTHER FINDINGS REPORTED IN SELECTED EVALUATION REPORTS OF ADULT DRUG COURT PROGRAMS PUBLISHED: 2000–PRESENT (2010)).

199. *Id.* (citing BUREAU OF JUSTICE ASSISTANCE DRUG COURT CLEARINGHOUSE, AM. UNIV., RECIDIVISM AND OTHER FINDINGS REPORTED IN SELECTED EVALUATION REPORTS OF ADULT DRUG COURT PROGRAMS PUBLISHED: 2000–PRESENT (2010)).

200. *See* BUREAU OF JUSTICE ASSISTANCE DRUG COURT CLEARINGHOUSE, AM. UNIV., RECIDIVISM AND OTHER FINDINGS REPORTED IN SELECTED EVALUATION REPORTS OF ADULT DRUG COURT PROGRAMS PUBLISHED: 2000–PRESENT, at 1, 31, 71 (2010). Study four includes criminal justice system costs and victimization costs, based on costs incurred by the comparison group of offenders not participating in drug court. *Id.* The number given is for participants not in the Circuit Court; Circuit Court participants had a lower re-arrest rate, and therefore higher savings, on every measure. *Id.* The study synopsis does not specify if participants were randomly assigned to participate in the alternative court; for those concerned about a self-selection bias among participants, please see the data from the next study,

counties completed drug court, reducing their arrest rate for the next two years by 85% in comparison to their arrest rate for the two years before admission into drug court, resulting in approximately $61 million avoided costs statewide per year.[201] In Virginia, researchers compared felony arrest rates for those who completed drug court, those who did not graduate, and those who were processed traditionally.[202] The rates were 16%, 33%, and 50%, respectively.[203]

While those statistics may not be sufficient to convince every critic, often the immediate economic efficiency of these courts can influence some. On average, an offender participating in drug court costs more in treatment but substantially less in jail and probation time, costing about $1,400 or 80% of an offender processed normally.[204] Including prevented recidivism, the savings extend to $6,744, and with prevented victimization costs, the total averages to $12,218 per offender.[205]

Drug courts are not the only alternative courts seeing success. As these alternative courts grew in popularity, innovative leaders generalized the principles to other issues linked to high recidivism rates or particularly vulnerable populations: intimate partner violence, truancy, mental health, homelessness, prostitution,[206] and veterans.[207] Graduates from a mental health court in San Francisco had a 39% reduction in overall recidivism and a 54% reduction of violent

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which utilized a within-groups, repeated measures design (instead of comparing two different groups, participants are compared in before and after conditions). *Id.* at 71.

201. *See id.* at 5, 33, 75. Study sixteen found "avoided criminal justice costs averaged approximately $200,000 annually per court for each 100 participants; with 90 adult drug courts operating statewide as of 2002, and drug court caseloads conservatively estimated at 100 participants per year, annual statewide cost savings for adult drug courts suggested by data to be $18 million per year; cost offset and cost avoidance estimated at $43 million predominately due to avoided jail and prison costs." *Id.* at 75.

202. *See id.* at 8, 37, 79. In study twenty-nine, participants were "chronic offenders prior to drug court entry; averaging 6.8 felony arrests and 5.6 misdemeanor arrests." *Id.* at 79.

203. *See id.* at 8, 37, 79.

204. NAT'L CTR. FOR STATE COURTS, *supra* note 193, at 5 (citing MICHAEL W. FINIGAN, SHANNON M. CAREY & ANTON COX, NAT'L INST. OF JUSTICE, THE IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS 44 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf).

205. MICHAEL W. FINIGAN, SHANNON M. CAREY & ANTON COX, NAT'L INST. OF JUSTICE, THE IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS, at IV (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf.

206. NAT'L CTR. FOR STATE COURTS, *supra* note 193, at 42.

207. *Leave No Veteran Behind*, ECONOMIST, June 2, 2011, http://www.economist.com/node/18775315 (last visited Jan. 13, 2013).

charges.[208] In North Carolina, mental health court graduates recidivated half as often as their normally processed counterparts.[209] In Washington, participants' number of arrests during the year after entering mental health court dropped to lower than a quarter of their arrests in the year prior, and they were rearrested for probation violations 62% less often.[210]

Despite the success of these problem-solving courts, critics still have concerns about these rehabilitative alternatives. They assert that these courts are not concerned with guilt or innocence, allow for judges to impose their own values on defendants, and will result in unfair variability between sentences.[211] These concerns can be addressed by implementing best practices. The first can be addressed with a post-conviction model rather than a diversionary model.[212] Waiting until sentencing, after a defendant has passed the plea or trial stage, to incorporate alternatives limits due process concerns, as participants are then probationers rather than criminal defendants.[213] Ensuring fidelity to treatment through the use of manuals outlining specific steps to graduation, evidence-based treatment protocols, and a clear understanding of what constitutes success in the program will limit variability and opportunities for judges to impose their own values on defendants.

Currently, these alternative programs address only certain types of crimes. Expanding the programs to allow participation by defendants who were not convicted of the specific crime, but whose criminality is driven by similar issues, would permit a more comprehensive effect. An individual convicted of stealing, a behavior he or she engaged in to support an addiction, would benefit from a drug court program in the same way as an individual convicted of possession of a controlled substance.

Limon was convicted of bank robbery and weapons charges, Story was convicted of unlawful possession of stolen mail,[214] and Tapia was

208. Dale E. McNiel & Renee L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1401 (2007).

209. LAUREN ALMQUIST & ELIZABETH DODD, JUSTICE CTR., MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 23 (2009), https://www.bja.gov/Publications/CSG_MHC_Research.pdf.

210. *Id.* at 24. Currently, there is not enough data to definitively calculate costs or savings of the programs. *Id.* at 26.

211. Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y. TIMES (Apr. 26, 2005), http://www.nytimes.com/2005/04/26/nyregion/26courts.html?_r=2&.

212. Brenda Bratton Blom, Julie Galbo-Moyes & Robin Jacobs, *Community Voice and Justice: An Essay on Problem-Solving Courts as a Proxy for Change*, 10 U. MD. L. J. RACE RELIGION GENDER & CLASS 25, 37–38 (2010).

213. *Id.* at 38.

214. For further discussion of these convictions, see section II.D.

convicted of smuggling unauthorized aliens into the country.[215] In these landmark cases surrounding 18 U.S.C. § 3582,[216] none of the defendants were convicted of crimes typically allowed into a problem-solving court. The alternative courts are showing success, but they are currently only available to a subset of the population that would benefit from the services provided. Broadening the inclusion criterion would allow these evidence-based alternatives opportunity for further impact.

18 U.S.C. § 3572 allows for rehabilitative factors, inter alia, to be considered in the imposition of a fine.[217] An excellent example of this is the emergence of the restorative justice approach to offender rehabilitation. While there is much more to the process of mediation and collaboration used in restorative justice,[218] one common element—found in more than 75% of participant agreements—is requiring offenders to pay restitution.[219] Early research did not show significant results, reaching only slightly lower rates of recidivism for participants.[220] However, as the field has grown and researchers have been able to identify variables limiting success,[221] there has been a swell of evidence showing lowered recidivism rates.[222]

Although judges may not consider rehabilitative factors when imposing a prison sentence, this is permissible for all other sanctions. Judges can reduce the likelihood an offender will one day necessitate a prison sentence under the Sentencing Guidelines by choosing rehabilitative and evidence-based alternatives. Finally, the first drug court

215. For further discussion of this conviction, see Part III.

216. 18 U.S.C. § 3582(a) (2006).

217. *Id.* § 3572.

218. *See generally* Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005).

219. Nancy Rodriguez, *Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism*, 53 CRIME & DELINQ. 355, 362 (2007).

220. *Id.* at 359 (citing Mike Niemeyer & David Shichor, *A Preliminary Study of a Large Victim/Offender Reconciliation Program*, 60 FED. PROBATION 30 (1996); Mark S. Umbreit, *Crime Victims Confront Their Offenders: The Impact of a Minneapolis Mediation Program*, 4 RES. ON SOC. WORK PRAC. 436 (1994); Mark S. Umbreit & Robert B. Coates, *Cross-site Analysis of Victim-Offender Mediation in Four States*, 39 CRIME & DELINQ. 565 (1993)).

221. *Id.* at 359–61.

222. *Id.* at 359 (citing Hennessey Hayes & Kathleen Daly, *Youth Justice Conferencing and Reoffending*, 20 JUST. Q. 725 (2003); Gabrielle Maxwell & Allison Morris, *Victim Participation in Sentencing: The Problems of Incoherence*, 40 HOWARD J. OF CRIM. JUST. 39 (2001); William R. Nugent, Mark S. Umbreit, Lizabeth Wiinamaki & Jeff Paddock, *Participation in Victim-Offender Mediation and Reoffense: Successful Replications?*, 11 RES. ON SOC. WORK PRAC. 9 (2001); Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127 (2005)).

was not founded until five years after the Sentencing Reform Act.[223] All of the research supporting alternative courts has been compiled in the last twenty-four years. The scientific knowledge available concerning rehabilitation and human behavior in the criminal justice system has grown exponentially since this legislation was passed.[224]

C. There Is a Place for Rehabilitation in Prison After *Tapia*

"[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."[225] Congress may have been correct on both points in 1984, but available scientific knowledge has grown to challenge those misperceptions.

Determining the rehabilitation of prisoners with reasonable accuracy is not impossible. A meta-analysis[226] of 131 studies suggests that amalgamating static, unchangeable risk factors, such as age and criminal history, with dynamic, changing risk factors, such as gang-affiliation and rehabilitation-program involvement, significantly increases risk prediction accuracy.[227] Since dynamic risk factors change with the offender's environment,[228] predicting recidivism will never be completely accurate, but current accuracy levels are approximately 70%.[229] Using actuarial recidivism prediction instruments, instead of human judgment, also increases accuracy.[230]

Not only can rehabilitation be measured on a limited scale, but it can also be reliably induced in prison. Recently, and over the past ten years in particular, there has been a growing accumulation of research linking some interventions to lower recidivism rates.[231] Spe-

223. *See supra* note 196 and accompanying text.
224. *See also* section IV.C (presenting further research about rehabilitation and human behavior in the criminal justice system that has been published since the Sentencing Reform Act).
225. S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.
226. A meta-analysis is a statistical combination of the results from multiple studies to provide a more comprehensive assessment of the outcomes in that area of research. *See* Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 Criminology 575, 579–81 (1996).
227. PETERSILIA, *supra* note 24, at 190 (citing Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575 (1996)).
228. Dynamic risk factors include family support, environment, and interpersonal relationships, among others. *See* Gendreau, *supra* note 226, at 575–77.
229. PETERSILIA, *supra* note 24, at 190–91.
230. *Id.*
231. Mark E. Olver, Keira C. Stockdale & J. Stephen Wormith, *A Meta-Analysis of Predictors of Offender Treatment Attrition and Its Relationship to Recidividism*, 79 J. CONSULTING & CLINICAL PSYCHOL. 6, 6–7 (2011).

cifically, the Risk-Need-Responsivity model has been linked to larger reductions in recidivism.[232] This model emphasizes three characteristics of treatment: treatment intensity should be matched to the risk level of the offender, treatment should focus on factors linked to criminal behavior, and treatment should be tailored to the personality and capability of the offender.[233] A series of meta-analyses has linked the use of this model to recidivism reduction for general,[234] violent,[235] sexual,[236] and intimate partner violence crimes.[237]

Parole boards could utilize guidelines based on this research to remain focused on more accurate predictive factors, like recidivism risk and offense severity.[238] The guidelines would also lower the subjective elements of release decision-making that can cause large sentencing disparities and a coercive environment.[239] Furthermore, measuring rehabilitation by recidivism risk reduction would limit the subjective variability between parole boards. Parole board members have less opportunity to impose personal values on the offender if decisions are based on empirical factors predicting the offender's likelihood to comply with society's values, as reflected by our laws.

To further ensure objectivity and to reduce political pressure, parole board members should be trained correctional professionals rather than politically appointed individuals.[240] In most states still using parole boards, the governor appoints parole board members.[241]

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232. *Id.* at 6 (citing D. A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL'Y & L. 39 (2010)).
233. *Id.*
234. *Id.* at 7 (citing D. A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL'Y & L. 39 (2010); D. A. Andrews & Craig Dowden, *Risk Principle of Case Classification in Correctional Treatment: A Meta-Analytic Investigation*, 50 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 88 (2006); D. A. Andrews, James Bonta & R. D. Hoge, *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 CRIM. JUST. & BEHAV. 19 (1990); Nana A. Landenberger & Mark W. Lipsey, *The Positive Effects of Cognitive-Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective* Treatment, 1 J. EXPERIMENTAL CRIMINOLOGY 451 (2005); Mark W. Lipsey, *The Effect of Treatment on Juvenile Delinquents: Results from Meta-Analysis*, *in* PSYCHOLOGY AND LAW: INTERNATIONAL PERSPECTIVES 131 (Friedrich Losel et al. eds., 1992)).
235. *Id.* (citing Craig Dowden & D. A. Andrews, *Effective Correctional Treatment and Violent Reoffending: A Meta-Analysis*, 42 CAN. J. OF CRIMINOLOGY 449 (2000)).
236. *Id.* (citing R. Karl Hanson, Guy Bourgon, Leslie Helmus & Shannon Hodgson, *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 CRIM. JUST. & BEHAV. 865 (2009)).
237. *Id.* (citing Julia C. Babcock, Charles E. Green & Chet Robie, *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 CLINICAL PSYCHOL. REV. 1023 (2004)).
238. PETERSILIA, *supra* note 24, at 189.
239. *Id.*
240. *Id.* at 191.
241. *Id.*

Two-thirds of the states have no professional qualification requirements.[242]

Rehabilitative goals should be a factor in sentencing a term of imprisonment, not by judges on the initial end, but by parole boards considering the release date of an offender. Not only are Congress's original concerns about accuracy reduced—this would also not be a regression to the days of unregulated parole board control subjecting inmates to members' personal opinions and leaving sentences unfairly variable and unpredictable.[243] With parole boards eradicated in sixteen states[244] and the federal prison system,[245] approximately 60% of inmates will not appear before a parole board prior to release.[246] While eliminating parole boards ostensibly seems like a way to punish more harshly, in actuality, this creates a situation where offenders are released back to the community with no requirements, support, or regulation.[247]

It is less likely prisoners will participate in self-improvement programs while in prison if they have no tangible motivation for doing so.[248] Unprepared, prisoners are struggling with success upon reentry. Within three years of release, approximately two-thirds are rearrested for at least one serious crime, almost half are convicted, and a quarter return to prison with a new sentence.[249] Of those who were re-arrested within three years, half were re-arrested within six months and two-thirds within the first year.[250] Including parole violations, 52% returned to prison within three years.[251]

Data from 1994 shows an increase of about 5% in the overall rearrest rate compared to data from 1983.[252] However, the general "two-thirds re-arrest rate" has been consistent since 1969.[253] New arrests now happen not only slightly more often, but sooner: in 1983, about one in four were re-arrested within six months, but in 1994, this ratio had grown to almost one in three.[254] Being young, African-

242. *Id.*
243. *Id.* at 188.
244. *Id.* at 187.
245. *See supra* section II.B.
246. PETERSILIA, *supra* note 24, at 188–89.
247. *Id.*
248. *Id.* at 188.
249. *Id.* at 140–41. Within three years of release 67.5% are re-arrested, 46.9% are convicted, and 25.4% return to prison with a new sentence. *Id.* (citing PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, 1 (2002) [hereinafter LANGAN]).
250. *See id.* at 141 (citing LANGAN, *supra* note 249).
251. *Id.* at 140 (citing LANGAN, *supra* note 249).
252. *Id.* at 143 (citing LANGAN, *supra* note 249).
253. *Id.* at 141.
254. *Id.* at 143 (citing LANGAN, *supra* note 249).

American, or male was linked to a higher likelihood of recidivism, but interestingly, time served in prison was not.[255]

Prisoners have higher prevalence rates for physical and mental impairments than the general population, which likely accounts for some of their difficulties reintegrating into society after release.[256] Furthermore, "persons with mental illness are increasingly criminalized and processed through the corrections system instead of the mental health system."[257] Deinstitutionalization was a well-intentioned national change in mental health policy that shifted the primary care of individuals with serious mental illness from psychiatric hospitals to community-based treatment.[258] Unfortunately, access to community services lagged behind demand for services, due in large part to limited resources, leaving a disparity between the treatment available and the treatment needed for successful community integration.[259] The people caught in this gap can often end up drawing the interest of law enforcement.[260] Overall, the prison population has a much higher prevalence of mental illness than the general population.[261] This distinction is most sharply defined with substance dependence, as some estimates put its prevalence rate as high as 72%.[262]

While all of this is happening within our prison population, the population itself is significantly growing. From the mid-1920s to the mid-1970s, there were about 110 inmates per 100,000 American citizens;[263] by 2010, the number had grown to 962 inmates per 100,000.[264] Ninety-three percent of all prison inmates will eventually

255. *Id.* at 142 (citing LANGAN, *supra* note 249).

256. *Id.* at 34–36. Thirty-one percent of state prisoners and twenty-three percent of federal prisoners are reported to have physical and mental impairments. *Id.* at 35. It is estimated these rates underrepresent actual prevalence; surveys establishing these numbers asked inmates if they had various impairments, assuming the inmates understood what was meant by the diagnoses, had access to health care, and had been diagnosed. *Id.* Twenty-one percent of all inmates report having a disability limiting their ability to work, compared to twelve percent of the general population. *Id.* at 35–36.

257. *Id.* at 36–37.

258. CHRIS KOYANAGI, THE KAISER FAMILY FOUND., LEARNING FROM HISTORY: DEINSTITUTIONALIZATION OF PEOPLE WITH MENTAL ILLNESS AS PRECURSOR TO LONG-TERM CARE REFORM 1 (2007), *available at* http://www.nami.org/Template.cfm?Section=About_the_Issue&Template=/ContentManagement/ContentDisplay.cfm&ContentID=137545. The number of national residents dropped from 559,000 in 1955 to 154,000 in 1980. *Id.*

259. *Id.*

260. PETERSILIA, *supra* note 24, at 37.

261. *Id.* at 38. In the prison population, one in six suffer from mental illness. *Id.* at 3.

262. Jennifer L. Rounds-Bryant & Lattie Baker Jr., *Substance Dependence and Level of Treatment Need Among Recently-Incarcerated Prisoners*, 33 THE AM. J. OF DRUG & ALCOHOL ABUSE 557 (2007).

263. PETERSILIA, *supra* note 24, at 21.

264. GLAZE, *supra* note 2, at 2.

be released.[265] Rehabilitative programs in prison are more important than ever to help our growing prison population overcome barriers to reintegration upon release. Even if participation in programs is not motivated solely by an inmate's hopes for self-improvement, beneficial changes can still occur.[266]

Rehabilitation still has an important role in prisons if we hope to improve our national situation. It is inappropriate for judges to make sentencing decisions based on rehabilitative factors without control over the inmate's participation in these programs. The defendants in both *Story*[267] and *Tapia*[268] were never enrolled in the programs for which their sentences were lengthened. It is up to prison administrators to make these programs available and legislatures to revitalize parole boards to emphasize these programs. The most important aspects of these programs are that they are evidence-based and subject to program evaluation for tangible outcomes. This focus on scientific evaluation will increase accountability and prevent a regression to hopeful-but-haphazard attempts at rehabilitation.

V. CONCLUSION

After *Tapia,*[269] federal judges cannot appropriately consider rehabilitative factors when sentencing defendants to imprisonment under the Sentencing Guidelines. This outcome was not only the correct application of the law but also a wise policy decision. Prison is not inherently rehabilitative and, while there are rehabilitative options in prison, judges do not control the administration of these options and should not base sentencing decisions on them.

However, rehabilitation still has a major role to play in our criminal justice system. Judges can choose rehabilitative options instead of imprisonment for defendants, and prison administrators can offer *evidence-based* rehabilitation programs. Without an emphasis on utilizing research to evidence the effectiveness of these programs, labeling them rehabilitative is at best unsubstantiated optimism and at worst a lie presented as a promise to victims, offenders, and the community. Repairing parole boards to reflect advances in scientific knowledge would help revive an emphasis on rehabilitation.

The assumption that prison was inherently rehabilitative did not work, but neither has completely abandoning rehabilitative goals. Never before have we housed so much of our population in prison. Our malfunctioning prison system is a drain on our economy, our com-

265. PETERSILIA, *supra* note 24, at 3.
266. *Id.* at 188.
267. United States v. Story, 635 F.3d 1241, 1248 (10th Cir. 2011).
268. Tapia v. United States, 131 S. Ct. 2382, 2391 (2011).
269. *Id.* at 2382.

munities, our families, and our people. There is no justification for failing to offer rehabilitation that could potentially transform someone's life and our communities, especially when it is more economically efficient.

The pendulum swung too far from rehabilitation during the sentencing reform movement; our goal should be to create a balance between the justifications for punishment. Incorporating rehabilitative options does not have to be to the exclusion of incapacitation, deterrence, and retribution—it can serve those purposes, as well. *Tapia*[270] should not function as an abdication of rehabilitation in our criminal justice system but instead as an opportunity to more closely focus the lens on evidence-based rehabilitation.

270. *Id.*