St. John's Law Review

Volume 89, Winter 2015, Number 4 Article 6

Let the Judge Speak: Reconsidering the Role of Rehabilitation in Federal Sentencing

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LET THE JUDGE SPEAK: RECONSIDERING THE ROLE OF REHABILITATION IN FEDERAL SENTENCING

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INTRODUCTION

Imagine that you are a judge in a criminal case. The trial is over, and the defendant, Jamie, was convicted of a serious drug-related crime, her second conviction for similar crimes. Previously, she served the United States Federal Sentencing Guidelines ("Guidelines") maximum sentence of eighteen months. Today is her sentencing proceeding for the most recent conviction. You feel very strongly that imprisonment is the proper punishment for Jamie in this case. However, you are unsure as to how long the term of imprisonment should be. Suppose the maximum sentence for this crime, according to the Guidelines, is twenty-four months. You believe that two years is a sufficient punishment due to the severity of the crime and the fact that it will keep Jamie from committing similar crimes during her incarceration. The twenty-four-month sentence might even send a message to others in society that these drug crimes can lead to long periods of imprisonment, and you hope that the sentence will deter others from following in Jamie's footsteps. However, Jamie's past conduct has shown that she poses a high risk of recidivism. At a nearby prison facility, there is a highly regarded rehabilitation program that helps defendants overcome drug problems and gives them vocational training so that they can get jobs when they are released from prison. The problem for Jamie, and for you, is that this program requires thirty-two months to complete and the United States Supreme Court, in *Tapia v. United States*,[1] interpreted § 3582(a) of the Sentencing

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[1] 131 S. Ct. 2382 (2011).

Reform Act to mean that promoting rehabilitation cannot be a factor justifying an increase in the length of a criminal defendant's term of imprisonment.[2] Therefore, even if you believe that her rehabilitative needs should be factored into Jamie's sentence, you cannot say anything about those needs at the proceeding for fear of offending *Tapia*.

Judges today are faced with this problem on a regular basis. Many defendants would benefit from the rehabilitative programs offered in prisons, but because of the prohibitive language in § 3582(a) of the Sentencing Reform Act,[3] defendants like Jamie are released from prisons without undergoing any type of rehabilitation and then fall back into their criminal ways.

The Sentencing Reform Act of 1984 ("SRA") was passed during an ideological shift towards conservatism within the government and in the wake of several studies that suggested the rehabilitative system used in prisons during the majority of the twentieth century was flawed because it did not achieve its goal of reducing the risk of recidivism among defendants.[4] Section 3582 deals with sentencing a defendant to a term of imprisonment.[5] It states that rehabilitation cannot be considered when imposing such a sentence and instead allows judges to consider only the other goals of punishment—deterrence, incapacitation, and retribution—when choosing to send a defendant to prison.[6]

In 2011, the Supreme Court attempted to resolve a split of authority among the circuit courts concerning the interpretation of § 3582(a) when it decided *Tapia v. United States*.[7] There, the Court ruled that a violation of the statute occurs if a judge lengthens a defendant's sentence of imprisonment solely to promote the defendant's rehabilitation.[8] Though this decision resolved the original split, it led to another concerning whether or not *Tapia* permitted a small degree of consideration of

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[2] *Id.* at 2392.

[3] 18 U.S.C. § 3582(a) (2012).

[4] Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1033–34 (1991). *See generally* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

[5] 18 U.S.C. § 3582.

[6] *Id.* § 3582(a).

[7] 131 S. Ct. 2382 (2011).

[8] *Id.* at 2392.

rehabilitation or if § 3582(a) and *Tapia* together constituted a complete ban on rehabilitation factoring into the decision as to the length of a defendant's prison sentence.

A look back at the reasons why rehabilitation was abandoned as an important consideration in sentencing a defendant to prison reveals several glaring flaws in the rationale for the move.[9] Recent studies and opinions indicate that there are significant benefits to rehabilitation in prisons for the defendant as an individual and for society as a whole.[10] Thus, it might be time to revisit the language of § 3582(a) and let rehabilitation play at least a minimal role in sentencing a defendant to prison.

This Note contends that the importance of rehabilitation as a valid and necessary principle of punishment is overlooked in § 3582(a) of the SRA and further argues that a judge should be permitted to consider rehabilitation when deciding to sentence a defendant to a term of imprisonment, so long as rehabilitation is not a dominant factor in coming to that decision. Part I outlines the principles of punishment and the rise and decline of the rehabilitative system of punishment in the United States. It also discusses the importance of rehabilitation and how society could benefit from a system that does not leave rehabilitation by the wayside. Part II discusses the Supreme Court's ruling in *Tapia v. United States*[11] and the resulting circuit split concerning the degree to which rehabilitation can be considered when sentencing a criminal defendant to a term of imprisonment in accordance with § 3553(a)(2)(D) and § 3582(a) of the SRA. Finally, Part III recommends that the Supreme Court resolve the circuit split by adopting the Fifth Circuit's additional justification and dominant factor tests, or alternatively, that Congress amend § 3582(a) so as to permit judges to consider and talk about potential rehabilitation, without fear of being overruled for such discussions, when sentencing a defendant to prison.

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[9] Vitiello, *supra* note 4, at 1032–34; Michael Welch, *Rehabilitation: Holding its Ground in Corrections*, 59 FED. PROBATION 3, 5 (1995).

[10] *Id.*

[11] 131 S. Ct. at 2392.

I. PUNISHMENT IN THE FEDERAL SYSTEM

A. Principles of Punishment

When a person is charged and convicted of a crime under the laws of the United States, a judge then sentences that person to a punishment so that the defendant is forced to suffer a consequence for that defendant's actions.[12] The Sentencing Reform Act under 18 U.S.C. § 3551(b) permits a person found guilty of a punishable offense to be sentenced to (1) a term of probation, (2) a fine, or (3) a term of imprisonment.[13] One or more of the four common justifications for these punishments—retribution, deterrence, incapacitation, and rehabilitation—can rationalize the consequences an individual has to endure as a result of committing a crime.[14]

Retribution is the idea that "punishment is justified when it is deserved."[15] A retributivist looks backward in time and decides if a person deserves punishment based on the wrongdoer's past choices.[16] For retributivists, the focus is on the past and the belief that a criminal should be punished whether or not the punishment will result in a later reduction of crime.[17] The principle behind retributivism is that a wrongdoer, or defendant convicted of a crime, should be punished because they used their free choice to act in a certain way, and in doing so, violated the rules of society.[18]

To the contrary, a person who sees punishment from a utilitarian perspective looks to the future at what effects the punishment will have on society and on the defendant.[19] A utilitarian believes in the idea of the greatest good for the greatest number of people; therefore, the pain stemming from punishment can be justified if and only if it results in a reduction

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[12] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.02(A) (6th ed. 2012).

[13] 18 U.S.C. § 3551(b) (2012). All of these forms of punishment are subject to the provisions of § 3553 of the Sentencing Reform Act ("SRA") and to various other subchapters in the SRA. *See generally id.* §§ 3551–3586.

[14] Andrea Avila, Note, *Consideration of Rehabilitative Factors for Sentencing in Federal Courts:* Tapia v. United States*, 131 S. Ct. 2382 (2011)*, 92 NEB. L. REV. 404, 406 (2013).

[15] DRESSLER, *supra* note 12, § 2.03(B)(1).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* § 2.03(A)(1).

of future crime and pain.[20] The four utilitarian justifications for punishment are general deterrence, individual deterrence, incapacitation, and rehabilitation.[21]

Deterrence is the first utilitarian justification for punishment. The idea behind both general and individual deterrence is to stop individuals who might have the inclination to commit a crime in the future from doing so because they are aware of the punishments that criminals who committed similar crimes were subjected to.[22] General deterrence is meant to convince the general community or society to refrain from future criminal conduct and individual deterrence serves the same purpose for those who have already committed a crime.[23] The punishments should be severe enough so as to intimidate defendants and make it so they do not want to endure those punishments a second time.[24] Critics of deterrence as a justification for punishment cite the high rates of recidivism in the United States[25] as evidence that deterrence has served no purpose in reducing crime.[26] However, proponents argue that there is no way to know what crime rates would be without punishment, and therefore, there is no statistically accurate way to determine if punishment is serving as a deterrent to crime.[27]

Incapacitation, the second utilitarian justification for punishment, is tied to specific deterrence in that it focuses on the individual who committed the crime and how that person's incarceration can benefit society.[28] The justification behind incapacitation is that while the defendant is being punished, the defendant is prevented from committing more crimes because of isolation from society during the period of punishment.[29] The theory of incapacitation is criticized because it is a very limited

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[20] *Id.*

[21] *Id.* § 2.03(A)(2).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] "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." Avila, *supra* note 14, at 407 n.27.

[26] *Id.* at 407.

[27] *Id.*

[28] DRESSLER, *supra* note 12, § 2.03(A)(2).

[29] *Id.* This justification for punishment specifically applies to punishment in the form of imprisonment. *Id.*

solution to the problem of criminal conduct within society; future criminal conduct is difficult to predict and most prisoners will be released eventually.[30]

Rehabilitation, the final justification for punishment, focuses on the individual defendant but also results in benefits for society as a whole. The effectiveness of rehabilitation has been debated a great deal during the latter half of the twentieth century and continues to be a topic of much discussion today.[31] The goal of rehabilitation is similar to that of the other utilitarian principles of punishment: to reduce future crime.[32] The idea behind rehabilitation stems from the assumption that people who commit crimes are suffering from a sickness that can be cured with the proper treatment.[33] Such treatment can come in the form of mental or psychiatric care, educational or vocational training, or drug and alcohol treatment programs.[34] Advocates of rehabilitation as a consideration in punishment believe that it is a more favorable form of punishment than one based on scaring the defendant into behaving in accordance with societal norms.[35] Proponents are quick to point out that the idea of redemption, which is at the heart of rehabilitation, reflects the Judeo-Christian values that the United States was founded upon.[36] However, rehabilitation has numerous critics who point to studies that suggest the rehabilitation efforts used in prisons for a great deal of the twentieth century did little to reduce recidivism.[37]

B. History of the Rehabilitative System

Throughout the history of the United States, there have been many theories of punishment and methods for bringing those theories into practice. The rise and decline of the rehabilitative system of punishment are the hallmarks of the twentieth century in regards to sentencing and the prison system.[38] The early

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[30] Avila, *supra* note 14, at 407.
[31] *Id.* at 407–09.
[32] DRESSLER, *supra* note 12, § 2.03(A)(2).
[33] Vitiello, *supra* note 4, at 1012.
[34] DRESSLER, *supra* note 12, § 2.03(A)(2).
[35] *Id.* § 2.04(A)(2).
[36] *Id.*
[37] *Id.*
[38] Shanna L. Brown, Comment, *Sentencing and Punishment—Sentencing Guidelines: The Sentencing Reform Act Precludes Courts from Lengthening a Prison*

1900s saw the establishment of the federal parole system, authorizing the use of indeterminate sentencing in which the judge, Congress, and a parole board each played a role in determining the length of a defendant's sentence.[39] This model developed over time into the "medical model" of the 1950s.[40] Under the medical model, rehabilitation as a principle of punishment focused around the idea that criminality, or the tendency to commit crimes, is a disease that can be treated through programs run as part of the prison system.[41] When defendants were sentenced under this system they were classified in a state "diagnostic center" and placed into a treatment program designed to reduce their risk of recidivism upon release from prison.[42] The Federal Bureau of Prisons ("BOP") provided specialized programs for inmates that focused on a variety of areas, ranging from drug and alcohol treatment to educational and behavioral adjustment programs.[43]

Despite lasting for over two decades as the dominant justification for imprisonment as a form of criminal punishment, influential studies conducted and published in the 1970s cast some doubt on the effectiveness of rehabilitation in prisons, suggesting that the rehabilitative ideal—every criminal can be cured—might not be an achievable goal.[44] The critics of rehabilitation argued that rehabilitation simply did not work because it was philosophically unsound and led to greater inequality.[45] There was evidence that because the rehabilitative model required completion of the treatment programs to be considered effective, some prisoners were serving significantly longer sentences than others found guilty of the same crime.[46] Some studies claimed that since the rehabilitative model had

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Sentence Solely To Foster Offender Rehabilitation, 87 N.D. L. REV. 375, 382–84 (2011).

[39] *Id.* at 382.

[40] *Id.* (internal quotation marks omitted).

[41] *Id.*

[42] *Id.*

[43] *Id.* at 382–83.

[44] *See e.g.*, Martinson, *supra* note 4 at 23–25 (discussing the results of one of the most famous studies conducted during that time period). Martinson's article was later known as the "nothing works" article. Vitiello, *supra* note 4, at 1032.

[45] Vitiello, *supra* note 4, at 1032.

[46] *Id.* at 1025.

taken full effect the prison population had doubled, a clear indication that the goal of reduction in crime was not being achieved.[47]

At the same time that the flaws in the rehabilitative system were beginning to show, the United States government started making an effort to demonstrate its power in the aftermath of the unstable social movements during the 1960s.[48] As a result, the government took a "tough on crime" stance, leaning away from the liberal rehabilitation model and, in effect, making those who still supported the model seem like soft on crime bleeding hearts.[49] There was a concern, even among judges themselves, that the indeterminate and rehabilitative system of sentencing left judges and parole boards with almost unchecked power when it came to sentencing and imprisoning criminal defendants.[50] This broad discretion led to a discrepancy in sentences that seemed to be at odds with the idea of equality, one of the most important and fundamental goals in the American system of government.[51] These fears, accompanied by the ideological shift from soft-hearted liberalism to hard-fisted conservatism, led to an acceptance of a retributive model of punishment that culminated in the passage of the Sentencing Reform Act of 1984.[52]

C. The Federal Sentencing Guidelines and Rehabilitation

The problems with federal sentencing and the rehabilitative model were brought to the attention of Senator Edward M. Kennedy by Judge Marvin E. Frankel[53] of the Southern District

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[47] *Id.* at 1030–31.

[48] Welch, *supra* note 9.

[49] *Id.* (internal quotation marks omitted) Some liberals even joined the conservative movement, citing the just deserts, or retributivist, model as the ideal form of punishment for someone who committed an act that is considered inherently wrong. Vitiello, *supra* note 4, at 1024.

[50] Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993).

[51] *Id.* at 227.

[52] Vitiello, *supra* note 4, at 1015; Welch, *supra* note 9; Brown, *supra* note 38, at 386.

[53] Judge Frankel, a former Columbia law professor and fifteen-year member of the federal bench in the Southern District of New York, advocated for sentencing reform because he found the sentencing powers he possessed as a judge to be "almost wholly unchecked and sweeping" and "terrifying and intolerable for a society that professes devotion to the rule of law." Stith & Koh, *supra* note 50 (quoting MARVIN

of New York and by members of a Yale University sentencing seminar.[54] Both Judge Frankel and the members of the Yale seminar voiced their heavy criticism of the current sentencing system and made recommendations to Senator Kennedy.[55] In response, Senator Kennedy introduced Senate Bill 2966, a sentencing reform bill, in 1975.[56] This first bill was criticized because it did not clearly define the goals of sentencing, and therefore, it did not pass.[57] The following years saw several different bills calling for the restructuring of criminal sentencing, but each attempt failed to pass both houses.[58] After nine years of debate, the House and the Senate finally passed the Sentencing Reform Act of 1984, which imposed a determinate sentencing system focused on the four principles of punishment.[59] In the Senate Report that accompanied the Sentencing Reform Act of 1984 ("SRA"), Congress indicated that it believed the indeterminate sentencing model had failed, calling the pre-1984 model " 'coercive' rehabilitation" and stating, "We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated."[60]

The SRA created the United States Sentencing Commission ("Commission") which acts pursuant to 28 U.S.C. § 994[61] and is part of the judicial branch of the federal government.[62] The

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E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972)) (internal quotation marks omitted).

[54] Brown, *supra* note 38, at 384–85. "Each month, members of this seminar would meet and discuss the problems with the current sentencing scheme and make recommendations for reform. The monthly sessions culminated in a book, which included a detailed proposal for the creation of sentencing guidelines and the creation of an independent sentencing commission." *Id.* at 384 (footnote omitted).

[55] Stith & Koh, *supra* note 50, at 228–30; Brown, *supra* note 38, at 384–85.

[56] Brown, *supra* note 38, at 384–85.

[57] *Id.* at 385.

[58] *Id.* at 385–86. For example, Senate Bill 1437, introduced again by Senator Kennedy along with Senator John McClellan, placed a clear prohibition on considering rehabilitation when imposing a term of imprisonment, but the bill did not pass because it lacked a discussion of the four primary philosophies behind punishment in the criminal system. In contrast, House Bill 6915 permitted the consideration of rehabilitation as a goal of sentencing but said it could not be a primary factor in deciding whether or not to incarcerate the defendant. *Id.*

[59] *See id.*

[60] S. REP. NO. 98-225, at 40 (1983).

[61] 28 U.S.C. § 994 (2012).

[62] Brown, *supra* note 38, at 387. The United States Supreme Court validated the authority of the Sentencing Commission in 1989:

Commission helped create a determinate sentencing model to combat the pervasive sentencing disparity that was at issue under the indeterminate rehabilitative model.[63] The Commission was charged with creating the United States Federal Sentencing Guidelines ("Guidelines") which set out the appropriate kind—probation, fine, or term of imprisonment—and range of punishment for each category of criminal offense.[64]

When the Guidelines were first promulgated, there was debate about whether they should be considered mandatory.[65] In *United States v. Booker*,[66] the Court held that making the Guidelines mandatory would violate the Sixth Amendment's right to a jury trial.[67] This ruling stripped the SRA of its mandatory nature but kept the majority of the statute intact, ruling that the Guidelines were advisory for sentencing judges.[68] Under *Booker*, sentencing judges are permitted to deviate from the range set forth in the Guidelines if there are particular mitigating factors, but judges must explain their reasons for deviating from the Guidelines recommendation.[69]

Despite the advisory nature of the Guidelines, there is still robust debate in federal courts concerning the interpretation of certain sections of the SRA. Two such sections are § 3553(a)(2) and § 3582(a), both of which deal with the principles of punishment.[70] The debate concerns the seemingly conflicting language in those sections regarding the permissibility of a judge considering rehabilitation when contemplating imposing a prison

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> The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges.

Mistretta v. United States, 488 U.S. 361, 412 (1989).

[63] *See* Vitiello, *supra* note 4, at 1028.

[64] 28 U.S.C. § 994; Brown, *supra* note 38, at 387.

[65] *See generally* United States v. Booker, 543 U.S. 220 (2005).

[66] *Id.* at 226.

[67] *Id.*.

[68] *Id.* at 245.

[69] *Id.*; Vitiello, *supra* note 4, at 1027.

[70] 18 U.S.C. §§ 3553(a)(2), 3582(a) (2012).

sentence and what the length of that sentence should be.[71] Section 3553(a)(2) lays out the goals of punishment in the federal system:

> The court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed[] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .[72]

In effect, § 3553(a)(2) calls for sentencing judges to consider retribution, deterrence, incapacitation, and rehabilitation when sentencing defendants.[73] Dispute has arisen, however, when judges and lawyers compare § 3553(a)(2)(D), permitting rehabilitation as a factor to be considered during sentencing, with § 3582(a), dealing with imposing a term of imprisonment. Section 3582(a) provides, "The court, in determining whether . . . a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."[74]

In grappling with how these two seemingly contradictory sections work together, it is first necessary to examine what the legislature intended when it dealt with the issue of rehabilitation, a system it was trying to leave behind, when passing the SRA. The Senate Report was clear that the "caution concerning the use of rehabilitation as a factor to be considered in imposing [a] sentence is to discourage the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner."[75] This statement indicates that Congress was wary of the rehabilitative model of punishment but did not direct that it should be abandoned altogether.[76] For example, § 3582(a) only applies to a

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[71] *Id.*
[72] 18 U.S.C. § 3553(a)(2).
[73] *Id.*
[74] 18 U.S.C. § 3582(a).
[75] S. REP. NO. 98-225, at 119 (1983).
[76] Brown, *supra* note 38, at 386.

sentence for a term of imprisonment, not to the other available types of punishment; therefore rehabilitation can be considered when determining the defendant's overall sentence.[77] Additionally, the Senate Report was clear that judges could still consider the availability of rehabilitation programs when considering which facility to recommend a defendant be sent to.[78] When it comes to rehabilitation and its role in sentencing a defendant to a term of imprisonment, a reading of the Senate Report demonstrates that, under the SRA, rehabilitation cannot be the sole factor considered when sentencing a defendant to a term of imprisonment.[79] However, courts around the country disagree as to whether the move away from the rehabilitative model was effective.[80] This led to a debate about whether the ban on considering rehabilitation under § 3582(a) also applies when a judge determines the length of the term of imprisonment.[81]

D. Flaws with the Rationale of the 1970s—Why Rehabilitation Works

The rationale behind the movement away from rehabilitation as a goal of punishment in prisons was flawed in several ways. The initial impetus for the antirehabilitation movement stemmed from an article written by Robert Martinson entitled "What Works," which quickly became known as the "nothing works" article.[82] Martinson believed that rehabilitation in prisons had no identifiable effects on the rate of recidivism among former inmates.[83] However, after his original work gained a great degree of fame and was cited during the numerous discussions advocating for a move away from rehabilitation, Martinson wrote a second article essentially denouncing his findings from the "nothing works" article as inherently flawed.[84] Using a new research method, Martinson was able to determine to what

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[77] 18 U.S.C. § 3582(a); S. REP. NO. 98-225, at 76–77.

[78] S. REP. NO. 98-225, at 119.

[79] *Id.* at 76–77, 119; Brown, *supra* note 38, at 386.

[80] *See infra* Part III.

[81] *See* Tapia v. United States, 131 S. Ct. 2382, 2392 (2011).

[82] *See generally* Martinson, *supra* note 4. *See also* Vitiello, *supra* note 4, at 1032–33.

[83] Martinson, *supra* note 4, at 25; *see* Vitiello, *supra* note 4, at 1032–33.

[84] Vitiello, *supra* note 4. at 1033–34. *See generally* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

degree certain combinations of treatment, coupled with other conditions, would produce a less likely chance that a defendant would commit a crime a second time.[85]

In addition to the flawed research techniques used in the "nothing works" article, the circumstances of the time period and the resources available in the prisons may have led to inaccurate conclusions about the effectiveness of rehabilitation in prisons.[86] Proponents of rehabilitation attribute the ineffectiveness of such programs during the middle and latter part of the twentieth century to staff problems and the lack of funds available to federal prisons to implement the necessary programs.[87] The staff and funding limitations placed on prisons made it difficult, if not impossible, for the rehabilitation programs, which were meant to reduce rates of recidivism, to be executed to their fullest extent.[88] Therefore, the problem in the 1970s was not that rehabilitation in prisons was not working; it was that the system was not equipped with the proper resources to allow these programs to reach their full potential.

One of the main arguments against rehabilitation as an effective form of punishment stems from the idea that rehabilitation entails forcing an offender to become prosocial.[89] In response to these arguments, proponents of rehabilitation as a form of punishment argue that "[a]lthough reformation may not be possible in all circumstances, . . . it will often work if society is prepared to commit the necessary resources to the process."[90] The proper resources and dedication to the rehabilitative process, advocates contend, would fix the problems that led to the demise of the rehabilitative system in the first place.[91] In addition, there is a valid argument for rehabilitation in the idea that the initial

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[85] Martinson, *supra* note 84, at 244; Vitiello, *supra* note 4, at 1033.

[86] Welch, *supra* note 9, at 4.

[87] *Id.* at 5–6.

[88] *Id.* at 4, 6.

[89] *Id.* at 3–4. Conservatives are skeptical about the idea that individuals' tendencies to turn to criminal conduct stems from the social conditions in which they were placed. This also leads to a concern about the effectiveness of the treatment received during a term of imprisonment. Some argue that while defendants may leave prison after completing rehabilitative programs as people less likely to commit crimes, when they return to their old lives, that progress will be washed away because defendants will find themselves back in the same circumstances that led them to commit crimes in the first place. *Id.*

[90] DRESSLER, *supra* note 12, § 2.04(A)(2).

[91] *Id.*

high costs of implementing effective rehabilitation programs would create future savings.[92] By putting forward the money for prison programs aimed at rehabilitating defendants now, society would save money on court costs and the cost associated with any potential future imprisonment of a recidivist defendant.

Rehabilitation is also important because it is the only principle of punishment that considers the defendant's needs and welfare rather than just the needs and preservation of society.[93] Incapacitation, deterrence, and retributivism all look at the effect of the defendant's crime and punishment on society, while rehabilitation looks to help the defendant overcome whatever it was that caused the defendant to be inclined to commit a crime in the first place. In the prison system, as opposed to the system of punishment considered by Congress and the courts when determining the laws and reasons behind sentencing, rehabilitation is seen as a valid goal.[94] The consideration of defendants' needs lends a sense of humanity to the correctional system that does not exist when the sole reason for sentencing defendants to imprisonment is to lock them away for a predetermined period of time.[95]

These arguments all support the idea that the importance of rehabilitation when sentencing a defendant to a term of imprisonment should be reconsidered. Tenth Circuit Judge Harris Hartz shared this idea. In his concurrence to *United States v. Story*,[96] Judge Hartz argued that rehabilitation should play at least some role in sentencing a defendant to a term of imprisonment.[97] He discussed the mandate of § 3553(a)(2)(C) in conjunction with his argument, which directed courts to consider the need to protect the public from any future crimes the defendant might commit as a factor when imposing a sentence on a defendant.[98] The idea behind the incapacitation considered

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[92] *Id.*

[93] Welch, *supra* note 9, at 6.

[94] *Id.* at 6–7.

[95] *Id.* at 6.

[96] 635 F.3d 1241 (10th Cir. 2011). In this case, the defendant was sentenced to twenty-four months in prison in order to make her eligible for a residential drug abuse program, and the court prohibited a lengthening of her sentence for this purpose. *Id.* at 1243, 1245.

[97] *Id.* at 1249 (Hartz, J., concurring).

[98] 18 U.S.C. § 3553(a)(2)(C) (2012); *Story*, 635 F.3d at 1249.

here, he posited, is directly tied to the concept of rehabilitation.[99] "Although rehabilitation is not a proper ground for increasing a sentence, the threat of recidivism is. And whether one views the problem as a need for rehabilitation or a need to protect against recidivism may well depend only on the lens one is looking through."[100] Therefore, an increased length in prison sentence for rehabilitative purposes not only furthers the goal of incapacitation, but also reduces the risk of recidivism, which Judge Hartz views as a valid sentencing goal.[101]

The importance of rehabilitation expressed by Judge Hartz is not lost on other federal judges. In cases like those discussed in Part II,[102] many appeals stem from sentencing judges speaking about rehabilitation during the proceeding, presumably because they believe it is an important and relevant justification for punishment. However, because of the restrictive language in § 3582(a) of the SRA, judges are forced to frame their discussion of rehabilitation as recommendations to the BOP rather than risk being overturned because they verbally considered the benefits that rehabilitation might have on the defendant and society during the sentencing proceeding.[103]

II. *TAPIA* AND THE CURRENT CIRCUIT SPLIT

Like the scholars during the later half of the twentieth century, courts around the country disagree as to the importance of rehabilitation when sentencing a criminal defendant to a term of imprisonment. As discussed supra, in *Tapia v. United States*,[104] the Supreme Court ruled that a sentencing judge can neither impose imprisonment nor lengthen a term of imprisonment to promote the defendant's rehabilitation.[105] The issue *Tapia* was intended to resolve arose as a result of the seemingly conflicting uses of rehabilitation in § 3582(a) and § 3553(a)(2)(D) and judges' desire to discuss rehabilitation despite the apparent prohibition of its consideration in § 3582(a).[106] Some circuit courts held that § 3582(a) barred

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[99] *Story*, 635 F.3d at 1249.
[100] *Id.*
[101] *Id.*
[102] *See infra* Part II.
[103] *See infra* Part III.
[104] 131 S. Ct. 2382 (2011).
[105] *Id.* at 2393.
[106] Avila, *supra* note 14, at 413; Brown, *supra* note 38, at 388.

courts from considering rehabilitation at all when imposing any sentence that involved imprisonment,[107] while others held that rehabilitation can be a factor in considering the length of a sentence; it just cannot be a factor when deciding to sentence a defendant to imprisonment.[108] In 2011, the Supreme Court ruled on *Tapia v. United States* in an attempt to resolve this circuit split and end the conflicting holdings about rehabilitation's role in federal sentencing.[109]

A. The Supreme Court's Current Ruling on Rehabilitation and Sentencing—Tapia

Alejandra Tapia was convicted of smuggling unauthorized aliens into the United States in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and (iii).[110] At her sentencing, the district court imposed a fifty-one-month term of imprisonment to be followed by three years of postrelease supervision, the maximum of the forty-one to fifty-one-month recommended prison sentence as set forth in the United States Federal Sentencing Guidelines[111] ("Guidelines"). In issuing this sentence the district court judge spoke about why he was imposing the maximum sentence: "[O]ne of the factors that affects this [sentence] is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program," officially known as the Bureau of Prisons Residential Drug Abuse Program.[112] On appeal, Tapia argued that her sentence was in violation of § 3582(a), which states that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[113] The Supreme Court granted certiorari to settle the circuit split and determine whether, despite the language concerning

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[107] The holding in *Tapia* is most analogous to the holdings in the following cases: In re Sealed Case, 573 F.3d 844, 849–51 (D.C. Cir. 2009); United States v. Manzella, 475 F.3d 152, 158 (3d Cir. 2007); United States v. Harris, 990 F.2d 594, 597 (11th Cir. 1993); United States v. Maier, 975 F.2d 944, 946–47 (2d Cir. 1992).

[108] The following cases were overruled by the holding in *Tapia*: United States v. Hawk Wing, 433 F.3d 622, 629–30 (8th Cir. 2006); United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994).

[109] Avila, *supra* note 14, at 413; Brown, *supra* note 38, at 388–89.

[110] 8 U.S.C. § 1324 (2012); *Tapia*, 131 S. Ct. at 2385.

[111] *Tapia*, 131 S. Ct. at 2385.

[112] *Id.*

[113] 18 U.S.C. § 3582(a) (2012).

rehabilitation in § 3553(a)(2)(D), a sentencing court judge can use rehabilitative hopes for the defendant as a reason to lengthen the term of imprisonment under § 3582(a).[114]

To determine if the district court's sentence length was impermissible, the Supreme Court conducted an analysis of what § 3582(a) was meant to achieve and reviewed the record for inconsistencies within that analysis.[115] The Court ultimately held in favor of the defendant, stating, "Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation."[116] Because the sentencing transcript, on its face, showed that the district court judge lengthened Tapia's sentence based solely on her rehabilitative needs,[117] the judgment was reversed and remanded to the United States Court of Appeals for the Ninth Circuit to consider other issues.[118]

In its reasoning, the Court noted that § 3553(a)(2) dictates the four purposes of sentencing as retribution, deterrence, incapacitation, and rehabilitation but pointed out that each of these apply to sentencing differently, or not at all, depending on the type of sentence being imposed.[119] The language of § 3582(a) instructs judges to consider the factors from § 3553(a)(2), but explicitly rejects the promotion of rehabilitation as a factor to be considered when imposing a sentence of imprisonment.[120] In addition, under 28 U.S.C. § 994(k), the United States Sentencing Commission is charged with the duty of "insur[ing] that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."[121] Justice Kagan, writing for the majority, said that the analysis of the issue could end there because the clarity of the statutes indicates that courts should refer to all of the

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[114] 18 U.S.C. §§ 3553(a)(2)(D), 3582(a) (2012); *Tapia*, 131 S. Ct. at 2386.

[115] *See generally Tapia*, 131 S. Ct. 2382.

[116] *Id.* at 2391.

[117] *Id.* at 2392.

[118] *Id.* at 2393.

[119] *Id.* at 2387–88; *see also* 18 U.S.C. § 3553(a)(2). Section 3551(b) of the SRA allows judges sentencing a federal offender to impose sanctions in the form of imprisonment, probation, or fine. 18 U.S.C. § 3551(b) (2012).

[120] 18 U.S.C §§ 3553(a)(2), 3582(a) (2012); *Tapia*, 131 S. Ct. at 2388.

[121] 28 U.S.C. § 994(k) (2012).

justifications for punishment, except for rehabilitation, when determining whether to impose imprisonment and, if they chose to do so, how long the term of imprisonment should be.[122]

However, the Court went on to address the argument presented in the opposing amicus brief which said that the word "recognize," as it appears in § 3582(a), simply means that a judge should "not put too much faith in the capacity of prisons to rehabilitate," and that rehabilitation can still be considered, to at least some degree, when determining length of imprisonment, if not when deciding to impose a sentence of imprisonment in the first place.[123] This argument was quickly struck down when the Court reiterated the clarity of the language in § 3582(a) and 28 U.S.C. § 994(k) and noted that the word "imprisonment" itself does not distinguish between the "defendant's initial placement behind bars and his continued stay there."[124] The Court noted that when imposing a term of probation or supervised release, judges are statutorily entrusted with the power to order a defendant to participate in a rehabilitation program, but there is no provision that gives the courts this power during the period of the defendant's incarceration.[125] The silence of the statute in this area is cited as evidence of Congress's intent to deny judges the capacity to order defendants to participate in prison-run rehabilitation programs.[126]

The holding of this case—a judge may not lengthen a criminal defendant's sentence of imprisonment based on the need for rehabilitation[127]—is clear, but the Court did allow one caveat to its ruling, saying that a sentencing court does not commit error by simply discussing opportunities for rehabilitation available during the length of a defendant's imprisonment.[128] The Court noted that § 3582(a) permits a judge to "make a recommendation concerning the type of prison facility appropriate for the defendant"[129] and, in that manner, may

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[122] *Tapia*, 131 S. Ct. at 2388.
[123] *Id.* at 2388–89.
[124] 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k); *Tapia*, 131 S. Ct. at 2389–90.
[125] *Tapia*, 131 S. Ct. at 2390.
[126] *Id.*
[127] *Id.* at 2392.
[128] *Id.*
[129] 18 U.S.C. § 3582(a).

encourage the Federal Bureau of Prisons ("BOP") to place a particular defendant in a place with access to treatment that might help the defendant.[130]

*B. The Post-*Tapia *Circuit Split*

While, as discussed above, *Tapia* attempted to resolve a prior circuit split, the Supreme Court's decision led to continued disagreement between several circuit courts concerning the level of consideration the goal of rehabilitation can play in determining the length of a term of imprisonment before it becomes *Tapia* error. Some circuits agree that as long as rehabilitation is not a "dominant" factor, but merely an "additional justification" in determining the length of the sentence of imprisonment, consideration of rehabilitative goals is permissible, even to increase the length of a defendant's sentence.[131] Conversely, other circuits interpreted *Tapia* in a more literal fashion, holding that rehabilitation cannot be considered when sentencing a defendant to prison and can only be discussed so as to recommend a prison facility to the BOP.[132]

1. "Additional Justification" and "Dominant" Factor Tests

On one side of the rehabilitation circuit split are the Tenth, Eighth, and Fifth circuit courts that believe rehabilitation can, and even should, play a minor role in determining the length of a defendant's imprisonment.[133] These courts seem to agree with the Senate Report, that rehabilitation should not be the sole purpose in sentencing a defendant to a term of imprisonment, but that rehabilitation is nonetheless an important principle of punishment that should not be ignored as a justification for sending a criminal defendant to prison.[134]

In *United States v. Cardenas-Mireles*,[135] the Tenth Circuit held that it was permissible for judges to consider rehabilitation when determining the length of a prison sentence, so long as

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[130] *Tapia*, 131 S. Ct. at 2392.

[131] United States v. Receskey, 699 F.3d. 807, 812 (5th Cir. 2012); *see also* United States v. Pickar, 666 F.3d 1167, 1169 (8th Cir. 2012); United States v. Cardenas-Mireles, 446 F. App'x 991, 995 (10th Cir. 2011).

[132] United States v. Deen, 706 F.3d 760, 767–68 (6th Cir. 2013); United States v. Gilliard, 671 F.3d 255, 256 (2d Cir. 2012).

[133] *See* cases cited *supra* note 131.

[134] S. REP. NO. 98-225, at 119 (1983).

[135] 446 F. App'x 991.

rehabilitation was only an "additional justification" as to the length of the sentence.[136] Defendant Cardenas-Mireles was charged with illegal reentry into the United States from Mexico after having been deported four times as a result of his forty-four convictions and seventy-two additional arrests over a period of three decades.[137] The district court judge sentenced him to the maximum sentence recommended by the Guidelines, ninety-six months.[138] On appeal, Cardenas-Mireles argued that his lengthy sentence was based on his need for rehabilitation, specifically medical care, and such a basis was a violation of *Tapia* and § 3582(a).[139] In explaining its reasoning for the lengthy sentence, the district court emphasized the defendant's recidivist tendencies, as evidenced by his numerous arrests and convictions.[140] The judge believed that Cardenas-Mireles's incapacitation was in society's best interest. The defense centered its arguments on the sentencing judge's following statement: "I just cannot bring myself to agree that any downward departure is particularly relevant here, especially given [Cardenas-Mireles's] mental and physical condition."[141] However, in explaining its holding, the Tenth Circuit determined that the defendant's "health was, at best, an *additional* justification, but not a *necessary* justification, for the 96-month sentence."[142] This "additional justification" test adheres to *Tapia*'s holding because the district court would have imposed the ninety-six-month sentence regardless of Cardenas-Mireles's need for medical rehabilitation due to his need to be incapacitated.[143] The discussion of his need for such treatment is permissible under the caveat in *Tapia* through which a sentencing judge is permitted to discuss and make recommendations concerning a defendant's need for rehabilitation.[144]

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[136] *Id.* at 995 (emphasis omitted).
[137] *Id.* at 992.
[138] *Id.* at 992–93.
[139] *Id.* at 994.
[140] *Id.* at 995.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] Tapia v. United States, 131 S. Ct. 2382, 2392 (2011).

The Eighth Circuit reached a similar conclusion in *United States v. Pickar*.[145] In this case, the court held that as long as rehabilitation was not a "dominant" factor in imposing a particular sentence length, then its consideration did not result in error on behalf of the sentencing court.[146] The defendant, Gregg Allen Pickar, was sentenced to a 150-month imprisonment after being found guilty of bank robbery by a jury.[147] Although the Guidelines recommended a sentence range of 100 to 125 months, the Eighth Circuit affirmed the sentence based on Pickar's recidivist tendencies, the danger he posed to the public, and the need to deter other people in society from committing the same crimes as Pickar.[148] The sentencing judge noted that being on probation in the past had not dissuaded Pickar from continuing his criminal tendencies and "that a long sentence is necessary to provide Mr. Pickar with needed care and treatment."[149] The Eighth Circuit examined the factors listed in § 3553(a), intended to guide a sentencing judge, and determined that the danger of Pickar's recidivism and the need to deter the general public from committing similar crimes were the "dominant" factors in choosing to impose such a lengthy sentence.[150] Because the sentence passed the "dominant" factor test, meaning that the need for rehabilitation was not a "dominant" factor, and in fact, there was no indication whatsoever that Pickar's sentence was lengthened on rehabilitative grounds, the 150-month sentence was affirmed.[151]

By adopting both the "additional justification" test and the "dominant" factor test, the Fifth Circuit, in *United States v. Receskey*,[152] affirmed the defendant, Julie Ann Receskey's, sentence of thirty months' imprisonment upon revocation of her supervised release stemming from a guilty plea to possession with intent to distribute methamphetamine.[153] Receskey argued

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[145] 666 F.3d 1167, 1169 (8th Cir. 2012).

[146] *Id.*

[147] *Id.* at 1167–68.

[148] *Id.* at 1168–69.

[149] *Id.* at 1169.

[150] *Id.*

[151] *Id.* at 1169–70 (contrasting the case at hand to *Tapia* where the trial court explicitly lengthened the defendant's sentence in order to ensure that she would be able to complete a drug treatment program).

[152] 699 F.3d 807 (5th Cir. 2012).

[153] *Id.* at 808.

that this sentence was unreasonable due to the fact that the district court violated *Tapia* by considering her need for rehabilitation when determining her sentence.[154] While the sentencing judge did discuss Receskey's need for drug treatment and expressed a hope that she would receive assistance in that area from the BOP, a simple discussion of the opportunities that the defendant would have in prison to pursue rehabilitation is not *Tapia* error.[155] The Fifth Circuit ruled that, based on the district court's discussion, it was clear that the judge was merely expressing a hope that Receskey would participate in some type of rehabilitative program.[156] The sentencing judge's concern over Receskey's needs may have been an "additional justification" in imposing the sentence, but any such justification was outweighed by the "dominant" factor of specific deterrence; the defendant had violated her supervised release on numerous occasions by testing positive for drug use and needed to be deterred from committing further violations.[157] To succeed on her appeal, Receskey would have had to prove that rehabilitation was a "dominant" factor in the judge's decision to send her to prison and that it was more than a simple "additional justification."[158] This is a seemingly high standard that indicates the Fifth Circuit's inclination to allow more discussion of rehabilitation than a strict interpretation of § 3582(a) and *Tapia* suggest.

2. Rehabilitation: A Nonfactor

Where the Fifth, Eighth, and Tenth Circuits permitted courts to consider rehabilitation as a factor in determining the length of a defendant's terms of imprisonment,[159] the Second and Sixth Circuits adopted a far stricter interpretation of the Supreme Court's ruling in *Tapia* and § 3582(a).[160] These circuits interpreted *Tapia* to mean that the only factors from § 3553(a)(2) that should be considered when sentencing a defendant to a term

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[154] *Id.* at 809.
[155] *Id.* at 810.
[156] *Id.* at 812.
[157] *Id.* at 808, 812.
[158] *Id.* at 812.
[159] *See generally* 699 F.3d 807; United States v. Pickar, 666 F.3d 1167 (8th Cir. 2012); United States v. Cardenas-Mireles, 446 F. App'x 991 (10th Cir. 2011).
[160] *See supra* note 132 and accompanying text.

of imprisonment are retribution, deterrence, and incapacitation, constituting a complete ban on rehabilitation as a justification for imprisonment.[161]

In *United States v. Gilliard*,[162] the Second Circuit, addressing the defendant's claims of a *Tapia* violation, affirmed the ninety-six-month sentence, holding that the district court applied the permissible sentencing factors from § 3553(a) and correctly omitted any consideration of rehabilitation in determining the length of the sentence.[163] The district court imposed an above-Guidelines sentence of ninety-six months of imprisonment on Gilliard, who pleaded guilty to "conspiring to distribute and possess with the intent to distribute heroin."[164] The court based its decision on Gilliard's "extensive criminal history," which included prior convictions for drug related crimes, and his tendency to violate the terms of his supervised release.[165] The court specifically stated that it sought to impose a lengthy sentence to advance the goal of specific deterrence due to Gilliard's tendency for recidivism.[166] While the district court did discuss Gilliard's apparent drug problem and need for treatment, the judge only discussed rehabilitation by way of recommending treatment programs to the BOP, rather than considering such treatment in determining the length of the sentence; therefore there was no *Tapia* error.[167]

The Sixth Circuit held similarly in *United States v. Deen*[168] when it found that the district court impermissibly considered rehabilitation as a factor in determining the length of Deen's imprisonment, in violation of both *Tapia* and § 3582(a).[169] Deen pleaded guilty to several violations of his supervised release—a punishment that was part of his sentence for a conviction for distributing cocaine—including domestic violence and alcohol use.[170] The Guidelines recommend a four to ten-month prison sentence for such violations; however, the district court imposed

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[161] *See, e.g.*, United States v. Gilliard, 671 F.3d 255, 259 (2d Cir. 2012).
[162] 671 F.3d 255.
[163] *Id.* at 257–59.
[164] *Id.* at 256–57.
[165] *Id.* at 257.
[166] *Id.*
[167] *Id.* at 259.
[168] 706 F.3d 760 (6th Cir. 2013).
[169] *Id.* at 767–68.
[170] *Id.* at 762.

a sentence of twenty-four months to "give the Bureau of Prisons another chance to do some in-depth rehabilitation with Mr. Deen."[171] The sentencing judge further stated, "[I]t is important to consider whether the goal of rehabilitation, which I think is the end game in terms of the criminal justice system, can be best achieved through incarceration, and it sounds as though maybe it can."[172] The Sixth Circuit, in overturning Deen's sentence as clear *Tapia* error, reiterated that imprisonment is not a means by which the goal of rehabilitation should be pursued.[173]

III. RECONSIDERING REHABILITATION IN PRISONS

There is a large amount of controversy and associated case law that primarily stems from the original circuit split[174] that led to the ruling in *Tapia* and the current circuit split.[175] The continuing debate in this area concerning rehabilitation and its role as a form of punishment when dealing with a sentence of imprisonment serves as an indicator that the complete abandonment of the rehabilitative system from the early and mid-1900s may not have been the best course of action. As detailed above, the importance of rehabilitation and the effectiveness of rehabilitative programs were severely misrepresented during the 1970s when the beginnings of the retributivist movement began.[176] Armed with that knowledge, it may well be time to revisit and reevaluate the use of rehabilitation as part of a criminal defendant's sentence of imprisonment.

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[171] *Id.* (internal quotation marks omitted).

[172] *Id.* (internal quotation marks omitted).

[173] *Id.* at 767–68. On another appeal concerning the consideration of rehabilitation in sentencing, the Eleventh Circuit held that "[b]ecause it is impermissible to consider rehabilitation, a court errs by relying on or considering rehabilitation in any way when sentencing a defendant to prison." United States v. Vandergrift, 754 F.3d 1303, 1311 (11th Cir. 2014). The court recognized, as laid out in *Tapia*, that rehabilitation can be discussed in a limited manner during sentencing, but made it clear that anything that could be interpreted as consideration of rehabilitation constitutes plain *Tapia* error. This holding is different from that of the Second and Sixth Circuits because the court found *Tapia* error in the judge's consideration of Vandergrift's rehabilitative needs, but did not overrule the sentence because the error did not affect his "substantial rights" and the "sentence would have been different but for the court's consideration of rehabilitation." *Id.* at 1311–12.

[174] *See* cases cited *supra* notes 107–08.

[175] *See supra* Part II.B.

[176] *See supra* Part I.D.

A. *Adopting the Fifth Circuit Test*

To resolve the current circuit split and to further the valid goal of rehabilitation, the Supreme Court should adopt the Fifth Circuit's combination of the "additional justification" and "dominant" factor tests.[177] As mentioned above, the Senate intended § 3582(a) to prohibit rehabilitation from being the sole principle of punishment considered when sentencing a defendant to a term of imprisonment.[178] This new test would allow judges to consider a defendant's rehabilitative needs without the risk of judges relying on rehabilitation as the only reason behind sentencing a defendant to prison. The test used by the Fifth Circuit does not offend the ruling in *Tapia* because it does not allow for a sentence to be lengthened for purposes of rehabilitation only;[179] it does allow judges to discuss and consider rehabilitation as a secondary factor in the reasoning behind choosing to sentence the defendant to a particular term of imprisonment as a form of punishment, as opposed to imposing a fine or a term of probation.[180]

The Second and Sixth Circuits adhered to Supreme Court precedent; however, they failed to consider the importance of rehabilitation to the defendant as an individual and to the betterment of society as a whole.[181] Not permitting a sentence of imprisonment to be based on rehabilitation at all may increase the risk of recidivism for some defendants.[182] Because of the unfortunate circumstances which many criminal defendants come from and return to upon their release from prison, the benefits of the deterrence and incapacitation these individuals were subjected to during their term of imprisonment can be washed away without the additional benefits of rehabilitation to

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[177] *See* United States v. Receskey, 699 F.3d 807, 812 (5th Cir. 2012).

[178] S. REP. NO. 98-225, at 119 (1983).

[179] *See* Tapia v. United States, 131 S. Ct. 2382, 2392 (2011).

[180] *Receskey*, 699 F.3d at 812.

[181] United States v. Deen, 706 F.3d 760, 767–68 (6th Cir. 2013); United States v. Gilliard, 671 F.3d 255, 256 (2d Cir. 2012). The Sixth Circuit recognized that there is a growing trend back towards understanding and embracing rehabilitation in prisons as a benefit to both defendants and society; however, the court felt bound by the Supreme Court precedent from *Tapia*, and therefore, prohibited the district court from considering rehabilitation in any manner when determining the length of Deen's term of imprisonment. *Deen*, 706 F.3d at 768–69.

[182] Welch, *supra* note 9, at 3–4.

help reduce the risk of recidivism.[183] Allowing judges to consider and talk about rehabilitation freely as an "additional justification" when sentencing a defendant to a term of imprisonment, but only allowing deterrence, incapacitation, and retributivism to be the "dominant" factors in determining the length that sentence, would help to reduce this risk of recidivism, and therefore help both the defendant and society.

B. Allowing Judges To Speak About Rehabilitation: Amending § 3582(a)

Alternatively, if the Supreme Court is unwilling to adopt the Fifth Circuit test, it may be the case that a more drastic measure is needed to balance the importance of rehabilitation and the statutory language in § 3582(a). Therefore, Congress should adopt the Eighth Circuit's "dominant" factor language into the statute. With that small change the relevant language would read: "recognizing that imprisonment [may not be a dominant factor in] promoting correction and rehabilitation."[184] This would allow judges openly to pursue the valid goal of rehabilitation, as referenced in § 3553(a)(2)(D), without offending Congress's original intention that rehabilitation not be the sole factor considered when sentencing a defendant to a term of imprisonment.[185]

The purpose of the contested language of § 3582(a) is valid and should be maintained. In limiting the use of rehabilitation when imposing a term of imprisonment, Congress wanted to "focus attention on the specific purposes of the sentencing process and assure that adequate emphasis is given to each."[186] Congress believed that a greater emphasis should be given to the goals of deterrence, incapacitation, and retribution in an effort to elevate the importance of the protection of society from criminal activity, but that does not mean that Congress intended to exclude rehabilitation from being given any consideration whatsoever.[187] This change to the statute would not offend Congress's original

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[183] *Id.* (acknowledging that rehabilitation is not a cure-all and that not all defendants can or will be rehabilitated, but noting that there is enough rehabilitative success to warrant a change in the system).

[184] 18 U.S.C. § 3582(a) (2012).

[185] 18 U.S.C. § 3553(a)(2)(D) (2012); S. REP. NO. 98-225, at 119 (1983).

[186] S. REP. NO. 98-225, at 119.

[187] *See id.*

intention because the "dominant" factor language inherently implies that rehabilitation is prohibited from being the sole justification for sentencing a defendant to a term of imprisonment, allowing deterrence, incapacitation, and retribution to have more substantial weight in the sentencing decision.[188]

In all of the district court cases discussed above, the judges were talking about rehabilitation, and whether or not their respective sentences were overturned depended on the circuit courts' interpretations of how much that discussion weighed in determining the length of the term of imprisonment.[189] *Tapia* allows judges to discuss rehabilitation so long as they are recommending a particular facility to the Federal Bureau of Prisons ("BOP") in which an individual defendant will have access to the specific treatment that defendant may need, but the time needed to complete these programs may be longer than the time the defendant is sentenced to be in prison.[190] Not being able to complete a rehabilitative program will not allow the defendant, upon release back into society, to take advantage of the full benefits rehabilitative programs have to offer, whether they be drug treatment, medical treatment, or even educational and vocational programs.

This problem concerning balancing the need for rehabilitation against the other principles of punishment could be resolved if the wording of § 3582(a) were modified so as to permit some degree of consideration to rehabilitation when a defendant is sentenced to a term of imprisonment. While this would create a fairly large change to the plain meaning of the statute, it is better to allow judges to speak freely concerning the defendant's rehabilitative needs than for judges to keep quiet for fear of being overturned and perhaps silently allowing too much consideration to be given to rehabilitation, leading to an increase in prison populations and a depletion of rehabilitation resources. This change would permit rehabilitation to be used when necessary to help a defendant who is going to be sent to prison anyway and would maintain the prohibition against sending defendants to prison solely so that they are forced to enroll and complete a rehabilitative program.

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[188] *Id.*

[189] *See supra* Part II.B.

[190] *See generally* Tapia v. United States, 131 S. Ct. 2382 (2011).

CONCLUSION

In promoting rehabilitative goals, not only would individual defendants benefit from the help and training they might receive while in prison, but society would benefit as well. Allowing defendants more time to complete rehabilitative programs while in prison would lead to less recidivism upon release, resulting in a safer society. Adopting the Fifth Circuit test or, alternatively, amending the language of § 3582(a), would allow you, as a judge, to sentence the defendant, Jamie, to thirty-two months in prison in the hope that she would be able to complete the drug treatment program and would be less inclined to commit more drug crimes in the future, assuming that your primary considerations for that sentence were incapacitation and deterrence. Both solutions elevate the role of rehabilitation when sentencing a defendant to a term of imprisonment without offending Congress's intention to prohibit rehabilitation from being the sole justification for sending a defendant to prison. This would promote the valid goals of rehabilitation, espoused by Congress when writing the Sentencing Reform Act of 1984, and maintain the importance of the other principles of punishment by helping to reduce the risk of recidivism among defendants who are released back into society.