

# WE'VE GOT SOME WORK TO DO: HOW THE UNITED STATES COULD BENEFIT FROM IMPLEMENTING GERMANY'S PRISON EMPLOYMENT PROGRAM

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## INTRODUCTION

On a warm afternoon in the lakeside town of Waren, Germany, Bernd Junge enjoys an ice cream sundae with his sister and niece.<sup>1</sup> To passersby, it is a pleasant everyday scene; they likely would not give the family a second glance, and they certainly would not guess that Junge is a convicted murderer currently serving a life sentence. Though he was sentenced to life in prison, Junge is able to enjoy this time with his family by the lake on an unsupervised weekend furlough—"the German fairy tale," as he calls it.<sup>2</sup> Due to good behavior during the first fifteen years of his sentence, Junge earned this weekend leave and is on the path to early release.<sup>3</sup> Even more, he is free to leave the prison every day for work.<sup>4</sup> This is no special occurrence; nearly three-quarters of German inmates serving life sentences are paroled after twenty years or less,<sup>5</sup> and eligible prisoners who exhibit good behavior may earn the opportunity to leave the prison for work or weekends like Junge.<sup>6</sup>

The idea of a murderer with this level of freedom may cause American jaws to drop. Had Junge been convicted in the United States—say, for example, in the state of Pennsylvania—he could be serving his sentence at a maximum-security prison along with three thousand other inmates ranging from low-level drug offenders to death row inmates.<sup>7</sup> He could be one of the six hundred inmates there serving life sentences, housed with the other convicted murderers and locked up

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1. Michael H. Gavshon & David M. Levine, *60 Minutes Presents: Behind Bars*, CBS NEWS: 60 MINUTES (Mar. 4, 2018), <https://www.cbsnews.com/news/60-minutes-presents-behind-bars-prison/> [<https://perma.cc/ZN7F-TWVL>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Bill Whitaker, *This is Prison? 60 Minutes Goes to Germany*, CBS NEWS: 60 MINUTES (Mar. 31, 2016), <https://www.cbsnews.com/news/this-is-prison-60-minutes-goes-to-germany/> [<https://perma.cc/9SHK-EL7R>]. See Strafvollzugsgesetz [StVollzG] [Prison Act], Mar. 16, 1976, Bundesgesetzblatt [BGBl I] at 581, last amended by Art. I of the Act of 19 June 2019, BGBl I at 840, § 11, 13 (Ger.) [hereinafter Prison Act].

7. Gavshon & Levine, *supra* note 1.

for twenty-three hours a day.<sup>8</sup> If sentenced to life without parole, he would not be on track for early release; “life means life. So, if you’re doing life here you’re not gonna [sic] be walking around a park—eating sundaes with your family.”<sup>9</sup>

From an American perspective, Junge’s sentence and the conditions of his imprisonment might seem unlikely to have any punitive effect or discourage him or others from committing serious crimes in the future. Nonetheless, several years after a 60 Minutes feature on Junge and the German prison system, Junge earned his release and has been doing well and staying out of trouble.<sup>10</sup> Given that German criminal sanctions so closely resemble normal life and evidently have a successful rehabilitative outcome, why does the U.S. have such harsh sentencing practices and strict conditions of imprisonment?

With its focus on the concepts of punishment and retribution, as of October 2021, the U.S. had the highest incarceration rate of any country in the world,<sup>11</sup> perhaps because it uses incarceration as its primary tool of punishment.<sup>12</sup> U.S. prison practices are characterized by the retributive principle of incapacitation<sup>13</sup>—by removing offenders from society, the government can punish them by controlling their daily lives, including restricting their physical movements, decision-making abilities, and civil liberties.<sup>14</sup> However, this philosophy has not proven to deter offenders from committing future crimes upon completion of their prison sentences; around forty percent of the adults released from prison over the last several decades have reoffended and ultimately ended up back in a penal institution.<sup>15</sup>

By contrast, the purpose of incarceration in Germany is rehabilitation and successful reentry into the community.<sup>16</sup> To this end, prison conditions are designed to mirror normal life as much as possible; inmates have significant freedoms in their clothing, daily activities, and possessions and decorations in their cells.<sup>17</sup> The German criminal justice system also sets out to impose shorter

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8. *Id.*

9. *Id.*

10. *Id.*

11. HELEN FAIR & ROY WALMSLEY, WORLD PRISON POPULATION LIST 2 (13th ed. 2021), [https://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_13th\\_edition.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf) (629 prisoners for every 100,000 of the U.S. population). This totaled over 2 million total prisoners in the U.S., up from 1.4 million only a decade prior. Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, 27 FED. SENT. R. 33, 33 (Oct. 2014).

12. Faye S. Taxman & Danielle S. Rudes, *Punishment Versus Rehabilitation*, in CORRECTIONS 233, 234 (William J. Chambliss ed., 2011).

13. Subramanian & Shames, *supra* note 11, at 33. For a definition of “incapacitation,” see *infra* note 80.

14. Taxman & Rudes, *supra* note 12, at 234.

15. Subramanian & Shames, *supra* note 11, at 35-37.

16. Whitaker, *supra* note 6.

17. *Id.*

prison terms or noncustodial sentences.<sup>18</sup> In cases where prison sentences are imposed, eligible inmates, like Bernd Junge, are permitted to participate in work release or unsupervised furlough<sup>19</sup> to gain skills that will make them capable of earning a livelihood after release.<sup>20</sup> This focus on preparing inmates for reentry into society appears to be working, as Germany's recidivism rate is significantly lower—about half, in fact, as of 2018—than that of the U.S.<sup>21</sup>

This Note will take a comparative approach, analyzing the incarceration practices—particularly inmate labor programs—in the U.S. and Germany, as well as each nation's reentry outcomes. This analysis focuses exclusively on federal prison regulations and reform proposals for the U.S. in order to provide the most direct comparison to the German system;<sup>22</sup> although both U.S. and German states have sole administrative authority over the penitentiaries within their jurisdictions, the fifty states within the U.S. each enact their own prison system regulations, while all prisons in Germany are governed by a single federal law.<sup>23</sup> Accordingly, for uniformity, this Note recommends federal policy reform rather than proposing each of the fifty states enact particular regulations.

The purpose of this analysis is to identify reforms that might be implemented in the U.S. criminal justice system to reduce the number of offenders who return to prison after previous release. In particular, this Note examines how Germany's prison system might serve as a model for the U.S. to decrease this rate. This is a high-stakes issue because at a broad level, it involves how communities have decided to punish those who cause harm, and on an individual level, it affects the lives of specific inmates both while they are in prison and after release. Comparing the American retributive method of incarceration to Germany's rehabilitative method will demonstrate how each of the two theories of punishment work in practice. Additionally, research on recidivism rates will show how these practices impact offenders not just during periods of imprisonment but also after release as they attempt to reintegrate into society. Based on the comparative data, this Note argues that the German criminal justice system's focus on rehabilitation, specifically through its training-based work program, is superior to the U.S. retributive, "tough on crime" approach to incarceration in

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18. *Id.* at 33. For examples of the noncustodial sentences, see *infra* notes 211-21 and accompanying text.

19. SELECT COMMITTEE ON HOME AFFAIRS, REHABILITATION OF PRISONERS, FIRST REPORT, 2004-5, HC 193-I, at 152 (UK); Prison Act § 11.

20. Prison Act § 37.

21. Gavshon & Levine, *supra* note 1. For a definition of "recidivism," see *infra* note 76.

22. Because the German penal system does not include private facilities, and due to ongoing uncertainty surrounding enforcement of President Biden's Executive Order terminating federal private prison contracts, this Note does not address contract or for-profit prisons in the U.S.; the analysis of federal penitentiaries solely includes BOP facilities. For a discussion of the Executive Order, see Morgan Simon, *What Does Biden's "Ban" On Private Prisons Really Mean?*, FORBES (Jan. 27, 2021, 12:33 PM), <https://www.forbes.com/sites/morgansimon/2021/01/27/what-does-bidens-ban-on-private-prisons-really-mean/?sh=277602a773cb> [<https://perma.cc/DQB2-9RVN>].

23. See *infra* Parts I.A, II.A.

terms of preparing offenders to successfully reenter the outside world following release from prison.

Reforming the U.S. prison system to adopt a more rehabilitative, rather than retributive, approach to punishment—specifically by implementing a prison labor system similar to that of Germany—would likely assist in reducing recidivism rates throughout the country. Accordingly, Part I of this Note considers the U.S. approach to incarceration, in particular its inmate labor program and the efforts to prepare offenders for reentry into society after release. Part II examines the German approach to similar programs. Part III advocates for implementation of inmate work programs like those of Germany in U.S. federal prisons, as well as stronger enforcement of U.S. policies already on the books, to better rehabilitate inmates and equip them with the skills necessary to reenter outside civilization. This Note concludes that doing so can improve U.S. inmates' chances of successfully integrating back into their communities after release and accordingly reduce rates of reoffense and recidivism.

#### I. THE U.S. PRISON SYSTEM: PAST AND PRESENT

Because the U.S. has separate systems for federal and state criminal law, its penal structure consists of federal prisons for those who have committed federal crimes as well as state prisons for those convicted of state crimes.<sup>24</sup> As such, federal and state laws each play roles in U.S. prison policy;<sup>25</sup> there is no uniform legislation governing all prisons across the country. Each of the fifty states has its own laws regulating and overseeing the penal facilities within its jurisdiction, but a single administrative body within the Department of Justice (DOJ) is responsible for managing all federal correctional institutions: the Bureau of Prisons (BOP).<sup>26</sup>

##### *A. Establishment of the American Criminal Justice System: From Corporal Punishment to Rehabilitation*

Immediately following the American Revolution, the newborn U.S. began a period of criminal justice reform, diverging from the English scheme of merciless physical punishment to its own rational, humane criminal justice system.<sup>27</sup> Dating back to medieval times, the penal practices of Britain and other nations in

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24. Ashley Brooks, *Breaking Down the Different Types of Prisons in America*, RASMUSSEN UNIV.: JUST. STUD. BLOG (June 17, 2019), <https://www.rasmussen.edu/degrees/justice-studies/blog/different-types-of-prisons/> [<https://perma.cc/ERQ8-UCT3>].

25. Stephanie Jurkowski, *Prisoners' Rights*, LEGAL INFO. INST.: WEX LEGAL DICTIONARY/ENCYCLOPEDIA (2017), [https://www.law.cornell.edu/wex/prisoners%27\\_rights](https://www.law.cornell.edu/wex/prisoners%27_rights) [<https://perma.cc/P8GU-42QN>].

26. Brooks, *supra* note 24; *BOP: Historical Information*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/about/history/> [<https://perma.cc/T3D3-MF64>].

27. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 935 (2016); LAWRENCE MEIR FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 63 (1993).

continental Europe fixated on corporal punishment and torture.<sup>28</sup> Viewing these methods as “chaotic and barbaric,” the U.S. conceived a criminal justice system that limited physical punishment and instead codified specific crimes and uniform punishments for each.<sup>29</sup>

In addition to their moral opposition to corporal punishment, in the decades following the Revolution, Americans began to realize physical cruelty was not actually successful in curbing crime.<sup>30</sup> In the search for a punitive method to replace physical punishment, the theory emerged that a more effective method of reducing crime would be to forcibly separate offenders from society.<sup>31</sup> This “radical surgery” idea—removing offenders from their communities and placing them in “an artificially created and therefore corruption-free environment”—formulated the concept of the penitentiary system.<sup>32</sup> By the end of the eighteenth century, the U.S. had begun to shift to prisons as the primary tool for criminal punishment.<sup>33</sup>

To accommodate this push toward incarceration, the U.S. needed to establish a formal prison system to replace the “crude arrangement of the colonial jails and workhouses.”<sup>34</sup> The states had independent authority to create and govern their own prisons, and while they varied in their initial models, the overall design was a combination of these two colonial institutions.<sup>35</sup> Pre-Revolution, jails largely served as places of temporary detention for those accused of crimes and awaiting trial rather than long-term facilities for inmates who had actually been convicted.<sup>36</sup> Workhouses, or houses of correction, had existed for centuries and instituted hard labor as a sentence for crimes not deserving of corporal or capital punishment.<sup>37</sup> This combination of jails and workhouses effectuated the substitution of imprisonment for corporal punishment and “the doctrine that this

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28. Kleinfeld, *supra* note 27, at 935.

29. *Id.*; FRIEDMAN, *supra* note 27, at 63.

30. Roger T. Pray, *How Did Our Prisons Get That Way?*, 38 AM. HERITAGE, July-Aug. 1987, at 1, 2. *See also* FRIEDMAN, *supra* note 27, at 77 (“In an age of rapid growth, impersonal cities, and rootless populations, public punishments (punishments of stigma and shame) seemed to lose their power. These tools worked best in small, closed communities.”).

31. G. EDWARD WHITE, *AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION* 73 (2014).

32. FRIEDMAN, *supra* note 27, at 77.

33. David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 103 (Norval Morris and David J. Rothman eds., 1995).

34. Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. OF CRIM. L. AND CRIMINOLOGY 48 (1921).

35. *Id.* at 36 (1921); FRIEDMAN, *supra* note 27, at 77.

36. FRIEDMAN, *supra* note 27, at 77; Barnes, *supra* note 34, at 35-36 (“Only . . . the few criminals who had received the rare penalty of imprisonment, remained in the jails or prisons longer than the period which elapsed between successive sessions of the courts.”).

37. FRIEDMAN, *supra* note 27, at 77; BLAKE MCKELVEY, *AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS* 2 (1977).

imprisonment should not be in idleness but at hard labor.”<sup>38</sup>

During the initial implementation of the new prison system, the focus was simply on the laws of punishment themselves, not on any particular attributes or practices within the prisons.<sup>39</sup> However, by the 1820s, this reform had made little impact on crime rates,<sup>40</sup> so officials began to consider “prison as a space that had the capacity and responsibility to transform people’s characters.”<sup>41</sup> Accordingly, states began structuring their penal institutions around a theory of rehabilitation.<sup>42</sup> While different states instituted different rehabilitative methods, the prevailing model was that of the Auburn State Prison in New York.<sup>43</sup> Based on the belief that labor was the best avenue for reform, the Auburn system provided that prisoners would work together during the day but then sleep alone in individual cells at night.<sup>44</sup> Almost all of the states eventually adopted this plan, foreshadowing the country’s continuing reliance on prison labor.<sup>45</sup>

While the states experimented with their respective prison systems through the nineteenth century, the U.S. still did not have federal penitentiaries, despite the fact that federal criminal law had essentially existed since the ratification of the Constitution.<sup>46</sup> At that time, there were so few convictions for federal crimes that there was no urgent need for separate penal facilities, so the national government housed prisoners guilty of federal offenses in state and local jails.<sup>47</sup> As the century progressed, though, this arrangement became inequitable and unmanageable,<sup>48</sup> and reformers pressured the federal government to take responsibility for its own offenders by creating an independent system of

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38. Barnes, *supra* note 34, at 37.

39. Rothman, *supra* note 33, at 103; *see also* Pray, *supra* note 30, at 2 (The prison was necessary, but the focus was on the laws, not on the nature of the prison. No one was yet arguing that life inside a prison would improve anybody.”).

40. Rothman, *supra* note 33, at 103.

41. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 558 (2021); *see also* Pray, *supra* note 30, at 4 (“Whereas the focus had been on more humane laws, which were supposed to eliminate crime from society, now it was believed that laws had failed but the internal routine of the prison could reform offenders before returning them to society.”).

42. Driver & Kaufman, *supra* note 41, at 558. In the context of theories of punishment, “rehabilitation is the goal of helping the individual alter his behavior to become more pro-social.” Taxman & Rudes, *supra* note 12, at 233.

43. Driver & Kaufman, *supra* note 41, at 558.

44. *Id.*; Rothman, *supra* note 33, at 106.

45. Rothman, *supra* note 33, at 107; Driver & Kaufman, *supra* note 41, at 558.

46. FRIEDMAN, *supra* note 27, at 71, 269. Article I, section 8 of the Constitution designates three federal crimes. *Id.* Article III, section 1 gives Congress the power to establish federal courts, and section 2 defines the jurisdiction of the federal courts. U.S. Const. art. III, §§ 1-2.

47. John W. Roberts, *The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership with Probation and Pretrial Services*, 61 FED. PROBATION 53 (1997).

48. Mark T. Carleton, Book Review, 37 AM. J. LEGAL HIST. 388 (1993).

prisons.<sup>49</sup>

By the 1890s, the proportion of federal prisoners in state prisons and county jails was steadily growing at the same time that many of these institutions were already over capacity.<sup>50</sup> Additionally, because prison regulations and procedures varied greatly across the states, federal offenders were not receiving equitable treatment depending on where they served their sentences.<sup>51</sup> Given the concerns about overcrowding and conditions of confinement,<sup>52</sup> Congress finally established a federal prison system in 1891 with the passage of the Three Prisons Act, which authorized the first three federal penitentiaries.<sup>53</sup> Consistent with state prisons' use of labor as a means to rehabilitation, the Act also apportioned funds to each of the three prisons specifically for the purpose of creating and maintaining employment workshops and vocational training for inmates.<sup>54</sup>

These first federal prisons fell under the authority of the Superintendent of Prisons, a DOJ official, but they functioned nearly autonomously in practice, with little actual DOJ supervision.<sup>55</sup> This lack of consistent direction resulted in both "haphazard administration" of the prisons and an inability to address developments in correctional philosophy emphasizing individual treatment for offenders.<sup>56</sup> To investigate these problems, in 1928, future BOP Director James V. Bennett conducted a study of the status of federal prisons.<sup>57</sup> Identifying crises concerning physical conditions and overcrowding as well as a lack of meaningful inmate programs, Bennett concluded the facilities were "virtually inhumane and totally unsuited to the rehabilitation of offenders, which he believed to be the paramount goal of corrections."<sup>58</sup> In response to these problems, Congress established the BOP on May 14, 1930, to provide centralized administration and

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49. MCKELVEY, *supra* note 37, at 194.

50. *Id.* at 193-94. In 1885, a total of 1,027 federal offenders were housed in state prisons and about 10,000 in county jails. *Id.* at 194. By 1895, these numbers had reached 2,516 and about 15,000, respectively. *Id.* See also Roberts, *supra* note 47, at 53.

51. Carleton, *supra* note 48, at 387-88.

52. Roberts, *supra* note 47, at 53.

53. BOP: *Historical Information*, *supra* note 26.

54. Ricky H. Coppedge & Robert Strong, *Vocational Programs in the Federal Bureau of Prisons: Examining the Potential of Agricultural Education Programs for Prisoners*, 54 J. OF AGRIC. EDUC. 116, 117 (2013).

55. BOP: *Historical Information*, *supra* note 26. Congress established the Department of Justice in 1870 to control all federal law enforcement and handle all civil suits and criminal prosecutions in which the U.S. had an interest. *150 Years of the Department of Justice*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/history/timeline/150-years-department-justice#event-1195101> [<https://perma.cc/22PT-X5SC>] (Oct. 19, 2021).

56. Roberts, *supra* note 47, at 53.

57. BOP: *Timeline*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/about/history/timeline.jsp> [<https://perma.cc/6DUQ-X2GQ>]; see John W. Roberts, *Grand Designs, Small Details: The Management Style of James V. Bennett*, 3 FED. PRISONS J. 29, 30 (1994).

58. Roberts, *supra* note 57, at 30.

regulation of federal prisons.<sup>59</sup> The enabling act, Public Law Number 71-218, officially standardized control of federal inmates, charging the BOP with the care, instruction, and discipline of those accused and convicted of federal crimes.<sup>60</sup>

A critical responsibility of the BOP was to provide for the rehabilitation and reformation of inmates, and to this end, Public Law Number 71-218 expressly authorized the BOP to create and manage industries,<sup>61</sup> farms, and other activities.<sup>62</sup> On December 11, 1934, President Franklin D. Roosevelt issued an executive order creating Federal Prison Industries, Inc. (FPI) “to consolidate the operations of all federal prison industries in order to provide training opportunities for inmates.”<sup>63</sup> Now operating under the trade name UNICOR, FPI’s mission is “to protect society and reduce crime by preparing inmates with job training and practical work skills for reentry success.”<sup>64</sup>

For the next several decades, rehabilitation remained the central tenet of the federal corrections system. As recently as the 1960s, a majority of the American population believed criminal offenders could be reformed, and thus the criminal justice system’s purpose should be to facilitate such reform.<sup>65</sup> Further, as a testament to the recent developments of the BOP and FPI at the time, “[i]t was widely believed that counseling, education, and job training were central to criminal desistance and that active intervention could have lasting effects.”<sup>66</sup> Rehabilitative efforts such as these became increasingly popular through the mid-1900s, and, up to this point, there was little doubt that such efforts would ultimately reduce recidivism rates among ex-offenders after their release.<sup>67</sup>

### *B. The “Tough on Crime” Era and the Rise of Retribution*

By the 1970s, however, policymakers and the public alike had grown dissatisfied with apparently fruitless rehabilitation efforts in prisons.<sup>68</sup> For both social and policy reasons, the rehabilitative ideal of corrections met its demise

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59. *BOP: Timeline*, *supra* note 57.

60. *BOP: Historical Information*, *supra* note 26; see Federal Prison Act, Pub. L. No. 71-218, § 2, 46 Stat. 325 (1930).

61. As defined by the BOP, “industries” refers to inmate work assignments in prison factories producing products for sale to the federal government. UNICOR, FACTORIES WITH FENCES: 85 YEARS BUILDING BRIGHTER FUTURES 6 (2019).

62. Act of May 14, 1930, Pub. L. No. 71-218, § 6, 46 Stat. 325, 326.

63. NATHAN JAMES, CONG. RSCH. SERV., RL32380, FEDERAL PRISON INDUSTRIES 2 (2007).

64. *About UNICOR*, UNICOR, <https://www.unicor.gov/about.aspx> [https://perma.cc/5L67-F2UT].

65. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 15 (2007).

66. *Id.*

67. Mario Papanozzi & Roger Guy, *Reentry: Parole by Any Other Name*, in OFFENDER REENTRY: RETHINKING CRIMINOLOGY AND CRIMINAL JUSTICE 7, 10 (Matthew S. Crow & John Ortiz Smykla eds., 2014).

68. *Id.*



during this period.<sup>69</sup> In light of significant sociopolitical events and changes in the 1960s and 1970s—the civil rights movement, the Kent State massacre, and the Vietnam War, to name a few—Americans began to think differently about the government’s ability to handle disorder.<sup>70</sup> Additionally, the existing model of indeterminate sentencing had come under attack, and both liberals and conservatives (albeit for different reasons) called for a system of fixed sentences for specific crimes.<sup>71</sup> Against this backdrop, prison policies began to shift from the mission of rehabilitation toward an overall goal of punishment itself.<sup>72</sup>

A primary driver behind this shift was sociologist Robert Martinson’s survey and subsequent report on offender rehabilitation.<sup>73</sup> In 1966, as part of its quest to increase rehabilitative efforts in state prisons, the New York State Governor’s Special Committee on Criminal Offenders hired Martinson and his colleagues to assess what was known about rehabilitation in hopes of determining the most effective means to this end.<sup>74</sup> The scholars analyzed 231 studies published from 1945 to 1967 on rehabilitation attempts in prisons in the U.S. and other countries to discern their effects on offender improvement.<sup>75</sup> In 1974, Martinson published an article describing the group’s findings entitled “What Works?: Questions and Answers about Prison Reform,” in which he concluded offender rehabilitation efforts up until that point in time had no significant impact on recidivism.<sup>76</sup> Hence, the answer to the question Martinson rhetorically posed in the article’s

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69. *Id.*

70. *Id.*; see also Brenda Vose, *Furlough and Work-Release Programs*, in CORRECTIONS 89, 92 (William J. Chambliss ed., 2011) (“Conservatives believed that the youth of the country had run amok and that the government and law enforcement needed to step in and reestablish order. Liberals, on the other hand, grew suspicious of the government because agents of the government were responsible for the shootings at Kent State University and killed guards and inmates at Attica State Penitentiary in New York. Despite their disagreement as to the root of the problem, both liberals and conservatives began to doubt the effectiveness of rehabilitation as the guiding philosophy of the correctional system.”).

71. PAGER, *supra* note 65, at 16. For an explanation of the indeterminate sentencing model, see *infra* notes 83-84 and accompanying text.

72. PAGER, *supra* note 65, at 15; Paparozzi & Guy, *supra* note 67, at 11.

73. Paparozzi & Guy, *supra* note 67, at 10-11.

74. Robert Martinson, *What Works?: Questions and Answers about Prison Reform*, 35 PUB. INT. 22, 23 (1974).

75. *Id.* at 24 (“A study had to be an evaluation of a treatment method, it had to employ an independent measure of the improvement secured by that method, and it had to use some control group, some untreated individuals with whom the treated ones could be compared.”). The measures of offender improvement included recidivism rates, adjustment to prison life, vocational success, educational achievement, personality and attitude change, and general adjustment to the outside community. *Id.*

76. Paparozzi & Guy, *supra* note 67, at 11; Martinson, *supra* note 74, at 25 (“With few and isolated exceptions, the rehabilitative effort that have been reported so far have had no appreciable effect on recidivism.”). “Recidivism” can be defined simply as a “return to criminal behavior” after release from prison. PAGER, *supra* note 65, at 13.

title was, in fact, “nothing,” and thus the “nothing works” movement was born.<sup>77</sup> Though Martinson later wrote an article deeming this a misinterpretation of his findings, the “nothing works” conclusion provided long sought-after proof that rehabilitative efforts were ineffective and thus should be abandoned in favor of a more retributive style of punishment.<sup>78</sup>

The “nothing works” movement served as a launchpad for the implementation of retributive practices which, by that point, both policymakers and the public had come to desire.<sup>79</sup> This new approach introduced the use of incapacitation as a means to both implement harsher punishment and promote public safety.<sup>80</sup> The punishment objective involved the concepts of containment and resulting deterrence. Removal from society was punishment in and of itself, and policymakers believed that longer sentences—and thus longer periods of time away from families, friends, and communities—would deter criminals and potential offenders from committing future crimes.<sup>81</sup> The public safety concept was simple: remove criminals from society to prevent them from committing additional crimes for the duration of their prison sentences, and thus crime levels will fall proportionately.<sup>82</sup> Put another way, the more offenders the government takes off the streets, the safer society will be.

Perhaps the most impactful embodiment of these retributive ideals was the shift from indeterminate to determinate sentencing. Under the indeterminate sentencing model, “[r]ather than assigning a fixed amount of time, judges would provide a minimum and maximum sentence,”<sup>83</sup> which “allowed offenders to be supervised until the time at which the state believed the offender had been rehabilitated.”<sup>84</sup> However, this system came under fire as inconsistent and arbitrary, as well as “soft on crime.”<sup>85</sup> Accordingly, courts converted to a determinate sentencing model, which required fixed periods of incarceration and introduced mandatory minimum sentences and sentencing enhancements.<sup>86</sup> This approach led to harsher criminal sanctions, particularly a greater chance of receiving a prison sentence as the form of punishment for a conviction and longer

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77. See Paparozzi & Guy, *supra* note 67, at 11.

78. *Id.*; Vose, *supra* note 70, at 92. “Retribution” refers to an “ideology in which the offender deserves to be punished for the harm done to others” as a matter of justice. Leonard A. Steverson, *Shaming Penalties*, in *CORRECTIONS* 275, 276 (William J. Chambliss ed., 2011). Retributive sentencing practices are “the dosing of punishment commensurate to the behavior of the individual, including his criminal history.” Taxman & Rudes, *supra* note 12, at 233.

79. PAGER, *supra* note 65, at 15.

80. Paparozzi & Guy, *supra* note 67, at 11. “Incapacitation” is defined as a “restriction of the liberties of the individual through confinement in a closed setting (prison, jail, or special facility) and is designed to physically prevent criminal conduct.” Taxman & Rudes, *supra* note 12, at 233.

81. PAGER, *supra* note 65, at 29; Vose, *supra* note 70, at 92.

82. PAGER, *supra* note 65, at 12.

83. *Id.* at 16.

84. Vose, *supra* note 70, at 92.

85. PAGER, *supra* note 65, at 16.

86. *Id.* at 16-17.

prison sentences overall.<sup>87</sup>

Adoption of the determinate sentencing model marked the beginning of the “tough on crime” era, which focused on punishment as an end in and of itself.<sup>88</sup> Nowhere was this focus more evident than in the “war on drugs.” While President Richard Nixon had declared drug abuse “public enemy number one” in 1971,<sup>89</sup> the war on drugs reached its pinnacle during the Reagan administration.<sup>90</sup> After winning the 1980 presidential election in part because of his tough on crime platform,<sup>91</sup> President Ronald Reagan directed national attention to the growing issue of and ensuing need to combat drug abuse and distribution.<sup>92</sup> As a result, the next two decades of crime policies fixated on punishing drug users, producers, and traffickers, specifically by using incarceration as a punitive strategy.<sup>93</sup>

These policies caused a vast increase in the proportion of inmates incarcerated for drug offenses<sup>94</sup> as well as the nation’s overall incarceration rate and the total number of offenders in prison.<sup>95</sup> The incarceration rate in 1970 was approximately 100 inmates per 100,000 residents, but this number had grown to over 400 inmates per 100,000 residents by 1995.<sup>96</sup> In 1980—when Ronald Reagan won the presidential election—there were 24,640 federal inmates across BOP facilities.<sup>97</sup> This population more than doubled in the 1980s, and then more than doubled again in the 1990s.<sup>98</sup> By the start of the twenty-first century, the total federal inmate population was over 145,000.<sup>99</sup>

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87. *Id.* at 17 (“The chances of receiving a prison sentence following arrest increased by more than 50 percent as a result of determinate sentencing laws. Likewise, the amount of prison time served increased substantially under new guidelines, with the average length of sentences served increasing by nearly 40 percent between the mid-1980s and the late 1990s.”).

88. Vose, *supra* note 70, at 93.

89. President Richard Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control (1971).

90. PAGER, *supra* note 65, at 18, 170 n.36.

91. William R. Wood, *Capital Punishment/Death Penalty*, in *CORRECTIONS* 7 (William J. Chambliss ed., 2011).

92. PAGER, *supra* note 65, at 18.

93. ROLANDA J. WEST, REEXAMINING REENTRY: THE POLICIES, PEOPLE, AND PROGRAMS OF THE UNITED STATES PRISONER REINTEGRATION SYSTEMS 1-2 (2017).

94. By 1993, over sixty percent of inmates in federal prisons were drug offenders, compared to sixteen percent in 1970. PAGER, *supra* note 65, at 19.

95. *Id.* at 12; *BOP: Historical Information*, *supra* note 26; Subramanian & Shames, *supra* note 11, at 33.

96. PAGER, *supra* note 65, at 12.

97. *BOP: Historical Information*, *supra* note 26. For context, this number had barely changed in forty years; the total BOP population in 1940 was 24,360 inmates. *Id.*

98. *Id.* (“From 1980 to 1989, the inmate population more than doubled, from just over 24,000 to almost 58,000 . . . During the 1990’s, the population more than doubled again, reaching approximately 136,000 at the end of 1999 as efforts to combat illegal drugs and illegal immigration contributed to significantly increased conviction rates.”).

99. *BOP: Population Statistics*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/>

*C. Reducing Recidivism: Pairing Punishment and Rehabilitation*

The repercussions of these decades of mass incarceration were threefold: a rapid rise in prison populations, a resulting surge in offenders returning to society upon execution of their prison sentences, and ultimate reoffense and reincarceration. First, given the drastic increase of incarcerated offenders in a relatively short amount of time, many prisons could not accommodate the surge of inmates.<sup>100</sup> Accordingly, the number of BOP facilities more than doubled by the end of the century—there were forty-four federal prisons in 1980 but ninety-five by the end of the 1990s.<sup>101</sup> The increase in incarcerated offenders also led to an eventual influx in individuals returning to society after completing their sentences, which states and cities struggled to manage.<sup>102</sup> Further, this lack of support for newly released offenders hindered their ability to reintegrate into society, so many were ultimately committing additional crimes and returning to prison.<sup>103</sup>

By the turn of the century, it had grown clear that local governments and communities could not provide sufficient assistance on their own to support the surge of ex-offenders coming home.<sup>104</sup> Accordingly, policymakers began to recognize the need for significant resources to prepare offenders for life after release and support ex-offenders who had recently reentered society.<sup>105</sup> As “the first president ever to acknowledge the vast social problem associated with America’s policies of mass incarceration,”<sup>106</sup> President George W. Bush called attention to this urgency in his 2004 State of the Union address:

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can’t find work, or a home, or help, they are much more likely to commit crime and return to prison . . . America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.<sup>107</sup>

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statistics/population\_statistics.jsp [https://perma.cc/F5X4-H44R] (Sept. 8, 2022, 12:00 AM). See Subramanian & Shames, *supra* note 11, at 33 for the impact of the tough on crime policies on state corrections systems (By 2012, [the policies’] impact had become clear: in 40 years, the prison population grew by 705 percent, from nearly 175,000 state inmates in 1972 to just under 1.4 million as of January in 2012.”).

100. Vose, *supra* note 70, at 93.

101. See *BOP: Historical Information*, *supra* note 26.

102. PAGER, *supra* note 65, at 10.

103. *Id.*

104. Lisa A. Rich, *A Federal Certificate of Rehabilitation Program: Providing Federal Ex-Offenders More Opportunity for Successful Reentry*, 7 ALA. C.R. & C.L. L. REV. 249, 257-58 (2016).

105. *Id.* at 256-57.

106. PAGER, *supra* note 65, at 10.

107. President George W. Bush, State of the Union Address (Jan. 20, 2004).

In consensus with President Bush's remarks, Congressional leaders introduced legislation that would solidify reentry efforts, both at the national level and through grants to state and local governments to institute their own programs.<sup>108</sup> On March 20, 2007, Congress passed the Second Chance Act to "strengthen overall efforts to reduce recidivism, increase public safety, and help states and communities to better address the growing population of ex-offenders returning to their communities."<sup>109</sup> In practice, the Act revived some of the rehabilitative ideals abandoned during the tough on crime era; it funded rehabilitation programs for prisoners nearing release<sup>110</sup> and provided support for programs offering alternatives to incarceration.<sup>111</sup> Despite promotion of these alternatives, though, the BOP continued to experience a steady rise in inmate totals, reaching its highest population to date of almost 220,000 in 2013.<sup>112</sup>

After a decade in effect, the Second Chance Act was expanded with the enactment of the First Step Act of 2018.<sup>113</sup> The First Step Act came into law on December 21, 2018, as the result "of a bi-partisan effort to improve criminal justice outcomes, as well as to reduce the size of the federal prison population while also creating mechanisms to maintain public safety."<sup>114</sup> One requirement of the Act is the Risk and Needs Assessment System, which requires BOP staff to conduct an evaluation of each prisoner in their respective institutions.<sup>115</sup> This assessment includes determining the risk of recidivism upon release and identifying areas of need to be targeted in an effort to reduce future recidivism.<sup>116</sup> Based on prisoners' initial assessments, the BOP will determine the type and amount of programming each prisoner requires and assign them to the appropriate recidivism reduction programs accordingly.<sup>117</sup> These programs are designed to

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108. Rich, *supra* note 104, at 257-59.

109. *Id.* at 259; *see* Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657.

110. Christine Tartaro & Marissa P. Levy, *Factors Associated with Recidivism Among Reentry Program Participants in the Jail Setting: Results and Recommendations*, in OFFENDER REENTRY: RETHINKING CRIMINOLOGY AND CRIMINAL JUSTICE 126 (Matthew S. Crow & John Ortiz Smykla eds., 2014).

111. Rich, *supra* note 104, at 260.

112. *BOP: Population Statistics*, *supra* note 99.

113. *BOP: First Step Act Overview*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp#:~:text=On%20December%2021%2C%202018%2C%20President,mechanisms%20to%20maintain%20public%20safety> [<https://perma.cc/44EX-W59P>].

114. *Id.*; *see* First Step Act of 2018, Pub. L. No. 115-391.

115. *See* FED. BUREAU OF PRISONS, INMATE AND CUSTODY MGMT. POL'Y NO. 5400.01, FIRST STEP ACT NEEDS ASSESSMENT (June 25, 2021).

116. *Id.* §§ 1-2

117. 18 U.S.C. § 3632. One component of the Risk and Needs Assessment System is the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN), which BOP staff uses to identify the risk of recidivism for each inmate. FIRST STEP ACT NEEDS ASSESSMENT, *supra* note 115 § 2. The risk of recidivism is then classified by PATTERN as minimum, low, medium, or high. *Id.*

help offenders succeed in their communities once they return from prison and are based on evidence indicating a particular activity will likely reduce recidivism.<sup>118</sup>

While the Second Chance Act and the First Step Act represent a return of rehabilitative corrections practices, this recent focus on reentry does not indicate an abandonment of the retributive practices of the “tough on crime” era;<sup>119</sup> the current methods could be better described as “[p]airing [p]unishment and [r]ehabilitation.”<sup>120</sup> The U.S. still utilizes determinate sentencing structures—including mandatory periods of incarceration for certain crimes—which multiply the chance of receiving a prison sentence following conviction.<sup>121</sup> As of 2010, seventy percent of convicted offenders received a sentence of term of imprisonment.<sup>122</sup> However, federal prison populations have consistently decreased since reaching their peak in 2013,<sup>123</sup> and the BOP maintains that “[a] variety of legislative changes, including most recently the First Step Act of 2018, will continue to contribute to the overall decline in the inmate population.”<sup>124</sup>

Determinate sentencing has another significant consequence, though: even if total inmate populations are decreasing, the amount of time certain inmates will spend in prison is increasing. The determinate structure includes guidelines and enhancements for repeat offenders, which allow judges to extend terms of incarceration based on the particular offense committed, the circumstances surrounding the commission of the offense, and the offender’s criminal history.<sup>125</sup> In practice, these policies produce an overall increase in the length of custodial sanctions.<sup>126</sup> Of the total inmates currently in federal prison, nearly half are serving a sentence of five to fifteen years, and another quarter are serving more than fifteen years but less than a life sentence.<sup>127</sup> As shown by this harsh use of prison sentences in the U.S. corrections system, “incapacitation and retribution are central and . . . rehabilitative aims remain secondary (at least often in practice if not in policy).”<sup>128</sup>

Another example of the vacillation between retributive and rehabilitative

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118. FIRST STEP ACT NEEDS ASSESSMENT, *supra* note 115 § 2.

119. PAGER, *supra* note 65, at 10.

120. Taxman & Rudes, *supra* note 12, at 233, 237.

121. *Id.* at 233; PAGER, *supra* note 65, at 16-17.

122. Subramanian & Shames, *supra* note 11, at 36.

123. BOP: *Population Statistics*, *supra* note 99.

124. BOP: *Historical Information*, *supra* note 26.

125. Kleinfeld, *supra* note 27, at 975-76. The Federal Sentencing Guidelines provide a structure for federal judges to use in administering sentences. *Id.* at 975. The structure includes two factors that may increase an offender’s minimum sentence: the offense and the offender’s criminal history. *Id.* Additionally, certain crimes may carry the potential for a sentencing enhancement; for example, a misdemeanor offense may increase to a felony if the offense was violent or the offender has a previous felony conviction. *Id.* at 976.

126. Subramanian & Shames, *supra* note 11, at 33.

127. BOP *Statistics: Sentences Imposed*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_sentences.jsp](https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp) [<https://perma.cc/R2YA-PSB4>] (Oct. 15, 2022).

128. Subramanian & Shames, *supra* note 11, at 35.

aims is the mission of the BOP: “to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.”<sup>129</sup> This vision appears to boil down to two overall goals—detaining criminals to keep the community safe and preparing them to succeed when they reenter society—which depict the dichotomy of the theories of punishment in the U.S. criminal justice system and federal prisons’ effort to not compromise one for the other.

To achieve the second goal of providing inmates with work and other self-improvement opportunities, the BOP offers several employment programs. By law, convicted inmates in federal penitentiaries who are physically and mentally able are required to work.<sup>130</sup> Within the BOP, there are two general categories of work programs: nonindustrial and industrial.<sup>131</sup> Nonindustrial work includes institutional maintenance and agriculture and is performed to maintain the operation of the prisons.<sup>132</sup> Industrial work involves the employment of inmates for profitable production and services, which is embodied by UNICOR.<sup>133</sup>

The BOP’s nonindustrial work program has two main purposes: to provide inmates the opportunity to develop work skills and experience that will help them obtain employment following release and to maintain operation of the prisons by ensuring all essential tasks are performed.<sup>134</sup> As to this second purpose, work assignments include food service, plumbing, painting, groundskeeping, and warehouse employment.<sup>135</sup> In addition to the skills gained, inmates earn hourly wages of \$0.12 to \$0.40, and wardens can grant additional “performance pay” in recognition of successful inmate work performance or participation in self-improvement programs.<sup>136</sup>

In terms of industrial work, BOP inmates also have the option to work at a UNICOR industry.<sup>137</sup> Depending on their proficiency and education level, inmates employed by UNICOR earn from \$0.23 per hour to a maximum of \$1.15

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129. *BOP: Agency Pillars*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/about/agency/agency\\_pillars.jsp](https://www.bop.gov/about/agency/agency_pillars.jsp) [<https://perma.cc/YB76-GKLQ>].

130. Crime Control Act of 1990, Pub. L. No. 101-647, § 2905, 104 Stat. 4789, 4914.

131. Christine Martin, *Prison Labor*, in CORRECTIONS 193, 194 (William J. Chambliss ed., 2011).

132. *Id.* at 194. Some examples of nonindustrial work are janitorial duties, food preparation, medical service, laundry, office help, and gardening. *Id.*

133. *Id.* at 194-95.

134. FED. BUREAU OF PRISONS, INMATE AND CUSTODY MGMT. POL’Y NO. 5251.06, INMATE WORK AND PERFORMANCE PAY § 545.20 (Oct. 1, 2008).

135. *BOP: Work Programs*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/work\\_programs.jsp#:~:text=Sentenced%20inmates%20are%20required%20to,hour%20for%20these%20work%20assignments](https://www.bop.gov/inmates/custody_and_care/work_programs.jsp#:~:text=Sentenced%20inmates%20are%20required%20to,hour%20for%20these%20work%20assignments) [<https://perma.cc/SG3M-ZRQU>].

136. *Id.*; INMATE WORK AND PERFORMANCE PAY, *supra* note 134.

137. JAMES, *supra* note 63, at 4; *see supra* note 64 and accompanying text.

per hour, and these amounts have not changed since at least 2007.<sup>138</sup> To evaluate the impact of UNICOR and its vocational and apprenticeship training, the BOP Office of Research and Evaluation conducted the Post-Release Employment Project (PREP).<sup>139</sup> Researchers collected data for up to twelve years on over seven thousand federal inmates, comparing those who worked in prison industries with similarly situated inmates who did not.<sup>140</sup> According to the outcomes of the study, inmates who worked for UNICOR were twenty-four percent less likely to recidivate after leaving prison and fourteen percent more likely to find and maintain gainful employment following release.<sup>141</sup> These results indicate “[UNICOR] and vocational/apprenticeship programs have a positive effect on post-release employment and recidivism, increasing the likelihood that inmates will successfully reintegrate into the community following release from federal prison.”<sup>142</sup>

Another employment option for certain inmates is the furlough program, which allows participants to leave their place of imprisonment for work purposes and then return to the prison during non-work hours.<sup>143</sup> Federal law permits the BOP to temporarily release a prisoner for certain prescribed purposes, including to work or participate in training in the community.<sup>144</sup> Similar to the missions of the BOP inmate work program and UNICOR, one expected result of participation in the BOP furlough program is “reduction of recidivism by securing transitional needs and enhanc[ing] community reintegration prior to release.”<sup>145</sup> In terms of community reintegration, furlough programs may be especially conducive because they “provide offenders a bridge from prison to release that affords them structured flexibility as the offender finds his or her footing and adjusts to life on the outside.”<sup>146</sup>

While the reformatory efforts of the U.S. throughout this century may seem to indicate that the country is heading toward a more rehabilitated prison population, these initiatives are not as impactful in practice as they are on paper. To begin, while the PREP results exhibit the instrumental effects UNICOR

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138. JAMES, *supra* note 63, at 3; BOP: UNICOR, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp#:~:text=Although%20there%20are%20approximately%2025%2C000,%C2%A2%20to%20%241.15%20per%20hour](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp#:~:text=Although%20there%20are%20approximately%2025%2C000,%C2%A2%20to%20%241.15%20per%20hour) [https://perma.cc/TTH8-WYUN].

139. *FPI and Vocational Training Works: Post-Release Employment Project (PREP)*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/resources/pdfs/prep\\_summary\\_05012012.pdf](https://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf) [https://perma.cc/L8B7-LJN9].

140. *Id.*; BOP: UNICOR, *supra* note 138.

141. BOP: UNICOR, *supra* note 138.

142. *FPI and Vocational Training Works: Post-Release Employment Project (PREP)*, *supra* note 139.

143. Vose, *supra* note 70, at 89, 91.

144. 18 U.S.C. § 3622(b)-(c).

145. FED. BUREAU OF PRISONS, INMATE AND CUSTODY MGMT. POL'Y NO. 5280.09, INMATE FURLOUGHS § 570.30 (Jan. 20, 2011).

146. Vose, *supra* note 70, at 96.



employment can have on ex-offender success, these effects are only available to a minor portion of the prison population; only eight percent of work-eligible federal inmates currently participate in the program.<sup>147</sup> Approximately 25,000 inmates are on the waiting list, so many offenders who want to reap these benefits are currently unable.<sup>148</sup>

This issue of accessibility is also prevalent in the Residential Drug Abuse Program (RDAP), the BOP's intensive substance use disorder treatment program.<sup>149</sup> RDAP participants live in their own unit separate from the general population where they participate in treatment for half the day and work, school, or vocational activities for the other half.<sup>150</sup> The BOP and the National Institute on Drug Abuse conducted an analysis of RDAP, and their findings "demonstrated that RDAP participants are significantly less likely to recidivate and . . . that the Bureau's RDAPs make a significant difference in the lives of offenders following their release from custody and return to the community."<sup>151</sup> Given the multitude of benefits, participation in the program is highly sought after, and there is a lengthy wait list.<sup>152</sup> In addition, certain offenders who may otherwise be able to secure a spot are unilaterally excluded from some of the program's incentives simply because of the severity of their offenses or high levels of risk of recidivism.<sup>153</sup> Georgetown University Law Professor Shon Hopwood described his personal experience with these constraints while serving time in a federal prison:

The BOP's most popular rehabilitative program is the Residential Drug Abuse Program (RDAP), which has a 5,000-person waiting list because of its unique incentive: a one-year sentence reduction. I served over ten years in federal prison but did not enroll in the RDAP. Because Congress excluded anyone convicted of a violent crime from receiving the year off for completing the RDAP, the incentive was unavailable to me. RDAP would have been beneficial, and although I was a particularly motivated prisoner, I did not enroll without the incentive attached.<sup>154</sup>

Like the availability issues with UNICOR, these barriers to participation can result in the prisoners in most need of a particular program being excluded from participation, which seems contrary to the purposes of the First Step Act and overall reentry support efforts. For inmates unable to participate in employment

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147. *BOP: UNICOR*, *supra* note 138.

148. *Id.*

149. *BOP: Inmate Substance Abuse Treatment*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp) [https://perma.cc/DW6B-5WCA].

150. *Id.*

151. *Id.*

152. Shon Hopwood, *Beyond First Steps: Reforming the Federal Bureau of Prisons*, 31 *FED. SENT. R.* 119, 120 (2018).

153. *Id.* at 119.

154. *Id.* at 120.

opportunities through UNICOR or RDAP, it is not as if they are simply missing out on the benefits of these programs while incarcerated; they are also at a severe disadvantage upon reentering society after completing their sentences. Despite the stated goals of the BOP's other work programs and the potential to gain or develop practical skills, ex-offenders still experience significant difficulties in finding and maintaining employment after release.<sup>155</sup> While one obvious explanation for this is simply the stigma associated with a criminal record, there are also more practical factors that play a role.<sup>156</sup> Regardless of what programming an inmate participates in while incarcerated, many will have to "relearn" societal norms upon their return.<sup>157</sup> To this end, while the aim of BOP inmate work and training programs is to provide skills that will help offenders obtain employment after release,<sup>158</sup> many offenders struggle to apply the skills learned in prison,<sup>159</sup> especially those who participated in nonindustrial work assignments.

Because many offenders "find themselves unable to utilize the skills and knowledge picked up in education [and other] programs while in prison," a significant amount of former offenders are unemployed within a year after their release from prison.<sup>160</sup> Studies from the last twenty years estimate that unemployed ex-offenders are three times more likely to return to prison than those with jobs.<sup>161</sup> While employment and training are by no means the only factors that contribute to recidivism rates, these rates are a key indicator of the effectiveness of a corrections system and its programs, and the U.S. has experienced consistently high rates throughout the twenty-first century.<sup>162</sup>

Undoubtedly, the federal prison system has made strides in the last few decades in reforming prison policy to focus more on programming and treatment and thus equipping offenders with tools to succeed upon reentering society after their release from prison. However, these measures have a long way to go implementation-wise before they can truly achieve their intended outcomes. While policies and practices such as the First Step Act, inmate employment and training programs, and the BOP's mission itself may give the impression that the American criminal justice system gives equal weight to containment and development of inmates, in practice, the U.S. fails to live up to its own standard for the latter.

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155. PAGER, *supra* note 65, at 58.

156. *Id.*

157. WEST, *supra* note 93, at 3-5.

158. *See supra* note 134 and accompanying text.

159. Rich, *supra* note 104, at 252.

160. *Id.*

161. *Id.* at 282.

162. Subramanian & Shames, *supra* note 11, at 33 ("[P]risoner recidivism rates—a key indicator of a corrections system's performance—have remained too high, stubbornly hovering around 40 percent over the last 20 years.").

## II. GERMANY'S REHABILITATIVE APPROACH TO INCARCERATION

Germany is a federal republic with sixteen states that retain sole responsibility over certain functions, including law enforcement.<sup>163</sup> The individual states are responsible for administration of the penitentiaries in their respective jurisdictions,<sup>164</sup> and—until enactment of the Prison Act 1976—they formerly had direct authority and wide discretion in prescribing the standard for treatment of prisoners.<sup>165</sup> The Prison Act “regulate[s] the execution of sentences of imprisonment in penal institutions and of measures of reform and prevention involving deprivation of liberty.”<sup>166</sup> The Act serves as the legal foundation for prisoners’ rights and duties, and it includes underlying general principles as well as provisions detailing specific regulations of the prison system.<sup>167</sup>

### A. Pre-World Wars

When Germany became a nation-state and enacted its first Penal Code in 1871, its criminal justice system was rooted in the notion of just retribution: punishment represented a particular amount of human suffering, imposed in proportion to the severity of a criminal offense.<sup>168</sup> To reduce arbitrariness in sentencing, the Code prescribed clear definitions of individual crimes and designated a fixed scale of penalties for each.<sup>169</sup> The criminal law in this era “represented the climax in the legal history of imprisonment,” establishing incarceration as the typical form of punishment for a multitude of offenses.<sup>170</sup>

At the time of the enactment of the Penal Code, Germany did not yet have uniform federal prison regulation, so the Code provided the sole legislative requirements for prison administration.<sup>171</sup> While the Code, in furtherance of its goal of uniform punishment, imposed fixed limits on the lengths of prison sentences, it did not include any other provisions on prison management.<sup>172</sup> Proponents of criminal law reform therefore advocated for uniform prison regulation as a vehicle for instituting equality and standardized treatment of prisoners in facilities across the country.<sup>173</sup>

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163. Karl A. Schleunes et al., *Germany - Government and Society*, BRITANNICA (Nov. 17, 2021), <https://www.britannica.com/place/Germany/Government-and-society#ref58041> [<https://perma.cc/BH2X-56XE>].

164. SELECT COMMITTEE ON HOME AFFAIRS, *supra* note 19, at 152.

165. Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME & JUST. 503, 537 (2010).

166. Prison Act § 1.

167. SELECT COMMITTEE ON HOME AFFAIRS, *supra* note 19, at 152.

168. Max Grünhut, *The Development of the German Penal System 1920-1932*, 22 CAN. BAR REV. 198, 199 (1944).

169. *Id.*

170. *Id.*

171. LIORA LAZARUS, *CONTRASTING PRISONERS' RIGHTS: A COMPARATIVE EXAMINATION OF ENGLAND AND GERMANY* 51 (2004).

172. Grünhut, *supra* note 168, at 199-200.

173. LAZARUS, *supra* note 171, at 51-52.

Incarceration continued as the standard sentencing practice into the start of the twentieth century. While rates for first-time offenses varied depending on the particular crime, the nation saw a discernible increase in recidivism.<sup>174</sup> This drove scholars and officials to reexamine the criminal code in the years leading up to World War I and evaluate whether it was serving its intended purpose: safety of both the individual and society, and prevention of future crime.<sup>175</sup> As part of this evaluation, into the next decades, much debate ensued about individual deterrence versus general prevention as the basis for the penal system.<sup>176</sup> This discussion did lead to one amendment to the Criminal Code which modified penalties for certain offenses, but the ultimate goal of reformers was to replace the Code with modern legislation.<sup>177</sup>

*B. Never Again: Post-Nazi Regime and the Birth of the Prison Act*

Following World War I, rehabilitation and prisoners' rights entered the reform conversation, but the movement reached new heights following World War II and the horrors of Nazi Germany.<sup>178</sup> Any progress made up to this point in reforming the criminal law took a sharp turn with the rise of National Socialism.<sup>179</sup> From 1933 to 1945, the National Socialists utilized incarceration practices to return to the retributive aim of punishment embodied in the 1871 Penal Code.<sup>180</sup> However, the primary goal of punishment under Nazi criminal law was deterrence;<sup>181</sup> a 1934 Nazi policy statement declared that imprisonment "should be an *empfindliches Übel*—'something nasty that makes them hurt,'" such that it would provide persistent reminders to refrain from committing future crimes.<sup>182</sup> Throughout this regime, prisoner rights were essentially nonexistent, and prisoners had no choice but to succumb to the "systematic repression and extermination" in the Nazi prisons and concentration camps.<sup>183</sup>

After conquering the Axis powers in 1945, the Allies initiated a movement toward denazification in Germany, but departure from Nazism did not come for several years.<sup>184</sup> Despite international condemnation of the regime's ideologies,

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174. Grünhut, *supra* note 168, at 204.

175. *Id.*

176. *Id.* at 205-06.

177. *Id.* at 206.

178. *Id.* at 218-19; LAZARUS, *supra* note 171, at 53-54.

179. "National Socialism" refers to the ideologies of the National Socialist Democratic Workers Party, also known as the Nazi Party. *Vocabulary Terms Related to the Holocaust*, HOLOCAUST MUSEUM HOUSTON, <https://hnh.org/education/resources/vocabulary-terms-related-holocaust/> [<https://perma.cc/7FW7-G8NH>].

180. LAZARUS, *supra* note 171, at 53-54.

181. *Id.*

182. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 99-100 (2005).

183. LAZARUS, *supra* note 171, at 54.

184. Samuel Miner, *The Reconstruction of Justice in Post-Nazi Western Germany*, *THE*

the 1950s were an “era of silence” in Germany concerning the Nazi praxes.<sup>185</sup> Rather than a mass upheaval of the remaining Nazi presence, parts of the German public were sympathetic to members of the Nazi Party, and a significant number of former Party members maintained government positions.<sup>186</sup>

Ultimately, it was the generational shift that eventually pushed the remaining Nazi ideologies out of post-war Germany.<sup>187</sup> This finally began a period of coming to terms with the past—a “collective ‘never again’ to the horrors of the Third Reich.”<sup>188</sup> This “never again” concept encompassed reform of both the criminal code and prison law.<sup>189</sup> The consensus among legislators and reformers was that total overhaul of the Criminal Code was necessary before a prison act could be properly considered, so efforts toward prison law codification took a back seat to criminal law reform into the 1960s.<sup>190</sup> A Draft Penal Code published in 1962 focused on “‘humanizing’ the criminal law by respecting the highest possible individual freedom” and “restrict[ing] the scope of the criminal law only to those acts which were seriously damaging to society.”<sup>191</sup> This marked the beginning of German reform efforts to soften punishment for criminal convictions and reduce incarceration as much as possible.<sup>192</sup>

Finally, the focus shifted to drafting legislation governing prison administration; in 1967, the Federal Ministry of Justice established the Prison Administration Reform Committee, whereby expert practitioners and academics

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NATIONAL WWII MUSEUM | NEW ORLEANS (Aug. 11, 2021), <https://www.nationalww2museum.org/war/articles/justice-in-post-nazi-western-germany> [<https://perma.cc/KUR7-ZXSL>]. The “Allies” were “[t]he nations fighting Nazi Germany and Fascist Italy during World War II, primarily Great Britain, the Soviet Union and the United States.” *Vocabulary Terms Related to the Holocaust*, *supra* note 179.

185. Miner, *supra* note 184. This “silence” refers to Germany’s initial failure to account for the Nazi past. ERNESTINE SCHLANT, *THE LANGUAGE OF SILENCE: WEST GERMAN LITERATURE AND THE HOLOCAUST* 19 (1999) (“Yet even as the . . . atrocities of the Nazi regime were exposed, denial and rationalizations began to prevail.”).

186. Miner, *supra* note 184.

187. *Id.*

188. Kleinfeld, *supra* note 27, at 933, 988; Amy L. Solomon, *Out From the Holocaust*, THE MARSHALL PROJECT (Dec. 20, 2018, 9:59 PM), <https://www.themarshallproject.org/2018/12/20/out-from-the-holocaust> [<https://perma.cc/3DYB-LECS>]. The “Third Reich” means “Third Empire” and was the name given to the Nazi regime in Germany. *Vocabulary Terms Related to the Holocaust*, *supra* note 179.

189. LAZARUS, *supra* note 171, at 54-55 (“The extremes of the Third Reich provoked widespread calls for the ‘rehumanization’ of the prison system and for the ‘total reform’ of the criminal law,” including “the codification of prison law centring on the definition and protection of prisoners’ rights.”).

190. *Id.* at 55.

191. *Id.* at 55-58.

192. Kleinfeld, *supra* note 27, at 933, 959; Thomas Weigend, *Sentencing and Punishment in Germany*, in *SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* 188 (Michael Tonry & Richard S. Frase eds., 2001).

began to officially develop the content of the future Prison Act.<sup>193</sup> The discussion during the drafting centered around two main ideals: prisoner rights and resocialization. To the former, the Committee emphasized the importance of reinforcing prisoners' abilities to live crime-free lives by maintaining their relationships with the outside world and protecting their rights to resocialization, home leave, and work.<sup>194</sup> Additionally, the drafters "were particularly concerned to establish administrative guidelines aimed at countering the damaging institutional effects of imprisonment and the entrenched culture of prison administration."<sup>195</sup>

Resocialization was the much more controversial ideal of the prison reform movement. Despite the fact that other countries were voicing doubt about the principle in the 1970s, Germany maintained a "commitment to resocialization as a substantive aim of imprisonment and as a guiding administrative principle around which prisoners' rights should be shaped."<sup>196</sup> While some nations used Martinson's 1974 report to justify more retributive punishment practices, Germany interpreted "nothing works" differently—not to abandon rehabilitative ideals and create a harsher penal system but to focus on preparing prisoners to reintegrate into society following release.<sup>197</sup> Influenced by reformers' and policymakers' shared commitment to resocialization, the Committee presented its draft in 1971, which the Government eventually adopted as its own legislative draft proposal in 1972.<sup>198</sup>

In the meantime, a series of cases came before the Federal Constitutional Court (FCC) in the early 1970s involving states' restriction of prisoners' rights by way of vague administrative rules rather than by statute.<sup>199</sup> The FCC ruled that prisoners had the same rights as ordinary citizens in the sense that, as mandated by the Constitution, their liberties can only be limited by a federal statute—not state restrictions.<sup>200</sup> The Court prescribed that any such legislation must "recognize that, because of their inherent, constitutionally protected, human dignity, prisoners would have to have an opportunity to resocialize themselves" and that the government "had the constitutional duty to provide them with prison

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193. LAZARUS, *supra* note 171, at 55-57.

194. *Id.* at 66.

195. *Id.* at 84.

196. Frieder Dünkel, *Reducing Tension and Improving Rehabilitation by Opening Prisons: Day Leave and Prison Furloughs in Germany*, in *CRIME POLICY IN EUROPE: GOOD PRACTICES AND PROMISING EXAMPLES* 159 (Council of Europe Publishing ed., 2004); LAZARUS, *supra* note 171, at 60-61.

197. LAZARUS, *supra* note 171, at 60-61.

198. *Id.* at 57, 60; *See* Regierungsentwurf eines Strafvollzugsgesetzes (BT-Dr. 7/918, 1972/73).

199. Van Zyl Smit, *supra* note 165, at 537; *see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 41/71, Mar. 14, 1972, 1972 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 33 (Ger.); BVerfG, 1 BvR 635/73, June 5, 1973, 1973 BVerfGE 35, 203 (Ger.).

200. Van Zyl Smit, *supra* note 165, at 537.

conditions that gave them the opportunity to do so.”<sup>201</sup> Because there was no federal legislation governing prisoners at the time, and the Prison Act was still in the drafting process, the judgments were in essence a push to the legislature to pass the Prison Act.<sup>202</sup>

An additional push for modern prison regulations also came from the European Committee on Crime Problems, specifically in the context of prison labor.<sup>203</sup> Inmate work was a frequently discussed component of resocialization throughout the period of criminal justice reform in Germany. In 1976, the Committee published a report on work in penal institutions, proposing modernization of prison labor in European countries.<sup>204</sup> The author asserted that unless inmates are able to accept work as an essential function of normal life, “the chances of a successful rehabilitation are seriously impaired.”<sup>205</sup> The report emphasizes the importance of normalizing the conditions and activities that take place in prison to prepare inmates for life in outside society, specifically by “replicating, as far as possible, the circumstances and environment that would be experienced in similar situations outside.”<sup>206</sup> In the prison labor context, work regimes “are organized and managed . . . in much the same manner as in comparable enterprises in free society” and “aimed at the models familiar in the outside world.”<sup>207</sup> At the conclusion of its analysis, the Committee recommended member states—including Germany—adopt the report’s proposals.<sup>208</sup>

Finally, the German parliament passed a uniform prison act in 1976, which came into effect on January 1, 1977.<sup>209</sup> The Prison Act represents the achievement of dual aspirations of penal reform in Germany: “movements for the codification of prison law on the one hand and the achievement of the resocialization purpose of imprisonment on the other.”<sup>210</sup>

### *C. The Prison Act Come to Life*

Since the enactment of the Prison Act, the German corrections system has centered around the goal of resocialization.<sup>211</sup> Indeed, the First Title of the Act

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201. *Id.*; LAZARUS, *supra* note 171, at 33.

202. Frieder Dünkler & Christine Morgenstern, *The Monitoring of Prisons in German Law and Practice*, 70 CRIME, L. AND SOC. CHANGE 93, 94 (2018).

203. See K. J. NEALE, WORK IN PENAL INSTITUTIONS (1976).

204. *Id.* at 5.

205. *Id.* at 25-26.

206. *Id.* at 26.

207. *Id.*

208. *Id.*, app.

209. SELECT COMMITTEE ON HOME AFFAIRS, *supra* note 19, at 152.

210. LAZARUS, *supra* note 171, at 50.

211. Resocialization refers to “the process whereby the prisoner, who in offending violates the basic prerequisites of social co-existence, is reintegrated into society.” LAZARUS, *supra* note 171, at 61. The goal is “to ensure that their relationship to society is sufficiently restored in order to prevent them from committing further criminal acts.” *Id.*

clearly establishes this purpose and its integration into prison administration:

#### Section 2

##### Objectives of Execution

By serving his prison sentence the prisoner shall be enabled in future to lead a life in social responsibility without committing criminal offences (objective of treatment). The execution of the prison sentence shall also serve to protect the general public from further criminal offences.

#### Section 3

##### Prison Regime

- (1) Life in penal institutions should be approximated as far as possible to general living conditions.
- (2) Any detrimental effects of imprisonment shall be counteracted.
- (3) Imprisonment shall be so designed as to help the prisoner to reintegrate himself into life at liberty.<sup>212</sup>

The process of resocialization begins immediately upon admission, at which point prison officials conduct treatment examinations of inmates.<sup>213</sup> The purpose of the examination is to formulate a treatment program for each prisoner that encompasses conditions of confinement and measures to prepare for integration into society after release.<sup>214</sup> One of the most important of these measures is inmate work. Though work is mandatory for offenders in German prisons, labor programs are structured with the goal of preparation for life after release.<sup>215</sup> The Act requires each prisoner to participate in work and basic or further training “to furnish the prisoner with skill and knowledge to make him capable of earning a livelihood after his release, or to preserve or promote such skill and knowledge.”<sup>216</sup>

Another core tenet of the German penal system is the principle of normalization, which guides both sentencing practices and conditions of confinement.<sup>217</sup> This concept has two components: small prison populations and approximation.<sup>218</sup> The rehabilitative theory of punishment favors non-custodial sanctions, so Germany infrequently imposes prison sentences;<sup>219</sup> “[p]rison is reserved for the worst of the worst . . . .”<sup>220</sup> In addition to prison sentences, possible criminal sanctions include fines, community service, driving bans or

212. Prison Act §§ 2-3.

213. *Id.* § 6.

214. *Id.* § 7.

215. *Id.* § 41.

216. *Id.* §§ 7, 37.

217. SELECT COMMITTEE ON HOME AFFAIRS, *supra* note 19, at 152; Subramanian & Shames, *supra* note 11, at 35.

218. Subramanian & Shames, *supra* note 11, at 35-36; Gavshon & Levine, *supra* note 1.

219. Subramanian & Shames, *supra* note 11, at 36.

220. Gavshon & Levine, *supra* note 1.



restrictions, forfeiture, confiscation, and suspended sentences/probation.<sup>221</sup> Given this multitude of alternatives, the amount of offenders actually sentenced to serve time in prison compared to the total number of adults sentenced under criminal law is miniscule: roughly six percent in 2016<sup>222</sup> and five percent in 2017.<sup>223</sup> Additionally, Germany suspended about seventy-five percent of prison sentences that were less than two years, so only a small portion of these offenders actually served time in prison.<sup>224</sup> Not only does Germany infrequently impose prison sentences, but when it does impose prison sentences, they are often very short; in 2006, seventy-five percent of prison sentences were for a year or less, and ninety-two percent were for two years or less.<sup>225</sup> Even for offenders with life sentences, seventy-five percent are paroled after twenty years or less.<sup>226</sup>

For those who do receive prison sentences, the principle of normalization is embodied by the concept of approximation, which suggests that living conditions in prison should mirror those of the outside world as much as possible.<sup>227</sup> The Prison Act provides that inmates can furnish their own cells, maintain certain personal effects, and engage in leisure activities.<sup>228</sup> This is exemplified in Waldeck Prison in northern Germany, where living conditions resemble dormitories; cells have doors to which inmates have the keys, inmates may decorate as they please, and there are a variety of recreational activities available.<sup>229</sup>

Another means to resocialization and normalization in the Prison Act is the relaxation of conditions of imprisonment, specifically opportunities for inmates to leave the prison.<sup>230</sup> As exemplified with Bernd Junge's case, German inmates are afforded notable opportunities to temporarily leave their correctional facilities, even those convicted of the most serious offenses.<sup>231</sup> For example, "recognizing that strong family and community connections are associated with successful reentry outcomes, corrections officials routinely award prisoners short term or extended home leave to visit with family or search for work or accommodation."<sup>232</sup> This leave may be under the supervision of a prison officer or unsupervised depending on the reasons for the leave and the prisoner's

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221. JÖRG-MARTIN JEHLE, *CRIMINAL JUSTICE IN GERMANY: FACTS AND FIGURES* 33-34 (7th ed. 2019); *see also* Subramanian & Shames, *supra* note 11, at 36.

222. Kleinfeld, *supra* note 27, at 933, 960.

223. JEHLE, *supra* note 221, at 35.

224. Subramanian & Shames, *supra* note 11, at 37.

225. *Id.*

226. Gavshon & Levine, *supra* note 1.

227. Prison Act § 3.

228. *Id.* § 19.

229. Gavshon & Levine, *supra* note 1.

230. Prison Act §§ 11-13.

231. Brit McCandless Farmer, *The German Prison Program that Inspired Connecticut*, CBS NEWS: 60 MINUTES OVERTIME (Mar. 31, 2019), <https://www.cbsnews.com/news/the-german-prison-program-that-inspired-connecticut-60-minutes/> [<https://perma.cc/KGS3-PQY6>].

232. Subramanian & Shames, *supra* note 11, at 38.

circumstances.<sup>233</sup>

In the context of inmate work in particular, the Prison Act also allows prisoners to regularly perform work outside the institution.<sup>234</sup> More specifically, the Act prescribes the opportunity for “free employment”:

The prisoner should be permitted to take up employment, vocational training or further vocational training outside the institution on the basis of free employment if this serves, within the scope of the treatment programme, the aim of teaching, preserving or promoting skill and knowledge for earning a livelihood after release, and if this is not barred by any overriding reasons of prison organisation.<sup>235</sup>

Bernd Junge, for example, earned the freedom to leave the prison every day for work, despite his life sentence and the seriousness of his crime.<sup>236</sup>

Like workers in the outside world, inmate workers in German prisons have certain social protections and benefits. Even if they become temporarily unable to work, prisoners can still receive a portion of their compensation in certain circumstances—33% if their job is paused for technical reasons, and 80% if they are on sick leave because of a work accident.<sup>237</sup> After working for one year, prisoners are entitled to three weeks of paid vacation.<sup>238</sup> They also are covered by unemployment insurance after release.<sup>239</sup> As of May 2014, incarcerated workers even have their own labor union; a group of German prisoners formed the Gefangenengewerkschaft/Bundesweite Organisation (GG/BO) “to advocate for minimum wage pay so they can earn enough for a greater chance at successful reentry after their release” and for the ability “to earn a pension so they aren’t released into poverty.”<sup>240</sup>

In practice, the principles of resocialization and normalization do work to keep prisoners from reoffending. Germany’s Federal Ministry of Justice<sup>241</sup> conducted a follow-up study with offenders who were released from prison in 2007, and within three years, two-thirds of them had not been convicted of

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233. Prison Act § 11.

234. *Id.*

235. *Id.* § 39.

236. Farmer, *supra* note 231.

237. Evelyn Shea, *A Comparative Study of Prison Labour in France, Germany and England*, 17 PENAL ISSUES 11, 12 (2006).

238. *Id.*

239. *Id.*; Joe Watson, *German Prisoners Form Union, Seek Minimum Wage and Pension*, PRISON LEGAL NEWS (Aug. 2, 2016), <https://www.prisonlegalnews.org/news/2016/aug/2/german-prisoners-form-union-seek-minimum-wage-and-pension/> [<https://perma.cc/T6FK-KQ5Q>].

240. Watson, *supra* note 239.

241. The Federal Ministry of Justice is a legislative ministry in Germany responsible for preparing federal legislative projects in civil, commercial, economic, criminal, and procedural law. *Structure and Organisation*, FEDERAL MINISTRY OF JUSTICE (May 20, 2022), [https://www.bmj.de/EN/Ministry/StructureOrganisation/StructureOrganisation\\_node.html;jsessionid=83D6412522D329B605ABDD4667178B4.1\\_cid324](https://www.bmj.de/EN/Ministry/StructureOrganisation/StructureOrganisation_node.html;jsessionid=83D6412522D329B605ABDD4667178B4.1_cid324) [<https://perma.cc/E7P8-BJQY>].

another crime.<sup>242</sup> Of the third who did reoffend, about half were only punished with a fine rather than an additional prison sentence, indicating that their subsequent crimes may not necessarily have been as severe.<sup>243</sup> Though these rates are not perfect, and Germany's system does not necessarily provide all of the answers to issues of reoffending and recidivism, stories of inmates like Bernd Junge prove that Germany's prison reform efforts thus far do produce successful outcomes.<sup>244</sup>

### III. ANALYSIS

#### *A. Comparison*

At different points in history, the U.S. and Germany have each incorporated rehabilitative and retributive ideals into their criminal justice systems and prison policies. Today, though, the underlying rationales for sentencing and incarceration practices vary greatly between the countries. While the U.S. has begun to restore a degree of rehabilitation with its recent focus on reentry efforts, the retributive sentencing practices and high incarceration rates from the "tough on crime" era still remain.<sup>245</sup> In Germany, on the other hand, the rehabilitative practice of resocialization is the cornerstone of the corrections system.<sup>246</sup>

Because the U.S. and Germany base their respective penal systems on different theories of punishment, they inevitably also have differences in their sentencing and incarceration practices. Since the end of the colonial era, the primary tool for American punishment has been incarceration.<sup>247</sup> Additionally, the U.S. still maintains the punitive sentencing practices adopted in the 1970s and 1980s which require mandatory prison sentences or sentence enhancements for certain types of crimes.<sup>248</sup> By contrast, Germany views prison sentences as the last resort for criminals and instead prefers to impose non-custodial sentences.<sup>249</sup>

Within correctional facilities, while the prison practices vary in theory, the U.S. and Germany have some programs in common. Both countries require treatment evaluations upon prisoner admission followed by a determination of an appropriate treatment program for each prisoner based on the evaluation results.<sup>250</sup> Additionally, U.S. and German prisoners are allowed to leave their

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242. Maurice Chammah, *Prison Without Punishment*, THE MARSHALL PROJECT (Sept. 25, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/09/25/prison-without-punishment> [<https://perma.cc/X4DA-VYK5>].

243. *Id.*

244. *See supra* notes 1-6 and accompanying text.

245. Rich, *supra* note 104, at 251-52.

246. Subramanian & Shames, *supra* note 11, at 35.

247. FRIEDMAN, *supra* note 27, at 77.

248. Kleinfeld, *supra* note 27, at 975; Subramanian & Shames, *supra* note 11, at 33, 35.

249. Subramanian & Shames, *supra* note 11, at 36.

250. FED. BUREAU OF PRISONS, INMATE AND CUSTODY MGMT. POL'Y NO. 5400.01, FIRST STEP ACT NEEDS ASSESSMENT (June 25, 2021); Prison Act §§ 6-7.

institutions under certain circumstances.<sup>251</sup> However, because Germany's ultimate focus underlying these practices is normalization, its system is more effective in terms of preparing inmates for reintegration into the community after release. More specifically, Germany's inmate work program is superior because it is more accessible and provides inmates with more applicable skills to make them capable of obtaining employment after release.

### *B. Recommendation*

While similar in some aspects on paper, Germany's approach to incarceration and inmate work is ultimately more effective than that of the U.S. because it better prepares inmates to re-join society once they are released, as exemplified by Germany's lower recidivism rates.<sup>252</sup> Thus, the U.S. should adopt a more rehabilitative model of incarceration like Germany's, including its focus on training inmates as part of its prison labor scheme. Inmate work is a good first step at reform because there is direct evidence that it works,<sup>253</sup> and there are already programs in place, so the BOP would only need to improve implementation of its existing practices rather than formulating an entirely new system.

As previously addressed in Part I, BOP research has proven that participation in a work program like UNICOR or treatment program like RDAP can help inmates after release by decreasing their chances of recidivating and increasing the likelihood that they will find and maintain gainful employment.<sup>254</sup> However, only so many inmates are able to actually participate in these programs, and given the large federal prison population, many inmates are left without a spot. With this in mind, in an effort to reduce its recidivism rates, the BOP should adopt a more widespread work and skills training program across all of its facilities rather than its current system of several separate employment options. This program should model the German concept of "free employment" with the aim of "teaching, preserving or promoting skill and knowledge for earning a livelihood after release . . . ."<sup>255</sup>

While this Note focuses on BOP facilities and recommends federal prison reform, a Connecticut state prison that has adopted German incarceration practices may serve as an archetype for the BOP. Nicknamed "the Rock," this prison "focuses on therapy and self-improvement, with the idea that rehabilitation will reduce re-offense."<sup>256</sup> In 2015, U.S. prison and law enforcement officials,

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251. Prison Act §§ 11-13; 18 U.S.C. § 3622(b)-(c).

252. According to a 2016 60 Minutes feature, Germany's recidivism rate is about half the U.S. rate. Gavshon & Levine, *supra* note 1.

253. *See supra* Part I.C.

254. BOP: UNICOR, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp#:~:text=Although%20there%20are%20approximately%2025%2C000,%2%A2%20to%20%241.15%20per%20hour](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp#:~:text=Although%20there%20are%20approximately%2025%2C000,%2%A2%20to%20%241.15%20per%20hour) [https://perma.cc/TTH8-WYUN].

255. Prison Act § 39.

256. Farmer, *supra* note 231.

including then-Governor of Connecticut Dannel Malloy and future Connecticut Correction Commissioner Scott Semple, toured a Berlin prison and witnessed Germany's rehabilitative approach to incarceration in effect.<sup>257</sup> This trip inspired a German-style program at the Rock,<sup>258</sup> whereby inmates are out of their cells from morning to night, participating in classes, counseling, and activities like board games, yoga, and lip sync contests.<sup>259</sup> Similar to German inmates' opportunity for free employment and other employment benefits, the Rock's program "has its own economic ecosystem, with various jobs, job training and its own monetary system."<sup>260</sup> By resembling real-life job and economic systems more closely than traditional U.S. prisons, this program alleviates the previously discussed problems of inmates having to "relearn" how to live in society or finding themselves unable to apply the skills they acquired in prison upon release.

Though "[i]t's too early to tell whether [the program] will reduce recidivism,"<sup>261</sup> both past and present inmate participants have found the programming meaningful and effective.<sup>262</sup> For example, another 60 Minutes report on the German prison system featured an interview with Shyquinn Dix, a former inmate at the Rock who went to college after his release, where he was a student-athlete and made the Dean's List.<sup>263</sup> With success stories like this, Connecticut's reform efforts are on the national radar and could inspire additional positive change.<sup>264</sup>

Of course, should the BOP decide to implement a more rehabilitative scheme in federal penitentiaries, it will likely face several hurdles in terms of implementation and acceptance. The first is funding and the costs associated with implementing a new program nationwide. Part of the BOP's mission is to provide "[t]hose skills building programs [it] can afford,"<sup>265</sup> but U.S. prisons are already underfunded because the government has not been willing to spend impactful amounts of money on behalf of prisoners.<sup>266</sup> Conversely, the cost of housing all of the inmates in the U.S. is \$80 billion a year,<sup>267</sup> but Germany actually spends less money on prisons proportionate to the U.S. because it has fewer inmates.<sup>268</sup> So, while there may be up-front costs, implementing this new program could

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257. *Id.*; Erik Ofgang, *How Scott Semple Helped Turn Connecticut's Prisons Into a Nationally Recognized Laboratory of Reform*, CONN. MAG. (May 21, 2019), <https://www.ctinsider.com/connecticutmagazine/magazine/article/How-Scott-Semple-Helped-Turn-Connecticut-s-17044631.php> [<https://perma.cc/VXR5-STHT>].

258. Farmer, *supra* note 231.

259. Whitaker, *supra* note 6.

260. Ofgang, *supra* note 257.

261. Whitaker, *supra* note 6.

262. Ofgang, *supra* note 257.

263. Whitaker, *supra* note 6.

264. Ofgang, *supra* note 257.

265. *BOP: Agency Pillars*, *supra* note 129.

266. Kleinfeld, *supra* note 27, at 933, 1002.

267. Gavshon & Levine, *supra* note 1.

268. *Id.*

actually be more financially efficient for the U.S. in the long run if reincarceration rates decrease.

Additionally, and perhaps most significantly, another obstacle that the BOP would have to overcome before reforming its prison labor system is public skepticism or backlash. It could be difficult to convince the majority of Americans that a milder penal system can work;<sup>269</sup> “[a]ttitudes and social norms do not instantly adjust to policy shifts; progressive change takes time and effort.”<sup>270</sup> As Pennsylvania Secretary of Corrections John Wetzel noted in his interview with 60 Minutes for its feature on the German prison system, “our culture, we don’t want to think lenient. We don’t want to think soft.”<sup>271</sup> However, in a 2012 poll, a majority of respondents from the American public indicated a belief that too many people are incarcerated, and “an overwhelming majority support[ed] a variety of policy changes that would shift non-violent offenders from prison to more effective, less expensive alternatives to incarceration.”<sup>272</sup> So, Americans might no longer be convinced that “tough on crime” policies are the answer to the problems of mass incarceration and recidivism.

Further, when considering prison labor reform, affording inmates—especially those convicted of violent or otherwise severe crimes—the freedom to work outside of prisons might seem counterintuitive; why would we allow someone who committed a harm against society to return to society? Won’t they just commit additional harm? The German system indicates this may not be the case. Take it from Bernd Junge: while he admittedly could have escaped his furlough, he did not want to; his sentence was almost finished, and he was ready to put his time in prison behind him.<sup>273</sup> In the U.S., if rehabilitative efforts inside BOP facilities—like those already in place under the First Step Act—can give inmates a sense that they are ready to reenter society upon release, they may have no desire to abuse privileges like furlough because they do not want to jeopardize the opportunity to resume their lives outside prison.

Ultimately, despite the obstacles, legislative efforts like the Second Chance Act and First Step Act as well as institutional changes like those made at the Rock are proof that German prison practices are transferable to the U.S., and therefore it is possible for the U.S. to shift to a more rehabilitative form of imprisonment. Accordingly, the U.S. should implement such practices as part of its existing reform effort to prevent recidivism and provide better reentry resources.

## V. CONCLUSION

As shown in Part I, despite recent efforts to do so, the U.S. prison system is ineffective at rehabilitating inmates and preventing them from reoffending and returning to prison. Part II demonstrated that Germany’s focus on resocialization

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269. Whitaker, *supra* note 6.

270. WEST, *supra* note 93, at 3.

271. Gavshon & Levine, *supra* note 1.

272. Subramanian & Shames, *supra* note 11, at 33.

273. Gavshon & Levine, *supra* note 1.

in prisons and its progressive inmate work program provides for much lower recidivism rates than in the U.S. Finally, in Part III, it was concluded that the U.S. should adopt a rehabilitative model of inmate work and training like that of Germany in an effort to better prepare inmates for reintegration after release. Therefore, the BOP should implement inmate work programs like Germany's, including the opportunity for free employment to better rehabilitate the inmates and prepare them for reentry to society, thus improving the inmates' chances of successfully integrating back into the community and refraining from reoffending.