Shadow Sentencing: The Imposition of Federal Supervised Release

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More than 95 percent of people sentenced to a term of imprisonment in the federal system are also sentenced to a term of supervised release. Since it was first established in the late 1980s, nearly one million people have been sentenced to federal supervised release. The human and fiscal costs of this widespread imposition are significant. Supervised release substantially restricts an individual's liberty and people on supervised release receive diminished legal and constitutional protections. The fiscal costs of supervised release are also high, particularly when almost one third of people on supervised release will have their supervision revoked and will return to prison.

Despite the importance of supervised release, little is known about how and why sentencing judges impose supervised release and what purpose it is supposed to serve in the federal criminal justice system. In most cases, supervised release is not mandatory and yet judges consistently fail to exercise their discretion in this area and impose supervised release in virtually all cases. Based on an empirical study of sentencing decisions in the Eastern District of New York, this article uncovers previously unidentified features of supervised release. It finds that judges widely impose supervised release without any apparent consideration of the purpose served by the sentence. This article argues that supervised release is over-used and proposes a new framework for its imposition to ensure that courts only impose supervised release on people who need it.

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INTRODUCTION

In 2006, after pleading guilty to possessing marijuana with intent to distribute, a federal Class D felony, Sylvester Rogers, Jr. was sentenced to six months in prison to be followed by three years of supervised release.[1] After completing his prison term, while serving his sentence of supervised release, Rogers was charged with committing an assault under Missouri law and, based on the alleged assault, was charged in federal court with violating the conditions of his supervision.[2] While the case against him in state court was still pending, the district court found him guilty by a preponderance of the evidence of violating the conditions of his supervised release and revoked his supervised

[1] United States v. Rogers, 543 F.3d 467, 467-68 (8th Cir. 2008). At the time of sentencing, the guideline supervised release range for a Class D felony was two to three years. U.S. SENTENCING GUIDELINES MANUAL § 5D1.2(a)(2) (2006). Supervised release is a form of conditional post-release community supervision similar to parole. *See infra* Part I.

[2] *Rogers*, 543 F.3d at 468.

release. As punishment for the violation, the court sentenced him to 24 months in prison and an additional four years of supervised release.[3] This sentence was upheld on appeal.[4]

Rogers's experience is not unique. Since it was first established in the late 1980s, nearly one million people have been sentenced to supervised release.[5] Between 2005 and 2009, more than 95 percent of people in the federal system sentenced to a term of imprisonment were also sentenced to a term of supervised release.[6] On average, one third of those individuals will have their supervised release revoked, most as a result of technical violations,[7] and receive, on average, a new prison sentence of 11 months.[8] Like Rogers, some will also receive an additional term of supervised release to follow this new sentence.[9]

Despite the high numbers of people sentenced to supervised release, the punishment has been given relatively short shrift by criminal procedure and sentencing scholars.[10] Little is known about how

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[3] *Id.*

[4] *Id.* at 469. Rogers challenged the imposition of the additional four year term as a violation of 18 U.S.C. § 3583(b), which establishes a three year maximum term of supervised release for Class D felonies. However the court found that because the statute under which he was sentenced, 18 U.S.C. § 841(b), authorizes longer terms, the sentencing judge had discretion to impose the longer sentence.

[5] U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 3 (2010), *available at* http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf [hereinafter SUPERVISED RELEASE REPORT].

[6] *Id.* at 50.

[7] *Id.* at 68 (stating that technical violations comprised 56.1 percent of all violations between 2005 and 2008). Technical violations are the least serious category of violation and include failing a drug test and failure to report to a supervising officer. *Id.* at 67. For a more detailed discussing of supervised release conditions, violations, and the revocation process, see *infra* Part I.C.

[8] *Id.* at 63 (citing data from 2008).

[9] U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(g)(2) (2011); *see, e.g.*, United States v. Rogers, 543 F.3d 467, 468 (8th Cir. 2008).

[10] With one recent, notable exception, *see* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013), legal scholars have tended to focus narrowly on the imposition of supervised release conditions. One area of scholarship on this topic examines how judges delegate authority over and enforcement of conditions. *See* Eugenia Schraa, Note, *Delegational Delusions: Why Judges Should Be Able to Delegate Reasonable Authority over Stated Supervised Release Conditions*, 38 FORDHAM URB. L.J. 899 (2011); Anders Sleight, Comment, *Probation Officers' Authority to Determine Conditions of Supervised Release and Restitution Payment: Fair or Foul?* 22 GEO. MASON U. C.R. L.J. 117

supervised release is imposed by judges or how it operates in practice, and there is no consensus on the purpose that it is supposed to serve in the federal criminal justice system. The 1994 observations of a former Chief of Operations for Probation still ring true today: "Supervised release remains the least understood part of the sentencing guideline system."[11]

This article begins to fill that gap in scholarly attention by examining the sentence of supervised release and investigating how and why it is imposed by federal judges.[12] Relying on data collected from an empirical study of sentencing decisions in the Eastern District of New York in 2012 and post-*Booker* data collected by the United States Sentencing Commission (the "Sentencing Commission"), it uncovers previously unidentified features of supervised release. It finds that the widespread imposition of supervised release occurs without any apparent consideration of either an individual's risk to public safety or his or her rehabilitation needs.[13] The article highlights the fact that judges are failing to exercise their discretion not to impose supervised release, and argues that its imposition is massively over-inclusive.

One possible explanation for why supervised release receives so little attention is that both practitioners and scholars tend to focus on the extremely long prison terms recommended by the U.S. Sentencing

(2011). A second area focuses on restrictive conditions for people convicted of sex and child pornography offenses. *See, e.g.*, Gabriel Gillett, Note, *A World Without Internet: A New Framework for Analyzing a Supervised Release Condition that Restricts Computer and Internet Acces*s, 79 FORDHAM L. REV. 217 (2010). In addition, supervised release has received some attention from criminologists. *See, e.g.*, Nancy Beatty Gregoire, *Introduction to the Special Issue on Evidence-Based Practices in Action*, FED. PROBATION, Sept. 2011, at 2 (introducing a special issue focusing on how the U.S. Probation and Pretrial Services System is integrating evidence-based practices into its procedures).

[11] Harold B. Wooten, *Violation of Supervised Release: Erosion of a Promising Congressional Idea into Troubled Policy and Practice*, 6 FED. SENT'G REP. 183, 183 (1994). The Department of Probation is responsible for supervising people serving their supervised release terms. *See also* Doherty, *supra* note 10, at 1020 ("The modern day supervised release system . . . consists of a hodgepodge of amendments and procedures that were cobbled together by different actors over many years.")

[12] Legal issues relating to supervised release arise at a number of stages (from imposition to supervision to revocation). This article focuses on the first stage – the decision of the sentencing court whether to impose supervised release and if so, for how long.

[13] *See infra* Part III.B.

Guidelines.[14] In comparison to those terms, supervised release might appear to be inconsequential.

This is not the case. The costs of supervised release are great and they exacerbate the already significant costs of incarceration,[15] at both the system and individual levels. Supervised release is expensive. The average term of supervised release adds $13,000 to the cost of incarcerating an individual.[16] Moreover, supervised release increases the length of time an individual is placed under the control of the criminal justice system and, like probation, it "substantial[ly] restricts" an individual's liberty.[17] People on supervised release are subject to conditions that control their movements and employment options[18] and

[14] *See, e.g.*, Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography under the Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27 (2013); Eric Holder, U.S. Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) (transcript available at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html) ("[T]oo many Americans go to too many prisons for far too long.")

[15] The costs of mass incarceration are enormous. In addition to the direct fiscal impact on budgets, the costs to individuals, communities, and society at large have been devastating, particularly as average lengths of stay have increased. For information on the fiscal costs of incarceration, *see generally* JOHN SCHMITT ET AL., CENTER FOR ECONOMIC AND POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 10 (2010) (noting the almost $75 billion spent on corrections in 2008 by federal, state, and local governments); PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 3 (2012) (describing an aggregate increase in average lengths of stay of 36% between 1990 and 2009). There is a large and growing body of literature on the impact of mass incarceration at a human and societal level. Good examples include: MICHELLE ALEXANDER, THE NEW JIM CROW (2010); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001) (collecting a series of essays on various aspects of the phenomenon of mass incarceration); PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2003); COUNCIL OF STATE GOVERNMENTS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY (2005), *available at* http://csgjusticecenter.org/wp-content/uploads/2013/04/1694-11.pdf; ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS (2008); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005).

[16] *See infra* notes 138-141 and accompanying text.

[17] *See* Gall v. United States, 552 U.S. 38, 48 (2007).

[18] See *infra* Part I.C. for a discussion of supervised release conditions.

they receive diminished legal and constitutional protections.[19] For example, many are subject to a special condition that requires them to submit to a warrantless search at any time.[20] Further, like Rogers, people may receive significant prison sentences as a result of a revocation of their supervised release based on a finding of guilt by preponderance of the evidence[21] and a hearing without the application of the Federal Rules of Evidence.[22]

Various institutional actors have offered different justifications for these liberty restrictions and diminished protections associated with supervised release. For example, when supervised release was originally proposed, it was intended to serve either a reintegrative or rehabilitative purpose,[23] and most appellate courts, including the Supreme Court, continue to assert that supervised release is not punitive.[24] Yet other appellate courts note its importance in reducing recidivism,[25] and the fact that its imposition is offense-based rather than need-based seems to suggest that protecting public safety is also a purpose of supervised release.[26]

What is not clear however, is why *trial* judges impose supervised release. Except for a few offense types, supervised release is not statutorily mandated; and while the Sentencing Guidelines recommend that it be imposed in the vast majority of cases in which a prison sentence is imposed, the Guidelines themselves are no longer mandatory.[27] Sentencing judges nevertheless appear to be failing to

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19 *See infra* Part II.B.

20 *See infra* notes 157-158.

21 18 U.S.C. § 3583(e)(3).

22 FED. R. EVID. 1101(d)(3).

23 S. REP. NO. 98-225, at 124 (1983). *See infra* Part I.A.

24 *See, e.g.*, Pepper v. United States, 131 S. Ct. 1229, 1248 n.15 (2011) ("Supervised release follows a term of imprisonment and serves an entirely different purpose than the sentence imposed under § 3553(a)." (citing United States v. Johnson, 529 U.S. 53, 59 (2000) ("Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."))); *see also* United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012) ("[T]he primary purpose of supervised release is to facilitate the reentry of offenders into their community, rather than to inflict punishment.")

25 *See, e.g.*, United States v. Jeane, 150 F.3d 483, 485 (5th Cir. 1998) (noting "reducing recidivism" as a purpose served by supervised release).

26 Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT. R. 204, 205 (1994).

27 United States v. Booker, 543 U.S. 220, 222 (2005).

exercise their discretion in this area and continue to impose supervised release in virtually all cases.[28]

Since the 1970s, scholars and judges have debated the proper role of judicial discretion.[29] In the sentencing context, these debates have focused on the role of the Sentencing Guidelines and the extent to which judges' sentencing decisions should be controlled by legislative and administrative determinations.[30] Much of the Sentencing Reform Act [SRA] and the Guidelines they established were aimed at reducing judicial discretion in sentencing.[31] The Supreme Court's decision in *Booker* largely restored this discretion,[32] and despite remaining concerns about the widespread use of mandatory minimum sentences,[33] judges are exercising their discretion, in particular by imposing below-guideline prison sentences.[34] Yet in the area of supervised release, judges still appear to follow the Guidelines without much deviation.

This article explores why judges are failing to exercise discretion in the area of supervised release, and argues that that judges are ill-equipped to make a decision at the time of sentencing as to whether an individual will need supervision when he or she is released from prison at a future date. It highlights research showing that not all individuals need supervision after release from prison and argues that supervised release should be imposed under a new framework that will better

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[28] SUPERVISED RELEASE REPORT, *supra* note 5, at 50.

[29] *See, e.g.*, Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI. L. REV. 947 (2010); Kent Greenawalt, *Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

[30] *See, e.g.*, Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006); Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2006); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

[31] Stith, *supra* note 30, at 1426, 1428; Gertner, *supra* note 30, at 530.

[32] Stith, *supra* note 30, at 1485.

[33] For example in March 2012, Judge John Gleeson criticized the widespread use of mandatory minimum sentences in drug cases. He argued that these terms "sweep reasonable, innovative, and promising alternatives to incarceration off the table at sentencing." United States v. Dossie, 851 F.Supp.2d 478, 478 (E.D.N.Y. 2012); *see also* Holder, *supra* note 14.

[34] *See generally* U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2012) [hereinafter BOOKER REPORT].

differentiate between people who need it (either to protect public safety or assist with reintegration) and those who do not. For these reasons, this article proposes that the decision be made just prior to the release date and with the assistance of an advanced actuarial risk assessment tool that is already being used by the Department of Probation – the Federal Post Conviction Risk Assessment.[35]

Part I reviews the history and development of supervised release and describes the statutory and regulatory framework for its imposition. It highlights the fact that although supervised release was originally intended to be rehabilitative, Congress seems to have abandoned this approach before it was ever implemented. Finally, it discusses the conditions imposed as part of a supervised release term and the violation and revocation processes.

Part II considers the costs of supervised release on individuals and the system as a whole. First, it documents the fiscal costs of supervision, both direct and indirect. Next, it describes the impact that supervised release has on individuals. In particular it notes the restrictions on individual liberty that result from supervision, the diminished legal and constitutional protections that individuals receive at revocation hearings, and the negative impact that supervision conditions can have on an individual's ability to reenter society.

Part III turns to how supervised release is imposed in practice. Relying on data I collected from sentencing decisions in the Eastern District of New York, it concludes that imprisonment dominates the sentencing process and that supervised release sentencing occurs in the shadow of prison sentencing, meaning that judges spend the vast majority of the sentencing hearing focused on imprisonment and only turn to supervised release at the end, almost as an after-thought. It finds that 1) supervised release is imposed on virtually all eligible individuals; 2) there is no discussion and no apparent consideration of the purpose that supervised release is supposed to serve; and 3) judges frequently impose additional special conditions as part of the supervised release sentence, again without any discussion of the purpose those conditions are intended to serve.

Based in part on these findings, Part IV discusses the purposes of supervised release and questions the prudence of a system in which judges make a decision prior to sending someone to prison as to whether

[35] *See infra* Part III.C.

that person will need supervision in the future, once he or she is released. It reviews prior reform proposals and explains in more detail my proposal for reforming supervised release to ensure that only people who need it receive supervision. Specifically it suggests that the Sentencing Guidelines should be amended so that judges impose only a maximum term of supervised release at sentencing. Then, just prior to an individual's release from prison, a trained Probation Officer should administer the Federal Post-Conviction Risk Assessment instrument; the results of this assessment will determine whether an individual will be required to serve a term of supervised release and if so, for how long. This will ensure that informed decisions are made about the imposition of supervised release and should result in a more efficient and just supervised release system. Part IV concludes with a discussion of the feasibility of reform. It reviews the recent turn in state corrections towards budget conscious criminal justice reform and suggests that the time is ripe for Congress to begin thinking about reforms to the federal criminal justice system. Parole reform has been the starting point in many states, at least in part because it is generally less controversial than prison reform. In addition, relatively small changes to parole can have a significant impact on both parole and prison populations and thus on corrections budgets.[36] For these reasons, supervised release might be a good place to start for those seeking broader federal criminal justice reforms.

I. From Parole to Supervised Release

A. The Origins of Supervised Release

For much of the twentieth century, sentencing in the federal system operated under an indeterminate model in a manner similar to that of most states. In an indeterminate sentencing system, the statute would specify a maximum penalty but the judge had discretion in terms of the type and length of sentence to impose.[37] Generally he or she would impose a range of years (e.g. three to eight years) but, once the minimum sentence was served, the actual release date would be

[36] *See, e.g.*, COUNCIL ON STATE GOV'TS, JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE 8 (2009) (describing a 25 percent reduction in parole revocations to prison as a result of parole reform).

[37] Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 492 (1999).

determined by a parole board, which had the discretion to make a determination as to whether an individual had been rehabilitated and was ready for release.[38]

After release, an individual was to be supervised in the community by a parole officer at most until the original sentence expired. In effect, the individual was serving part of his or her sentence in the community. This system was based on the rehabilitative ideal, "a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society."[39] Although rehabilitation was the primary purpose of parole, most systems also emphasized the importance of public safety.[40] The federal parole system did not differ significantly from most state parole systems.[41]

Across the United States, beginning in the 1970s, indeterminate sentencing and the rehabilitative ideal came under attack from a number of fronts,[42] in part based on apparent evidence that rehabilitation programs were ineffective and failed to reduce recidivism.[43] In the

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[38] DON STEMEN ET AL., VERA INST. OF JUSTICE, OF FRAGMENTATION AND FERMENT: THE IMPACT OF STATE SENTENCING POLICIES ON INCARCERATION RATES, 1975-2002, at 9 (2005). In the federal system, rather than imposing a range of years, judges imposed a specific term of years up to the maximum authorized by statute. *See* Barbara Meierhoefer Vincent, *Supervised Release: Looking for a Place in a Determinate Sentencing System*, 6 FED. SENT'G REP. 187, 187 (1994) ("Each sentence . . . was actually a range of months, anchored at the high end by the 'mandatory release date' (the sentence imposed less earned good time) and at the low end by the parole eligibility date, which could be set by the court to fall anywhere between zero months and one-third of the sentence imposed."); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

[39] Mistretta v. United States, 488 U.S. 361, 363 (1988).

[40] *See generally* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 (1993).

[41] *See also* Doherty, *supra* note 10, at 987-90 (discussing the development of federal parole from 1910 to 1972). *See generally* PETER B. HOFFMAN, U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM (2003), *available at* https://www.ncjrs.gov/pdffiles1/Archive/202937NCJRS.pdf.

[42] *See generally* FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981); Kevin Reitz, *Sentencing*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT (Michael Tonry ed., 1998).

[43] Robert Martinson, *What Works? Questions and Answers about Prison Reform*, PUB. INT., Spring 1974, at 22; DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 20 (1975).

federal system there were two main criticisms of the existing system:[44] variation in sentences given to people "with similar histories, convicted of similar crimes, committed under similar circumstances,"[45] and uncertainty as to how long a particular individual would actually spend in prison.[46]

Aimed at rationalizing sentencing and addressing these concerns, the solution proposed by Congress was the Sentencing Reform Act [SRA].[47] Passed in 1984, the SRA had two purposes: to ensure "honesty in sentencing" and to "reduce 'unjustifiably wide' sentencing disparity."[48] The SRA essentially abolished indeterminate sentencing and parole release. It established the United States Sentencing Commission and directed it to come up with guidelines to be used for sentencing; these guidelines were intended to establish a range of determinate sentences based on categories of offenses and characteristics of defendants.[49]

To replace parole release and supervision, the SRA established supervised release. Unlike parole, which cut short an individual's prison sentence allowing them to serve the remainder in the community, supervised release was an additional, separate order that could be imposed in cases where a prison sentence was also imposed.[50] "[I]t was intended to replace parole except that it was to be based on the needs of the defendant rather than on the time left on the original sentence."[51] As initially enacted, the main purpose of supervised release was rehabilitation. It was designed "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release."[52]

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44 *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES WITHOUT ORDER (1973).

45 S. REP. NO. 98-225, at 38 (1983).

46 *Id.* at 56; Frankel, *supra* note 44, at 86.

47 Sentencing Reform Act of 1984, Pub L. No. 98-473, 98 Stat. 1987. Earlier efforts at reforming federal parole failed to satisfy critics of the discretion of the paroling authorities. *See* Doherty, *supra* note 10, at 993.

48 Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

49 *Id.* at 5.

50 U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A(2)(b) (2011).

51 Biderman & Sands, *supra* note 26, at 204.

52 S. REP. NO. 98-225, at 124 (1983).

Only deterrence and treatment were originally specified as purposes for courts to consider when imposing supervised release.[53] Supervised release was not intended to be imposed for the purposes of punishment or incapacitation, "since those purposes will have been served to the extent necessary by the term of imprisonment."[54] For this reason, Congress initially declined to provide for the possibility of revocation, stating that "it does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant."[55] Instead, compliance with the conditions of supervised release would be enforced through the use of contempt proceedings, but only "after repeated or serious violations of the conditions of supervised release."[56] If an individual committed a new crime, then new charges should be filed.[57]

However, as a result of changes in the political climate,[58] and "skepticism from probation officers and prosecutors,"[59] that approach soon changed. Before the SRA even took effect, Congress passed the Anti-Drug Abuse Act of 1986.[60] This Act provided for mandatory terms of supervised release for certain drug offenses, and amended the supervised release statute, establishing revocation and reimprisonment for violations of supervised release conditions.[61] "From 1987 onward, the primary purpose of supervised release has been to protect the community from an offender presumed to be dangerous."[62] Supervised

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53 Meierhoefer Vincent, *supra* note 38, at 187.

54 S. REP. NO. 98-225, at 125 (1983).

55 *Id.*

56 *Id.* For a discussion of the mechanisms of contempt proceedings, see Doherty, *supra* note 10, at 1000.

57 S. REP. NO. 98-225, at 125.

58 Biderman & Sands, *supra* note 26, at 204-05.

59 Editors' Notes, *Supervised Release*, 6 FED. SENT'G REP. 182 (1994); s*ee also* Meierhoefer Vincent, *supra* note 38, at 188 ("[N]either judges nor prosecutors were accustomed to the need for such time-consuming [contempt] proceedings . . . . The resulting concern was that . . . some offenders would violate the conditions of supervised release with impunity, with the officer helpless to do much about it expect move to have yet more conditions imposed with little help of compliance."); *see also* Doherty, *supra* note 10, at 1000 (discussing a position paper written by Benjamin F. Baer, chair of the U.S. Parole Commission, criticizing the contempt mechanism).

60 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

61 *Id.*, § 1006, at 3207-6 to -7; *see also* Biderman & Sands, *supra* note 26, at 204-05. For a discussion of supervised release conditions as well as the revocation process, see *infra* Part I.C.

62 Biderman & Sands, *supra* note 26, at 205.

release as originally envisaged by the SRA was never implemented, and rather than being need-based, as will be discussed in the next section, its imposition became offense-based.

B. The Imposition of Supervised Release

Unlike many states that abolished discretionary parole, Congress declined to make supervised release mandatory. With the exception of a few categories of crime, described below, the decision to impose supervised release was left to the sentencing court. Although Congress originally anticipated that the only people who would receive a sentence of supervised release would be "those, and only those, who need […] it,"[63] as discussed below, virtually every eligible federal defendant receives a term of supervised release.[64] Both the imposition and length of this term are based not on any perceived needs of a defendant, but purely on the classification of the original offense.[65] Until recently, even criminal history played no role in these decisions.[66]

There are two ways in which supervised release can be imposed. First, it is mandated by statute for certain offenses, most commonly in drug trafficking, sex, and domestic violence cases.[67] The minimum terms required in these cases range from one year to life and usually a maximum term of life is possible.[68] Cases where supervised release is statutorily mandated make up fewer than half of federal cases.[69]

Second, in all other cases, 18 U.S.C. 3583(a) gives sentencing courts *discretion* to impose a term of supervised release in felony or misdemeanor cases where it has imposed a term of imprisonment.[70] In

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[63] Johnson v. United States, 529 U.S. 694, 709 (2000).

[64] SUPERVISED RELEASE REPORT, *supra* note 5, at 50.

[65] Biderman & Sands, *supra* note 26, at 205.

[66] UNITED STATES SENTENCING GUIDELINES § 5D1.1 cmt. n.3(B) (2011) (amended November 1, 2011). *See infra* notes 85-87 and accompanying text.

[67] *See, e.g.*, 21 U.S.C. §§ 841(b), 960(b) (2012) (setting out mandatory minimum terms of one to ten years for defendants convicted of certain drug offenses). *See generally* SUPERVISED RELEASE REPORT, *supra* note 5, nn. 19-22. There are some circumstances in which a defendant can obtain relief from the application of these mandatory terms. For example, in drug-trafficking cases, if the "safety valve," 18 U.S.C. § 3553(f), applies a judge may decline to impose the otherwise mandatory supervised release term. *See* U.S. SENTENCING GUIDELINES MANUAL §5D1.2, cmt. nn.2-3.

[68] SUPERVISED RELEASE REPORT, *supra* note 5, at 6.

[69] *Id.* at 3.

[70] "The court, in imposing a sentence to a term of imprisonment for a felony of

determining whether to impose such a term and if so, how long that term should be, the sentencing court must consider most of the same 3553(a) factors considered by the court when determining whether to impose a sentence of imprisonment.[71] These factors include "the nature and circumstances of the offense and the history and characteristics of the defendant,"[72] deterrence,[73] protecting the public,[74] treating the defendant,[75] the Sentencing Guidelines,[76] the need to avoid "unwarranted sentence disparities,"[77] and restitution.[78]

The only 3553(a) factor that a court is not supposed to consider is the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[79] The reason for this, as courts have explained is that supervised release is not supposed to punish an individual but instead is intended to provide rehabilitation or reintegration.[80] However, only one of the remaining factors explicitly relates to rehabilitation: "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[81]

Although just one of the factors to be considered by the Court, the Sentencing Guidelines largely govern the sentencing process, including the imposition of supervised release.[82] The Guidelines advise that a term "shall" be imposed in all felonies where a term of

misdemeanor, *may* include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. § 3583(a) (2012) (emphasis added).

[71] *Id.* § 3583(c). The statute does not appear to require a court to *expressly* consider these factors when imposing a supervised release sentence so long as it has already done so with respect to the prison sentence. *See* United States v. O'Georgia, 569 F.3d 281, 289 (6th Cir. 2009); SUPERVISED RELEASE REPORT, *supra* note 5, at 8.

[72] 18 U.S.C. § 3553 (2012)

[73] *Id.* § 3553(a)(2)(B).

[74] *Id.* § 3553(a)(2)(C).

[75] *Id*. § 3553(a)(2)(D).

[76] *Id.* § 3553(a)(4).

[77] *Id*. § 3553(a)(6).

[78] *Id.* § 3553(a)(7).

[79] *Id.* § 3553(a)(2)(A).

[80] *See, e.g.*, United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012).

[81] 18 U.S.C. § 3553(a)(2)(D).

[82] *See* Pepper v. United States, 131 S. Ct. 1229, 1241 (2011) (reviewing its post-Booker decisions in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), and noting that the Guidelines are the starting point but that other statutory concerns could also be taken into consideration).

imprisonment of more than one year is imposed.[83] They also provide for an optional term of supervised release in Class A misdemeanor and felony cases where a prison sentence of less than one year is imposed.[84]

In determining whether to impose a term of supervised release, the Guidelines require the court to consider the statutory 3553 factors as well as two additional factors: a defendant's criminal history[85] and substance use history.[86] The Guidelines note that "the more serious the defendant's criminal history, the greater the need for supervised release"[87] and highly recommend that supervised release be imposed in cases where the defendant is "an abuser of controlled substances or alcohol."[88] There is just one category of defendants for which courts are "ordinarily" advised not to impose a term of supervised release: where "the defendant is a deportable alien who likely will be deported after imprisonment."[89]

The Guidelines also regulate the length of a term of supervised release. Minimum terms are either one or two years depending on the offence level; maximum terms generally range from one to five years, but may be higher depending on the type of offense and if there is a higher maximum term specified in the operating statute.[90] The same factors to be used in determining whether a sentence of supervised release is to be imposed are to be used in determining the length of a

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[83] U.S. SENTENCING GUIDELINES MANUAL § 5.D1.1(a) (2011).

[84] *Id.* § 5.D1.1(b).

[85] *Id.* § 5.D1.1, cmt. n.3(B). This factor was added to the Guidelines in 2011 as a result of the Commission's 2010 report on supervised release. SUPERVISED RELEASE REPORT, *supra* note 5. The report found that people in the lowest criminal history category were far less likely to violate a condition of their release and have their supervision revoked.

[86] U.S. SENTENCING GUIDELINES MANUAL § 5.D1.1, cmt. n.3(C). This factor was also added in 2011 but its origins are not addressed in the Application Note and there was nothing in the 2010 report on the impact of substance abuse on an individual's ability to successfully complete supervised release.

[87] *Id.* § 5.D1.1, cmt. n.3(B).

[88] *Id.* § 5.D1.1, cmt. n.3(C).

[89] *Id.* § 5.D1.1(c). This provision is another recent amendment to the Guidelines and was added in 2011 based on the Commission's determination that the "high rate [91 percent] of imposition of supervised release for non-citizen offenders is unnecessary because 'recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.'" U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 82 (2011) (citing Padilla v. Kentucky, 559 U.S. 356, 366 (2010)); *see also* Thomas Nosewicz, *Watching Ghosts: Supervised Release of Deportable Defendants*, 14 BERKELEY J. CRIM. L. 105 (2009).

[90] U.S. SENTENCING GUIDELINES MANUAL § 5D1.2(a)(2).

term of supervised release.[91]

While the court has the ultimate discretion to determine the appropriate sentence, to assist the court in doing so, "the probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence."[92] With respect to the supervised release portion of the sentence, the Department of Probation's own guidelines require that the Pre-Sentence Investigation Report [PSR] address:[93] "(1) the need for any term of supervision to be imposed; (2) the length of any term of supervision; and (3) the types of conditions, if any, needed to address identified risks or needs."[94] However, it appears that to address the first item, all the Probation Officer needs to do is determine whether a term is required either by statute or by the Guidelines.[95]

Only in cases where a term is not mandated by statute or required by the Guidelines is Probation required to engage in an individualized evaluation of the need for a term.[96] In these cases, the decision whether or not to recommend a term of supervision "should be based on a careful evaluation of all the circumstances in the individual case."[97] More specifically, the officer "should assess whether a term of supervision is necessary" by considering "the risks the defendant poses to community safety, and whether supervision can effectively reduce those risks."[98]

If the Probation Officer does recommend supervised release, he or she is also required to assess the length of the term to be imposed. The Probation guidelines emphasize that punishment is not a justification for a term longer than the minimum period and prescribes that the length of the term "should be based on the applicable law and a

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[91] *Id.* § 5D1.2, cmt. n.4.

[92] FED. R. CRIM. P. 32(c)(1)(A).

[93] PSRs are reports completed by probation officers to help judges make their sentencing decisions. They contain information about the offense as well as sensitive material about the defendant's background and his or her friends and family. Because of privacy concerns with this information, as discussed in Part III, the PSRs are not posted on the public docket and were thus not available to me for this study.

[94] ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 107, THE PRESENTENCE INVESTIGATION REPORT, at V-7 (2006).

[95] *Id.*

[96] *Id.*

[97] *Id.* at V-8.

[98] *Id.* at V-7 to V-8.

careful evaluation of all the circumstances in the individual case."[99]

C. Supervised Release: Conditions and Revocation

Similar to probation and parole, supervised release subjects people to an extensive list of conditions with which they must comply or risk revocation and reimprisonment.[100] Section 3583(d) requires courts to set certain conditions of supervision, including a prohibition on the possession of a controlled substance and a prohibition on committing a new crime.[101] It also requires the court to impose specific conditions on defendants convicted of specific crimes. For example, an individual convicted for the first time of a domestic violence offense must be required to attend an approved rehabilitation program.[102] These required conditions along with several other conditions relating to the obligations of defendants to pay court-ordered fines and restitution are also set out in the Sentencing Guidelines as "mandatory conditions."[103]

In addition to these conditions, however, the statute also gives courts wide discretion to order any other condition[104] as long as the condition is "reasonably related" to the factors that courts are required to consider when imposing supervised release,[105] "involves no greater deprivation of liberty than is reasonably necessary" for those factors, and is consistent with Sentencing Commission policy statements.[106]

The Sentencing Guidelines contain an expansive list of conditions that may be imposed on defendants. As well as the "mandatory conditions" described above, there is a list of 15 "standard" conditions that the Commission recommends be imposed.[107] These include reporting requirements,[108] employment requirements,[109] and

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[99] *Id.* at V-8.

[100] *See generally* 18 U.S.C. § 3583(d) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 (2011).

[101] 18 U.S.C. § 3583(d).

[102] *Id.*

[103] U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(a).

[104] 18 U.S.C. § 3583(d) (referring to conditions "set forth as a discretionary condition of probation" as well as other "appropriate" conditions).

[105] *Id.* For a list of these factors, see *supra* notes 72-79 and accompanying text.

[106] *Id.*

[107] U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(c).

[108] *Id.* § 5D1.3(c)(2)-(3).

[109] *Id.* § 5D1.3(c)(5).

association restrictions.[110] The Guidelines also set out seven "special" conditions that are "recommended" under certain specified circumstances but may also be imposed in other cases "where appropriate."[111] For example, in all felony cases, a condition prohibiting the defendant from possessing a weapon should be imposed.[112] Finally, there are six "additional" conditions that "may be appropriate on a case-by-case basis."[113] These include a curfew and occupational restrictions.[114]

Courts review conditions under the plain errors standard and, for the most part, uphold the most commonly challenged conditions. For example, all circuits that have addressed the issue have rejected defendants' arguments that a requirement to submit a DNA sample violates the Fourth Amendment.[115] Conditions that restrict defendants' rights to work, travel, and generally engage in otherwise legal activity tend to be upheld as long as the restrictions are narrow and further a valid sentencing goal.[116]

Violations of any of these conditions can result in the revocation of an individual's supervised release.[117] There are three types of violations: Grade A violations include conduct amounting to a serious criminal offense, for example a crime of violence;[118] Grade B violations include most other criminal offenses punishable by a prison term of a year or more;[119] Grade C violations, often referred to as "technical

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[110] *Id.* § 5D1.3(c)(9).
[111] *Id.* § 5D1.3(d).
[112] *Id.* § 5D1.3(d)(1).
[113] *Id.* § 5D1.3(e).
[114] *Id.* § 5D1.3(d)(5)-(4).
[115] *See, e.g.*, United States v. Kriesel, 508 F.3d 941, 946-47, 950 (9th Cir. 2007) (holding that a "convicted felon" has "diminished privacy interests" that are outweighed by the government's "significant" interest in "identifying supervised releases, preventing recidivism, and solving past crimes"); *see also* United States v. Sczubelek, 402 F.3d 175 (3d Cir. 2005).
[116] *See generally* SUPERVISED RELEASE REPORT, *supra* note 5, at 15-17. There is a significant body of case-law challenging conditions specific to people convicted of sex offenses. This paper does not deal with this area. For an effective survey of the law in this area, see Brett M. Shockley, *Protecting Due Process from the Protect Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 WASH. & LEE L. REV. 353 (2010).
[117] *See generally* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A; *id.* § 7B1.3(a).
[118] *Id.* § 7B1.1(a)(1).
[119] *Id.* § 7B1.1(a)(2).

violations," include minor criminal activity (punished by less than a year in prison) and violation of any other condition of supervision.[120]

Probation Officers are required to report both Grade A and B violations to the court[121] but if they determine that a Grade C violation is minor and that failing to report "will not present an undue risk to an individual or the public" they do not need to report the violation.[122] Upon the filing of a violation report, the Court holds a revocation hearing.

If the Court finds that a defendant has violated a condition of supervised release, it has two options. It can either continue the defendant on supervised release (with or without extending the term or modifying any conditions) or revoke supervised release and impose a term of imprisonment.[123] If supervision is revoked, the term of imprisonment that can be imposed ranges from 3 to 63 months depending on the violation grade and the criminal history category of the defendant, unless there is an applicable statute requiring a higher or lower sentence, as there was in *Rogers* for example.[124] The Commission recommends that this sentence run consecutively to any other term of imprisonment being served by the defendant or imposed after revocation.[125] In addition, the court may require the defendant to serve an additional term of supervised release upon release from prison.[126]

II. The Impact of Supervised Release

Until recently, the growth in the United States prison population over the last thirty years had been steady and dramatic.[127] In the last

[120] *Id.* § 7B1.1(a)(3).
[121] *Id.* § 7B1.2(a).
[122] *Id.* § 7B1.2(b).
[123] *Id*. ch. 7, pt. A. 2(b). Courts cannot impose or lengthen a revocation sentence "to enable an offender to complete a treatment program or otherwise to promote rehabilitation" in prison. United States v. Deen, 706 F.3d 760, 768 (6th Cir. 2013) (quoting Tapia v. United States, 131 S.Ct. 2382, 2393 (2011)).
[124] U.S. SENTENCING GUIDELINES MANUAL § 7B1.4.
[125] *Id.* § 7B1.3 cmt. n.4.
[126] *Id.* § 7B1.3(g)(2) ("The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.").
[127] In 1972, the imprisonment rate was 95.5 per 100,000 U.S. residents; by 2009 it had reached 506 per 100,000. Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM.

three years, however, there have been indications of a shift in this overall trend. In 2010, the United States state prison population declined for the first time since 1972,[128] and this decline continued in 2011.[129] During this time, however, the federal prison population has continued to increase: between 2010 and 2011, while the state prison population dropped by 1.5 percent, the federal prison population increased by 3.1 percent.[130] This continues a pattern evident in recent years whereby the federal prison population has grown significantly faster than state prison populations: Since 2000, the aggregate state prison population has grown at an average annual rate of 1.1 percent, while the federal prison population has grown at an average annual rate of 3.3 percent.[131] The federal prison population is projected to continue to increase through 2020.[132]

The different directions being taken by state and federal prison populations are mirrored in the number of people under parole or post-prison supervision.[133] While the number of people on state parole or post-prison supervision increased by 1.1 percent in 2011, the number of people on federal supervised release increased by 5.1 percent.[134] Supervised release is imposed on the vast majority of people sentenced to prison in the federal system. Between 2005 and 2009, 313,366 individuals[135] were sentenced to prison; more than 95 percent of them (297,959) were also sentenced to a term of supervised release.[136] Excluding individuals sentenced to life terms of supervised release, the

L. & CRIMINOLOGY 1225, 1230 (2010).

[128] PAUL GUERINO ET. AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 1 (2011) (describing an overall decrease of 0.5 percent).

[129] E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 1 (2012) (describing an imprisonment rate of 492 per 100,000).

[130] *Id.* at 2.

[131] *Id.*

[132] U.S. GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 12 (2012).

[133] *See* LAURA M. MARUSCHAK & ERIKA PARKS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2011 (2012).

[134] *Id.* at 7.

[135] SUPERVISED RELEASE REPORT, *supra* note 5, at 49-50. Four hundred and fifty-one individuals sentenced to prison were excluded due to missing data on the imposition of supervised release.

[136] *Id.*

average term of supervised release was 41 months.[137] As this section shows, the impact of these high numbers is great, in terms of both costs to the federal criminal justice system and the effect on individuals.

A. The Fiscal Costs of Supervised Release

In Fiscal Year 2010, it cost $10.79 per day to supervise an individual on supervised release.[138] This compares with $77.49 to keep someone in a federal prison.[139] Although the direct costs of supervised release are clearly not as great as incarceration costs, given that everyone on supervised release has already served a prison sentence, the costs of supervised release exacerbate the already high costs of incarceration. For example, using the average length of a supervised release term between 2005 and 2009—41 months,[140] supervised release would add an estimated additional cost of over $13,000 to the cost of prison.[141]

In addition to the direct supervision costs, additional costs include the administrative costs of revoking supervised release. For example, revocation and sentencing hearings must be held for the almost one-third of people who fail to successfully complete their terms of supervised release.[142] These costs are spread among a variety of federal agencies including the Administrative Office of the United States Court (the Department of Probation, the Federal Courts, and the Office of Defender Services) and the Department of Justice (the United States Attorneys). Finally, there are the additional prison costs,[143] for those sent back to prison (for an average term of 11 months) and further supervision costs for those defendants sentenced to a recommenced term of supervised release.[144]

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[137] *Id.* at 50. As the Commission points out, because life terms are excluded, the average length of supervised release terms is likely higher. *Id.* at n.234.

[138] *Newly Available: Costs of Incarceration and Supervision in FY 2010,* THIRD BRANCH NEWS (June 23, 2011), http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx.

[139] *Id.*

[140] SUPERVISED RELEASE REPORT, *supra* note 5, at 50.

[141] $10.79*30.4*41 = $13,449 (using an average of 30.4 days per month).

[142] SUPERVISED RELEASE REPORT, *supra* note 5, at 61.

[143] One author has estimated that the average prison sentence on a revocation costs approximately $26,000. Doherty, *supra* note 10, at 1016.

[144] SUPERVISED RELEASE REPORT, *supra* note 5, at 69.

B. The Effect of Supervised Release on Individuals

Supervised release, particularly its conditions, can also have a severe impact on individuals. Although the Supreme Court has described supervised release conditions as "transition assistance,"[145] these conditions can "substantially restrict" the freedom of an individual subject to them.[146] Describing probation conditions (which are virtually identical to supervised release conditions),[147] the Court in *Gall* noted:

> Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony and refrain from excessive drinking. Most probationers are also subject to individual "special conditions" imposed by the court. Gall, for instance, may not patronize any establishment that derives more than 50% of its revenue from the sale of alcohol, and must submit to random drug tests as directed by his probation officer.[148]

While some conditions, including attendance at a drug or alcohol treatment program, do appear to be aimed at assisting the individual on supervised release, many do not. For example, all individuals on supervised release who were convicted of a felony offense are required by statute to provide a DNA sample,[149] while some can be restricted from engaging in certain occupations.[150] Another commonly imposed condition is the finance condition, which requires a defendant "to provide the probation officer access to any requested financial information" in cases where restitution, forfeiture, or a fine has been imposed.[151]

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[145] United States v. Johnson, 529 U.S. 53, 60 (2000).

[146] Gall v. United States, 552 U.S. 38, 58 (2007); *see also* Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 441, 448-450 (2011) (finding that some supervision conditions can inhibit the successful reentry of people on parole).

[147] *Compare* 18 U.S.C § 3583(d) (2012), *and* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 (2011) (listing the conditions of supervised release), *with* 18 U.S.C. § 3563 (2012), *and* U.S. SENTENCING GUIDELINES MANUAL § 5B1.3 (describing the conditions of probation).

[148] *Gall*, 552 U.S. at 48-49 (citations omitted).

[149] 18 U.S.C § 3583(d) (2012); 42 U.S.C. § 14135a(a)(2) (2011).

[150] U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(e)(4).

[151] *Id.* § 5D1.3(d)(3). Although a clear intrusion into the defendant's privacy, courts have generally upheld this and other financial conditions. *See* SUPERVISED RELEASE

While these conditions may have a legitimate public safety purpose, it is hard to see how they assist an individual in transitioning to the community. In addition, despite the Supreme Court's characterization of conditions as "transition assistance," appellate courts do not need to consider whether a particular condition has an impact on an individual's reentry.[152] It suffices that the sentencing court has stated that a special condition it is imposing has a rehabilitative purpose.

Some argue that supervision conditions like these make the successful completion of community supervision more difficult. As Jacobson puts it:

> Given all the social, economic, and health deficits of those coming out of prison, it becomes less than surprising that so many parolees are sent back to prison for rule violations. When one combines these problems with conditions that are routinely set for parole—no drug use, having a permanent address, having or actively seeking employment, keeping reporting and treatment appointments—a recipe for failure results."[153]

At a more general level, there is little empirical evidence that post-prison supervision either improves public safety or advances reintegration.[154] Although limited, national data on recidivism that consider supervision status indicate that people released from prison without any supervision are no more likely to commit new crimes than people released to parole or post-prison supervision.[155] Moreover, qualitative research that investigates the impact of parole on reentry suggests that parole supervision fails to help people reenter society and indeed can sometimes hinder the reentry process.[156]

Individuals on supervised release may also receive diminished legal and constitutional protections both while on supervised release and during the revocation process. A common special condition is the "search condition" which gives probation officers the ability to search

REPORT, *supra* note 5, at 13-14 & nn.67-68.

[152] *See supra* notes 115-116 and accompanying text.

[153] MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 150 (2005).

[154] *See generally* Scott-Hayward, *supra* note 146.

[155] *Id.* at 441-43.

[156] *Id.* at 443-50; *see also* Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339, 345 (2009); Jacqueline Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle, Washington*, FED. PROBATION, June 1997, at 12, 16.

individuals and their property without the Fourth Amendment requirements of probable cause or a warrant.[157] Courts have upheld these conditions and also upheld warrantless searches without a condition specifically authorizing them, on the basis that people on supervised release have a diminished expectation of privacy.[158]

Further, while defendants have the right to counsel at supervised release revocation proceedings,[159] the exclusionary rule does not apply,[160] and most of the protections generally afforded to defendants at criminal trials do not apply to defendants at their revocation hearings. For example, as evidenced in *Rogers*, people on supervised release may be convicted of violating their supervised release and sent back to prison, for conduct that may or may not be criminal, based simply on a finding of the preponderance of the evidence.[161] The Federal Rules of Evidence do not apply[162] and hearsay is generally admissible as long as it is reliable.[163]

Finally, if the conduct for which his or her supervised release is revoked can be charged as a new crime, particularly a state crime, an individual may in effect be punished twice for the same act.[164] In

[157] U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(d)(7)(C) (2011). Although this condition is only specifically provided for those convicted of sex offenses, it is often imposed by courts for other individuals. SUPERVISED RELEASE REPORT, *supra* note 5, at 18-20.

[158] *See, e.g.*, United States v. Betts, 511 F.3d 872, 876 (9th Cir. 2007) (citing Samson v. California, 547 U.S. 843 (2006) (noting that people on parole have fewer protections than people on probation)).

[159] 18 U.S.C. § 3006A(a)(1)(E) (2012).

[160] *See, eg.*, United States v. Charles, 531 F.3d 637, 640 (8th Cir. 2008).

[161] 18 U.S.C. § 3583(e)(3) (2012).

[162] *See* FED. R. EVID. 1101(d)(3) (providing that the Rules do not apply to sentencing hearings or the granting or revocation of probation); United States v. Walker, 117 F.3d 417 (9th Cir. 1997) (holding that the Rules do not apply to supervised release revocations because supervised release is akin to probation and parole); *see also* United States v. Bari, 599 F.3d 176, 179 (2d Cir. 2010) ("Although we conclude that the Federal Rules of Evidence do not apply with their normal force in supervised release revocation hearings, the Rules nevertheless provide some useful guidelines to ensure that any findings made by a district court at such hearings are based on 'verified facts' and 'accurate knowledge.'").

[163] SUPERVISED RELEASE REPORT, *supra* note 5, at n.182 (discussing cases).

[164] Any time served in prison as a result of the revocation is attributed to the original offense of conviction and therefore there are no double jeopardy issues. Johnson v. United States, 529 U.S. 694, 700 (2000) ("Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of the supervised release were also

addition, if an individual is prosecuted for a new crime, the fact that the behavior occurred while he or she was on supervised release can lead to a higher sentence.[165]

III. Supervised Release in the Eastern District of New York: A Case-Study

The data collected and analyzed by the United States Sentencing Commission provide a valuable insight into the prevalence of supervised release nationwide, including rates of imposition, lengths of terms, and termination and revocation of supervised release.[166] However the Commission's Supervised Release report is limited in a number of ways. For example, data on the imposition of conditions are not available,[167] and the quantitative analyses conducted by the Commission provide little insight into how and why judges impose supervised release. In order to gain a deeper and richer understanding[168] of how supervised release is imposed, I conducted a case study of sentencing hearings in one United States district.

Limited quantitative analyses were conducted to ascertain whether the overall data on the imposition of supervised release in the Eastern District followed national patterns and to examine the imposition of special conditions of supervision. However, the focus of the study was on investigating how judges think about and impose supervised release; thus the bulk of the analysis is qualitative. This section describes the case-study and its findings. Overall, the study shows that the dominant focus of sentencing hearings is the decision whether or not to impose a prison sentence and if so, how long the prison term should be. Across the board, supervised release sentencing occurred in the shadows of prison sentencing.

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punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.")

[165] U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (2011) (advising the Court to add two points to the defendant's criminal history category if the defendant committed the instant offense while under supervised release); *see, e.g.,* United States v. Morales, No. 11–1109–cr, 2012 WL 4215888 (2d Cir. Sept. 21, 2012).

[166] SUPERVISED RELEASE REPORT, *supra* note 5, at 49-69.

[167] *Id.* at 49.

[168] Sidney Tarrow, *Bridging the Quantitative-Qualitative Divide in Political Science*, 89 AM. POL. SCI. REV. 471, 472 (1995) (discussing how qualitative research can complement quantitative research).

A. The Study

For almost three months, between February 3 and April 30, 2012, I collected data on all sentencing hearings that took place in the Brooklyn courthouse of the Eastern District of New York. The Eastern District is one of the busiest districts in the federal system. In addition, unlike many other districts, it publishes a daily public calendar, listing all scheduled hearings by type. This made it possible to identify all scheduled sentencing hearings and enabled the creation of a comprehensive dataset of hearings that took place during the time period. I collected case data, observed hearings, and reviewed transcripts, sentencing memoranda, judgments, and other sentencing related documents where available. The only relevant documents that were not available were the Pre-Sentence Investigation Reports [PSR], which are not posted on the public docket due to the sensitive material they contain.

In total, 178 sentencing hearings took place during the study period.[169] The records for two of the cases were sealed leaving 176 cases in the dataset.[170] In 155 of these cases, the defendant was sentenced to a term of imprisonment;[171] the findings presented below are based on these 155 cases. Of this sub-total, I attended 18 hearings in person and reviewed the transcripts of 20 additional hearings,[172] totaling 38 cases

[169] Some hearings involved multiple defendants; however each individual defendant is sentenced separately and so is classified separately.

[170] There was one additional case that was sealed, but because I attended the sentencing hearing and thus have some information on the case, it is included in the dataset.

[171] This includes sentences of time served. One defendant, who was charged with violating the conditions of his supervision had his supervision conditions modified but did not receive any prison time or any additional supervised release. The remaining 20 defendants were sentenced to probation.

[172] My goal was to review the transcripts of all sentencing hearings that I was not able to attend in person. However, not all transcripts were posted on the case docket and where the transcript was not available, it had to be purchased directly from the court reporter. Obtaining transcripts for all hearings would have been cost-prohibitive and therefore I obtained a stratified sample of hearing transcripts. I sought variation on two fronts. First, in whether or not supervised release was imposed. Because supervised release was *not* imposed in so few cases, I obtained transcripts for all nine of those cases. Second, because the questions I was seeking to answer related to the decision-maker, I tried to obtain transcripts from cases presided over by as many judges as possible. In the end, 13 of the 17 sitting judges were represented in my sample of hearings to be analyzed.

for which the hearing itself could be analyzed.[173]

B. Findings

The sentencing of a defendant generally follows the same pattern.[174] When the PSR is completed by the assigned probation officer, it is given to the judge and shared with both parties. As discussed above, the PSR contains information about the defendant's background, the circumstances of the offense, and other relevant issues. It includes a calculation of the sentence range under the Sentencing Guidelines. The defense attorney is responsible for reviewing the PSR with the defendant. Next, each party generally submits a sentencing memorandum to the court containing its position on the appropriate sentence. These memoranda often contain objections to information contained or conclusions drawn in the PSR. In some cases a revised PSR is prepared; in other cases the judge officially amends the PSR on the record during the sentencing hearing.

Although judges have different ways of structuring the sentencing hearing, they generally begin by reviewing, on the record, the materials they have received and on which the sentence will be based. Next, they usually move to a discussion of what the recommended prison sentence should be under the guidelines. Both parties are given the opportunity to make representations to the court on sentencing. The defendant is also given an opportunity to speak. Finally the judge announces and explains the sentence, always beginning with the imprisonment portion of the sentence.

As described in more detail below, overall, the data collected confirm the nationwide pattern that supervised release is imposed in virtually all cases. More surprising was the finding that supervised release was almost never contested at sentencing. In most cases, it was neither discussed by judges at the sentencing hearing, nor mentioned by the parties in sentencing submissions.

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[173] In four cases I both attended the hearing and reviewed the transcript. In addition to these cases, I also attended eight hearings and reviewed four transcripts in cases where probation was imposed.

[174] Unless otherwise specified, the description of the sentencing process and all findings are based on the data collected for this study.

1. Supervised Release was Imposed in the Vast Majority of Cases

Overall, supervised release was imposed in more than 94 percent of cases,[175] and the average term was 34 months.[176] In just 9 of the 155 cases examined did judges decline to impose supervised release. Three of those 9 cases involved sentences for a violation of the conditions of an existing supervised release term (VOSR), where the judge imposed a prison term but did not impose any additional supervised release.

Five of the remaining six cases in which supervised release was not imposed had one thing in common: the immigration status of the defendants. In these cases, the judge explicitly declined to impose a term based on the likelihood that the defendant would be deported; this comports with the Sentencing Guidelines, which advise courts not to impose a term of supervised release where a defendant is likely to be deported upon release from prison.[177]

For example, in *Dosunmu*, Judge Irizarry noted: "I expect that Ms. Dosunmu has learned her lesson and will not be returning to the United States, and so I'm not going to impose a term of supervised release under the recent amendment to the guidelines."[178] In another case, the judge expressed concerns about not imposing supervised release because the defendant had a history of illegally reentering the United States after deportation but eventually agreed with the probation officer's recommendation after learning that the defendant had received a supervised release term in a related case in a different district:

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[175] This tracks the national data reported by the United States Sentencing Commission; between 2005 and 2009, 95 percent of those sentenced to prison were also sentenced to supervised release. SUPERVISED RELEASE REPORT, supra note 5, at 49-50. Because judges do not generally state whether a mandatory supervised release term applies, it is not clear how many of the cases involved mandatory supervised release. *See infra* Part III.B.2.

[176] This average term is slightly lower than the national average term of 41 months. SUPERVISED RELEASE REPORT, *supra* note 5, at 50. As in that report, I excluded life terms of supervised release (two in this study). The most commonly imposed term of supervised release was 3 years.

[177] U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(c) (2011). Despite the change to the Guidelines, it appears that many judges continue to impose supervised release on defendants who are likely to be deported as evidenced by the number of cases in which deportation conditions are imposed. *See infra* Part III.B.4.

[178] Transcript of Sentencing Hearing at 9, United States v. Dosunmu, No. 12-CR-00173 (E.D.N.Y. Apr. 16, 2012).

> The Court: . . . Probation is not recommending that there be a term of supervised release.
>
> The Probation Officer: That's correct, Your Honor. That's due to the fact that he is going to be deported.
>
> The Court: I agree with that, with most defendants. But he has been deported twice. Yet, he's before me again.
>
> The Probation Officer: Your Honor, just to point out in paragraph 40 on the immigration case in the District of Massachusetts, he was given two years of supervised release on that case.
>
> The Court: All right. Then I will not impose a term of supervised release here. . .[179]

In the final case where no supervised release was imposed, *United States v. Arshad*, the judge did not explain her decision.[180] The only reference to supervised release during the hearing was after the judge had delivered the prison sentence (of time served) and indicated that she was not imposing a fine. The AUSA asked the judge whether she was imposing supervised release and the judge simply responded no.[181] There was no further discussion, and there was no discussion of supervised release in the sentencing memoranda submitted in the case.

2. Supervised Release is Rarely Discussed at Sentencing

The lack of discussion in *Arshad* is emblematic of how supervised release is treated at sentencing. Supervised release was not contested in any of the hearings observed or in the transcripts reviewed. In no case reviewed did a sentencing judge ever explain why he or she was imposing supervised release or justify the length of the term imposed.[182] In most cases, the hearing focused almost entirely on the prison sentence and at the end of the hearing, after stating what the prison sentence would be, the judge stated how long a term of

[179] Transcript of Sentencing Hearing at 20-21, United States v. Garcia, No.10-CR-00424 (E.D.N.Y. Apr. 5, 2012).

[180] Christine S. Scott-Hayward, Field Notes on United States v. Arshad, No. 12-CR-00069 (E.D.N.Y. Feb. 17, 2012) (on file with author).

[181] *Id.*

[182] Although not explained at the sentencing hearing, in one case, in his Statement of Reasons, a judge did explain his supervised release sentence. United States v. DiMattina, 885 F. Supp. 2d 572, 582 (E.D.N.Y. Aug. 8, 2012) ("Three years of supervised release on both counts provide adequate protection for the community and sufficient general and specific deterrence.").

supervised release he or she was imposing, and listed any additional conditions.[183] Despite the fact that when it comes to prison sentences, judges are very careful about making sure that they announce what the guideline calculation is and whether there is a mandatory minimum prison term to be imposed, most judges never specified whether there was a mandatory supervised release term or what the supervised release guideline was.[184]

In the few cases where supervised release was discussed, the discussion was generally brief. For example, in *United States v. Kaziu*, there was some confusion about the maximum available term of supervised release for the offense of conviction, a terrorism offense. The original PSR had listed it as five years, but at the hearing it was confirmed that the maximum was life, which is the term that the judge imposed.[185] In another case, the judge imposed a below guideline prison sentence of time served along with three years of supervised release. At the hearing, the judge warned the defendant not to "celebrate today" and talked to him at some length of the importance of not "let[ting] up."[186]

Further, while defense attorneys almost uniformly contest the prison portion of the sentence, in no case observed did a defense attorney object to the imposition of supervised release. Off the record conversations with a number of federal defenders (from both the Eastern and Southern Districts of New York) revealed that the perceived mandatory nature of supervised release is so entrenched that they do not even bother to fight its imposition, or even the length of a term. One federal defender told me that if defense attorneys pay any attention to supervised release, they focus on the number and/or type of conditions imposed. However, in none of the hearings observed for this study did any defense attorney make an objection of this type.

The sentencing memoranda I reviewed contained slightly more discussion of supervised release but such discussion remained exceptional and, surprisingly, in no case did a defense attorney argue

[183] The judge also stated whether there would be a fine and/or restitution or forfeiture.

[184] Judge Kiyo Matsumoto was one notable exception. In all three of her cases reviewed, Judge Matsumoto clearly announced the felony level of the offense of conviction followed by the applicable imprisonment, supervised release, and fine guideline ranges.

[185] Transcript of Sentencing Hearing at 31, United States v. Kaziu, No. 09-CR-00660 (E.D.N.Y. Mar. 2, 2012).

[186] Christine S. Scott-Hayward, Field Notes on United States v. Salazar, No. 10-CR-00773 (E.D.N.Y. Apr. 20, 2012) (on file with author).

against the imposition of supervised release or for a shorter term.[187] Of the 155 cases in the dataset, sentencing memoranda (for one or both parties) were available in 110 cases. Just nine submissions mentioned supervised release in any fashion. For example, at least one sentencing memorandum was available in each of the five cases described earlier where supervised release was not imposed due to the likelihood of the defendant being deported. However supervised release was not raised in any of these memoranda.

The types of disputes appearing in the memoranda vary and many just mention supervised release as part of the appropriate punishment. However, one dispute concerned the length of the supervised release term to be imposed. In *Maflahi,* a case where the defendant was being sentenced for violating his supervised release, the government sought a three to nine month Guideline prison sentence as well as an additional 30 month supervised release term.[188] The defendant sought just one of day confinement, followed by 3 months home confinement and just 3 additional months of supervised release.[189] The court ultimately sentenced Maflahi to 3 months in prison followed by 33 months on supervised release.[190]

In a few other memoranda, the mentions of supervised release related to conditions. For example, in *United States v. Alexander*, the defense attorney noted that sex offender treatment would be an appropriate condition of supervised release.[191] Similarly in *United States v. Delgado*, defense counsel noted that intensive conditions would be appropriate.[192] In *United States v. Avant,* defense counsel asked for a special condition to be imposed to assist defendant in receiving mental health treatment.[193]

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[187] Sentencing memoranda were not available for all cases. In some cases, they simply did not appear on the docket; in other cases they were sealed.

[188] Sentencing Memorandum by United States at 2, United States v. Maflahi, No. 03-CR-00412 (E.D.N.Y. Mar. 27, 2012).

[189] Letter in Response to Government's Sentencing Memorandum at 3, United States v. Maflahi, No. 03-CR-00412 (E.D.N.Y. Apr. 3, 2012).

[190] Violation of Supervised Release Order, United States v. Maflahi, No. 03-CR-00412 (E.D.N.Y. Apr. 25, 2012).

[191] Defendant's Sentencing Memorandum at 22, United States v. Alexander, No. 09-CR-00022 (E.D.N.Y. Apr. 24, 2012).

[192] Defendant's Sentencing Memorandum at 3, United States v. Delgado, No. 11-CR-00223 (E.D.N.Y. Mar. 22, 2012).

[193] Defendant's Sentencing Memorandum at 1, United States v. Avant, No. 10-CR-00763 (E.D.N.Y. Feb. 24, 2012).

3. Judges Impose Special Conditions in Most Cases

Although the standard conditions of supervised release are fairly comprehensive,[194] this study shows that judges impose additional special conditions in most cases and further that most of these conditions are not explicitly aimed at rehabilitating or reintegrating the defendant. Of the 146 cases where supervised release was imposed, judges imposed at least one special condition in 143 cases. By far the most frequently imposed condition was the prohibition on possessing a firearm,[195] which was imposed in 129 cases.

Deportation conditions,[196] which make a return to the United States after deportation a violation of supervised release despite the fact that the defendant may also be charged with illegal reentry, were imposed in 47 cases; this notwithstanding the that fact that the Guidelines recommend that supervised release not be imposed at all where deportation is likely. The oddity of imposing supervised release where the defendant will be deported was hinted at by one judge who told the defendant: "You'll be under supervision for four years. Of course, you won't be under any supervision at all because you'll be in Mexico, but the term during which you won't be under supervision but you'll be on supervised release is four years."[197]

Other commonly imposed conditions include financial disclosure conditions (imposed in 46 cases) and warrantless search conditions (imposed in 33 cases). Fifteen defendants were subject to a

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[194] *See supra* notes 100-103 and accompanying text.

[195] "The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon." This is one of four conditions listed on the Supervised Release page of Form AO 245B, Judgment in a Criminal Case. To impose the condition, the judge just checks a box. *See, e.g.*, Judgment as to John Watson, United States v. Watson, No. 10-CR-00010 (E.D.N.Y Aug. 6, 2012).

[196] *See, e.g.*, Judgment, United States v. Davis, No. 09-CR-00235 (E.D.N.Y. Feb. 28, 2012) ("The defendant if deported may not re-enter the United States illegally.").

[197] Transcript of Sentencing Hearing at 21-22, United States v. Valenzuela-Albiar, No. 11-CR-00229 (E.D.N.Y. Mar. 16, 2012). Two other defendants were granted to permission to serve their supervised release outside of the United States but in neither case was there any discussion of what agency would be monitoring the defendant. *See* Judgment at 4, United States v. Mejia, No. 11-CR-00141 (E.D.N.Y Apr. 4, 2012) ("The Court has allowed the defendant to serve his term of supervised release in Colombia."); Judgment at 4, United States v. Greenidge, No. 11-CR-00399 (E.D.N.Y. Feb. 15, 2012) ("Defendant may reside in Bermuda during the supervised release term but must report to his probation officer if he re-enters the United States.").

curfew or home detention, eleven were required to complete some form of community service, while nine were subject to electronic monitoring. Defendants were restricted from associating with certain people or categories of people in 15 cases. The controversial condition requiring DNA collection was imposed in just two cases.

The most commonly imposed conditions that explicitly relate to the rehabilitation or reentry of the defendant were the requirement to attend a drug treatment program (imposed in 49 cases) and the requirement to attend a mental health treatment program (imposed in 27 cases). Employment or vocational training requirements were imposed in 27 cases. Despite its proven efficacy,[198] just one defendant was required to participate in Cognitive Behavioral Therapy (CBT). Two defendants were given gambling treatment conditions. Although sex offense conditions are subject to the most scholarly attention, they were required in just six cases in this study. Finally, in one case involving a drug trafficking offense, a defendant was required to "address student loan debt."[199] This defendant was given six additional conditions but the court also instructed the Probation department to provide "financial counseling" and "inquire as to the possibility of certificate of relief from civil disabilities."[200]

Whether the supervised release conditions are aimed at protecting public safety, rehabilitating the defendant, or simply monitoring the defendant, what was common to the imposition of all of them is that in none of the hearings I attended did the judge explain why a particular condition was imposed. While it is possible that the purposes of these conditions were addressed in the PSRs and thus the judges were making an informed decision as to the necessity of the conditions, the reasons for the conditions were not stated on the record. Further, in no case did a defense attorney contest any conditions imposed by the judge or proposed by the probation officer either at a hearing or in sentencing documents. In fact, at one hearing, the prosecutor proposed expanding a condition imposed by the judge, which was agreed to by the judge without any objection from defense counsel.[201]

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[198] *See infra* note 274.

[199] Judgment at 5, United States v. Wiltshire, No. 11-CR-00164 (E.D.N.Y. Apr. 10, 2012).

[200] *Id.* at 4.

[201] Transcript of Sentencing Hearing at 29-30, United States v. Marcus, No. 05-CR-00457 (E.D.N.Y. Mar. 5, 2012).The judge in the case had prohibited the defendant from

C. Limitations

Case studies like this one are necessarily small and do not utilize random sampling methods. Because of this, the findings described above are not generalizable to all districts and only describe the reality in the Eastern District. More research needs to be done to ascertain whether the situation in the Eastern District is representative of the country as a whole. However, there is no reason to think that it is an outlier. The widespread imposition of supervised release in the Eastern District follows national patterns of imposition. Further, informal conversations with judges outside the Eastern District suggest that there is a similar lack of attention to supervised release in other districts. In addition, because the PSRs were not publically available, I did not have access to the same information that judges had access to, which made it more difficult to ascertain why judges made the decisions that they did. However, again, one judge told me that there was very little in the PSR relating to supervised release. Finally, because not all transcripts are publicly available, I was unable to review the transcripts of all hearings that occurred during the study time period.

Despite these concerns, the study does provide valuable insights into the process by which supervised release is imposed. Although more research is necessary,[202] the study findings combined with the national quantitative data available suggest some problems with the supervised release framework and the way in which judges impose supervised release. These problems and some possible solutions are discussed in the next section.

IV. A New Framework for Imposing Supervised Release

A. Why Do Judges Impose Supervised Release?

State parole and post-prison supervision systems generally have missions that combine public safety with reentry or rehabilitation. For example, the mission of the Alabama Board of Pardons and Paroles is:

contacting the victim; the prosecutor asked that the judge include electronic contact in that prohibition and also asked that the judge prohibit the defendant "from posting anything about the victim on the internet." *Id.*

[202] Under ideal conditions, a future follow-up study would include an examination of sentencing data (both qualitative and quantitative) and PSR data from multiple districts, which would be randomly selected. It would also include formal interviews with judges and other court actors.

> "to promote and enhance public safety through cooperation and collaboration with the Legislature, the Courts, the Department of Corrections, other criminal justice agencies, victims, and the community by providing investigation, supervision, and surveillance services in a holistic approach to rehabilitating adult offenders."[203]

Like most parole systems, federal supervised release also appears to have the dual goals of rehabilitation and protecting public safety.[204] As discussed earlier, the Supreme Court and other appellate courts emphasize the "rehabilitative ends" it is supposed to serve.[205] For example, in *United States v. Vallejo*, the Ninth Circuit Court of Appeals noted that the goal of supervised release is to "facilitate the reintegration of the defendant into the community."[206] However, the Ninth Circuit and other courts also highlight its role in protecting public safety. In *United States v. Gementara*, in upholding a supervised release condition, the court noted that it was imposed "for the stated and legitimate statutory purpose of rehabilitation and, to a lesser extent, for general deterrence and protection of the public."[207] In *United States v. Jeanes*, the Fifth Circuit noted: "Supervised release . . . serves a broader, societal purpose by reducing recidivism."[208] The Fifth Circuit has also noted how these two purposes work together, emphasizing the importance of being "monitored by the system" to the "rehabilitative goals" of supervised release.[209]

Despite the fact that the governing statute gives courts discretion to impose a term of supervised release, the Sentencing Guidelines recommend virtually automatic application of supervised release. It is

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[203] Ala. Bd. of Pardons & Paroles, *Mission Statement*, http://pardons.state.al.us/ALABPP/Main/Mission%20Statement.htm (last visited Nov. 26, 2013).

[204] Meierhoefer Vincent, *supra* note 38, at 188 ("Unlike some popular conceptions, supervision has always focused on managing risk in the community. The re-integrative services and rehabilitative efforts which constitute a large part of the supervision function have never been solely to help the offender, but also to assist that offender in leading a law-abiding life, thereby protecting the public as well.").

[205] United States v. Johnson, 529 U.S. 53, 59 (2000).

[206] United States v. Vallejo, 69 F.3d 992, 994 (9th Cir. 1995); *see also* United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012).

[207] United States v. Gementera, 379 F.3d 596, 602 (9th Cir. 2004) (upholding a special condition requiring the defendant to wear a sign reading: "I stole mail; this is my punishment").

[208] United States v. Jeanes, 150 F.3d 483, 485 (5th Cir. 1998).

[209] United States v. Jackson, 426 F.3d 301, 305 (5th Cir. 2005).

not clear why but given the dominance of punitiveness at the time the Guidelines were first implemented, perhaps the Commission erred on the side of caution by recommending supervised release terms in most cases but giving judges discretion to decline to do so. However, judges are not deviating from the Guidelines in any meaningful way, and it is not clear why. Although it is possible that they are engaging in reasoned decisions with respect to its imposition, their reasoning is not explained on the record and therefore the question of why judges almost uniformly impose supervised release remains unanswered.

At the most basic level, when a supervised release term is required by statute or by the Guidelines, the probation officer does not appear to be required to engage in a detailed individualized evaluation of the need for supervised release.[210] This might mean that the PSR simply tells judges that this is a case where the Guidelines require supervised release and list a recommended term.[211] Indeed, informal conversations with some federal judges confirm this interpretation.

Another possible explanation is that post-*Booker,* many judges are exercising their new-found discretion to impose below-guideline prison sentences.[212] One reason for this might be their ability to also impose supervised release and thus maintain control over the defendant. That way, if a defendant violates a condition or commits a new crime, the trial judge gets a second chance at sentencing him or her. However, although limited, the data collected for this study do not support this. In the cases where the guideline prison sentence was specified, there were no differences in either judges' tendencies to impose supervised release or the length of term imposed between cases where a below guideline sentence was imposed and cases where the sentence was within the guideline range. For example, two defendants were charged in the same case with drug trafficking, a class B felony. The first defendant received a prison sentence of 41 months, below guideline range of 51-63 months while the second defendant received a sentence of 36 months, within the

[210] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 94, at V-7.

[211] Again, because PSRs are not publicly available, there is no way to confirm this interpretation.

[212] The Sentencing Commission's most recent report on the impact of the Guidelines on sentencing found that 44.2 percent of prison sentences imposed between December 2007 and September 2011 were below the guideline range (including both government and non-government sponsored below range sentences). BOOKER REPORT, *supra* note 34, at 3, 5.

guideline range of 30-37 months.[213] Both defendants received the same supervised release term of 3 years.[214]

On the other hand, perhaps it is simply too difficult for judges, or even probation officers, to make a reasoned determination at sentencing as to whether an individual will need rehabilitation after release or what risk he or she will pose to the public once released from prison. In one case in my study, in declining to impose a search condition, this difficulty was recognized by a judge:

> The Court: . . . Are there special conditions that the Probation Department recommends?
>
> Probation Officer: "Your Honor, we had recommended a search condition based on the nature of the offense and —
>
> The Court: That is too far down the road. I won't do that. Any others?[215]

Even if the PSR discusses these issues, Judges cannot predict with any certainty what impact serving a prison sentence will have on an individual's risk and needs.[216] For this reason, the sentencing hearing is not the best time to make a decision about future risks or needs. In effect, by following the Guidelines, a judge is making a prediction based purely on the offense of conviction as to whether a person will need supervision in the future either to protect the public or assist that person in reintegrating into the community. However, judges do not appear to be making any reasoned prediction, and instead are simply putting everybody on supervised release. This is problematic. In addition to the negative consequences of supervised release described earlier, research shows that post-prison supervision can be particularly counter-productive when it is given to people who don't need it.

One of the findings of recent research on effective interventions is that not everyone needs to be supervised after release.[217] It turns out

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[213] *Compare* United States v. Espana-Urrutia, No. 11-CR-00440 (E.D.N.Y. Feb. 23, 2012) *with* United States v. Urrutia, No. 11-CR-00440 (E.D.N.Y. Feb. 23, 2012).

[214] *Id.* The incomplete nature of the data prevented me from statistically testing this hypothesis using the complete dataset.

[215] Transcript of Sentencing Hearing at 32, United States v. Kaziu, No. 09-CR-00660 (E.D.N.Y. Mar. 2. 2012). The probation officer then requested that the defendant be prohibited from possessing a firearm and the judge imposed this condition.

[216] *See infra* note 252 and accompanying text (discussing risk and need factors that may be affected by a prison stay).

[217] *See* Scott-Hayward, *supra* note 146 (arguing for the abolition of parole for people at a low risk to reoffend); Cecilia M. Klingele, *Rethinking the Use of Community*

that supervising low-risk individuals can sometimes be a mistake. Not only is there no increase in recidivism rates when low-risk people are not supervised, requiring low-risk people to participate in the treatment and other programs common to post-prison supervision can actually increase the likelihood that they will reoffend.[218] While it is not clear exactly why this occurs, possible reasons include the fact that supervising low-risk people and placing them in programs can disrupt their pro-social networks,[219] as well as the fact that increased supervision and the associate conditions increase the likelihood of violations.[220]

Thus, whether the goal of supervised release is rehabilitation or public safety, or both, the current framework for its imposition appears counter-productive. The remainder of this Part reviews the limited prior proposals for reforms, and suggests a new framework to ensure that supervised release is imposed more thoughtfully and that, as Congress originally intended, "probation officers will only be supervising those releasees from prison who actually need supervision[.]"[221] Finally, it considers the feasibility of reform.

B. Prior Reform Proposals

In 1994, the Federal Sentencing Reporter published a special issue focused on supervised release.[222] While many of the articles addressed the supervision and revocation components of supervised release, some contributors suggested ways to reform its imposition or limit the length of supervision terms.[223] For example, to address the

Supervision (Univ. of Wisc. Legal Studies Research Paper Series, No. 1220, 2013), *available at* http://ssrn.com/abstract=2232078 (calling for the use of community supervision (including both probation and post-release supervision) to be limited).

[218] CHRISTOPHER T. LOWENKAMP & EDWARD J. LATESSA, NAT'L INST. OF CORRS., TOPICS IN COMMUNITY CORRECTIONS: UNDERSTANDING THE RISK PRINCIPLE: HOW AND WHY CORRECTIONAL INTERVENTIONS CAN HARM LOW-RISK OFFENDERS (2004); *see also* Christopher T. Lowenkamp et al., *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs*, 52 CRIME & DELINQ. 77, 88 (2006) (finding programs showed increases in recidivism rates unless they targeted higher risk people).

[219] Lowenkamp et al., *supra* note 218, at 89.

[220] *Id.*; *see also* JACOBSON, *supra* note 153, at 150.

[221] S. REP. NO. 98-225, at 125 (1983).

[222] 6 FED. SENT'G REP. 181, 181-222 (1994).

[223] *See* Wooten, *supra* note 11; David N. Adair, *Revocation of Supervised Release—A Judicial Function*, 6 FED. SENT'G REP. 190 (1994); Biderman & Sands, *supra* note 26.

heavy burden of revocation policies on the workload of courts, and the costs of imprisonment resulting from revocations, Harold Wooten, then the Chief of Operations for Probation, suggested shortening the period of supervised release.[224] He argued that it should "be limited to two years with no extensions, except when requested by the offender for continued treatment, with no violation sanctions possible after the two-year term."[225]

Also concerned with the workload problem, Adair, Assistant General Council with the Administrative Office of U.S. Courts, argued that the (then mandatory) Guidelines requirement that supervised release be imposed on all individuals who are sentenced to a term of more than a year was "far too inclusive."[226] He criticized the offense-based nature of the guidelines and emphasized that supervised release "is still a separate part of the sentence with a separate purpose, to assist the offender who needs such assistance."[227] Without making a concrete proposal, he suggested: "Consideration should be given to identifying types of offenders, particularly those who receive relatively short sentences, who need no post release supervision other than the short periods of community confinement which the Bureau of Prisons is authorized to provide."[228]

Between 1994 and 2010, supervised release imposition practices received little analysis or criticism.[229] The closest the Sentencing Guidelines came to being significantly reformed was in 2011. The Sentencing Commission's 2010 report on supervised release did not propose any reforms, but it did highlight the fact that supervised release was imposed in virtually all cases.[230] In response, in 2011, the Commission proposed a series of amendments including two options

[224] Wooten, *supra* note 11, at 186.
[225] *Id.*
[226] Adair, *supra* note 223, at 192.
[227] *Id.* at 193.
[228] *Id.* Then and now, the Bureau of Prisons has authority to allow an individual to serve a portion of his or her term in a halfway house or other community facility. 18 U.S.C. § 3624(c) (2012).
[229] With the exception of its 2011 report, *supra* note 5, the Sentencing Commission has largely ignored supervised release (and other sentences, including fines) in its frequent publications. For example, its reports on the impact of *Booker* on sentences fail to include any analysis of supervised release sentences. *See, e.g.*, BOOKER REPORT, *supra* note 34.
[230] SUPERVISED RELEASE REPORT, *supra* note 5, at 3-4.

"that would reduce the number of cases in which the court is required by the guidelines to impose supervised release."[231] In proposing these amendments the Commission again quoted the Senate Report on the SRA, which noted that "probation officers will only be supervising those releases from prison who actually need supervision."[232]

The Commission proposed two options. The first would have increased the threshold prison term required for the imposition of supervised release from one year in prison to fifteen months.[233] The second would have required the Court to order a term of supervised release only if required by statute.[234] Neither of these proposals was ultimately adopted. The Commission also proposed two options for reducing the minimum term of supervised release. The first would have reduced the minimum term for Class A-D felonies from either two or three years to one year and eliminated the existing one year minimum term for Class E felonies or Class A misdemeanors.[235] The second would have removed the requirement of a minimum term for any offense.[236] Again, neither of these proposals was adopted, although some minimum terms were reduced for Class A-D felonies.[237]

The 2010 report highlighted the fact that "success rates in supervision are highly correlated with offenders' criminal history categories at the time of the original sentencing."[238] The Guidelines were amended to reflect this. Since 2011, in addition to the statutory section 3553 factors, courts have been required to consider a defendant's criminal history when determining whether to impose supervised release and if imposed, how long a term to impose.[239]

More recently, Professor Fiona Doherty has argued that

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[231] U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 78 (2011).

[232] *Id.* (quoting S. REP. NO. 98-225, at 125 (1983)).

[233] U.S. SENTENCING COMM'N, *supra* note 231, at 78.

[234] *Id.*

[235] *Id.* at 79.

[236] *Id.*

[237] Although the Commission declined to reduce the minimum terms for all felonies to one year, it did reduce the minimum term for Class C and D felonies from two years to one year, and for Class A and B felonies from three years to two years. U.S. SENTENCING GUIDELINES MANUAL § 5.D1.2(a) (2011).

[238] SUPERVISED RELEASE REPORT, *supra* note 5, at 70.

[239] U.S. SENTENCING GUIDELINES MANUAL § 5.D1.1, app. 3(B).

supervised release "creates a classically indeterminate sentence,"[240] which is conceptually unstable in the otherwise determinate sentencing system that is the Federal criminal justice system.[241] Doherty points out that the current system, where supervised release is "enforced by revocation and reincarceration is premised on the notion that rehabilitation (in addition to deterrence) can be effectively generated by the threat of more punishment."[242] She criticizes this system "for pretending that sending people back to prison, even for non-criminal conduct, is not punishment."[243]

Although not framed as policy proposals, she makes a number of suggestions for changes to the supervised release system that might allow supervised release to be "both constructive and coherent as a transitional tool."[244] One option is a system almost like mandatory parole; all individuals "would spend a predetermined period in the community under supervision at the tail end of the prison sentence."[245] However, while she is correct that unlike discretionary parole, non-discretionary supervised release would be "uniform and transparent at the time of sentencing,"[246] universal post-prison supervision, as I have argued elsewhere, requiring supervision for all individuals, regardless of need, creates an "overbroad net of supervision."[247] As an alternative, Doherty offers that supervised release might be completely eliminated and rehabilitation and reintegration services be offered by prisons instead.[248] However, there is no evidence to suggest that prisons are capable of providing these types of services, and more fundamentally, given how entrenched post-prison supervision is in the federal system, this idea is unlikely to be politically feasible.[249]

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[240] Doherty, *supra* note 10, at 1017.
[241] *Id.* at 1030.
[242] *Id.* at 1018.
[243] *Id.* at 1023.
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] Scott-Hayward, *supra* note 146, at 453-54 (quoting MODEL PENAL CODE: SENTENCING, at 31(Discussion Draft No. 3, 2010)); *see also supra* notes 218-20 and accompanying text.
[248] Doherty, *supra* note 10, at 1029. Doherty also offers a number of other options including limiting conditions of supervision, providing full process to individuals at the revocation stage, and relying on behaviorist tools. *Id.* at 1024-28.
[249] *See* Scott-Hayward, *supra* note 146, at 457-58 (describing failed attempts at abolishing post-prison supervision at the state level).

While all of the proposals and reforms described above have some merit, none addressed the timing issue identified above; the fact that currently, judges are in effect predicting, based purely on the offense of conviction, the future risks and needs of an individual after release from prison. In the next section, I propose a new framework for the imposition of supervised release that focuses on this problem.

C. Rationalizing Supervised Release

Given the various costs of supervised release at both the individual and system levels, and the fact that not all individuals need to be on supervised release, this article argues that supervised release reform should focus on reducing the number of people on supervised release in a thoughtful way that ensures the "rational use of supervised release for those [people] who actually require assistance or may reasonably be expected to present a danger to the public."[250] For the reasons described in the remainder of this section, this article suggests that the best way to do this is 1) move the decision to impose supervised release from the sentencing hearing to just prior to the defendant's release from prison, and 2) utilize the Federal Post Conviction Risk Assessment instrument to make this decision.

1. The Timing of Imposition

Some might argue that the problems identified in this article might be solved by mandating that all PSRs include an individualized assessment of the need for supervised release and amending the Guidelines to require explicit consideration of that assessment at sentencing. However, this would not address the fundamental problem with the current supervised release framework, which is that the sentencing hearing is not the appropriate place to make a decision whether to impose a supervised release sentence. Unlike the sentence of probation, which generally begins directly after sentencing, the sentence of supervised release will usually be served a few years down the road.[251]

The supervised release statute and court decisions interpreting it

[250] Adair, *supra* note 223, at 193.

[251] The average prison sentence for a person also sentenced to supervised release is 60 months. SUPERVISED RELEASE REPORT, *supra* note 5, at 50. The one exception is for sentences of time served, where the individual will begin his or her supervised release term immediately.

make it clear that supervised release is intended to protect public safety and rehabilitate individuals. Given this, neither judges nor probation officers are well-equipped to determine at the time of sentencing whether an individual will need supervision after he or she is released from prison. Although some factors that predict the risks and needs of an individual, such as criminal history, will not generally change between when a person enters prison and when he or she leaves, others, like age, will change, and still others, including education or job training, and antisocial cognition may change depending on programs available in prison.[252]

To address the timing issue, the first part of my proposal moves the decision to impose supervised release from the sentencing hearing to just prior to release from prison. However, this raises the question of how this decision should be then made. Because supervised release is part of the sentence, and "the right to impose the punishment provided by law is judicial" the district court is required to retain ultimate authority over supervised release.[253] Thus, if the sentencing judge did not impose a supervised release sentence at the initial sentencing hearing, a second sentencing hearing would have to occur before supervised release could be imposed. Pragmatic considerations—both cost and workload—advise against this. Therefore I propose that at the initial sentencing hearing if a judge decides to impose supervised release, he or she will simply impose a maximum term. Whether the defendant will serve a shorter term or even no term at all will be determined just prior to release from prison using, as will be discussed in the next section, a risk assessment tool.

Relying on a risk assessment tool to determine whether supervised release is imposed does still look like the imposition of punishment by a non-judicial actor and therefore there is still some risk that a second hearing may be required.[254] However this risk is small. Rule 32.1(c) of the Federal Rules of Criminal Procedure applies to modifications of an individual's supervised release conditions and would likely also apply here. Currently, if the individual whose conditions are being modified waives a hearing, or if the relief sought is favorable to

[252] For a discussion of risk assessment including how these and other factors are used in actuarial risk assessment instruments, see Scott-Hayward, *supra* note 146, at 458-59.

[253] *Ex parte* United States 242 U.S. 27, 41 (1916).

[254] Currently, modifying, reducing, or enlarging conditions of supervised release generally requires a hearing. *See generally* Schraa, *supra* note 10.

the individual, and the government does not object, a hearing is not required.[255] Given that in no case a Probation Officer would be able to impose a term above the maximum imposed by the judge, in most cases, a hearing and the costs that would go with it would not be required. Further, in light of the fact that this proposal should reduce both the overall numbers of people on supervised release and the number of people having their supervised release revoked, any costs of limited additional hearings would be outweighed by the cost-savings of the proposal.

2. The PCRA

Clearly the best way to ensure that only those who need supervision after release are sentenced to a supervised release term is to conduct an individualized assessment of each individual's risks and needs. And while actuarial risk assessment instruments have been subject to some criticism,[256] most agree that they are better at predicting risks and needs than clinical judgment alone. Further, using an actuarial risk assessment would protect line probation officers from any unintended consequences of a decision not to impose supervised release. For example, a probation officer might be inclined to rubber-stamp the maximum sentence imposed by the judge out of fear of what might happen if he or she decided not impose supervised release on an individual who then committed a new offense. If an actuarial risk assessment instrument was utilized, the blame for any "mistake" would fall on the instrument itself rather than on an individual officer.

For these reasons, the second part of my proposal argues that the decision as to whether an individual should receive supervised release and if so, for how long, should be should be made using the Federal Post Conviction Risk Assessment (PCRA) instrument, a validated fourth generation risk assessment instrument.[257]

The PCRA was developed in 2004 by the Administrative Office

[255] FED. R. CRIM. P. 32.1(c)(2).

[256] Scott-Hayward, *supra* note 146, at 458, n.269 (discussing criticisms).

[257] ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF PROB. AND PRETRIAL SERVS., AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT 1 (2011). Fourth generation risk assessment instruments are the most comprehensive and best respected instruments. *See, e.g.*, Scott VanBenschoten, *Risk/Needs Assessment: Is This the Best We Can Do?*, FED. PROBATION, Sept. 2008, at 38-39; D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 12-17 (2006).

of the United States Courts with the goal of improving "the effectiveness and efficiency of post-conviction supervision."[258] Although the Department of Probation department had been using actuarial risk assessment since the 1970s,[259] the Risk Prediction Index that they were using used only static factors.[260] The PCRA was developed specifically for the Probation department and validated on both supervised release and probation populations.[261] The PCRA is currently being used by Probation to improve the effectiveness and efficiency of supervised release – including deciding the level of supervision – but has the potential to be used in deciding whether supervised release is necessary at all.[262]

While using a risk assessment as part of sentencing might appear controversial, there is some precedent for doing so.[263] For example, since 1997, Virginia has utilized an actuarial risk assessment instrument to identify non-violent defendants for diversion from incarceration.[264] An evaluation of the use of this strategy showed that most judges and probation officers thought the instrument was a "good tool" and was "useful in decision-making."[265] A final, more pragmatic, concern is

[258] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 257, at 1.

[259] *Id.* at 4.

[260] *Id.* at 7. Static factors are factors that are not amenable to change in the sense that they are not under an individual's control, such as age and criminal history. VanBenschoten, *supra* note 257, at 38, 39. Fourth generation instruments like the PCRA also include dynamic factors, such as substance use or antisocial thinking, that can be potentially changed through treatment or other interventions. *Id.*

[261] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 257, at 7.

[262] The PCRA would need to be validated for this purpose but other similar instruments have been successfully used in a number of states to do this. For example, in 2009, California instituted non-revocable parole, which allowed certain low-risk people to be released from prison without supervision or conditions. California relied on a validated risk assessment tool to help identify this population. *Non-Revocable Parole*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/parole/non_revocable_parole/index.html (last visited Mar. 1, 2013).

[263] Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, 29 JUST. Q. 1 (2012).

[264] BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE STAGE EVALUATION (2002). The instrument was piloted in six sites between 1997 and 2001 and launched state-wide in 2002. Meredith Farrar-Owens, Dir., Va. Criminal Sentencing Comm'n, Presentation at the National Association of Sentencing Commissions 2012 Conference, Use of Offender Risk Assessment in Virginia, (August 6, 2012), *available at* http://thenasc.org/2012conference/2012presentations.html.

[265] OSTROM ET AL., *supra* note 264, at 2.

simply whether or not this type of criminal justice reform is even possible in today's political climate. This issue is discussed in the next section.

D. The Feasibility of Reform: The Move to Budget-Conscious Criminal Justice Reform

While criminal justice reform has always been difficult given the political pressures on politicians to be perceived as "tough on crime," we are currently in an unprecedented era of reform.[266] Until recently, despite the increasing amounts of state funds being spent on corrections,[267] and the well-documented drop in crime rates during the 1990s,[268] legislators and policymakers have generally been unwilling to propose solutions that reduce reliance on incarceration, largely for fear of being seen as "soft on crime."[269] However, the recent fiscal crisis in state budgets has changed that and has led legislators to look at areas that were previously considered sacrosanct. One of these areas is corrections.

Over the last few years, numerous states, including some, like Texas, that have traditionally been seen as extremely tough on crime, have cut their corrections budgets. In 2009, 26 states made cuts to their fiscal year 2010 corrections budgets.[270] This continued into fiscal year 2011, with at least 23 states reducing appropriations for corrections.[271]

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[266] *See generally* Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1 (2010); Mary D. Fan, *Beyond Budget-Cut Criminal Justice*, 90 N.C. L. REV. 581 (2012).

[267] In 2008, for example, federal, state, and local governments spent almost $75 billion on corrections, the largest portion of which was on incarceration. JOHN SCHMITT ET AL., *supra* note 15, at 2; *see also* CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS (2012), *available at* http://www.vera.org/download?file=3542/Price%2520of%2520Prisons_updated%2520version_072512.pdf (calculating the average annual cost of keeping a person in prison as $31,000).

[268] *See generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007).

[269] *See generally* VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS (2009); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997).

[270] CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 2 (2009).

[271] VERA INST. OF JUSTICE, THE CONTINUING FISCAL CRISIS IN CORRECTIONS: SETTING

The types of cuts made by states vary significantly. Many states focused on operational efficiencies, cutting personnel costs, decreasing food services, and decreasing medical and health services.[272]

However, some states have used the economic crisis to examine their criminal justice policies in light of the increasing body of research on rehabilitation and recidivism that shows that there are programs, which, if implemented correctly, can reduce recidivism; these programs and practices are referred to as "evidence-based practices" and are simply practices that research has shown to be effective.[273] These practices include assessing risk and needs, targeting interventions based on risk and need (focusing resources on moderate and high-need individuals), relying on graduated sanctions (including the use of positive reinforcements), utilizing cognitive behavioral therapy, and measuring outcomes beyond recidivism, including drug use and employment.[274]

For example, in 2007, Texas was faced with the choice between building new prisons and reducing its prison population.[275] With assistance from the Council on State Governments, Texas chose a

A NEW COURSE 8 (2010).

[272] *Id.* at 11; SCOTT-HAYWARD, *supra* note 270, at 5.

[273] *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 71-73 (2003); COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 46 (2005).

[274] BRAD BOGUE ET AL., NAT'L INST. OF CORRS., IMPLEMENTING EVIDENCE-BASED PRACTICE IN COMMUNITY CORRECTIONS: THE PRINCIPLES OF EFFECTIVE INTERVENTION (2004); *see also* AMY L. SOLOMON ET AL., PUTTING PUBLIC SAFETY FIRST: 13 PAROLE SUPERVISION STRATEGIES TO ENHANCE REENTRY OUTCOMES (2008) (outlining parole supervision strategies to enhance reentry outcomes); *see infra* Part IV.B.3. Many of these evidence-based practices draw on the Risk-Needs-Responsivity ("RNR") theory of rehabilitation, which focuses on assessing risks and needs, and ensuring that correctional interventions are matched to the motivation, learning style and circumstances of the individual. *See generally* D.A. Andrews et al., *Classification for Effective Rehabilitation: Rediscovery Psychology*, 17 CRIM. JUST. & BEHAV. 19 (1990).

[275] *See* COUNCIL ON STATE GOV'TS, *supra* note 36. Efforts in Texas and many other states that have relied on evidence-based practices to implement cost-cutting programs have been supported and partially funded by organizations like the Pew Public Safety Performance Project, which "works with states to advance data-driven, fiscally sound policies and practices in the criminal and juvenile justice systems that protect public safety, hold offenders accountable, and control corrections costs." *Public Safety Performance Project*, PEWSTATES.ORG, http://www.pewstates.org/projects/public-safety-performance-project-328068 (last visited November 18, 2013).

system-wide reform strategy. The legislature expanded substance use and mental health programming, intermediate sanction facilities, and programs that focused on people under probation and parole supervision with the goal of reducing the number of revocations.[276] Between 2006 and 2008, the parole revocation rate decreased by 25 percent.[277]

Termed "rehabilitative pragmatism"[278] or "humonetarianism"[279] by legal scholars, this new correctional paradigm appeals to legislators and policy-makers focused on budget cuts. As Hadar Aviram explains, "[u]nder this framework, perceptions are changed, and policies are created, with short-term savings in mind; right-wing and left-wing politicians alike feel comfortable stepping away from punitive policies whenever costs are cited; and correctional techniques are chosen and discussed mainly through their impact on taxpayers' wallets."[280]

A pragmatic approach to penal policy like this one has much to offer a federal system that has been getting larger every year and has been subject to criticism from all directions. As discussed earlier, the federal prison population has grown much faster over the last ten years than state prison populations, and now accounts for nearly 7 percent of the national prison population.[281] Federal corrections spending has grown correspondingly, and, despite cuts to the operating budgets of other agencies, thus far, federal corrections agencies have been insulated from budget cuts. For example, Bureau of Prisons budget requests for fiscal years 2011 and 2012 called for a ten percent increase over 2010 funding levels.[282]

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[276] COUNCIL ON STATE GOV'TS, *supra* note 36, at 2, 4.

[277] *Id.* at 6.

[278] Fan, *supra* note 266, at 637-38 ("Rehabilitative pragmatism . . . . orients policy toward the practice of 'evidence-based rehabilitation" . . . . [which] calls for structuring rehabilitative programs to generate measurable outcomes and renders opaque expert judgment calls more transparent and readily evaluated through a demand for evidence of efficacy.").

[279] Aviram, *supra* note 266, at 1, 3.

[280] *Id.* at 3. Fan agrees, arguing that while these policies revive rehabilitation, it is "not as the old rehabilitative ideal defined in terms of the offender's interests in rehabilitation. Rather the goals are saving money and serving collective interests." Fan, *supra* note 266, at 633.

[281] CARSON & SABOL, *supra* note 129, at 2.

[282] *See* James Ridgway & Jean Casella, *No Budget Cuts for Federal Prisons*, MOTHER JONES (Apr. 13, 2011, 12:53 PM), http://www.motherjones.com/mojo/2011/04/no-budget-cuts-federal-prisons (criticizing FY2011 and FY2012 budget requests to increase Bureau of Prisons funding); Kevin Johnson, *2011 Budget gives Federal*

Until recently, there had been few calls for federal criminal justice reform but over the last two years, an increasing number of politicians and other policymakers have been speaking out in favor of reducing prison populations. [283] Although some question the likelihood of bipartisan consensus on this issue,[284] calls for reform have come from both parties.

Taking note of state efforts, in 2012, former Representative Alan Mollohan (Democrat) and David A. Keene, former chairman of the American Conservative Union published an Op-Ed calling for Congress to take action:

> [T]he federal government has done little in recent years to address the pressing issues of growing incarceration rates, prison overcrowding and recidivism. These issues place a heavy burden on the judicial system and on society at large. . . [I]t is time for Congress to act, and it should look to states for the roadmap.[285]

Then in April 2013, Senators Rand Paul and Patrick Leahy co-sponsored the Justice Safety Valve Act of 2013,[286] a bill authorizing judges to disregard mandatory minimums in certain cases. Writing in support of the bill, Senator Paul argued that "mandatory minimums do

Prisons $528 Million, USA TODAY, Feb. 4, 2010, http://www.usatoday.com/news/washington/2010-02-03-prison-budget_N.htm (describing a proposed increase of almost $528 million, in large part to address staffing shortages, bringing the total Bureau of Prisons budget to $6.8 billion).

[283] *See, e.g.*, Derek P. Jensen, *Chaffetz Unveils Prison Program to Reduce Recidivism and Lower Crime*, SALT LAKE TRIB., May 30, 2013, http://www.sltrib.com/sltrib/politics/56385962-90/chaffetz-crime-federal-low.html.csp (describing a plan to allow low-risk people to be released early from prison to halfway houses, home confinement, or electronic monitoring).

[284] *See, e.g.*, Douglas A. Berman, *Is It Really True that "Conservatives and Liberals Are Increasingly United" on Criminal Justice Reform?*, SENTENCING LAW AND POLICY (Aug. 17, 2012, 10:07 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/08/is-it-really-true-that-conservatives-and-liberals-are-increasingly-united-on-criminal-justice-reform.html (supporting the ideas expressed by authors but expressing doubt as to whether there is a likelihood of bipartisan consensus at the federal level).

[285] Alan B. Mollohan & David A. Keene, *Left and Right Agree on Criminal Justice Reforms: Congress Should Move with Bipartisan Consensus*, WASHINGTON TIMES, Aug. 15, 2012, http://www.washingtontimes.com/news/2012/aug/15/left-and-right-agree-on-criminal-justice-reforms/.

[286] *See also* George Will, *Leahy and Paul Plan on Mandatory Sentencing Makes Sense*, WASHINGTON POST, June 5, 2013, http://www.washingtonpost.com/opinions/george-will-leahy-and-paul-plan-on-prison-sentences-makes-sense/2013/06/05/9731afba-cdfc-11e2-8845-d970ccb04497_story.html.

much harm to taxpayers and to individuals, who may have their lives ruined for a simple mistake or minor lapse of judgment."[287] There is increasing support for reform of mandatory minimum sentencing from the highest levels of government. In August 2013, Attorney General Eric Holder noted that "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason"[288] and announced a number of reform efforts, including a new charging policy for drug offense prosecution to reduce the use of mandatory minimum sentences.[289]

CONCLUSION

Federal supervised release is a serious punishment that is imposed on tens of thousands of people each year, almost as many as are sentenced to prison, and far more than are sentenced to probation. Yet it continues to be largely ignored by scholars and practitioners who instead focus on the problems of incarceration. This is a mistake: "As long as federal sentences remain unjustifiably severe, defense attorneys will be tempted to treat supervised release as a footnote in the long chapter on sentencing. Unfortunately, our clients' battles continue long after incarceration."[290] It is time for supervised release sentencing to come out of the shadows of prison sentencing.

[287] Rand Paul, *Minimizing Authority of Judges: Mandatory Sentencing Pre-empts Individual Consideration*, WASHINGTON TIMES, Apr. 5, 2013, http://www.washingtontimes.com/news/2013/apr/5/minimizing-authority-of-judges/.

[288] Holder, *supra* note 14.

[289] *Id.* In describing some of these efforts, Holder noted that the Justice Department has "studied state systems and been impressed by the policy shifts some have made."

[290] JENNIFER GILG, OFFICE OF DEFENDER SERVICES, THE FINE PRINT: STRATEGIES FOR AVOIDING RESTRICTIVE CONDITIONS OF SUPERVISED RELEASE 20 (2011), *available at* http://www.fd.org/docs/select-topics—-common-offenses/fine_print.pdf?sfvrsn=4.