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Rethinking the Use of Community Supervision

Cecelia Klingele

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CRIMINAL LAW

RETHINKING THE USE OF COMMUNITY SUPERVISION

CECELIA KLINGELE*

Community supervision, whether in the form of probation or post-release supervision, is ordinarily framed as an alternative to incarceration. For this reason, legal reformers intent on reducing America's disproportionately high incarceration rates often urge lawmakers to expand the use of community supervision, confident that diverting offenders to the community will significantly reduce overreliance on incarceration. Yet, on any given day, a significant percentage of new prisoners arrive at the prison gates not as a result of sentencing for a new crime, but because they have been revoked from probation or parole. It is therefore fair to say that, in many cases, community supervision is not an alternative to imprisonment but only a delayed form of it. This Article examines the reasons why community supervision so often fails and challenges popular assumptions about the role community supervision should play in efforts to reduce overreliance on imprisonment. While probation and post-release supervision serve important purposes in many cases, they are often imposed on the wrong people and executed in ways that predictably lead to revocation. To decrease the overuse of imprisonment, sentencing and correctional practices should therefore limit, rather than expand, the use of

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community supervision in three important ways. First, terms of community supervision should be imposed in fewer cases, with alternatives ranging from fines to unconditional discharge to short jail terms imposed instead. Second, conditions of probation and post-release supervision should be imposed sparingly and only when they directly correspond to a risk of reoffense. Finally, terms of community supervision should be limited in duration, extending only long enough to facilitate a period of structured reintegration after sentencing or following a term of incarceration.

TABLE OF CONTENTS

I. INTRODUCTION	1016
II. HISTORY AND STRUCTURES OF COMMUNITY SUPERVISION	1021
A. Probation	1022
B. Post-release Supervision.....	1026
III. THE DYNAMICS OF REVOCATION.....	1030
A. Conditions of Release.....	1032
B. Methods of Supervision.....	1036
C. Responses to Rule Violations.....	1038
IV. RESPONSES TO THE PROBLEM OF REVOCATION	1042
A. What Problem?.....	1042
B. New Legal Responses.....	1047
1. Limits on Sanctioning Technical Violations.....	1047
2. Graduated Sanction Grids	1049
3. Effects of Legal Change.....	1052
V. A DIFFERENT APPROACH: LIMITING COMMUNITY SUPERVISION	1054
A. Limiting the Sanction	1055
B. Limiting Release Conditions	1060
C. Limiting Terms of Supervision.....	1062
VI. CONCLUSION	1065

I. INTRODUCTION

It is no secret that the United States has the highest incarceration rate in the world. Between 1977 and 2010, the number of people confined in state and federal prisons grew from roughly 300,000 to more than 1.5 million¹—a figure that places the United States seven times ahead of its

¹ See LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 3 tbl.1 (2011); BUREAU OF JUSTICE

Western European counterparts with respect to incarceration rates.² The cost of mass incarceration, in social, moral, and financial terms, has generated considerable recent scholarly and legislative attention.³ Those convicted of crimes often face lifelong collateral consequences that limit their abilities to vote, gain employment, and participate fully in civic life⁴—a reality that limits not only their own prospects, but those of their children and communities.⁵ The widespread reach of the criminal justice system has harsh consequences for the state, too.⁶ Even before the 2008 financial crisis dramatically reduced state and county budgets, the rising cost of operating correctional facilities had caught the attention of state and local policymakers, and in recent years, legislatures have shown growing interest in reforms aimed at reducing the costs associated with criminal punishment.⁷

STATISTICS, U.S. DEP'T OF JUSTICE, STATE AND FEDERAL PRISONERS, 1925-85, at 3 tbl.2 (1986).

² By global standards, the United States is far and away a leader in imprisonment, confining nearly 1 out of every 100 adults. Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 857 (2009); see also Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, 33 CRIME & JUST. 347, 348–50, 375 (2005).

³ In the past decade, there has been a large body of work discussing the direct and indirect costs of mass incarceration. For a sampling, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* (2005); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001); NAT'L GOVERNORS ASS'N, *STATE EFFORTS IN SENTENCING AND CORRECTIONS REFORM 2* (2011), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/1110SENTENCINGREFORM.PDF> (“If states want to reduce corrections costs, they must find ways to reduce prison populations.”); Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENT'G REP. 332 (2002); Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 23 (Joan Petersilia & Kevin R. Reitz eds., 2012).

⁴ See generally MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013) (describing the broad range of legally authorized collateral consequences).

⁵ See generally CLEAR, *supra* note 3 (discussing the ways in which mass incarceration negatively affects families and communities); Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOL. BULL. 175, 175 (2012) (reporting that children of incarcerated parents face elevated risks of behavioral problems).

⁶ See CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 8 fig.3 (2012) (tabulating the cost of imprisonment on a per-state basis).

⁷ The federal, state, and local governments spend nearly \$75 billion annually on costs

Reformers interested in reducing imprisonment rates often advocate the increased use of noncustodial sanctions. They have encouraged judges to sentence more people to terms of probation and have urged legislatures to authorize or expand opportunities for prisoners to obtain conditional release at the end of their sentences.⁸ Imprisonment is juxtaposed against community supervision: from this perspective, every sentence of probation is a small victory in the battle against mass incarceration and its associated costs. In reality, however, the relationship between incarceration and community supervision is complex and interwoven.

The growth of U.S. prison populations during the latter half of the twentieth century has been well documented and much decried,⁹ but the dramatic growth in community supervision that occurred during the same period has received far less attention. Notably, the same period that saw dramatic growth in prison populations also saw significant increases in the number of people serving terms of community supervision. Between 1977 and 2010, the number of individuals on probation more than quadrupled, growing from just over 800,000 to more than 4,000,000.¹⁰ And, despite trends during the period that reduced opportunities for early parole release,¹¹ the number of individuals serving terms of supervision following incarceration grew from more than 173,000 to nearly 841,000.¹²

associated with corrections. JOHN SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 10 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>; see also PEW CTR. ON STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 16 (2008) (noting that Vermont, Michigan, Oregon, Connecticut, and Delaware—in that order—spend more money annually on corrections than on higher education).

⁸ See, e.g., Richard Rosenfeld et al., *The Contribution of Ex-Prisoners to Crime Rates*, in PRISONER REENTRY AND CRIME IN AMERICA 80, 102–03 (Jeremy Travis & Christy Visser eds., 2005) [hereinafter PRISONER REENTRY] (concluding that “expanded use of discretionary parole supervision” would better protect the public from the safety threat posed by released prisoners); see also Juliene James et al., *A View from the States: Evidence-Based Public Safety Legislation*, 102 J. CRIM. L. & CRIMINOLOGY 821, 841 (2012) (“Using community corrections, rather than institutional sentences, has the potential to improve communities. Defendants and offenders who are not incarcerated have the opportunity to remain with their families, hold on to employment, and participate in treatment or other programming within the natural context of their lives, as opposed to the ‘unnatural’ setting of a prison or jail.”).

⁹ See generally ALEXANDER, *supra* note 3; CLEAR, *supra* note 3; JACOBSON, *supra* note 3.

¹⁰ LAUREN GLAZE & THOMAS BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, ADULTS ON PROBATION IN THE UNITED STATES, 1977–2010 (2011) [hereinafter GLAZE & BONCZAR, ADULTS ON PROBATION], available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2026>.

¹¹ See Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV.

The average annual per person cost of incarceration is approximately fifteen times higher than the cost of community supervision.¹³ Standing alone, that figure suggests that community corrections is a cost-saving alternative to incarceration—and community supervision often is less costly when it averts the need for a harsher sanction. The picture becomes more complicated, however, when we consider how often terms of community supervision lead to terms of imprisonment.

Estimates suggest that half of the people admitted to U.S. jails, and more than one-third of those admitted to prison, arrive there as a result of revocation from community supervision.¹⁴ While that figure is dramatic in its own right, it obscures the wide variance between state revocation rates. In states such as New Hampshire,¹⁵ North Carolina,¹⁶ and Wisconsin,¹⁷

465, 480–81 (2010) (discussing the rise of determinate sentencing and its effects on the availability of parole release).

¹² See LAUREN GLAZE & THOMAS BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *ADULTS ON PAROLE IN THE UNITED STATES, 1975–2010* (2011), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1997>.

¹³ The cost of incarceration for a federal prisoner averages \$28,284 annually, Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081 (Sept. 15, 2011), while the cost of confining state prisoners averages \$31,286, HENRICHSON & DELANEY, *supra* note 6, at 9 (surveying forty states and reporting an average annual cost varying from “\$14,603 in Kentucky to \$60,076 in New York”). These figures include the “overhead” costs of incarceration and not simply the cost of housing, clothing, and feeding a single prisoner. By contrast, the average cost of community supervision is \$1,250 for an individual on probation and \$2,750 for an individual on post-release supervision. PEW CTR. ON STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 12* (2009).

¹⁴ PEGGY BURKE ET AL., PEW CTR. ON STATES, *WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS 1* (2007); see also Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recommitment*, in *PRISONER REENTRY*, *supra* note 8, at 50, 61–62.

¹⁵ COUNCIL OF STATE GOV'TS, *JUSTICE REINVESTMENT IN NEW HAMPSHIRE: ANALYSES & POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS & INCREASE PUBLIC SAFETY 4* (2010), available at http://www.nh.gov/nhdoc/divisions/publicinformation/documents/012010_justice_rein_analyses.pdf (“In 2009, probation and parole revocations for condition violations (where there wasn't a new sentence) together accounted for 57 percent of all admissions to state prison.”).

¹⁶ COUNCIL OF STATE GOV'TS, *JUSTICE REINVESTMENT IN NORTH CAROLINA: REDUCING SPENDING ON CORRECTIONS AND REINVESTING IN STRATEGIES TO INCREASE PUBLIC SAFETY 2* (2010), available at http://csgjusticecenter.org/wp-content/uploads/2012/12/JR_North_Carolina_FINAL.pdf (“In 2009, probation revocations accounted for 53 percent of prison admissions.”).

¹⁷ COUNCIL OF STATE GOV'TS, *JUSTICE REINVESTMENT IN WISCONSIN: ANALYSES & POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS AND INCREASE PUBLIC SAFETY 4* (2009), available at http://csgjusticecenter.org/wp-content/uploads/2012/12/Wisconsin_Analyses_and_Policy_Options.pdf (“At the end of 2007, more than half (55 percent) of the people incarcerated in state prison were there because they had failed to comply with the conditions of community

more than half of new prison admissions result from revocation of community supervision, not from conviction for a new crime. These statistics suggest that rather than serving as an alternative, community supervision often is no more than a deferred sentence of incarceration.

Increasingly, state and county governments have begun to notice the link between high revocation rates and prison growth. In response, many have enacted new laws aimed at reducing revocation rates by limiting the ability of courts and correctional agencies to imprison people who violate the conditions of their release. Early assessments suggest that these legal changes have met with some success in reducing the number of revocations in adopting jurisdictions. However, they often have been implemented hastily, with the primary goal of reducing the immediate costs associated with confinement, rather than examining why rule violations are so prevalent, or what kind of limitations on revocation may be justified as a matter of principle.

This Article challenges the conventional thinking that expanding the use of community supervision will necessarily mitigate the problem of over-incarceration. It examines why probation and parole—the most popular alternatives to incarceration—have become important drivers of prison growth and concludes that the best way to reduce prison populations is to limit, rather than expand, their use. While recognizing the continued vitality of community supervision as a sentencing option, the Article suggests that other alternatives to prison, including conviction alone, fines, and even short jail terms, may be preferable sentences in many cases.

Following this Introduction, Part II reviews the history and organizational structure of community supervision in the United States. Part III examines the reasons for high revocation rates, ones that are rooted in the legal framework that governs community supervision. Those include the conditions that are imposed, the methods of supervision that are utilized, and the responses that are available for responding to violations of the terms of release. Part IV discusses several ways in which states have tried to reduce high revocation rates. This section challenges many of the principles underlying these efforts, and questions their effectiveness. Part V then introduces a new framework for thinking about the role of community supervision in efforts to reduce overreliance on prison. It proposes that the role of supervision should be a limited one—limited in terms of the number of people serving terms of release, the conditions to which they are made subject, and the periods of time they remain under

supervision or because they had committed a new crime while under supervision.”).

state oversight. Using community supervision in this way will provide for wiser stewardship of limited correctional resources and avoid adding to the problem of over-incarceration.

II. HISTORY AND STRUCTURES OF COMMUNITY SUPERVISION

The term “community supervision” describes the practice of allowing a convicted criminal defendant to serve his sentence in the community, either as an alternative to incarceration or as part of a transition from prison back into ordinary life. A community sentence that is imposed in lieu of imprisonment is called probation; a community supervision term that follows a period of imprisonment is most commonly referred to as parole or supervised release.¹⁸ Regardless of whether a term of community supervision is preceded by a prison sentence, it is always structured as a form of conditional release: during the period of community supervision, a convicted individual must comply with state-imposed conditions in order to retain his liberty. Failure to do so may result in imprisonment.

Noncustodial sanctions have always been a part of the criminal law. Historically, these often took the form of corporal punishments, such as flogging or branding, as well as public humiliations, banishment, and fines—all sanctions that were imposed quickly and required no ongoing oversight from the state.¹⁹ Community supervision, with its often lengthy periods of state control, is a relatively recent development, originating in the mid-1800s and later gaining widespread acceptance and use.²⁰

In the United States, community supervision varies tremendously from one jurisdiction to another. It goes by different names, is controlled by different branches of government, and is subject to legal constraints that are far from uniform.²¹ Any discussion of community supervision must therefore begin with a basic examination of the most common forms of supervision and the legal and institutional constraints that control their use.

¹⁸ Periods of supervision following incarceration go by many different names, including post-release supervision, N.C. GEN. STAT. § 15A-1368.2 (2011), extended supervision, WIS. STAT. ANN. § 973.01(d) (West 2005), post-prison supervision, OR. REV. STAT. § 144.085(1) (2011), and post-release control, OHIO REV. CODE ANN. § 2967.28 (West 2006).

¹⁹ Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 49, 51–53 (Norval Morris & David J. Rothman eds., 1995).

²⁰ See generally Wilfred Bolster, *Adult Probation*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 132 (1914); B. W. Brown, *Parole An Institution of the Future*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 65 (1915); Charles A. De Courcy, *The Probation System of Massachusetts*, 19 YALE L.J. 187 (1910); Albert H. Hall, *Indeterminate Sentence and Release on Parole*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 832 (1912).

²¹ See Joan Petersilia, *Probation in the United States*, PERSPECTIVES, Spring 1998, at 37–38.

Community supervision can be divided into two distinct categories: probation and post-release supervision. Although the conditions governing release under both categories tend to be identical, the practices developed independently in ways that continue to influence their structures today.

A. PROBATION

Probation is a community-based sanction imposed by a court in lieu of imprisonment.²² In many jurisdictions, probation is treated as an alternative to a formal (i.e., custodial) sentence; in others, it is treated as a sentence in its own right.²³ It always includes a defined period of conditional release in the community, sometimes preceded by a short jail stay.²⁴ Probation is conditioned on a convicted person's compliance with rules, such as reporting regularly to a probation officer; attending work, classes, or treatment programs; avoiding new criminal conduct; and complying with other restrictions designed to promote rehabilitation and contain risk.²⁵ At their discretion, supervising probation officers may often add additional rules to those imposed by the sentencing courts.²⁶

Modern probation is usually credited as an American innovation that began in the nineteenth century.²⁷ In 1841, a shoemaker and temperance

²² See *id.* at 30 (defining probation as “[a] court-ordered disposition alternative through which an adjudicated offender is placed under the control, supervision and care of a probation staff member in lieu of imprisonment, so long as the probationer meets certain standards of contact . . .”). In some jurisdictions, a short term of imprisonment may be imposed as a “condition” of probation or as part of a “split sentence.” PATRICK A. LANGAN & ROBYN L. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 1992, at 29 (1996) (reporting that in 1992, 56% of felony cases included a combined sentence of probation and jail time).

²³ Compare *People v. Daniels*, 130 Cal. Rptr. 2d 887, 891 (Cal. Ct. App. 2003) (“Although courts sometimes refer to it as a ‘sentence,’ probation is not a sentence even if it includes a term in the county jail as a condition. In granting probation, the court suspends imposition or execution of sentence and issues a revocable and conditional release as an act of clemency.” (citations omitted)), with *State v. Hamlin*, 950 P.2d 336, 339 (Or. Ct. App. 1997) (“With the passage of the sentencing guidelines, . . . [p]robation is no longer the suspension of a sentence; probation *is* the sentence.”).

²⁴ Using jail in combination with probation is a practice often referred to as a “split sentence.” A 1996 study found that split sentences were used in approximately a quarter of felony cases. Petersilia, *supra* note 21, at 35.

²⁵ See, e.g., 18 U.S.C. § 3563 (2012); OR. REV. STAT. § 137.540(1) (2011); N.H. SUPER. CT. R. 107.

²⁶ See *infra* Part III.A.

²⁷ Similar practices, including the use of charitable “police court missionaries” whose job was to help divert offenders deemed good candidates for rehabilitation, developed in Europe during the same period. Peter Young, *A Sociological Analysis of the Early History of Probation*, 3 BRIT. J.L. & SOC’Y 44, 56 (1976).

advocate named John Augustus petitioned the Boston Police Court for permission to “sponsor” a man whose crimes would have ordinarily resulted in a term of mandatory confinement.²⁸ The court relented, and several weeks later, Augustus returned the man to court and proclaimed his rehabilitation.²⁹ Persuaded that the man had been reformed, the court imposed a nominal fine and sent him on his way.³⁰

In 1891, Massachusetts passed legislation authorizing the first state probation officers, whose job was twofold: first, to investigate the circumstances of each person brought before the court so that the judge might “know what a man is as well as what he has done”; and second, “to take the care of convicted persons who do not need imprisonment, but who should not be discharged.”³¹ Other jurisdictions quickly followed suit, and by 1910, thirty-four states had adopted probation laws.³² The federal government passed probation legislation in 1925.³³

Probation immediately became a popular disposition. Surveys from the 1950s and ’60s indicate that roughly 40%–50% of convicted criminals were sentenced to probation.³⁴ Even as criminal justice policies became more punitive during later decades of the twentieth century, the use of probation increased: in 2001, 60% of those under correctional supervision were serving terms of probation.³⁵ This development is best explained by changes in supervisory practices. Throughout the 1980s and ’90s, jurisdictions developed “intensive supervision” programs, imposed more

²⁸ Frank W. Grinnell, *The Common Law History of Probation: An Illustration of the “Equitable” Growth of Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 15, 24–25 (1941).

²⁹ Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 155 (1997). Over the course of following fifteen years, Augustus voluntarily supervised nearly two thousand offenders, earning himself the title of the nation’s first probation officer. *Id.*; Grinnell, *supra* note 28, at 25. In his autobiography, Augustus reported significant success helping those in his care, most of whom had violated temperance laws. *See generally* JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE (Boston, Wright & Hasty 1852).

³⁰ Petersilia, *supra* note 29, at 155.

³¹ *The Massachusetts Probation System, Its Administration and Operation*, 10 PUBLICATIONS AM. STAT. ASS’N 236, 236–37 (1907) [hereinafter *Mass. Prob. Sys.*]. Those dual roles continue to be served by probation officers today, who conduct presentence investigations and provide direct oversight to those placed on community supervision.

³² De Courcy, *supra* note 20, at 191.

³³ Joel R. Moore, “*The United States Probation System*,” 23 AM. INST. CRIM. L. & CRIMINOLOGY 638, 639 (1932).

³⁴ Heinz R. Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 486–87 (1962).

³⁵ Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 191 (2003).

restrictive conditions, and increased rates of revocation.³⁶ Although these changes allowed probation to remain consistent with the ethos of the times, they moved it far from its simple and minimalist roots, turning it into a much more formal sanction than the probation Augustus pioneered.

By 2011, 3,971,300 people were serving terms of probation.³⁷ Probation is often a sanction of first resort for offenders convicted of minor crimes and for youthful or first-time offenders. It is also, however, a common disposition for repeat offenders and for those convicted of many nonviolent felony offenses.³⁸

As its history suggests, probation was originally a way to “keep less serious and/or first [time] offenders from undergoing the corrupting effects of jail terms.”³⁹ Early advocates lauded probation as “one of the highest forms of social service work,” designed to assist the wayward in recommitting themselves to a law-abiding life.⁴⁰

While rehabilitation remains a goal of probation, its purposes have become more complicated. Early in its history, probation became a tool not only for reform, but for manipulation of the criminal process: prosecutors then and now used the promise of probation to induce guilty pleas from defendants, for reasons good and ill.⁴¹ From the perspective of the offender, probation offers an opportunity to avoid a term of imprisonment and maintain work, familial relationships, and access to community programs. From the perspective of the state, it provides a chance to connect offenders with needed services, while also allowing agents to keep tabs on convicted individuals who are not dangerous or culpable enough to require imprisonment, but who nonetheless require some state intervention as a result of their criminal conduct. How these purposes should be ordered in any given case is a matter that has received inadequate study.

³⁶ *Id.* at 192–93; see also Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 *CRIME & JUST.* 281, 282–83 (1993).

³⁷ LAURA M. MARUSCHAK & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES*, 2011, at 1–2 (2012).

³⁸ *Cf.* Petersilia, *supra* note 29, at 149 (“Probation is the most common form of criminal sentencing in the United States.”).

³⁹ Ralph W. England, Jr., *What is Responsible for Satisfactory Probation and Post-Probation Outcome?*, 47 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 667, 675 (1957).

⁴⁰ Charles Evans Hughes, Jr., *Probation Progress*, 23 *AM. INST. CRIM. L. & CRIMINOLOGY* 915, 920 (1933).

⁴¹ Logan, *supra* note 35, at 178; see also DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 78 (1980).

The power to impose probation was originally understood as an outgrowth of the court's power to suspend sentences.⁴² But even after statutes began to authorize probation as a freestanding sanction, the decision whether to place a convicted individual on probation remained vested in the discretion of the court. It is not surprising, therefore, that in many jurisdictions, probation officers were treated as officers of the court, appointed by judges and reporting to them directly.⁴³ Over time, efforts to professionalize the rehabilitative role of the probation officer led to the development of more centralized administrative structures in some jurisdictions, in which probation officers reported violations to the court but were employed as civil servants and served under independent probation commissions, boards of charity, or other independent state agencies.⁴⁴

The structures in which probation officers operate have continued to diversify. One study identified more than 2,000 probation agencies in the United States, each with unique characteristics shaped by local culture and practice.⁴⁵ Today, "probation services . . . differ in terms of whether they are delivered by the executive or the judicial branch of government, how services are funded, and whether probation services are primarily a state or a local function."⁴⁶

⁴² Prior to the adoption of formal probation legislation, courts justified the power to impose probation as part of their discretionary power to suspend a sentence *prior to* the time of conviction. See G.C.D., Comment on Recent Cases, *Criminal Law: Power to Suspend Sentence*, 4 CAL. L. REV. 144, 144 (1916). After conviction, courts ordinarily lost jurisdiction over the sentence within a short period of time. See Klingele, *supra* note 11, at 499–501. Consequently, the court's ability to delay execution of the sentence was originally confined to the preconviction period. Federal courts, however, rejected the idea that judges could indefinitely suspend sentences in the absence of authorizing legislation. *Ex parte United States*, 242 U.S. 27, 44 (1916). Thus, probation was often imposed before conviction, though exceptions can be readily found. The modern use of conditional deferred adjudication harkens back to this same practice of preconviction "probation." Some state statutes still authorize probation as a preconviction disposition. See MASS. GEN. LAWS ch. 276, § 87 (1974) ("The superior court . . . may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant's consent, before trial and before a plea of guilty, or in any case after a finding or verdict of guilty . . ."); see also Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 598 (1937) (discussing changes in the use of the suspended sentence in the context of probation).

⁴³ Charles L. Chute, *State Supervision of Probation*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY 823, 827 (1918).

⁴⁴ See *id.*

⁴⁵ Petersilia, *supra* note 29, at 169 (citing HOWARD ABADINSKY, *PROBATION AND PAROLE: THEORY AND PRACTICE* (1997)).

⁴⁶ *Id.* While some probation offices function as arms of the sentencing court, in some

B. POST-RELEASE SUPERVISION

In many important ways, post-release community supervision is similar to probation. Individuals leaving prison to serve a term of post-release supervision are required to comply with conditions that are largely identical to those imposed on probationers. Like probation, post-release supervision is designed to serve both rehabilitative and surveillance purposes, providing individuals with access to programs and other supports, while imposing restrictions designed to improve public safety and increase the detection of new crime. Despite these similarities, post-release supervision is often administered in ways that differ importantly from probation and that can be traced to its distinct historical origins.

Unlike probation, post-release supervision did not originate in the courts. Alexander Maconochie, a British naval captain-turned-penologist, is often credited with “inventing” parole.⁴⁷ While serving as director of a British penal colony on Norfolk Island during the 1840s, Maconochie devised and implemented a graduated system of release, in which inmates earned increased freedom through good behavior and other evidence of rehabilitation.⁴⁸ In 1854, Sir Walter Crofton, then head of the Irish penal system, adopted a version of Maconochie’s system in his own country. Crofton added the practice of conditionally releasing prisoners, subject to continued rehabilitation (as evidenced by employment and desistance from future crime).⁴⁹

The perceived success of these British and Irish “ticket of leave” systems, as they were called, led American reformers to call for their adoption in the United States.⁵⁰ New York became the first state to formally do so when the Elmira Reformatory opened in 1876.⁵¹ The Reformatory, which implemented the ticket of leave system, awarded “marks” for good behavior that culminated in release from the institution.⁵²

jurisdictions, probation officers are employed by corrections departments, or even county governments. See N.Y. EXEC. LAW § 255 (McKinney 1993); N.Y.C. DEP’T PROB., *History of Probation*, <http://www.nyc.gov/html/prob/html/about/history.shtml> (last visited Aug. 8, 2013).

⁴⁷ LEANNE FIFTAL ALARID ET AL., *COMMUNITY-BASED CORRECTIONS* 235–36 (7th ed. 2008).

⁴⁸ *Id.*

⁴⁹ *Id.* at 237.

⁵⁰ JOHN W. ROBERTS, *REFORM AND RETRIBUTION: AN ILLUSTRATED HISTORY OF AMERICAN PRISONS* 63–64 (1997).

⁵¹ *Id.*; Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 431 (2011).

⁵² ROBERTS, *supra* note 50, at 65.

Other states soon followed, adopting parole along with various forms of the indeterminate sentence.

In New York, and later in other states, a prisoner who exhibited good conduct was permitted to leave the prison under the supervision of a guardian (usually a family member or employer), who would vouch for the person's good conduct during the period immediately following release.⁵³ After a period ranging from a few months to a few years, the individual would be fully discharged.⁵⁴ By 1942, all states and the federal government had adopted parole legislation.⁵⁵

As with probation, over time the practice of parole became more structured and institutionalized. Release became less dependent on the warden's determination that a prisoner had behaved well and more dependent on the assessment of a parole board that a prisoner had been "rehabilitated."⁵⁶ Formal state agents were hired to conduct pre-release investigations and provide more formal oversight of parolees' behavior in the community, though their effectiveness varied.⁵⁷

Beginning in the 1970s, widespread disillusionment with the state's ability to rehabilitate prisoners led to the restriction of discretionary parole in many jurisdictions.⁵⁸ In 1987, the Comprehensive Crime Control Act of 1984 abolished parole for federal defendants,⁵⁹ and by the turn of the century, sixteen states had eliminated parole for all newly convicted prisoners.⁶⁰ Many others passed laws restricting discretionary parole.⁶¹

⁵³ Scott-Hayward, *supra* note 51, at 431; *see also* 1907 Wis. Sess. Laws 660 ("No prisoner shall be paroled until some employment or situation has been secured for such prisoner and it shall satisfactorily appear to such board of control that such employment or position is suitable in every way and will continue for a period of at least one year.").

⁵⁴ 1907 Wis. Sess. Laws 659–61.

⁵⁵ Scott-Hayward, *supra* note 51, at 431; *see also* JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 58 (2003).

⁵⁶ *Cf.* Klingele, *supra* note 11, at 473.

⁵⁷ *See* HELEN LELAND WITMER, *ADULT PAROLE WITH SPECIAL REFERENCE TO WISCONSIN* 119–22 (May 5, 1925) (unpublished Ph.D. dissertation, University of Wisconsin–Madison) (on file with University of Wisconsin–Madison Library) (discussing the job of early Wisconsin parole agents and noting that their ability to fulfill their investigatory and supervisory duties with respect to parolees was taxed by limited education and resources).

⁵⁸ *See* Scott-Hayward, *supra* note 51, at 432–34; *see also* Klingele, *supra* note 11, at 473–81.

⁵⁹ Pub. L. No. 98-473, 98 Stat. 1976, 2027–30 (1984) (repealing 18 U.S.C. § 4205 (repealed 1984)).

⁶⁰ *See* Klingele, *supra* note 11, at 481. Many of these states replaced discretionary parole with other forms of post-release supervision, and several states that abolished early release entirely later reinstated it.

⁶¹ *Id.*

Although post-release supervision was restricted, it was not abolished. Many states retained discretionary parole for offenders convicted of less serious offenses or for those who had served a designated portion (usually 85%) of their custodial sentences.⁶² In addition, many states gave judges the ability to impose terms of conditional release to follow upon the completion of custodial sentences.⁶³ In some states, a period of post-release supervision was made mandatory.⁶⁴

The result is that, in most jurisdictions, despite changes in release practices, a significant number of people leave prison to begin sentences of community supervision. In 2009, nearly three out of every four individuals released from prison were subject to a term of post-release community supervision.⁶⁵ In 2010, more than 840,000 individuals were serving a state or federal sentence of post-release supervision.⁶⁶

As with probation, the purposes of post-release supervision have changed over time, or have at least become more complex. Initially, and to some degree still today, post-release supervision was designed to assist already-rehabilitated offenders in their transitions from prison to community life.⁶⁷ The same cultural shifts that led to restrictions on discretionary releases from prison during the 1980s and 1990s also led to a shift in focus among post-release supervision agents, away from a casework model and toward a crime control model.⁶⁸ High profile crimes committed by parolees placed political pressure on legislatures and correctional agencies to tighten restrictions on conditional release and react harshly to

⁶² *Id.* at 480–81.

⁶³ See Scott-Hayward, *supra* note 51, at 434.

⁶⁴ See, e.g., N.C. GEN. STAT. § 15A-1341 (2009) (setting forth guidelines for the imposition of supervised release terms on individuals convicted of qualifying offenses); N.H. REV. STAT. ANN. § 504-A:15 (LexisNexis 2011) (requiring a minimum of nine months' supervision for all prisoners prior to completion of a prison sentence); WIS. STAT. ANN. § 973.01(1)–(2) (West 2005) (requiring all sentences of imprisonment to include bifurcated terms of confinement and “extended supervision”).

⁶⁵ See Scott-Hayward, *supra* note 51, at 434.

⁶⁶ See GLAZE & BONCZAR, *supra* note 12.

⁶⁷ Under the discretionary parole schemes that were pervasive from 1900 to roughly 1980, individuals were released upon a finding of rehabilitation by the parole board. See Klingele, *supra* note 11, at 471–72.

⁶⁸ NAT'L RESEARCH COUNCIL, COMM. CMTY. SUPERVISION & DESISTANCE FROM CRIME, PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION 36 (2008); Paul Cromwell, *The Evolving Role of Parole in the Criminal Justice System*, in CRIME & JUSTICE IN AMERICA: PRESENT REALITIES AND FUTURE PROSPECTS 405, 411 (Wilson R. Palacios et al. eds., 2d ed. 2002).

any violations.⁶⁹ In many agencies, surveillance became the primary purpose of post-release supervision, and tolerance for violations decreased.

These “law enforcement” influences have often found themselves in tension with a growing appreciation for the importance of helping prisoners navigate the difficult transition from prison to community—a process that has come to be known as reentry. Beginning in the mid-1990s, studies revealed that up to one-half of prisoners were being rearrested within three years of release from custody, with most of the failure occurring within the first six months.⁷⁰ Later research provided a rich picture of the challenges confronting those leaving prison.⁷¹ These studies were so compelling that they led Congress to pass legislation authorizing hundreds of millions of dollars in funding for programs and research to improve outcomes for people leaving jails and prisons,⁷² a significant portion of which was distributed to departments of corrections and other community supervision agencies to assist them in their efforts to connect former offenders to social services and employment opportunities.⁷³

The tension between the casework and surveillance-oriented roles of post-release supervision officers is inherent and unlikely to be resolved any time soon. Like probation officers, post-release supervision officers are

⁶⁹ See, e.g., Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 *CRIME & JUST.* 479, 479–80 (1999) (discussing public demand for parole abolition following the high-profile murder of thirteen-year-old Polly Klaas and the legislative response).

⁷⁰ See Cecelia Klingele, *The Early Demise of Early Release*, 114 *W. VA. L. REV.* 415, 421 (2012).

⁷¹ See generally FAYE S. TAXMAN ET AL., *FROM PRISON SAFETY TO PUBLIC SAFETY: INNOVATIONS IN OFFENDER REENTRY* (2002) (presenting a conceptual model of the offender reentry process); JEREMY TRAVIS, *URBAN INST., BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005) (describing the housing, employment, and other challenges facing returning prisoners); JEREMY TRAVIS ET AL., *URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY* (2d ed. 2005) (discussing the negative effects of incarceration on prisoners’ children and extended families), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf; Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *AM. SOC. REV.* 777 (2002) (finding that felon disenfranchisement has substantially affected U.S. Senate elections and that at least one Republican presidential victory would have been reversed if former felons had been allowed to vote); Christy A. Visher, *Returning Home: Emerging Findings and Policy Lessons About Prisoner Reentry*, 20 *FED. SENT’G REP.* 93 (2007) (generally describing the challenges of reentry).

⁷² See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

⁷³ In 2011, departments of corrections throughout the country received funding through the Second Chance Act Reentry Program for Adult Offenders with Co-Occurring Substance Disorders and other grant funding. See *Office of Justice Programs Announces 2011 Grant Awards*, ASS’N OF STATE CORR. ADM’RS, <http://www.asca.net/articles/1733> (last visited Aug. 9, 2013) (linking to spreadsheets that list grant recipients for Second Chance funding).

asked to wear many hats, sometimes simultaneously. Former Massachusetts Probation Chief Ron Corbett spoke for all community corrections officers when he offered this anecdote:

When I was asked at a meeting of probation officers, “Are we supposed to be cops or social workers?[]” I answered with another question—“How many of you are parents to teenagers?” I asked those that raised their hands, “Would you say you were a cop or social worker?” One of those that raised his hand said, “At different times, I was both.” Bingo⁷⁴

For community corrections agents, the question is not whether rehabilitation and surveillance are legitimate purposes of supervision; rather, the question is how to balance the competing demands they make on agents’ time and the criminal justice system’s limited resources. The answer is often shaped by the culture of the agencies in which post-release officers perform their work.

Before the 1980s, post-release supervision was primarily the job of parole officers employed by departments of corrections or independent parole boards. With the advent of determinate sentencing and the decline of discretionary parole, parole agencies underwent a significant shift. No longer responsible for managing discretionary parolees, parole officers still remained responsible for supervising mandatory parolees and individuals with newly imposed terms of post-imprisonment community supervision. These newly coined “community corrections” officers often remained aligned with correctional agencies or independent parole boards, though sometimes they merged with probation offices to supervise individuals on both probation and post-release supervision. As a result, post-release supervision officers now operate in a wide variety of institutional contexts, sometimes reporting directly to courts (as in the federal system) and other times operating within correctional agency structures.⁷⁵

III. THE DYNAMICS OF REVOCATION

By definition, sentences of community supervision are intended to be noncustodial. In many jurisdictions, however, community supervision often ends in confinement. One study followed individuals released from prison in 2004 and found that in thirteen states, 25% or more of those released were reincarcerated for purely “technical” violations⁷⁶ of community

⁷⁴ Tricia M. Oliver, *A Q&A with Ron Corbett, Probation Commissioner*, 18 MASS. LAWYERS J. 1, 10 (2011).

⁷⁵ See Part III *infra*.

⁷⁶ See, e.g., KAN. STAT. ANN. §§ 75-5214, 75-5216 (1981), VA. CODE ANN. §§ 53.1-136,

supervision within three years.⁷⁷ Recent estimates suggest that half of the people in U.S. jails, and more than one-third of those entering prison, have been incarcerated as a result of revocation.⁷⁸ While revocation rates vary tremendously from one jurisdiction to another and are not perfectly recorded (particularly with respect to probation), it is clear that in many jurisdictions the failure of community supervision accounts for a dramatic portion of new prison admissions.

Furthermore, rates of success appear to have decreased over time. One study estimated that successful probation completion rates “declined from 69% in 1990 to 59% in 2005,” while successful parole completion declined from 50% to 45% in the same period.⁷⁹ Consistent with that finding, a 2009 report found that 40% of new California prison admissions annually come as a result of probation revocation alone.⁸⁰

Why does community supervision end so often in imprisonment? The answer can be found in the legal and institutional structures that control the imposition and execution of community supervision. These include the number and kind of rules on which release is conditioned, the methods of supervision employed by community corrections agents, and the legal framework that governs the state’s response to violations of community supervision.

53.1-145 (2013), WIS. STAT. §§ 301.001, 304.01 (2009), WIS. ADMIN. CODE DOC § 328.04 (2013). A technical violation is a breach of the rules of release that is not in itself criminal. Violating curfew, drinking alcohol, missing appointments, or having contact with prohibited individuals are all examples of technical violations.

⁷⁷ PEW CTR. ON STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS* 14 ex.2 (2011) (listing California, Georgia, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New Jersey, New York, South Dakota, Utah, and Wisconsin as reincarcerating 25% or more of releasees for technical violations). Because the study included all released prisoners and not just those released to serve terms of community supervision, the actual percentage of individuals revoked in each of the named jurisdictions was likely much higher than 25%.

⁷⁸ BURKE ET AL., *supra* note 14, at 1; *see also id.* at 3 (“[S]hifts in practices with respect to parole release and reincarceration for parole violations accounted for 60 percent of the increase in the nation’s prison population between 1992 and 2001.”); Blumstein & Beck, *in PRISONER REENTRY*, *supra* note 8, at 56.

⁷⁹ Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 593 (2009); *see also* LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES*, 2006, at 6, 9 (rev. 2008).

⁸⁰ *See, e.g., Achieving Better Outcomes for Adult Probation*, LEGISLATIVE ANALYST’S OFFICE (May 29, 2009), http://www.lao.ca.gov/2009/crim/Probation/probation_052909.aspx; *see also* PEW CTR. ON STATES, *THE IMPACT OF CALIFORNIA’S PROBATION PERFORMANCE INCENTIVE FUNDING PROGRAM 1* (2012), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Pew_California_probation_brief.pdf.

A. CONDITIONS OF RELEASE

Community supervision, whether in the form of probation or post-release supervision, is often framed as a benevolent alternative to legally authorized confinement.⁸¹ Because community supervision is imposed only in cases in which confinement is a permitted sanction, reviewing courts have tended to treat the imposition of probation or post-release supervision conditions as an “act of grace” that permits convicted individuals to serve “lighter” sentences than the law permits.⁸² Laws governing the imposition of release conditions are broadly permissive: courts and correctional agencies may legally impose almost any condition on a probationer or parolee on the grounds that any conceivable term of release will be less punitive than the authorized term of confinement. Individuals who are subjected to particularly onerous conditions of supervision may challenge them as impermissibly infringing on constitutional rights,⁸³ however, courts typically treat such rights as “diminished” during the period of supervision.⁸⁴ Thus, for reasons both practical and legal, conditions of release “are rarely subjected to any appellate review.”⁸⁵ When they do face review, it tends to be “extremely deferential.”⁸⁶

There is wide variety in the number and kind of conditions that are imposed on individuals under community supervision. In many jurisdictions, all sentences of community supervision include mandatory

⁸¹ See, e.g., *United States v. Murray*, 275 U.S. 347, 357 (1928) (“The great desideratum [of the Federal Probation Act] was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment.”).

⁸² Often called the “act of grace theory,” this finds its origins in *Burns v. United States*, 287 U.S. 216, 223 (1932), and *Escoe v. Zebst*, 295 U.S. 490, 492–93 (1935) (“Probation or suspension of sentence comes as an act of grace to one convicted of a crime . . .”). See Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 55–56 (1981); see also Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 88–90 (2000) (discussing act-of-grace theory).

⁸³ Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 202–07 (1967); see also Hink, *supra* note 34, at 489–90.

⁸⁴ See Jasmine S. Wynton, Note, *MySpace, YourSpace, But Not TheirSpace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1886 (2011) (“Offenders on probation, parole, or supervised release have diminished constitutional rights and thus receive less constitutional protection than those who are no longer under state supervision.”).

⁸⁵ See, e.g., Horwitz, *supra* note 82, at 110.

⁸⁶ *Id.*

conditions to which all offenders are subject. Most common among these is the requirement that no new crimes be committed; others include reporting regularly to the supervising agent and making restitution payments.⁸⁷ The weight of these standard conditions can be significant.⁸⁸

In addition to generally applicable standard conditions, courts may be required to impose additional mandatory rules on certain categories of offenders. Under federal law, all individuals convicted of crimes of domestic abuse must attend an approved rehabilitation program, for example.⁸⁹ Sex offenders are often singled out for extra conditions, which may include registration, around-the-clock GPS monitoring, limits on access to the Internet, and chemical castration.⁹⁰

In addition to mandatory conditions, courts are authorized to impose additional conditions of supervision at their discretion.⁹¹ Most states

⁸⁷ Heather Barklage et al., *Probation Conditions Versus Probation Officer Directives: Where the Twain Shall Meet*, 70 *FED. PROBATION* 37, 37 (2006) (“Currently, both federal and state probation and parole systems utilize what are known as ‘standard conditions of supervision.’ These ‘standard’ conditions routinely require the offender to: 1) avoid commission of any new offenses; 2) notify the supervising agency prior to leaving the district of supervision; 3) notify the supervising agency of any change in residence; 4) maintain stable employment; 5) report any new arrests without delay to the supervising agency; 6) report regularly to the supervising agency; and 7) to comply with any directives or instructions from the supervising corrections agent.”).

⁸⁸ See, e.g., Ben M. Crouch, *Is Incarceration Really Worse? Analysis of Offenders’ Preferences for Prison Over Probation*, 10 *JUST. Q.* 67, 79 (1993) (finding that two-thirds of Texas prisoners surveyed would prefer a year in prison to ten years of probation, and nearly one-third would prefer one year in prison to three years of probation). In the federal system, individuals serving terms of probation must comply with seven standard conditions, any one of which could result in revocation (and sometimes a new criminal charge, see 18 U.S.C. § 1001 (2012), if not performed, *id.* § 3563(a) (listing mandatory probation conditions that include committing no new crimes, paying fines and restitution, avoiding drug use, performing drug tests, notifying the court of changes in economic conditions, and providing a DNA sample)).

⁸⁹ 18 U.S.C. § 3563(a)(4).

⁹⁰ *Id.* § 3563(a)(8) (“The court shall provide, as an explicit condition of a sentence of probation . . . for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act[.]”); Michael Petrunik et al., *American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness*, 21 *FED. SENT’G REP.* 111, 115 (2008) (“California was the first state to pass legislation mandating chemical castration through antiandrogen treatment as a parole condition for certain categories of sex offender, followed by Florida in 1997.”); Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 17, 36–38 (2008). Sex offender conditions are so restrictive that some departments have established special units to provide supervision to sex offenders. See Madeline Carter et al., *Promoting Offender Accountability and Community Safety through the Comprehensive Approach to Sex Offender Management*, 34 *SETON HALL L. REV.* 1273, 1292–93 (2004). Officers working in these units ordinarily carry a smaller caseload to enable them to provide more careful supervision. *Id.*

⁹¹ See, e.g., 18 U.S.C. § 3563(b) (listing twenty-two discretionary conditions, and

explicitly authorize sentencing courts to impose additional conditions.⁹² As a consequence, courts have been known to impose a wide range of conditions, ranging from the bizarre (“[y]ou may never even sit in the front seat (of a car)”⁹³) to the controversial (don’t get pregnant⁹⁴) to the downright dangerous (put a bumper sticker on your car announcing you are a sex offender⁹⁵).⁹⁶ Even when the conditions imposed are reasonable in themselves, the lack of robust legal limits on release conditions often results in a laundry list of conditions to which any given offender is bound.⁹⁷

Historically, individuals on community supervision were required to “be of good behavior” and “conduct [themselves] in a law-abiding manner.”⁹⁸ Such vague directives have given way to more specific rules, but the broad flavor of the original admonitions remains. Some conditions that attach to community supervision impose restrictions that are tied to the offender’s known risks, such as prohibitions on weapons for violent offenders, drug use for those with substance abuse related convictions, and socializing with codefendants or convicted felons for those whose criminal

authorizing “such other conditions as the court may impose”).

⁹² N.C. GEN. STAT. § 15A-1343(a) (2011) (“The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.”).

⁹³ Cary Spivak & Dan Bice, *Front-Seat Ban Adds to Odd Legacy of Judge Schellinger*, MILWAUKEE J. SENTINEL, Apr. 18, 2003, at 1B.

⁹⁴ Dan Slater, *The Judge Says: Don’t Get Pregnant. A Lapsed Law Now Sees New Life*, WALL ST. J., September 25, 2008, at A18, available at http://online.wsj.com/article/SB122230566090673847.html?mod=googlenews_wsj (last visited Aug. 9, 2013).

⁹⁵ See Ross E. Milloy, *Texas Judge Orders Notices Warning of Sex Offenders: Car and Home Signs Elicit Praise and Shock*, N.Y. TIMES, May 29, 2001, at A10 (reporting that after “a judge ordered 21 registered sex criminals to post signs on their homes and automobiles warning the public of their crimes, [] the results were almost immediate. One of the offenders attempted suicide, two were evicted from their homes, several had their property vandalized and one offender’s father had his life threatened, according to court testimony.”).

⁹⁶ For critiques of these and other conditions that purport to shame and “creatively” punish, see generally Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357 (challenging the justifications for extreme shaming sanctions).

⁹⁷ A study of individuals on conditional release in Wisconsin revealed an average of thirty conditions per offender, approximately half of which were discretionary. KIT VAN STELLE & JANA GOODRICH, UNIV. WIS. POPULATION HEALTH INST., THE 2008/2009 STUDY OF PROBATION AND PAROLE REVOCATION 158 (2009), available at <http://uwphi.pophealth.wisc.edu/about/staff/van-stelle-kit/2008-2009-study-of-probation-and-parole-revocation.pdf>.

⁹⁸ Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 315 n.31 (1959) (quoting *State v. McBride*, 83 S.E.2d 488, 490 (N.C. 1954); *Swan v. State*, 90 A.2d 690, 693 (Md. 1952)).

activity has been influenced by their gang affiliations.⁹⁹ Other conditions, however, govern aspects of life that are not in themselves criminal or even immoral. Supervision rules commonly impose curfews, prohibit alcohol consumption, and require participation in educational programs. Additional administrative conditions may require offenders to attend meetings with community corrections officers (often at a distance from the offenders' homes), pay restitution and fees for supervision and required treatment programs, submit monthly financial forms with supporting documentation, obtain permission before traveling outside the jurisdiction, and notify the agent immediately of any change in residence or employment.

While often reasonable when considered individually, in the aggregate, the sheer number of requirements imposes a nearly impossible burden on many offenders.¹⁰⁰ Not surprisingly then, violations of the conditions of community supervision are pervasive. Many are minor, but because all conditions are court-imposed as a condition of release, even the slightest infraction gives the state legal authority to imprison the violator. And, as one agent observed, uncovering evidence of minor violations is not difficult:

[M]ost of our violations are technical. . . . I mean, if you can't write up a report, and cite at least a technical violation, you're not really struggling very hard, because there are so many conditions. There's got to be something that the guy didn't do right, right?¹⁰¹

For those serving terms of probation, release conditions are ordinarily imposed by the sentencing court.¹⁰² Individuals serving terms of post-release supervision may be subject to court-imposed conditions,¹⁰³ to conditions set by the releasing agency,¹⁰⁴ or to a combination of both.¹⁰⁵

⁹⁹ One study of probationers found that in 1995, two out of five "probationers were required to enroll in some form of substance abuse treatment. . . . Nearly a third of all probationers were subject to mandatory drug testing . . ." THOMAS P. BONZCAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF ADULTS ON PROBATION, 1995, at 7 (1997).

¹⁰⁰ The likelihood of violation is high in any case, but the odds are heightened by the fact that individuals involved in the criminal justice system are more likely to be drug-addicted, economically disadvantaged, suffering from physical and mental ailments, and are more likely to have learning and language deficits.

¹⁰¹ Interview with Correctional Agent (July 25, 2012). The identity of agents interviewed for this project are protected as confidential under the terms of University of Wisconsin–Madison IRB Protocol SE-2012-0220.

¹⁰² See, e.g., FLA. STAT. § 948.03 (2010); KY. REV. STAT. ANN. § 439.553 (West 2011).

¹⁰³ See, e.g., 18 U.S.C. § 3583(d) (2012).

¹⁰⁴ See, e.g., FLA. STAT. § 947.1405 (2010); NEV. REV. STAT. § 213.12175 (1997); see also OHIO REV. CODE ANN. §§ 2967.01(E), 2967.131 (West 2000).

Even when courts, rather than agencies, are responsible for setting rules, correctional agents often implement those rules in ways that add to (or subtract from) the burdens they place on those subject to them. Federal and state courts have tried to limit the degree to which correctional officers may assume the “core judicial function” of imposing and modifying rules of release, but as a practical matter, some delegation takes place out of necessity, as agents give meaning to vague conditions, such as orders to “meet with the agent,” “submit to drug testing,” or “pay restitution.”¹⁰⁶ When to meet, how often to test, and how much to pay are questions that agents often play an important role in answering.¹⁰⁷ Consequently, agents’ methods of supervising and implementing conditions become important components of understanding the dynamics of revocation.

B. METHODS OF SUPERVISION

Supervision styles are tremendously varied and are heavily influenced by office culture. In some jurisdictions, particularly those in which agents carry heavy caseloads, officers have become little more than glorified bureaucrats who spend their days completing paperwork and conducting periodic check-ins with offenders in the agents’ offices.¹⁰⁸ In other places, officers spend most of their time in the field, visiting offenders in their homes and at their places of work. Some agents have offices in the

¹⁰⁵ See, e.g., KY. REV. STAT. ANN. §§ 439.177, 439.3108.

¹⁰⁶ See Barklage et al., *supra* note 87, at 38–39.

[T]he crux of the problem is the extent to which the probation officers’ instructions or directives require the defendant to adhere to new requirements of supervision about which he did not have reasonable notice. Too much limitation of the community supervisor’s discretion is obviously problematic, for it will render the agent unable to respond to changing conditions in an offender’s circumstances. On the other hand, courts cannot abandon their constitutional and statutory sentencing roles by granting plenary powers to correctional personnel.

Id. at 40; see also *United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995); *Whitehead v. United States*, 155 F.2d 460, 462 (6th Cir. 1946) (“Fixing the terms and conditions of probation is a judicial act which may not be delegated.”).

¹⁰⁷ See, e.g., COUNCIL OF STATE GOV’TS, JUSTICE REINVESTMENT IN KANSAS: ANALYSES & POLICY OPTIONS TO REDUCE SPENDING ON CORRECTIONS & REINVEST IN STRATEGIES TO INCREASE PUBLIC SAFETY 5 (2013) (“Two out of every three community corrections directors surveyed said that judges sentencing someone to probation typically provide the probation officer with the discretion to increase reporting requirements or impose a curfew without having to go back to court first.”).

¹⁰⁸ See Mark Jones & John J. Kerbs, *Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations*, 71 FED. PROBATION 9, 12 (2007) (reporting survey findings that probation and parole officers carried an average caseload of 141 offenders and a maximum caseload of 4,000 offenders).

communities where the people they supervise live; others are located in central administration centers located at a significant distance from the places where probationers and parolees reside.

For reasons that should be apparent, the more distance officers have from the lives of the people they supervise, the more enforcement-oriented they tend to be. Conversely, the more immersed agents are in the complicated and difficult lives of the people they supervise, the more they tend to embrace a casework model of supervision, seeing themselves more as service brokers than as law enforcement officers. While some of the difference in supervision styles can be attributed to differences in personality and training among officers,¹⁰⁹ studies suggest that institutional structures and incentives heavily influence the model of supervision agents follow.¹¹⁰

Agents learn about violations from several common sources: failed drug tests, calls from collateral contacts, and many times, from the offenders themselves. Objective sources of information, such as drug test results and data provided by electronic monitoring, allow agents to obtain information about rule violations even when they have little contact with those in their charge. To gain information from other sources, agents are often required to develop relationships of trust with those they supervise, as well as their families and associates.¹¹¹ When such relationships are left unattended, violations may go undetected, leading to fewer revocations, perhaps, but also to the possibility of serious threats to public safety.

While positive relationships between offenders and agents is a factor that has been correlated with reduced rates of recidivism,¹¹² too much

¹⁰⁹ See Lloyd E. Ohlin et al., *Major Dilemmas of the Social Worker in Probation and Parole*, 2 *CRIME & DELINQ.* 211, 215 (1956) (discussing the role of personality in agent decisionmaking).

¹¹⁰ See generally Richard McCleary, *How Structural Variables Constrain the Parole Officer's Use of Discretionary Powers*, 23 *SOC. PROBS.* 209 (1975) (examining the structural dynamics of revocation decisions).

¹¹¹ The same agent quoted above observed that the most common way he learned about rule violations was from offenders' "girlfriends, ex-girlfriends, family, [or] friends." Interview with Correctional Agent (July 25, 2012). One of the agent's colleagues reported that offenders themselves serve as a primary source of information: "[S]ometimes I get a call, and this is actually most of the time, I'll get a text from the person Texting is great, because [a rule violation is] not something they're going to call you with. It's much easier for them to admit to me that way, for whatever reason So, yeah, I'll learn straight from my client." Interview with Correctional Agent (Jan. 7, 2013). These sources of information would be less readily available to agents who did not make themselves accessible to offenders and their family members or develop trust with them.

¹¹² See, e.g., Christopher T. Lowenkamp et al., *When a Person Isn't a Data Point: Making Evidence-Based Practice Work*, 76 *FED. PROBATION* 11, 16 (2012). See generally

supervision can result in higher rates of revocation. Studies have suggested that, contrary to expectations, socially disadvantaged offenders who are offered rehabilitative interventions, such as counseling or drug treatment, are often more likely to be revoked than are those who are not offered treatment services.¹¹³ Researchers have attributed this result to the higher level of visibility and surveillance that attach to state-imposed interventions, however benevolent their design: in short, more conditions tend to mean more opportunities for violation and detection.¹¹⁴

C. RESPONSES TO RULE VIOLATIONS

When violations have been detected—as they so often are—methods of sanctioning vary as much as the conditions themselves and depend heavily on the discretionary decisions of multiple actors within the criminal justice system. Violations may be handled informally by the supervising community corrections officer. This form of street-level diversion is often left wholly to the discretion of the individual officer but is sometimes formally sanctioned by law.¹¹⁵ If the agent decides more formal action must be taken, then a sanction is imposed at the agent’s discretion or in consultation with a supervisor. The most serious response is to refer the case for full or partial revocation. For violations of probation, this will usually mean returning to the sentencing court,¹¹⁶ while for violations of

JAMES BONTA & D. A. ANDREWS, RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION (2007) (discussing the importance of client relationships as one aspect of reducing recidivism).

¹¹³ Celesta A. Albonetti & John R. Hepburn, *Probation Revocation: A Proportional Hazards Model of the Conditioning Effects of Social Disadvantage*, 44 SOC. PROBS. 124, 135 (1997) (“Findings from the pooled proportional hazards model indicate that, contrary to expectations, offenders who received both treatment and drug testing, compared to only drug testing, did less well on probation.”); see also Todd R. Clear & Patricia L. Hardyman, *The New Intensive Supervision Movement*, 36 CRIME & DELINQ. 42, 44–45 (1990); Kenneth C. Land et al., *Logistic Versus Hazards Regression Analyses in Evaluation Research: An Exposition and Application to the North Carolina Court Counselors’ Intensive Protective Supervision Project*, 18 EVALUATION REV. 411, 424 (1994).

¹¹⁴ Albonetti & Hepburn, *supra* note 113, at 135.

¹¹⁵ See, e.g., WIS. ADMIN. CODE DEP’T OF CORR. § 10.01.06 (2007) (“Alternatives to Revocation (ATR) shall be considered in all cases. Alternatives can be formal or informal in nature.”).

¹¹⁶ Wisconsin is an exception, authorizing administrative law judges to hear revocation petitions in most cases. See, e.g., WIS. STAT. § 301.03 (2009) (“[T]he decision to revoke probation, extended supervision or parole in cases in which there is no waiver of the right to a hearing shall be made by the division of hearings and appeals in the department of administration”).

post-release supervision, an administrative agency is usually designated as the decisionmaker.

At the agent level, the response to a rule violation will depend a great deal on the proclivities of the supervising agent¹¹⁷ and the circumstances of the infraction. Minor violations, such as missed appointments, late-filed report forms, or curfew violations may be disregarded entirely or handled with an informal reminder or admonition. Agent responses to low-level violations vary tremendously, even within the same office. Compare these three responses to the problem of late-filed report forms:

Agent 1: I'm not a huge stickler on the monthly report forms. Get it to me. . . . I understand people have time limitations and paperwork is just not some people's thing, and I get that. To me, that's not as important as being in contact with me and letting me know what's going on with them in their life. I prefer that over looking at [a] piece of paper.¹¹⁸

Agent 2: [I]f you know of a violation, you should always bring it up, and you should always point out what they should be doing and what they didn't do correctly. This is what you want. . . . [T]he very technical, very minor things—I've tried to stress with [people under supervision]—this may impact . . . get[ting] you discharged early.¹¹⁹

Agent 3: I know some people who, as soon as that report is late, they're whipping out a letter saying, get it in! And I might be more negligent and say, you know, the next time I see that person, "you know, you're two reports behind," and, you know, let them get it caught up.¹²⁰

Other violations, such as contact with a former codefendant or unauthorized travel, may be given informal treatment as well. These "street level" discretionary decisions are often made by community corrections officers without the guidance of formal law or policy and are not infrequently left undocumented.¹²¹

When a violation is significant enough to warrant a formal response from the supervising agent, either due to its severity or frequency, or to the proclivities of the individual agent, the options for responding will vary according to the policies and procedures of the local jurisdiction. Sometimes the law requires revocation for a small category of particularly serious violations.¹²² More often, however, agents have wide authority to take actions ranging from recounseling the offender on his obligations to initiating revocation proceedings.

¹¹⁷ See Ohlin et al., *supra* note 109, at 215.

¹¹⁸ Interview with Correctional Agent (July 25, 2012).

¹¹⁹ Interview with Correctional Agent (Jan. 13, 2013).

¹²⁰ Interview with Correctional Agent (July 25, 2012).

¹²¹ Field observations; interviews with Correctional Agents (June 2012 to Jan. 2013).

¹²² See 18 U.S.C. §§ 3565(b), 3583(g) (2012).

The number of intermediate options available to the agent will vary considerably from one jurisdiction to the next. Often, they include modifying the conditions of supervision (usually with consent of the offender); referring the offender for outpatient or inpatient counseling or treatment; placing the offender under closer surveillance through increased visits or electronic monitoring; or even detaining the offender for a brief time in the local jail. Which of these options the agent selects will vary based on a combination of officer proclivity, office culture, and administrative guidelines, if any exist.¹²³

When an agent determines that revocation is the proper response to a rule violation, he must ordinarily petition either a court or administrative agency to hold a hearing on the alleged violation and impose a sanction when evidence of a violation is found.¹²⁴ Following the historical pattern that links probation to courts and post-release supervision to correctional agencies, in many jurisdictions, judges determine the sanctions for probation violations and boards of parole or other Executive Branch agencies set sanctions for violations of post-release supervision.¹²⁵ In some places, the supervising agency itself holds hearings to decide whether a person in its charge has violated the conditions of release and whether revocation is appropriate.¹²⁶

At a revocation hearing, individuals under supervision are entitled to minimal due process protections.¹²⁷ They are entitled to notice of the

¹²³ Cf. Todd R. Clear & Edward J. Latessa, *Probation Officers' Roles in Intensive Supervision: Surveillance Versus Treatment*, 10 JUST. Q. 441, 441 (1993) (finding little evidence that officers integrate the conflicting roles required of them, and noting in its abstract instead that “[t]he ‘law enforcer’ role appears to be a product of both personal philosophy and organizational policy, whereas the ‘social worker’ role is influenced more heavily by organizational policy”); McCleary, *supra* note 110, at 224 (examining the structural dynamics of revocation decisions and concluding that the research data suggest that “the agent of failure [in revocation cases] may often lie in the structural dynamic of the parole supervision agency”).

¹²⁴ The evidentiary standards for revocation hearings are low. The rules of evidence do not ordinarily apply at such hearings, and the state’s burden of proof is usually set at a preponderance of the evidence standard.

¹²⁵ See, e.g., MO. CODE REGS. ANN. tit. 14, § 80-4.030(1) (2012) (“When the board chooses to pursue revocation of probation, parole, or conditional release, the alleged violator has the right to a revocation hearing before the authority that originally granted the probation, parole, or conditional release.”); see also IOWA CODE § 908.4(1) (2002) (“The parole revocation hearing shall be conducted by an administrative parole judge who is an attorney.”).

¹²⁶ See, e.g., 37 TEX. ADMIN. CODE § 146.9(a) (2013) (“The parole panel or designee of the board shall conduct the [parole] revocation hearing.”).

¹²⁷ See *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973); *Morrissey v. Brewer*, 408 U.S.

alleged violation and may call witnesses and testify in their own defenses.¹²⁸ They are also entitled to the assistance of counsel in connection with the revocations.¹²⁹ Proving a violation ordinarily requires no more than a preponderance of the evidence,¹³⁰ and evidentiary standards are relaxed. Hearsay is usually admissible,¹³¹ and the exclusionary rule does not bar consideration of evidence that may have been obtained in violation of a supervisee's right against unreasonable search and seizure.¹³² Except where revocation is mandatory,¹³³ a decisionmaker ordinarily has a number of sanctions available if she finds that a violation has occurred. Typically, available sanctions include modifying the conditions of release or returning the offender to custody for all or some of the remainder of his sentence. In the case of probation revocation, if a sentence was withheld (rather than suspended), the sentencing court can choose from all dispositional options that were available at the time of the original sentencing.

Given the frequency with which rules of release are violated and the ease with which such violations can be proven, it should come as no surprise that revocation is a fairly commonplace event. The size of the population under community supervision is so significant that "revoking even a few percent of them or revoking all those who are rearrested can

471, 483 (1972); *see also* Joel Bassett, Note, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 479, 489-90 (1969).

¹²⁸ *See Scarpelli*, 411 U.S. at 786; *Morrissey*, 408 U.S. at 487-88.

¹²⁹ *Mempa v. Rhay*, 389 U.S. 128, 137 (1967); *Scarpelli*, 411 U.S. at 781.

¹³⁰ *See, e.g.*, ALASKA STAT. § 33.16.220(h) (2012); GA. CODE ANN. § 42-8-34.1(b) (2001); *see also* Hadar Aviram with Valerie Kraml & Nicole Schmidt, *Dangerousness, Risk, and Release*, 7 HASTINGS RACE & POVERTY L.J. 175, 184 (2010) (observing that in California the "standard of proof for [revocation] hearings is a mere preponderance of the evidence, which is problematic considering that the hearings are not limited to technical returns, but can be used to adjudicate new crimes as well").

¹³¹ *But see* GA. CODE ANN. § 24-1-2(b) (West 2013) (making rules of evidence applicable to probation revocation hearings).

¹³² Pa. Bd. of Prob. & Parole v. *Scott*, 524 U.S. 357, 367-68 (1998) (holding that the exclusionary rule does not bar introduction of evidence seized in violation of a parolee's Fourth Amendment rights at a revocation hearing); *see also* Duncan N. Stevens, Note, *Off the Mapp: Parole Revocation Hearings and the Fourth Amendment*, 89 J. CRIM. L. & CRIMINOLOGY 1047, 1047 (1999).

¹³³ *See, e.g.*, 18 U.S.C. §§ 3565(b), 3583(g) (2012); HAW. REV. STAT. § 706-625(3) (2004) ("The court shall revoke probation if the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order or has been convicted of a felony."); 730 ILL. COMP. STAT. ANN. 5/3-3-9(b-5) (2007) (imposing mandatory revocation for sex offenders found living with other known sex offenders).

have a dramatic impact on prison admissions.”¹³⁴ That is exactly what has happened.

IV. RESPONSES TO THE PROBLEM OF REVOCATION

A. WHAT PROBLEM?

High revocation rates alone tell us little about the proper function of community supervision. In fact, high rates of revocation invite any number of potentially contradictory conclusions: that the sanction is overused because inappropriate candidates are being selected for community-based punishment; that the sanction is overly punitive because the kind and number of conditions make compliance impossible; that community supervision is functioning well because correctional agents are being vigilant in returning to custody those who pose threats to public safety; or that community supervision is fundamentally broken because too many people are failing to successfully complete their terms in the community. Before proposing legislative responses to the “problem” of revocation, it is useful to determine whether a problem exists, and if so, what the nature of that problem might be.

Criticism of high revocation rates has come from many quarters. First, and most vocal, are legislators and correctional administrators desperate to reduce the costs of incarceration. Spending on corrections has been growing at a faster pace than any other category of state spending except Medicaid.¹³⁵ As budgets continue to shrink, states are no longer capable of

¹³⁴ Petersilia, *supra* note 29, at 166 (reporting that between 30% and 50% of all new prison admissions stem from probation and parole failures). Because counties rarely collect data in ways that permit easy analysis across jurisdictions, much more is known about post-release revocation rates and procedures than is known about probation revocation. *See id.* at 179–85. Nevertheless, it is possible to make some general estimates of the prevalence of revocation based on state-specific studies.

¹³⁵ CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, *THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES* 3 (2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf (citing data compiled by the National Association of State Budget Officers). In some states, corrections spending has now eclipsed spending on higher education. *See, e.g.*, Katherine Buslacchi, *Pa. May Spend More on Prisons than Higher Education, Corbett Says*, DAILY COLLEGIAN, Feb. 14, 2013, http://www.collegian.psu.edu/archive/2013/02/14/jails_and_drug_counseling.aspx; *see also* Alison Bauter, *As Priorities Shift, Corrections Budget Passes UW System*, MILWAUKEE J. SENT., Aug. 16, 2012, <http://www.jsonline.com/news/statepolitics/wisconsin-corrections-spending-passes-that-of-uw-system-ua62t4k-166039926.html> (“In 2011, Wisconsin state spending quietly hit a milestone: For the first time, the state budgeted more taxpayer dollars for prisons and correctional facilities than for the University of Wisconsin System.”); Commentary, *Jail Not*

paying the bills associated with prison growth. Consequently, many lawmakers have become eager to find ways to manage offenders in less expensive, noncustodial settings whenever possible.¹³⁶ From this purely financial perspective, revocation is seen as a problem, because it increases the number of people in prison and the attendant costs of confining them.

Whether it is legitimate for cost to play a role in sentencing decisions is a matter of some debate. When the State of Missouri recently introduced a “cost information system” that allows sentencing judges to compare the cost of various sentencing options,¹³⁷ it evoked strong reactions from supporters and detractors alike.¹³⁸ Pragmatists hailed it as a long-overdue way of focusing judges’ attention on the real consequences of their sentencing practices.¹³⁹ Critics decried it as an illegitimate attempt to substitute punishment based on desert with utilitarian considerations wholly unrelated to offenders’ culpability.¹⁴⁰

The same philosophical debates that attend cost considerations at

College, PROVIDENCE J., Jul. 5, 2010, at 6 (“For the fourth year in a row, Rhode Island is spending more on its Department of Corrections than on higher education . . .”).

¹³⁶ See, e.g., Kevin Johnson, *To Save Money on Prisons, States Take a Softer Stance*, USA TODAY, Mar. 18, 2009, at 1A (reporting on a new Kansas law that “gives local probation departments broader authority to decide whether technical violations of release, such as missed meetings with probation officers or failed drug tests, should result in prison”).

¹³⁷ See Monica Davey, *Touching Off Debate, Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 19, 2010, at A1 (“For someone convicted of endangering the welfare of a child, for instance, a judge might now learn that a three-year prison sentence would run more than \$37,000 while probation would cost \$6,770. A second-degree robber, a judge could be told, would carry a price tag of less than \$9,000 for five years of intensive probation, but more than \$50,000 for a comparable prison sentence and parole afterward. The bill for a murderer’s 30-year prison term: \$504,690.”).

¹³⁸ See, e.g., Douglas A. Berman, *Are Costs a Unique (and Uniquely Problematic) Kind of Sentencing Data?*, 24 FED. SENT’G REP. 159, 160 (2012) (arguing that “it is hard to be seriously opposed to, or even skeptical about, modern movement toward these ‘evidence-based’ sentencing policies and practices”); Ryan W. Scott, *How (Not) to Implement Cost as Sentencing Factor*, 24 FED. SENT’G REP. 172, 173–76 (2012); Michael A. Wolff, *Missouri Provides Cost of Sentences and Recidivism Data: What Does Cost Have to Do with Justice?*, 24 FED. SENT’G REP. 161, 162–63 (2012).

¹³⁹ See, e.g., Lynn S. Branham, *Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing*, 24 FED. SENT’G REP. 169, 171 (2012) (“I unabashedly favor endeavors, such as the one in Missouri, to better inform judges’ sentencing decisions and to bring more transparency into the sentencing process.”).

¹⁴⁰ See, e.g., Chad Flanders, *Cost as a Sentencing Factor: Missouri’s Experiment*, 77 MO. L. REV. 391, 410 (2012) (“Cost as a sentencing factor should be presumptively disfavored. Although we probably cannot excise all consideration of cost in sentencing, we should not make it a salient factor for judges to consider.”); Davey, *supra* note 137, at A1 (“Justice isn’t subject to a mathematical formula . . .” (quoting St. Louis County Prosecutor Robert P. McCulloch) (internal quotation marks omitted)).

sentencing attend cost considerations related to revocation of community supervision. For good or ill, considerations of cost are embedded in the functioning of the criminal justice system and consequently must be confronted.¹⁴¹ While this is true as a matter of pragmatism, there are dangers in crafting criminal justice policy with the primary goal of saving money.¹⁴² In a system of law that purports to exercise moral authority, it is essential that law and policymakers grapple with what is fair and not merely what is cost effective.¹⁴³

While cost has been a driving factor in the willingness of legislatures to “do something” to reduce revocation rates, criticism has come from other quarters, too. Advocates of “evidence-based practices” have argued that most jurisdictions engage in misdirected supervision practices that place too many conditions on low-risk offenders (leading to unnecessary revocation for minor infractions unrelated to public safety) and too few constraints on high-risk offenders (allowing dangerous violators to go undetected and unpunished). They point to a small but growing body of quantitative research that has identified measurable offender characteristics that correspond to individuals’ statistical risk of criminal reoffense and suggest that relying on actuarial risk prediction tools can help judges decide whom to place on supervision, what services to offer, and what level of surveillance to provide. While proponents of “evidence-based” practices do not condemn high revocation rates *per se*, most agree that a significant number of revocations are unnecessary and could be avoided through more strategic supervision practices. From this perspective, high revocation rates are problematic because they point to inefficiencies in the allocation of

¹⁴¹ Scott, *supra* note 138, at 173 (“[N]o real-world criminal justice system can completely ignore costs, at least at a systemic level.”).

¹⁴² For an example of the inhumane form such cost-saving measures might take, see Editorial, *Two Meals and Not Always Square*, N.Y. TIMES, June 29, 2009, at A20 (decrying efforts to save money in prisons by cutting the number and quality of meals served to inmates).

¹⁴³ In a provocative essay, Michael Tonry has criticized the willingness of progressive reformers to frame law changes that reduce prison populations as cost-saving measures, rather than morally necessary ones. Michael Tonry, *Making Peace, Not a Desert: Penal Reform Should be About Values Not Justice Reinvestment*, 10 CRIMINOLOGY & PUB. POL’Y 637, 638 (2011). He points out that the arguments that led to harsh sentencing laws and penal practices were largely moral ones: victims deserved justice; offenders deserved punishment. “No one should be surprised,” he asserts, “that normative arguments based on ideas about justice and moral rights and wrongs often trump instrumental ones.” *Id.* The lesson to be learned is that although changes in the laws governing community supervision may have the benefit of saving money, that benefit should be viewed as incidental to the primary goal of fairly administering the criminal justice system. If new laws are not morally defensible, then they ought not to be enacted.

limited correctional resources.

Other concerns are more fundamental and challenge the assumption that community supervision and its attendant conditions have any effect on the criminal behavior of those under supervision. The conditions that attach to a sentence of community supervision often restrict behavior that is otherwise lawful in an attempt to promote rehabilitation and control threats to public safety. The enforcement of those conditions is morally justified only if it is plausible to believe that they may actually be capable of accomplishing their desired purposes. There are many reasons to think, however, that conditions of supervision are often neutral, and sometimes even detrimental, to the ability of convicted individuals to lead law-abiding lives.

Critics have long observed that the rate of criminal reoffending by those under supervision seems fairly unaffected by the availability of treatment programs, or even the nature of interactions between agents and their clients.¹⁴⁴ Many of the factors that most influence desistance from crime, including age and personal narrative, bear little connection to the conditions and programmatic interventions imposed by sentences of community supervision.¹⁴⁵ Some have attributed this to static

¹⁴⁴ See, e.g., England, *supra* note 39, at 668 (“The supporters of probation are characteristically disposed to credit the relatively low post-probation failure rates found in most studies to the rehabilitative value of this correctional device; the problem of controlling variables is such, however, that no conclusive evidence has appeared demonstrating that the probation experience is the independent variable in these low rates.”). More recent studies have reached similar conclusions. A 2005 study comparing rearrest rates for individuals released through both mandatory and discretionary supervision schemes and those released without supervision found no differences at all between those without supervision and those released with supervision under mandatory release schemes. (As expected, those selected for release by discretionary decisionmakers performed somewhat better than their peers.) AMY L. SOLOMON ET AL., *URBAN INST., DOES PAROLE WORK?: ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES* 8 (2005); James Bonta et al., *Exploring the Black Box of Community Supervision*, 47 *J. OFFENDER REHABILITATION* 248, 251 (2008) (reporting study findings that indicated no statistically significant relationship between community supervision and the incidence of violent recidivism). A recent study of predictors of reoffense by Kentucky parolees reached the following conclusion:

All five statistically significant predictions of reincarceration for a parole violation are ‘static’ variables that describe attributes of demographics (race) and experience (gang membership, number of prior incarcerations, number of institutions served in, and final custody classification). Although (perhaps) indicators of risk, these are not variables that can be affected by a method of supervision.

Gennaro F. Vito et al., *Characteristics of Parole Violators in Kentucky*, 76 *FED. PROBATION* 19, 21 (2012).

¹⁴⁵ See, e.g., SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* 85–108 (2001) (discussing how personal narratives of success correspond to

characteristics of those under supervision, in particular those on probation:

Augustus and his immediate successors are reputed to have had high rates of success in reforming their charges, despite the fact that Augustus (and this is probably true of his Boston disciples) was not even remotely a specialist in behavior problems, and apparently had no training in even the crude behavior sciences of his day. What he did have in common with his followers of today, however, was the fact that his probationers were first offenders and minor recidivists released to him for supervision under suspended sentences, and it is just here that an explanation may lie for the observed uniformity in probation success-failure rates. . . . Criminologists might do well to consider the possibility that in the circumstances common to most probation systems—in the ordinary selectivity of clients and the ordinary routines of operation—may lie the real clues to the apparent effectiveness of this correctional device.¹⁴⁶

Some have argued that supervision not only does little good but may cause overt harm. Christine S. Scott-Hayward has documented the effects of supervision on offenders' abilities to secure and maintain employment and reestablish familial connections and has found that, in some cases, supervision methods and conditions interfere with successful reentry.¹⁴⁷

Like any discretionary decision made within the criminal justice system, revocation is subject to criticisms that it is arbitrary and "lawless" insofar as the decision of how or whether to respond to rule violations is left in the hands of unguided agents.¹⁴⁸ Worse still is the allegation that the decision to revoke may be not only arbitrary but covertly discriminatory. Studies of state revocation practices have found that individuals of color are in some instances more likely to be revoked from community supervision than are their white counterparts for identical violations.¹⁴⁹

desistance from crime). *See generally* JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70* (2003) (describing the strong effects of aging on rates criminal offending). There is also, however, a strong body of literature finding that reductions in the consumption of illegal drugs also reduces criminal offending. Because substance-abuse treatment and avoidance of illegal drugs are often conditions of supervision, probation and post-release supervision may well reduce criminal reoffense among individuals who struggle with addiction.

¹⁴⁶ England, *supra* note 39, at 675–76. Half a century later, England's observations remain timely.

¹⁴⁷ *See* Scott-Hayward, *supra* note 51, at 448.

¹⁴⁸ *See* Benjamin Steiner et al., *Short-Term Effects of Sanctioning Reform on Parole Officers' Revocation Decisions*, 45 *LAW & SOC'Y REV.* 371, 373–77 (2011) (connecting the problem with agent discretion to literature on the discretionary power of judges and other criminal justice system actors).

¹⁴⁹ *See, e.g.*, SENTENCING PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 16 (2008), *available at* http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

These various criticisms, grounded in both pragmatism and principle, suggest that high revocation rates are a problem for a host of reasons. The next question is how that problem can be remedied.

B. NEW LEGAL RESPONSES

The concerns of “evidence-based” researchers and cost-conscious politicians have proven synergistic. In the past ten years, a number of states have passed laws and changed policies, hoping to save money by reducing their rates of revocation. Much of this new legislation requires agents to make use of the actuarial risk assessment tools advocated by evidence-based practitioners when deciding both the level of supervision that will be imposed upon particular offenders and how severely to sanction violations of release conditions. These developments are being implemented in a variety of ways, but the most common are laws that limit revocation for technical violations and policies that require the use of formal sanctioning grids.

1. *Limits on Sanctioning Technical Violations*

Policymakers recognize that not all conditions of release are of equal importance. One way in which they have tried to contain revocation rates is by barring revocation as a sanction for many noncriminal violations. These so-called technical violations—so denominated because failure to comply with them is only prohibited by the technicality of the community supervision order—have long been associated with overly punitive revocation. Consequently, many new laws prohibit revocation for many common, low-level violations.

North Carolina provides a good example of this phenomenon. In 2011, the state passed its Justice Reinvestment Act in response to high revocation rates.¹⁵⁰ The Act made a number of changes to state laws governing revocation in an effort to reduce reliance on revocation as a sanction for rule violations. The state’s approach was twofold. First, it delegated to probation agents the power to impose short jail stay sanctions without the need for judicial review,¹⁵¹ allowing agents to respond

¹⁵⁰ 2011 N.C. Sess. Laws; *see also* MICHELLE HALL ET AL., NORTH CAROLINA SENTENCING AND & POLICY ADVISORY COMM’N, JUSTICE REINVESTMENT ACT IMPLEMENTATION EVALUATION REPORT 2–4 (2013), *available at* <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/JRIRReports-2013.pdf>.

¹⁵¹ These short stays, which do not exceed “six days of jail confinement during any three separate months of a period of probation, for a total confinement time of up to 18 days,” are referred to as “quick dips.” Jamie Markham, *Quick Dips*, N.C. CRIM. L.: UNC SCH. GOV’T BLOG (Nov. 3, 2011), <http://nccriminallaw.sog.unc.edu/?p=3023>. Longer “dunks” of ninety

immediately to detected technical violations. Second, the new laws prohibited revocation for any reason other than absconding from supervision or committing a new crime (with an exception for individuals who had twice previously been sanctioned to ninety days of confinement as an alternative to revocation¹⁵²).

In 2010, Alabama also restricted the ability of courts to revoke probation and parole as a result of technical violations.¹⁵³ Supporters of the law asserted that the changes would produce an \$18 million savings in the annual cost of revocation and provide sensible alternatives to imprisonment.¹⁵⁴ Under the new law, as originally drafted, full revocation was available only when a person under supervision committed a new crime; in all other instances, sanctions were capped at ninety days' confinement.¹⁵⁵ Notably, in 2011, the law was amended to eliminate the distinction between new crimes for which revocation was available and "technical violations" for which it was not. Under the revised law, revocation is now a permissible sanction not only for new law violations but also for "[p]ossession, receipt, or transportation of any firearm"; "[a]ny violation of any condition prohibiting contact with any victim"; and "[a] violation of any condition which presented a danger to the health, safety, or welfare of any person."¹⁵⁶

Many additional states, including Louisiana,¹⁵⁷ Washington,¹⁵⁸ and

days may be imposed by courts for violations short of absconding and new criminal conduct. See Jamie Markham, *Confinement in Response to Violations (CRV) and Limits on Probation Revocation Authority*, N.C. CRIM. L.: UNC SCH. GOV'T BLOG (Oct. 25, 2011) [hereinafter Markham, *Confinement*], <http://nccriminallaw.sog.unc.edu/?p=2994>.

¹⁵² See Markham, *Confinement*, *supra* note 151.

¹⁵³ NICOLE D. PORTER, SENTENCING PROJECT, *THE STATE OF SENTENCING 2011: DEVELOPMENTS IN POLICY AND PRACTICE* 11 (2012).

¹⁵⁴ See *Alabama Reforms Probation Law to Promote Safety and Reduce Prison Crowding*, EQUAL JUSTICE INITIATIVE (May 10, 2010), <http://www.eji.org/node/391>.

¹⁵⁵ ALA. CODE § 15-22-54 (2010).

¹⁵⁶ *Id.* § 15-22-54(e)(1).

¹⁵⁷ PORTER, *supra* note 153, at 11–12 ("Prior to reform, an individual whose parole or probation was revoked for a first technical violation was required to serve up to 90 days in custody or a maximum sentence of six months in a drug diversion program. HB 415 authorizes a parole or probation officer to impose administrative sanctions for a technical violation of parole or probation conditions, if the Board of Parole or court determines that the offender is eligible and when certain requirements are met including the offender waiving the right to a violation hearing. According to the Department of Corrections, in 2010 there were 4,258 individuals who violated the conditions of their probation or parole. The new measure is expected to save the state more than \$3.9 million by reducing the length of confinement for certain prisoners.")

¹⁵⁸ Washington State takes a fairly extreme position with respect to revocation.

Oregon,¹⁵⁹ also have enacted laws that restrict the ability of decisionmakers to revoke community supervision for individuals who commit certain kinds of rule violations. While such legislation undoubtedly reduces the number of individuals who are formally revoked from community supervision and placed in prison, it is important to notice that these “reforms” do not eliminate the use of custodial sanctions. Sentences of one week, thirty days, or even ninety days are not insignificant. They impose both financial costs (in terms of jail beds used) and human costs (in terms of lost employment, housing, and child custody). In evaluating the “success” of new legislation, these significant burdens should not be discounted.

Moreover, as the Alabama experience illustrates, placing categorical limits on revocation for certain types of behavior can have unintended consequences. The distinction between “technical violations” and “new crimes” glosses over many important differences in the severity of the conduct that underlies a violation. In some cases, a new crime does not justify revocation. Disorderly conduct and many other low-level misdemeanors rarely signify a true threat to the community and often merit only minor sanctions best handled by sentencing in the new criminal case. Conversely, technical violations may involve dangerous behavior that merits revocation. The pedophile who stalks the playground may be engaged in grooming behaviors that pose a genuine threat to community safety and undermine his own rehabilitation. In such cases, limiting the ability of correctional agencies and courts to revoke supervision may undermine, rather than improve, the legitimacy of conditional release.

2. *Graduated Sanction Grids*

Even when community supervision officers have alternative sanctions at their disposal, institutional culture, misinformed assumptions about risk, and personal preferences may lead agents to seek custodial penalties (and

Ordinarily, “[a]n offender who violates any condition or requirement of a sentence may be sanctioned by the court with up to sixty days’ confinement for each violation or by the department with up to thirty days’ confinement” WASH. REV. CODE ANN. § 9.94A.633(1)(a) (West 2012). A person charged with a new felony offense may have community supervisions “suspended” only when he is subject to a term of supervision in another state or has been released on discretionary parole. *Id.* § 9.94A.633(4).

¹⁵⁹ Oregon law defines several kinds of rule violations for which revocation is restricted or unavailable. For example, probation cannot be revoked “as a result of the probationer’s failure to pay restitution unless the court determines from the totality of the circumstances that the purposes of the probation are not being served.” OR. REV. STAT. § 137.540(9) (2011). It is also “not a cause for revocation of probation that the probationer failed to apply for or accept employment at any workplace where there is a labor dispute in progress.” *Id.* § 137.540(10).

may lead decisionmakers to impose them) more often than policymakers desire. Categorical restrictions on revocation are one response to this problem. Another is the use of sanctioning guidelines.

In response to criticism that revocation is too often a disproportionate response to rule violations, many departments have developed administrative sanctioning grids for use by all community correctional agents.¹⁶⁰ Some simply match the severity of an infraction to the severity of the authorized response. Other grids, such as the one used in Massachusetts, are structured more like the guidelines often used by sentencing courts.¹⁶¹ These tend to be grids arranged along two axes: one for the severity of the infraction and one that tracks either the “risk level” of the person under supervision (again, low, medium, or high) or the number of previous violations. In some states, each square of the grid contains a narrow range of periods of confinement, which may be imposed upon revocation or as an alternative to it.¹⁶² Others (for example Minnesota) are less directive, and provide a menu of options from which correctional agents may select when responding to rule violations.¹⁶³ Noncustodial sanctions are preferred to custodial ones, but options up to full revocation remain available for serious violations and repeat offenders. Administrative guidelines can reduce revocation rates by encouraging (or requiring) agents to make use of alternatives to revocation before using prison as a sanction. More importantly, they can help encourage sanctioning practices that are prudent and parsimonious. Insofar as they require agents to respond to all violations, such guidelines improve the certainty of punishment, increasing specific deterrence,¹⁶⁴ and insofar as they encourage agents to try a variety

¹⁶⁰ See, e.g., 37 PA. CODE § 75.1 (1979) (establishing presumptive guidelines for parole revocation).

¹⁶¹ See *infra* Appendix 1.

¹⁶² Unlike sentencing guidelines, which are usually made public, revocation guidelines are often closely guarded by supervising agencies, presumably out of concern that offenders would not be deterred from violating rules if they knew that the sanction imposed would be insubstantial. That approach is in deep tension with behavioral modification theories that emphasize the importance of certainty in punishment. See generally ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE (2009) (reporting favorably on the effects of clear and certain punishment in deterring rule violations by individuals on conditional release); Faye S. Taxman et al., *Graduated Sanctions: Stepping into Accountable Systems and Offenders*, 79 PRISON J. 182, 187 (1999) (asserting that certainty of punishment deters reoffense).

¹⁶³ See *infra* Appendix 2.

¹⁶⁴ Beau Kilmer et al., *Efficacy of Frequent Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota’s 24/7 Sobriety Project*, 103 AM. J. PUB. HEALTH e37, e41–e42 (2013); see also HAWKEN & KLEIMAN, *supra* note 162, at 17–18.

of less punitive sanctions before resorting to custodial sentences, they increase proportional responses to rule violations. These are welcome improvements.

Often, guidelines do not merely suggest alternatives to revocation but set forth a hierarchy of increasingly severe sanctions that agents are required to apply systematically to each subsequent violation.¹⁶⁵ This “graduated sanctions” approach purports to be grounded in principles of procedural justice. From this perspective, the legitimacy of the sanction turns on how predictably it is enforced:

Applying procedural justice theory to the supervision setting argues for a proactive process that aligns sanctions with expected response patterns. Sanctions are the crime prevention tool because they provide swift and certain responses to negative behavior. . . . [P]robation agents who respond shortly after the noncompliant act is known and who respond in a decisive and consistent manner are more likely to use proactive processes that increase the perception of the fairness and appropriateness of the action. The tendency of the criminal justice system to favor individualized responses or the tailoring of responses to circumstances may actually enhance the perception of unfairness (i.e., some offenders are treated differently for the same behavior, such as positive urine, etc.). A perception of unfairness may increase noncompliance due to offenders’ resentment.¹⁶⁶

Graduated sanctions purport to respond also to concerns about procedural justice by “integrat[ing] sanctions into the expected response patterns.” By adopting formulaic responses to rule violations, graduated sanctions consciously disavow individualized justice in favor of predictability.¹⁶⁷

There are several potential problems with guidelines that require agents to respond to violations with incremental harshness. First, the deterrence they seek to promote only works if punishment is “certain” and “predictable.” That can only happen when rule violations are detected with regularity. In other words, the success of the model requires agents to detect a large percentage of violations. Such detection is only possible with increased surveillance, with all of its negative repercussions.¹⁶⁸

More importantly, graduated sanction grids do not address the more important problem of unnecessary rules of supervision. Responding “swiftly” and “certainly” to all violations is only fair when the rules that have been violated are worthy of sanction. Graduated sanctions make no distinction between rules that matter and rules that do not; consequently, they can impose increasingly severe punishments for infractions that

¹⁶⁵ Taxman et al., *supra* note 162, at 190–91.

¹⁶⁶ *Id.* at 187.

¹⁶⁷ *Id.*

¹⁶⁸ *See supra* text accompanying note 113.

endanger the public as well as those that do not.

3. *Effects of Legal Change*

Most laws designed to reduce revocation rates are relatively new and have not been subjected to rigorous empirical testing or the test of time. Simple studies conducted by stakeholders in a few states have reported modest success in terms of cost reduction—at least in the short run. In California, new laws resulted in a 23% reduction in probation revocation in their first year at a much-touted savings of \$179 million.¹⁶⁹ A recent study by Texas’s Legislative Budget Board found that the rearrest rate for individuals on community supervision fell from “47.1 percent . . . to 36.8 percent” over a four-year period,¹⁷⁰ a change researchers indicated can be affected by factors such as changes in supervision practices and in release and revocation policies of the Texas Board of Pardons and Paroles.¹⁷¹ In Kansas, revocation rates reportedly declined by almost 25% as a result of the implementation of “evidence-based practices” designed to reduce imprisonment.¹⁷² Despite the limited data available on the degree to which legal changes have reduced revocation rates, many advocates are cautiously optimistic that these new laws and practices are succeeding in reducing the number of people on community supervision who are returned to prison as a result of rule violations.

If immediate cost savings were the only measure by which successful reform were measured, then it would be easy to applaud the union of frugality and behavioral science that appears to be producing promising results. The problem is that such a response glosses over important and difficult questions about the way in which these new laws operate and their long-term effects on the legitimacy of conditional release sanctions.

Community supervision has historically been attentive to the needs of offenders and to the context in which they act. Guidelines, on the other hand, are more concerned with predictable and evenhanded outcomes than

¹⁶⁹ PEW CTR. ON STATES, CALIFORNIA’S PROBATION, *supra* note 80, at 3 (citing ADMIN. OFFICE OF THE COURTS, SB 678 YEAR 1 REPORT: IMPLEMENTATION OF THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT (2011), *available at* <http://www.courts.ca.gov/documents/SB678-Year-1-Report-FINAL.pdf>).

¹⁷⁰ LEGISLATIVE BUDGET BD., STATEWIDE CRIMINAL JUSTICE RECIDIVISM AND REVOCATION RATES 2 (2013), *available at* http://www.lbb.state.tx.us/Public_Safety_Criminal_Justice/RecRev_Rates/Statewide%20Criminal%20Justice%20Recidivism%20and%20Revocation%20Rates2012.pdf.

¹⁷¹ *Id.*

¹⁷² Scott-Hayward, *supra* note 51, at 456.

with culpability or need. The restrictions that legislatures are now placing on the discretionary power of agents and courts to respond to rule violations can find themselves at odds with the rehabilitative goals of probation and post-release supervision, as such restrictions function in ways that can be either overly punitive or excessively lenient, depending on the nature and circumstances of any given rule violation.

As an example, consider a rule that requires a probation agent to impose graduated sanctions for all violations of supervision. Imagine that a person under supervision fails to file her monthly report form for three consecutive months. The first month, her agent reminds her of her obligation. The second month, the agent reminds her again and requires her to report to the office for her next visit with a completed form. When she fails to do so and another month passes with no form, following the graduated sanction scale, the agent imposes five days' jail time.

If the probationer failed to file her form because reporting the details of her financial life caused her intense anxiety—forcing her to confront her dire financial straits and inability to adequately support her family—then a sanction of imprisonment might be unduly harsh and, to the degree it interferes with her employment, counterproductive. In such an instance, giving the agent discretion to work with the probationer to complete her forms or to access treatment for anxiety before “graduating” to custodial sanctions would be more in keeping with the rehabilitative goals of probation, particularly if the crime of conviction had nothing to do with her finances. On the other hand, if the probationer failed to file her report form because she was trying to hide from the agent evidence of new debt she had incurred or money she had obtained by manipulating others, then a sentence of five days' jail might be insufficient to hold her accountable, particularly if her crime of conviction involved defrauding others.¹⁷³

As this example illustrates, revocation guidelines often find themselves in tension with considerations of individualized justice that legitimize the practice of community supervision.¹⁷⁴ In their best form, guidelines promote fair and proportionate responses to rule violations by encouraging alternatives to revocation. If they are too rigid, however, they risk sanctioning behavior that does not deserve censure or underpunishing more

¹⁷³ The examples in this paragraph are derived from two real cases that the author was able to observe and discuss with agents in the field. In these cases, offenders on post-release supervision failed to file monthly financial forms for two very different reasons.

¹⁷⁴ See generally Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 *YALE L.J.* 933 (1995) (discussing the tension between the Federal Sentencing Guidelines' retributive philosophy and probation officers' fundamentally rehabilitative orientation).

culpable conduct. While guidelines are a useful tool in guiding the discretionary responses of correctional officers and revocation decisionmakers, they are inadequate to fully address the challenge of responding to rule violations.

V. A DIFFERENT APPROACH: LIMITING COMMUNITY SUPERVISION

Mass incarceration is a real problem, and it deserves a legal response. Given the emphasis that reformers have placed on expanding opportunities for offenders to serve community-based sentences,¹⁷⁵ it seems counterintuitive to suggest that a better solution to the problem of over-incarceration may be to *limit* the use of community supervision as a sanction for crime. Nonetheless, it is a proposal worth taking seriously.

Limitations on community supervision sentences can come in many forms. Limiting the use of community supervision does not necessarily mean imposing fewer total sentences of probation or post-release supervision. It also does not mean replacing sentences of community supervision with terms of imprisonment—at least, not in most cases. What it does mean is asking decisionmakers to structure and utilize community supervision sanctions in new ways. Legislators must exercise restraint when setting the length and number of conditions that attach to community sentences. Judges and lawyers must be more strategic in selecting the individuals for whom community supervision sanctions are appropriate. Correctional officials must be judicious in imposing discretionary release conditions and in deciding how to respond to violations, paying attention to the purposes those sanctions are intended to serve.¹⁷⁶

A great deal of injustice can be avoided and a great many resources conserved if more careful attention is given to three key decisions: whom to place on supervision; what conditions to attach to the supervisory term; and how long supervision should last. By exercising parsimony in each of these decisions, courts and correctional agencies can ensure that community supervision terms serve the purposes for which they were designed and do not end in unjustified incarceration.¹⁷⁷

¹⁷⁵ See, e.g., SENTENCING PROJECT, *supra* note 149, at 16.

¹⁷⁶ See generally Michael E. Smith, *Will the Real Alternatives Please Stand Up?*, 12 N.Y.U. REV. L. & SOC. CHANGE 171 (1983–1984) (discussing alternatives to incarceration and the need to develop enforceable punishments and strategies for social control—other than incarceration).

¹⁷⁷ Cf. Michael E. Smith, *Let Specificity, Clarity, and Parsimony of Purpose Be Our Guide*, 20 L. & POL'Y 491, 500–05 (1998).

A. LIMITING THE SANCTION

By definition, a person who is not serving a term of conditional release cannot be revoked. While community supervision sentences serve many important purposes, they necessarily hold out the possibility of imprisonment. Consequently, it is shortsighted to view community supervision terms as true “alternatives” to incarceration. They are “possible alternatives” at best. Therefore, when a court is persuaded that the proper punishment for an offender is a truly noncustodial sanction, it should select a sentence that does not impose the contingent liability of community supervision. Too often, such alternatives are overlooked on both the front and back ends of the sentence.

At sentencing, except in the most minor of misdemeanor cases, most actors in the criminal justice system (including prosecutors, defense counsels, and judges) tend to view probation as the only alternative to jail or prison. The choice of what sentence to impose is seen as binary, and consequently, probation is used in a host of cases in which it is not an appropriate sanction. Examples abound. Probation may be used to make it appear that the court is “doing something” in a case where the victim is vocally unhappy, but the offender’s criminal conduct was minor, his contrition is sincere, and his risk of reoffense is nil. It may be offered to induce a plea of guilty from a defendant whose offense is serious, but whose past record or personal deficits clearly render him incapable of complying with even the most basic conditions of release. (In such cases, the inevitability of revocation will be obvious to everyone in the courtroom except, perhaps, the defendant himself.) Probation may be imposed merely to oversee the payment of restitution to a victim of crime. In each of these cases, probation is either destined to fail, does not advance public safety, or performs a function that could be easily accomplished outside the criminal justice system. Imposing probation in these cases does not allocate limited supervisory resources wisely, either because it subjects individuals to supervision they do not need, or because it places people on conditional release who are certain to end up behind bars anyway. The good news is that alternatives are available in these unsatisfactory cases.

Probation has never been an appropriate sanction for every convicted person. Early students of probation observed that it is best designed for those “convicted persons who do not need imprisonment, *but who should not be discharged.*”¹⁷⁸ This observation suggests that there is a class of

¹⁷⁸ *Mass. Prob. Sys.*, *supra* note 31, at 236–37 (emphasis added). Those dual roles continue to be served by probation officers today, who persist in conducting presentence investigations and providing direct oversight to those placed on community supervision.

individuals for whom unconditional discharge—that is, conviction without further sanction—is sufficient punishment. While the concept of unconditional discharge as a freestanding punishment may seem foreign to modern ears, it is a sanction that still exists in the laws of several New England states,¹⁷⁹ and it has been reintroduced in early drafts of the proposed revision of the Model Penal Code’s sentencing provisions.¹⁸⁰

The process of being charged and convicted is inherently punitive¹⁸¹ and carries with it a lasting stigma. Conviction often brings with it serious consequences, both formal and informal. In addition to the social stigma that attaches to being a “convict,” the formal legal consequences of conviction often include disenfranchisement, limits on occupational licensing, public benefits eligibility, and a host of other noncriminal, but nonetheless punitive, sanctions that may endure for a lifetime.¹⁸² For many minor and first-time offenders, no sanction other than conviction itself may be needed to punish and deter: the shame and stigma of conviction will be adequate. That is truer today than ever, since the collateral consequences that attach upon conviction now number in the hundreds for any given felony.¹⁸³

¹⁷⁹ See, e.g., CONN. GEN. STAT. ANN. § 53a-34(a) (West 1971) (“The court may impose a sentence of unconditional discharge in any case where it is authorized to impose a sentence of conditional discharge . . . if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant’s release.”); ME. REV. STAT. ANN. tit. 17, § 1346 (2011) (A convicted person not guilty of murder “and for whom a court determines that no other authorized sentencing alternative is appropriate punishment may be sentenced by the court to an unconditional discharge.”); N.H. REV. STAT. ANN. § 651:2(I) (LexisNexis 2012); N.Y. PENAL LAW § 65.05(1) (McKinney 1992) (“(a) . . . [T]he court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate. (b) When a sentence of conditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.”); 42 PA. CONS. STAT. § 9723 (1980) (“If in the light of all the circumstances, probation would be appropriate under section 9722 (relating to order of probation), but it appears that probation is unnecessary, the court may impose a sentence of guilty without further penalty.”).

¹⁸⁰ See MODEL PENAL CODE: SENTENCING § 6.02(1)(e) (Discussion Draft No. 5, 2013).

¹⁸¹ Malcolm Feeley’s classic work on the processing of criminal cases illustrates this point nicely. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199 (1979).

¹⁸² See generally LOVE ET AL., *supra* note 4 (discussing legal and political ramifications of the growth and proliferation of collateral consequences).

¹⁸³ *Id.* at 513–16 (reporting on an ongoing American Bar Association survey of state laws that found an average of more than 1,000 collateral consequences per felony conviction).

Unconditional discharge may also serve to adequately stigmatize an offender who has been charged with one or more serious criminal offenses, along with minor incidental or related misconduct that pales in comparison to the primary offense. Often in such cases, a period of confinement is imposed on the offender for the more serious conduct, while a concurrent or consecutive term of probation is imposed in connection with the minor offense solely for the purpose of imposing what is perceived to be a nominal sentence for the less serious conduct. A better practice would be to allow conviction alone to stigmatize the related or incidental conduct for which no additional punishment is required. For example, imagine a defendant who drives recklessly and causes an accident that injures himself and a passenger in his vehicle. When confronted by the responding officer, he initially gives his brother's name, but then quickly confesses his real identity. If he is later convicted of reckless driving causing injury and obstructing a law enforcement officer, it may well be adequate to impose a traditional fine, period of supervision, or short term of confinement for the reckless driving, and to allow conviction alone to stand as punishment for obstructing the officer.

In cases where unconditional discharge alone provides insufficient punishment, fines stand as a viable alternative to incarceration in many cases. Because fines have disparate effects on individuals of different socio-economic classes, courts are sometimes reticent to impose them, fearing they will either be uncollectable (for the poor) or a mere slap on the wrist (for the wealthy). Properly imposed, however, fines can be a viable alternative to incarceration. While the indigent make up a disproportionate share of criminal defendants,¹⁸⁴ many of those convicted are employed and have available to them the means to make modest financial payments as a penalty for their offenses, particularly if courts are willing to permit payment plans that are sensitive to changes in income over time. Similarly, "day fines," which calibrate the amount of a fine to the income of those being sentenced, can provide an immediate sanction to those convicted of criminal behavior and do so in a way that does not impose additional obligations on low-risk individuals or require ongoing state oversight.¹⁸⁵

in the first states surveyed).

¹⁸⁴ According to the Office of Justice Programs, "A study of the 100 most populous counties in the United States found that 82 percent of indigent clients were handled by public defenders, 15 percent by assigned counsel attorneys, and 3 percent by contract attorneys." OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FACT SHEET (2011), *available at* http://www.ojp.gov/newsroom/factsheets/ojpbs_indigentdefense.html.

¹⁸⁵ See NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISONS AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 113–16 (1990) (comparing

Day fines are routinely used in Europe as a popular and freestanding sanction for criminal offenses.¹⁸⁶ While day fines have not enjoyed the same popularity here in the United States, they could serve as another sentencing option that would allow courts to hold offenders accountable for criminal conduct without squandering limited community correctional resources in cases where additional supervision is deemed unnecessary.

Finally, there are cases in which a short jail or even prison sentence may be fairer (and more frugal) than a certain-to-fail sentence of community supervision. Placing an untreated alcoholic on probation with a “no drink” condition is a recipe for disaster, as everyone in the courtroom (except perhaps the defendant) is well aware at the time of sentencing. Similar misuses of probationary sanctions are pervasive. Prosecutors and defense attorneys often plea bargain for a noncustodial sentence in cases where it is predictably certain to fail. Thinking that any noncustodial disposition is a good one, defense lawyers routinely fail to object to conditions of supervision that their clients cannot be expected to follow—from avoiding contact with a best friend or lover to staying in school full-time. As a consequence, the “good deal” secured by the lawyer often turns into a delayed sentence of imprisonment for the unsuspecting defendant, with an ultimate punishment that is often more punitive than the custodial sentence a court would be likely to impose in the first instance.¹⁸⁷ In cases such as these, probation cannot plausibly serve its intended purposes of furthering rehabilitation and public safety. In these cases, probation is a “set up” for later revocation that will likely be followed by a term of imprisonment that punishes not only the original crime, but the rule

use of day fines in Europe to the resistance to fining in American criminal courts).

¹⁸⁶ *Id.* at 116.

¹⁸⁷ An example of how punishment on revocation is often much more severe than would be expected for the underlying offense conduct comes from a criminal defense lawyer, who described a case she handled on post-conviction review several years ago. “David” was a seventeen-year-old homeless high school student who had consensual sex with his fifteen-year-old girlfriend, a felony offense in a state where the age of consent is eighteen, and minors are tried as adults at age seventeen. Interview with Mary Prosser, Attorney, Frank J. Remington Ctr., in Madison, Wis. (Mar. 4, 2013). He was convicted of second-degree sexual assault (a strict liability offense) and sentenced to five years’ probation, with the sentence withheld. David liked to talk back to authority figures, and he did not get along well with his probation agent. One year into his period of supervision, David’s probation was revoked for three rule violations: he was “verbally argumentative,” and condoms and alcohol were found in the room he shared with another young man. He denied they were his. Upon revocation, he was sentenced to nine years in prison and seven years of post-release supervision, and he was ordered to register as a sex offender for the period of post-release supervision. *Id.*

violations that follow, even when the rules themselves have little to do with public safety. In such instances, it may be more honest (and, incidentally, more frugal) to impose a deserved term of confinement from the start.

While this approach may at first seem less humane than offering a community-based sanction, which at least holds out the possibility of avoiding imprisonment, it is helpful to remember that studies have repeatedly shown that a significant number of individuals with experience in the criminal justice system prefer short custodial sentences to longer periods of community supervision.¹⁸⁸ Offenders often find community supervision difficult and tend to rank alternatives to incarceration as more punitive than judges, correctional officers, or the general public believe them to be.¹⁸⁹ This is usually because offenders find it difficult to meet the expectations of their agents: not only must they avoid further criminal activity, but they must also secure employment, avoid drugs and alcohol, attend treatment, and make it to regular meetings with their agents. Even when an offender has succeeded in meeting expectations for a period of time, any mistake can result in revocation, and the experience of imprisonment on top of the completed portion of community supervision. For those offenders who, by virtue of cognitive or psychological limitations, personality traits, or force of habit are unable to comply with rules of supervision, a short term of confinement is a better, more immediate punishment than probation as a prolonged and certain prelude to later revocation.

Just as probation should not be the default disposition when prison is not required, post-release supervision should not be imposed in cases where it does not serve a readily identifiable public safety interest. Often, post-release supervision is imposed on offenders for whom surveillance makes little sense. For minor felons, one-time serious offenders, and those for whom age, health, or other personal attributes make recidivism unlikely, state supervision serves little purpose other than to impose the “contingent liability” of future incarceration.¹⁹⁰ This fact has not gone unnoticed by those on the ground. The former commissioner of corrections for New York City, Martin Horn, has advocated abolishing post-release supervision entirely and instead providing individuals leaving prison with vouchers for needed transitional services.¹⁹¹ Scott-Hayward has advocated for abolition

¹⁸⁸ See DAVID C. MAY & PETER B. WOOD, RANKING CORRECTIONAL PUNISHMENTS: VIEWS FROM OFFENDERS, PRACTITIONERS, AND THE PUBLIC 43–46 (2010).

¹⁸⁹ *Id.* at 97–102.

¹⁹⁰ See Scott-Hayward, *supra* note 51, at 442 (post-release supervision may impede efforts at successful reentry).

¹⁹¹ Martin F. Horn, *Rethinking Sentencing*, 5 CORRECTIONS MGMT. Q. 34, 38 (2001).

of post-release supervision, arguing that, at least in the case of lower-risk offenders, it has outlived its usefulness.¹⁹² The “principled minimalist” position¹⁹³ taken by Horn and Scott-Hayward is consistent with the evidence suggesting that post-release supervision does not accomplish its intended purposes in many cases: it does not prevent reoffense, and it delivers transitional services poorly at the cost of subjecting ex-prisoners to the constant spectre of possible revocation.

Saying that probation and post-release supervision should be limited is not to say that they serve no important function in the criminal justice system. When an individual does not need to be imprisoned either because of the seriousness of her offense or the system’s inability to contain her risk of reoffense in a community-based setting, but does require medical or social services to reduce that risk and needs formal oversight while committing to a law-abiding life in the community, then probation may be an appropriate disposition. Similarly, when an offender has been incarcerated for a long time or has a particularly violent history and is likely to have a difficult period of readjustment to community life, a term of post-release supervision is appropriate.

B. LIMITING RELEASE CONDITIONS

When terms of probation or post-release supervision serve a plausible purpose, they should still be “limited” in terms of how much they restrict the freedom of those under supervision. Just as it is true that terms of conditional release cannot be revoked for those not serving them, release conditions that are not imposed cannot be violated. Conditions of release should be applied parsimoniously and never as a matter of course.¹⁹⁴

As discussed above,¹⁹⁵ in almost all jurisdictions, boilerplate conditions are imposed on individuals placed on probation or post-release supervision. Some of these conditions are sensible and obvious: “Don’t commit new crimes.” “Keep your supervision agent aware of how to contact you.” Directives like these spell out the basic requirements for allowing legitimate supervision to occur safely in the community. But boilerplate conditions are not limited to the fundamentals. Many agencies

¹⁹² Scott-Hayward, *supra* note 51, at 460, 464.

¹⁹³ WALTER J. DICKEY & MICHAEL E. SMITH, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, RETHINKING PROBATION: COMMUNITY SUPERVISION, COMMUNITY SAFETY 32–33 (1998) (describing Horn’s position as “principled minimalism”).

¹⁹⁴ *Cf.* MODEL PENAL CODE: SENTENCING § 6.09(8) (Preliminary Draft No. 9, 2013) (“Conditions should be attached sparingly, and not as a matter of routine.”).

¹⁹⁵ *See supra* Part III.A.

routinely require individuals under supervision to abstain from alcohol, comply with travel restrictions, seek agent permission before getting a new job, changing residences, etc. While these restrictions may be relevant to public safety concerns in some cases, in many others they have no nexus to the individual's criminal propensities and may serve as an impediment to the successful completion of supervision. Although agent discretion may prevent revocation in cases of minor violations that do not pose a risk to the public, the exercise of wise discretion is never guaranteed. In a world where risk aversion defines supervisory practices in many jurisdictions,¹⁹⁶ allowing boilerplate rules to be imposed on probationers and parolees creates conditions in which costly and unnecessary revocation can occur.

With appreciation for the fact that violation of any condition imposed may later serve as a ground for imprisonment, legislatures should limit the number and kind of conditions that are required in every case, and courts and community corrections officials should ensure that all discretionary conditions imposed on offenders relate directly to their risk of criminal reoffense. While a recovering alcoholic convicted of operating a motor vehicle when he is intoxicated might reasonably be subjected to a ban on alcohol consumption, a young burglar with no history of alcohol-related crime should not. Similarly, while treatment conditions designed to reduce risks that are closely associated with past criminal offending are properly the subject of a community supervision order, therapy that is intended merely to better the life prospects of a person under supervision should not be made a condition of release.¹⁹⁷ While benevolent in its intention, such a condition imposes too high a potential price on the person subject to its requirements.¹⁹⁸ By eliminating conditions that do not bear directly on an offender's criminal rehabilitation and risk of harm to the community, courts and correctional agents prevent minor, unimportant conditions from serving as grounds for later revocation.

¹⁹⁶ See *supra* Part III.B.

¹⁹⁷ Supervising agencies should make social services available to their clients as appropriate and work as brokers to connect clients (and, as appropriate, their families) to community resources. Except insofar as they bear a direct connection to criminal reoffense, accessing those services should not, however, be made a condition of release.

¹⁹⁸ Limiting the ability of courts and correctional agencies to require individuals to "better themselves" in ways that are not linked to clearly identified risks of criminal offense is consistent with recent federal case law limiting judges' ability to impose lengthy custodial sentences for the sole purpose of ensuring that prisoners gain access to prison-based rehabilitative programs. See *Tapia v. United States*, 131 S. Ct. 2382, 2393 (2011) (holding that it is error for a court to "*impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation*"). In either circumstance, an individual should not be required, on pain of potential or certain imprisonment, to do more than pay for past wrongdoing and to comply with the law in the future.

C. LIMITING TERMS OF SUPERVISION

In addition to limiting the imposition of community supervision to proper candidates and to limiting the condition imposed on those offenders, legislatures, courts, and correctional officers should take steps to limit the length of time individuals spend under correctional supervision. Recent trends have extended periods of probation and post-release supervision far beyond the months and years that immediately follow conviction or release from prison. In many states, periods of community supervision can now last for ten or twenty years, or even for a lifetime.¹⁹⁹ Such lengthy periods of supervision serve little purpose other than to provide almost unlimited opportunity for violations and revocation. Shortening terms of probation and post-release community supervision keeps supervision focused on reducing the risk of reoffense in the period of time during which reoffense is most likely to occur; that is, in the months and years immediately following conviction or release from prison.²⁰⁰

One reason to favor lengthy community sentences is that they provide a measure of guaranteed state oversight of individuals known, by virtue of their past convictions, to pose a heightened risk of criminal reoffense. While the argument for increased surveillance and services is strong in the first few years following release, it weakens with the passage of time. For all but the riskiest offenders, the surveillance offered by community supervision is likely to fail, either by missing signs of new offending or by “catching” them committing low-level offenses that do not justify the resources their apprehension consumes. While supervision may sometimes result in detection of a serious crime, many serious offenses will be (and are) detected through ordinary police activity: there is no evidence to suggest that supervision significantly increases the detection of new crimes and therefore justifies long-term, ongoing state intervention. Committing significant correctional resources to what is effectively preventive policing will often yield little in the way of public safety benefits, while exposing the individual under supervision to a significant risk of imprisonment based

¹⁹⁹ See, e.g., MO. ANN. STAT. § 559.106 (West 2006) (lifetime supervision for sex offenders); NEV. REV. STAT. ANN. § 213.1243(2) (LexisNexis 2009) (“Lifetime supervision shall be deemed a form of parole”); MICH. STAT. ANN. § 333.7401(2)(a)(iv) (amended 2003) (lifetime probation for certain drug offenses) (repealed and supplemented by MICH. STAT. ANN. § 333.7401(4) (2003) (recommending no more than five years of probation for individuals previously sentenced to lifetime probation under the abrogated law)).

²⁰⁰ AMY L. SOLOMON ET AL., URBAN INST., PUTTING PUBLIC SAFETY FIRST: 13 PAROLE SUPERVISION STRATEGIES TO ENHANCE REENTRY OUTCOMES 14 (2008), available at http://www.urban.org/uploadedpdf/411791_public_safety_first.pdf.

on violations of the conditions of release—violations whose detection becomes increasingly likely over time.

A second justification often given for terms of supervision is the need to collect restitution, fines, and fees from convicted individuals, who often take many years to satisfy their financial obligations.²⁰¹ Extending terms of community supervision for the sole purpose of collecting money that the offender has already been ordered to pay is a practice that is difficult to justify. Almost by definition, such practices impose greater burdens on poor offenders than on wealthy ones and may well expend more resources on supervision than they collect in payments. It is important to order and collect restitution; however, other measures, such as civil judgment or contempt, could be used to ensure that restitution is paid without requiring extended terms of probation or post-release supervision with their attendant risk of revocation.²⁰²

The easiest way to limit terms of supervision is to reduce the statutory maximum period of supervision provided by law, thereby limiting the ability of sentencing judges and correctional agencies to impose lengthy terms of community supervision. A second way is to authorize judges or correctional agents to shorten the community sentences of individuals who have demonstrated compliance for a designated period of time. In recent years, states such as Colorado, New Hampshire, South Dakota, and Texas have passed laws and adopted policies expanding the practice of early termination.²⁰³ In 2003, the federal Judicial Conference, whose judges have long-possessed the power to terminate supervision early, adopted formal guidelines to assist probation agents in identifying candidates for early termination.²⁰⁴

²⁰¹ See ARIZ. REV. STAT. ANN. § 13-902(C) (2010) (authorizing an extension of probation for five years beyond the otherwise maximum sentence if “the court has required . . . that the defendant make restitution” and the “condition has not been satisfied” at the end of the probation).

²⁰² A good analogy here might be to child support enforcement procedures, which often make use of garnishment and other civil remedies to ensure collection.

²⁰³ PORTER, *supra* note 153, at 11, 14–15; see also MIKE MCALISTER, N.H. DEP’T OF CORR. POLICY & PROCEDURE DIRECTIVE, ENFORCEMENT OPERATIONS STATEMENT NO. 5.64, EARLY TERMINATION FROM PROBATION/PAROLE SUPERVISION I (Mar. 28, 2011), available at <http://www.nh.gov/nhd/doc/documents/5-64.pdf> (requiring that probation and parole cases be reviewed for early termination at least once a year).

²⁰⁴ Press Release, The Third Branch, *Good Behavior Rewarded* (Mar. 2004), available at http://www.uscourts.gov/News/TheThirdBranch/04-03-01/Good_Behavior_Rewarded.aspx. The release identified the following criteria as grounds for early termination:

- stable community reintegration (e.g., residence, family, employment);
- progressive strides toward supervision objectives and in compliance with all conditions of supervision;

Early termination has several benefits. First, it offers an incentive to offenders to comply throughout the early course of supervision—a time when the risk of reoffense is greatest.²⁰⁵ It also reduces the cost of community supervision by shortening sentences and removes the potential cost of future imprisonment by reducing the period of time in which an offender is subject to supervision and the possibility of revocation. It is also a politically palatable option: unlike early prison release legislation, which has met with considerable political opposition,²⁰⁶ early termination laws have not been the subject of significant political debate.

The challenge to implementing early termination laws is more practical than political. Most statutes rely on community corrections agents to “nominate” candidates for early release and to end supervision early, either through administrative action or by petitioning the sentencing court.²⁰⁷ The difficulty with this approach is that it requires agents to terminate their most compliant clients. Because most officers carry heavy caseloads and deal with many individuals who have great needs and difficulty complying with release conditions,²⁰⁸ there are many subconscious incentives to avoid early termination. To encourage the use of early termination, laws should make termination presumptive after a sustained period of compliance.

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- no aggravated role in the offense of conviction, particularly large drug or fraud offenses;
 - no history of violence (e.g., sexually assaultive, predatory behavior, or domestic violence);
 - no recent arrests or convictions (including unresolved pending charges), or ongoing, uninterrupted patterns of criminal conduct;
 - no recent evidence of alcohol or drug abuse;
 - no recent psychiatric episodes;
 - no identifiable risk to the safety of any identifiable victim; and
 - no identifiable risk to public safety based on the Risk Prediction Index.

²⁰⁵ SOLOMON ET AL., *supra* note 200, at 14.

²⁰⁶ See Klingele, *supra* note 70, at 441–50.

²⁰⁷ See, e.g., ARIZ. R. CRIM. P. 27.4(a) (“At any time during the term of probation, upon motion of the probation officer or on its own initiative, the court, after notifying the prosecutor, may terminate probation and discharge the probationer absolutely as provided by law.”); FLA. STAT. ANN. § 948.04(3) (West 2004) (“If the probationer has performed satisfactorily, has not been found in violation of any terms or conditions of supervision, and has met all financial sanctions imposed by the court, including, but not limited to, fines, court costs, and restitution, the Department of Corrections may recommend early termination of probation to the court at any time before the scheduled termination date.”).

²⁰⁸ Matthew DeMichele & Brian K. Payne, *Probation and Parole Officers Speak Out—Caseload and Workload Allocation*, 71 FED. PROBATION 30, 30 (2007); see also Jason Clark-Miller & Kelli D. Stevens, *Effective Supervision Strategies: Do Frequent Changes of Supervision Officers Affect Probationer Outcomes?*, 75 FED. PROBATION 11, 11 (2011) (“Caseload size has long been a concern of community corrections officials and researchers with regard to effective management of offenders in the community . . .”).

VI. CONCLUSION

Sentences of community supervision serve important purposes: they allow people who have been convicted of crimes to access community resources to address underlying criminogenic needs, and they provide a community-based forum for accountability and oversight. They also carry with them the constant threat of imprisonment—a threat that is realized in a significant number of cases.

Creating revocation guidelines and limiting the kinds of behaviors that can result in returning to prison are important developments in the battle to reduce unnecessary revocation. They do not, however, address many of the fundamental problems that lead to revocation, which can be described as too many rules, placed on too many people, for far too long. Many individuals currently serving sentences of community supervision could be punished in other nonconditional and noncustodial ways. Others could be subjected to far fewer rules and supervised for far less time while posing no greater threat to public safety.

As legal reformers continue their efforts to reduce prison populations, they would do well to rethink the role of community supervision in efforts to reduce overreliance on prison. By limiting the use, duration, and conditions of probation and post-release supervision, lawmakers can succeed in reducing unnecessary revocation while also ensuring the continued legitimacy of community sanctions.

Appendix 1
*Massachusetts Graduated Sanctions Guidelines Grid*²⁰⁹

RISK LEVEL	High	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visits/contacts for up to 30 days-PO Curfew (up to 14 days-PO, up to 30 days-PS) Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change in level)-PS Community service-PS Electronic monitoring (up to 90 days-PS; over 90 days-BD) Formal warning from the Board (90 days)-BD Final warning from the Board (180 days)-BD Halfway back (up to 90 days-PS; over 90 days-BD) Hearing on the street-PS Detain for hearing in custody with treatment recommendation-PS Detain for hearing in custody-PS</p> <p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend Employment Services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS</p>	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visit/contacts for up to 30 days-PO Curfew (up to 14 days-PO, up to 30 days-PS) Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change in level)-PS Community service-PS Electronic monitoring (up to 30 days-PS; over 30 days)-BD Formal warning from the Board (90 days)-BD Final warning from the Board (180 days)-BD Halfway back (up to 90 days-PS; over 90 days-BD) Hearing on the street-PS Detain for hearing in custody with treatment recommendation-PS Detain for hearing in custody-PS</p> <p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend Employment Services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS OCC up to Level IV (if consistent with SAC)-BD</p>	<p>Mandatory Sanction Detain for hearing in Custody-PS</p>
	Medium	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visits/contacts for up to 30 days-PO Curfew (up to 14 days)-PO Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change)-PS Community service-PS</p> <p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend employment services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS</p>	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visits/contacts for up to 30 days-PO Curfew (up to 14 days-PO; up to 30 days-PS) Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change)- PS Community service-PS Electronic monitoring (up to 30 days-PS; over 30 days)-BD Formal warning from the Board (90 days)-BD Final warning from the Board (180)-BD Halfway back (up to 90 days-PS; over 90 days-BD) Hearing on the street-PS</p> <p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend employment services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS OCC Level IV-BD</p>	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visits/contacts for up to 30 days-PO Curfew (up to 14 days-PO; up to 30 days-PS) Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change)-PS Community service-PS Electronic monitoring (up to 30 days-PS; over 90 days)-BD Formal warning from the Board (90 days)-BD Final warning from the Board (180)-BD Halfway back (up to 90 days-PS; over 90 days-BD) Hearing on the street-PS</p> <p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend employment services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS OCC Level IV-BD</p>
		Low	Medium	High
		VIOLATION SEVERITY		

²⁰⁹ *Graduated Sanctions Guideline Grid*, MASS.GOV, <http://www.mass.gov/eopss/docs/pb/grad-sanctions-grid.pdf> (last visited Sept. 23, 2013).

Appendix 1
Continued

Low	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visits/contacts for up to 30 days-PO Curfew (up to 14 days)-PO Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change)-PS Community service-PS</p>	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visits/contacts for up to 30 days-PO Curfew (up to 14 days)-PO Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change)-PS Community service-PS Electronic monitoring (up to 30 days)-PS</p>	<p>Sanctions Warning ticket-PO Increase urine testing-PO Increase visits/contacts for up to 30 days-PO Curfew (up to 14 days-PO; up to 30 days-PS) Supervisor's conference (formal conf. w./PS, PO and/or Parolee)-PS Increase level of supervision (formal change)-PS Community service-PS Electronic monitoring (up to 30 days-PS; over 30 days)-BD Formal warning from the Board (90 days)-BD Final warning from the Board (180 days)-BD Halfway back (up to 90 days-PS; over 90 days-BD) Hearing on the street-PS Detain for hearing in custody with treatment recommendation-PS Detain for hearing in custody-PS</p>
	<p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend employment services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS</p>	<p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend employment services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS</p>	<p>Interventions Assessment by SAC-PO Attend AA/NA-PO Attend outpatient drug treatment-PO Attend other evaluation and counseling-PO Attend employment services-PO OCC Level II or III (without ELMO)-PO Attend residential treatment-PS</p>
	Low	Medium	High

VIOLATION SEVERITY

Appendix 2

*Minnesota Guidelines for Revocation of Parole/Supervised Release*²¹⁰

Release Condition Severity Level	Proposed Disposition
<p>SEVERITY LEVEL I</p> <ol style="list-style-type: none"> 1. If restitution is ordered as part of the sentence, the offender will make payments as directed by agent/designee. 2. The offender will submit at any time to unannounced visit and/or search of the offender's person, vehicle or premises by the agent/designee. 3. An offender will not leave the state of Minnesota without written approval from the agent/designee, and then only under the terms and conditions as prescribed in writing. (The offender has left and returned to the state). 	<p>Absent multiple or aggravating factors, the presumptive disposition is to restructure with new or modified condition(s)</p> <p>If revoked due to aggravating factors, the presumptive return time is for a minimum of 60 days.</p>
<p>SEVERITY LEVEL II</p> <ol style="list-style-type: none"> 1. The offender will maintain contact with the agent/designee as directed and respond promptly to any communication regarding release. 2. The offender will at all times follow the instructions of the agent/designee. 3. The offender must reside at the approved residence and may not change residence until approved by the agent/designee. The offender will keep the agent/designee informed of his/her activities. Daily activities must be constructive and include those designed to obtain/maintain employment and/or attend a treatment or education program as directed by agent/designee. 4. The offender will inform the agent/designee either by direct or indirect contact, within 24 hours of any court appearance and/or contact with law enforcement 5. The offender will refrain from the use or possession of intoxicants and will not use or possess narcotics, alcohol, or other drugs, preparations, or substances as defined by Minnesota Statutes, Chapter 152, except those prescribed for the offender by a licensed physician or approved by the agent/designee. The offender will not possess or allow in his/her residence any drug paraphernalia or mood-altering substances not prescribed by a physician. The offender will submit to breathalyzer, urinalysis, and/or other DOC approved methods of chemical analyses, directed by the agent/designee. 6. Conviction of any misdemeanor. 7. Subsequent violation of Level I condition(s). 	<p>Absent any aggravating factors, the presumptive decision is to restructure with new or modified conditions.</p> <p>If revoked due to an aggravated factor(s) the presumptive return time is for a minimum of 90 days.</p>

²¹⁰ MINN. DEP'T OF CORR., REVIEW OF GUIDELINES FOR REVOCATION OF PAROLE AND SUPERVISED RELEASE: 2009 REPORT TO THE MINNESOTA LEGISLATURE 27 app.A (2009).

Appendix 2
Continued

SEVERITY LEVEL III

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|---|---|
| <ol style="list-style-type: none"> 1. Conviction of any gross misdemeanor. 2. For non-ISR offenders, violation of any special condition(s) of release. 3. Violation of any condition(s) of a restructured release form. 4. Subsequent violation of Level II condition(s). | <p>Absent any mitigating factors, the presumptive decision is to revoke.</p> <p>If revoked, the presumptive return time is for a minimum of 120 days.</p> |
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SEVERITY LEVEL IV

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|---|--|
| <ol style="list-style-type: none"> 1. For ISR offenders, violation of any special condition(s) of release. 2. Conviction of any felony. 3. The offender must go directly to the residence specified and report to the agent/designee by telephone or by personal visit within 24 hours of release or as specifically directed by the agent/designee. 4. The offender is apprehended out of state and is out of state without agent/designee written approval. (Transport was required to return offender to the state). 5. The offender will not engage in any assaultive, abusive or violent behavior, including harassment, stalking or threats of violence. 6. The offender will not have direct or indirect contact with victim(s) of current or previous offenses without prior documented approval of agent/designee. 7. The offender must not purchase or otherwise obtain or have in possession any type of firearm or dangerous weapon. 8. Subsequent violation of Level III condition(s). | <p>Absent multiple and/or significant circumstances, the presumptive decision is to revoke.</p> <p>If revoked, presumptive return time is for a minimum of 150 days, if 180 days or more, disposition must include a determination of Risk to Public or Unamenable to Supervision per Promulgated Rules.</p> |
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