INDETERMINATE SENTENCING RETURNS: THE INVENTION OF SUPERVISED RELEASE

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The determinacy revolution in federal sentencing, which culminated in the passage of the Sentencing Reform Act of 1984, has since been upended by a little-noticed phenomenon: the evolution of federal supervised release. A "determinate" sentencing regime requires that prison terms be of fixed and absolute duration at the time of sentencing. Because of the manner in which supervised release now operates, however, contemporary federal prison terms are neither fixed nor absolute. Instead, the court has discretion to adjust the length of a prison term after sentencing based on its evaluation of the post-judgment progress of the offender. This power to amend the duration of the penalty is the classic marker of the "indeterminate" sentence.

In this Article, I show how federal supervised release has dismantled the ambitions of the determinacy movement and made federal prison terms structurally indeterminate in length. I conclude that the widespread use of supervised release has created a muddled and unprincipled form of indeterminate sentencing: one that flouts the insights and vision of the nineteenth-century indeterminacy movement as well as the twentieth-century determinacy movement. Having dislocated once-celebrated theories of sentencing, federal supervised release now controls the lives of more than 100,000 people without offering any alternative theoretical basis for doing so. This Article draws on the lessons of a 200-year history to expose the current nature of supervised release and to envision a more coherent role for its future.

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INTRODUCTION

The Sentencing Reform Act of 1984 (SRA) emerged from a determinacy revolution that sought to establish certainty and transparency in the length of federal prison terms.[1] The statute

[1] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2012), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_1.pdf (noting that in enacting the SRA, Congress "first sought honesty in sentencing"). Congress "sought to avoid the

prospectively abolished federal parole, which had provided a mechanism for the early, discretionary release of federal prisoners. After the passage of the SRA, a prison sentence imposed by a federal court at judgment was supposed to be "determinate,"[2] or definite, in length. Under this framework, the prison sentence originally imposed would be the prison sentence actually served—with no possibility of the kinds of discretionary adjustments in length that had characterized federal sentencing under the parole system.[3]

In place of parole, the SRA created supervised release, a new system of post-incarceration supervision.[4] Supervised release imposes conditions on a person's behavior after he or she is released into the community, but it does not substitute for part of a prison sentence. It instead follows the completed prison sentence imposed at judgment. Supervised release, as originally conceived, was a form of community supervision that was consistent with the imposition of a determinate prison term.

This Article argues that supervised release, as it has evolved, has usurped the determinacy revolution by making federal prison terms "indeterminate," or indefinite, in length. It explains how determinacy in federal sentencing unraveled, despite the political and intellectual energy expended on implementing it in the name of "truth in sentencing."

First, soon after the SRA's passage, Congress created a revocation procedure that allows judges to return people to prison for violating the conditions of their supervised release, including conditions prohibiting behavior that is not criminal.[5] Second, federal courts justified this revocation scheme by framing reincarceration as additional

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confusion and implicit deception that arose out of the pre-guidelines sentencing system, which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison." *Id.*; *see also* Thomas B. Marvell & Carlisle E. Moody, *Determinate Sentencing and Abolishing Parole: The Long-Term Impact on Prisons and Crime*, 34 CRIMINOLOGY 107, 108 (1996) ("A defendant given a determinate sentence can estimate the actual term to be served by taking the sentence length set by the judge and subtracting credits expected, such as those for pretrial detention and good time in prison.").

[2] In this Article, I do not use "determinate" to refer to the goal of guidelines-based sentencing, which is to create presumptive prison terms for specific crimes to eliminate disparity across defendants convicted of the same or similar crimes.

[3] *See* discussion *infra* Part III.B.

[4] Supervised release did not displace federal probation. In the federal system, probation has always been an alternative to incarceration, whereas supervised release can only be imposed to supplement incarceration. *See* discussion *infra* Part IV.A.

[5] *See* discussion *infra* Part IV.B.

punishment for the underlying crime, as opposed to punishment for the supervised release violation.[6]

These developments render the time spent in prison for the underlying crime variable, creating prison sentences that are structurally indeterminate.[7] The system tailors the period of incarceration based on post-judgment assessments of the rehabilitative progress of the offender and the danger posed to the public by his or her presence in the community.

This Article is the product of my efforts to locate and understand the historical and conceptual roots of supervised release. By investigating the system's nineteenth-century antecedents, I have come to understand that "supervised release" is a misnomer: It incorrectly implies a period of release that is supervised and disguises the true nature of what the system has become. Supervised release is better described as what I call "conditional release," a mechanism that I trace back to the Australian ticket of leave at the turn of the nineteenth century. Conditional release is a method of release from confinement that is contingent upon obeying conditions of release under threat of revocation (return to prison) under reduced due process protections. As a form of conditional release, supervised release has reintroduced widespread indeterminate sentencing into the federal system.

Although the supervised release system produces indeterminacy, it does not reflect the principles of the nineteenth-century advocates of indeterminate sentencing. Nor does supervised release serve the goals of certainty and transparency advanced by the twentieth-century proponents of the determinate sentence. In fact, no clear penological or adjudicative principles validate supervised release in its current form. Neither the case law, the academic literature, nor the legislative history contains a conceptual or practical defense of the system as it now exists.[8] And yet, the issue is

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[6] *See* discussion *infra* Part IV.C.

[7] *See* U.N. DEP'T OF SOC. AFFAIRS, THE INDETERMINATE SENTENCE 1 (1954) (describing the core features of indeterminate sentencing regimes).

[8] Articles that do examine supervised release tend to concentrate on controversial conditions, such as shaming sanctions and bans on Internet use and pornography. Little attention has been paid to the conceptual framework underlying supervised release. The same has been true of academic treatment of parole systems more generally. *See* Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, FED. PROBATION, June 2001, at 3, 6 ("It is safe to say that parole has received less research attention in recent years than any other part of the correctional system.").

not an abstract one, given the number of people on supervised release.[9]

In this Article, I demonstrate that the roots of supervised release, specifically as a system of indeterminate sentencing and conditional release, are to be found not in the history of the SRA, but in the system the SRA was designed to replace. Indeed, these practices have a pedigree almost as old as the systematized use of imprisonment as a penal sanction (at least in the United States),[10] although their history is much harder to find. The names and ideas of the foundational theorists of indeterminacy and conditional release—most directly, Alexander Maconochie and Walter Crofton—have all but disappeared from contemporary scholarship. I returned to the nineteenth-century sources to learn what their writings might reveal about the conceptual underpinnings of our modern-day system.

Returning to these sources revealed that the path to supervised release has been characterized by short-lived innovation and historical forgetting. In this Article, I show how many of the principles that originally gave rise to indeterminacy (and eventually parole) resemble the concerns that later motivated the rise of determinacy (and the end of parole). These connections were not apparent in the 1980s, in part because parole had strayed too far from its advocates' original vision. Supervised release, I will argue, has done the same.

The lack of any clear philosophy or purpose has not slowed the growth of supervised release. The last twenty-five years have seen an enormous expansion in its scope, both in terms of the number of people impacted and the breadth of the conditions imposed.[11] Periods of supervised release regularly trigger reimprisonment, meted out at hearings with minimal due process protections and followed by additional periods of supervised release, all attributable to the same underlying crime. Select offenses, including federal drug trafficking crimes, now carry the possibility of lifetime supervised release.

Post-release supervision and revocation have become normalized to such an extent, in both federal and state practice, that it is hard to conceive of a time when such concepts were new and controversial. The documents from the nineteenth century, however, reveal a lively debate about whether any extension of penal control into the

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[9] *See* BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2010, at 8 (2011), *available at* http://bjs.gov/content/pub/pdf/ppus10.pdf (reporting that by the end of 2010, there were 103,423 people on supervised release).

[10] *See* John H. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. LEGAL STUD. 35, 36 (1976) (noting that Europeans used imprisonment as a penal sanction before the United States).

[11] *See* discussion *infra* Parts IV.E–F.

community impedes or encourages meaningful reintegration. By explicating the indeterminacy of our current federal sentencing system, I hope to reopen that discussion.

The ultimate aim of this Article is to seek a more considered approach to supervised release. Building on the insights of the indeterminists and determinists, I present three alternative approaches for assessing supervised release going forward. First, I offer a framework for analyzing supervised release as a crime-control mechanism of deterrence and incapacitation. Second, I imagine how supervised release could be restructured to make it a coherent tool of transitional rehabilitation. Third, I consider the complete elimination of supervised release as a means of restoring honesty and certainty to prison sentencing and respecting the autonomy of released offenders. Deciding which of these approaches to pursue would require a settled and principled understanding of the purposes of supervised release.

The Article proceeds in five parts. Part I unearths the ideas behind the indeterminacy movement and explores the early debates over conditional release. Part II examines how U.S. reformers imported the principles of Maconochie and Crofton into the United States and describes how adherence to these principles had dissipated by the time federal parole was adopted in 1910. Part III analyzes the core ideas of the determinacy movement, which led to the SRA and the overthrow of federal parole. Part IV describes the emergence and evolution of supervised release, focusing on how the supervised release system has come to reincorporate indeterminacy and conditional release into the federal system. Part V begins the work of reimagining supervised release for the future.[12]

I
The Rise of Indeterminacy and Conditional Release

In this Part, I investigate the separate motivations that underlay the development of conditional release and the subsequent rise of the indeterminate sentencing movement. I explore the roots of conditional release by examining the ticket-of-leave system, an early form of conditional release that emerged in the Australian penal colonies at the turn of the nineteenth century. I also examine the ideas of

[12] Although this Article focuses on federal supervised release, the issues presented are also relevant to many states' practices. Like the federal government, many states abolished parole release in the 1970s and 1980s, but continued to embrace and expand post-release supervision programs at the same time. *See* Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry 45–46 (2005) (describing these trends in state practice).

Alexander Maconochie, a Scottish penal reformer who is broadly recognized as the primary architect of the indeterminacy movement.[13]

First, I want to clarify the relationship between conditional release and indeterminacy theory, particularly as this theory was conceived by Maconochie. A sentence that provides for conditional release necessarily creates an indeterminate (that is, indefinite) prison term. But conditional release is not the only means of creating an indeterminate sentence: A person can serve a prison term of indefinite length and then be released without condition into the community. Indeed, as I shall explain below, Maconochie developed his theory of indeterminacy in the late 1830s largely in reaction *against* the idea of conditional release as embodied in the Australian ticket of leave.

Indeterminacy theory, however, would later come to embrace conditional release. Walter Crofton incorporated conditional release into indeterminacy theory in Ireland in the mid-1850s. Crofton chaired the Irish Convict Board when tickets of leave first were being implemented into domestic law in England and Ireland. Over the next several decades, reformers used the ideas of Maconochie—as adapted by Crofton—to justify the introduction of what they called parole (indeterminate sentencing with conditional release) into the United States. The writings of Maconochie and Crofton, now largely forgotten, provide important insights into the central elements of supervised release as it operates today.[14]

A. The Australian Penal Colonies

Any investigation of the doctrine of supervised release in Anglo-American law must begin in the Australian penal colonies. Between 1788 and 1867, the United Kingdom transported to the Australian colonies more than 150,000 people, mostly from England and Ireland, as punishment for their crimes.[15] In managing these penal colonies, the British government experimented with systems of conditional release

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[13] *See, e.g.*, U.N. DEP'T OF SOC. AFFAIRS, *supra* note 7, at 12 ("The originator of the whole movement leading to the indeterminate sentence was . . . undoubtedly Alexander Maconochie.").

[14] The writings of Maconochie and Crofton come out of a particularized nineteenth-century male British discourse that made many assumptions about how the world operated, including the proper position of the British government and the innate characteristics of criminals, women, the poor, and other groups. In this Article, I analyze the systems advocated by Maconochie and Crofton in light of the roles they played in the indeterminacy movement. More work needs to be done, however, to examine critically the development of these ideas, their semantic presentation, and their implementation in the broader social, economic, and political context of the nineteenth century.

[15] Helen Leland Witmer, *The History, Theory and Results of Parole*, 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 24, 30 (1927).

as a means of rewarding good behavior and integrating offenders into Australian society.[16]

Because the U.K. government assumed the cost of transporting offenders to Australia, the colonial governor was awarded "property in service" of the offenders for the duration of their sentences. Some transported convicts labored in the custody of the colonial government, mainly in prisons or on the public works.[17] Most, however, were assigned to free settlers by a colonial Board of Assignment.[18] Once assigned, convicts worked without wages: The masters paid a fixed sum to the government to cover the cost of their maintenance.[19]

By 1800, the colonial government had received the power to grant tickets of leave to transported convicts before the end of their sentences. These tickets excused convicts from further government or assigned work "during good behavior or until His Excellency's further pleasure shall be made known."[20] In 1821, the ticket-of-leave system was standardized, with those prisoners serving seven-year transportation terms becoming eligible for a ticket of leave after four years, those with fourteen-year terms eligible after six years, and those with life terms eligible after eight years.[21] The ticket of leave was framed as an indulgence, one that provided "hope to a convict if he behaved well," but could be revoked "in case of misconduct."[22]

There has been a misperception in the scholarly literature that there was little or no government supervision of ticket-of-leave holders in Australia.[23] This is contradicted by a number of period

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16 *See* SELECT COMMITTEE ON TRANSPORTATION, REPORT, 1837-8, H.C., at xvii (U.K.) [hereinafter SELECT COMMITTEE REPORT] (describing the conditional release system in the Australian penal colonies).

17 I use the term "convict" in this Section because that is the term used in contemporaneous accounts.

18 JOHN VINCENT BARRY, ALEXANDER MACONOCHIE OF NORFOLK ISLAND 25, 42 (1958).

19 *See* SELECT COMMITTEE REPORT, *supra* note 16, at 114 (discussing the payment system for assignment in New South Wales).

20 Frederick A. Moran, *The Origins of Parole*, 1945 Y.B. NAT'L PROBATION ASS'N 71, 78 (quoting the ticket of leave).

21 *Id.*

22 SELECT COMMITTEE REPORT, *supra* note 16, at xvii.

23 *See, e.g.*, U.S. DEP'T OF JUSTICE, 4 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PAROLE 12 (1939) (reporting that before Maconochie's experiments, those on tickets of leave were released into the community without any supervision); *see also* DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 49 (1959) (asserting that there was "no government supervision of the ticket-of-leave recipient" in Australia); WILLIAM C. PARKER, PAROLE: ORIGINS, DEVELOPMENT, CURRENT PRACTICES AND STATUTES 17 (1975) (claiming a lack of government supervision of those on tickets of leave).

sources, most particularly by the writings of Maconochie.[24] Just before Maconochie left for Australia in 1836, the London Society for the Improvement of Prison Discipline had asked him to investigate the treatment of transported convicts in Van Diemen's Land (now Tasmania), the largest of the penal colonies.[25] The British Undersecretary of Colonies approved this request, but required Maconochie to transmit communications on the subject to the Secretary of State, rather than to the Society.[26] Upon his arrival, Maconochie took heartily to the task. He prepared a series of reports for the government, which would prove highly influential in parliamentary reforms of the transportation system.

In historical accounts, Maconochie became widely—and incorrectly—cited as a founding father of the ticket of leave.[27] These accounts described Maconochie as having initiated or revitalized that system. In truth, Maconochie criticized the very concept of conditional release as embodied in its earliest known example: the Australian ticket of leave.[28]

In his first reports from Australia, dated October 1837, Maconochie described a system of active supervision of convicts on

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[24] *See, e.g.*, CHARLES B. GIBSON, IRISH CONVICT REFORM: THE INTERMEDIATE PRISONS, A MISTAKE 8 (Dublin, McGlashan & Gill 1863) (describing the government's monitoring system for ticket-of-leave holders in Australia); *English Convicts: What Should Be Done with Them*, 23 WESTMINSTER & FOREIGN Q. REV. 1, 2–3 (1863) (noting that conditions on colonial tickets of leave were rigorously enforced through revocation and reimprisonment).

[25] BARRY, *supra* note 18, at 20. Maconochie went to Australia as the private secretary for the new governor of Van Diemen's Land. Previously, he had served as a captain in the Royal Navy, as the first Secretary of the Royal Geographic Society, and as a professor of geography at University College London. R. Gerard Ward, *Captain Alexander Maconochie, R.N., K.H., 1787–1860*, 126 GEOGRAPHICAL J. 459, 459, 460 (1960).

[26] BARRY, *supra* note 18, at 20 (quoting A. Maconochie, *Report on Convict Discipline*, *in* 7 ACCOUNTS AND PAPERS OF THE HOUSE OF COMMONS, SESSION 1837–1838, at 5, 5 (1838)).

[27] *See, e.g.*, DRESSLER, *supra* note 23, at 49 (reporting that "the ticket-of-leave plan lay comparatively fallow until Alexander Maconochie arrived in Australia"); JOHN LEWIS GILLIN, CRIMINOLOGY AND PENOLOGY, 565 (3d ed. 1945) (1926) (citing W. L. CLAY, OUR CONVICT SYSTEMS 21 (Cambridge, Macmillan and Co. 1862)) (suggesting that Maconochie was responsible for the idea of conditional release in Australia); U.S. DEP'T OF JUSTICE, *supra* note 23, at 12 (claiming that Maconochie was a leading force in the development of the Australian ticket-of-leave system); Witmer, *supra* note 15, at 27, 28 (describing Machonochie's mark system as a piece of the probation system implemented in Australia in 1842). In a 1976 article, written while he was a fellow for the Department of Law and Research School of Social Sciences at the Australian National University, Stephen White pointed out many of these misattributions. Stephen White, *Criminology: Alexander Maconochie and the Development of Parole*, 67 J. CRIM. L. & CRIMINOLOGY 72, 72–73 (1976).

[28] U.S. DEP'T OF JUSTICE, *supra* note 23, at 10 (noting that the "earliest plan of conditional liberation" was developed in the Australian penal colonies).

tickets of leave. Ticket-of-leave holders had to live in allotted districts, where they had an 8:00 p.m. curfew and had to report any change of address to the police. Although allowed to keep their wages, they could not own property and were required to attend frequent musters, or check-ins. Tickets of leave could be suspended in summary fashion for what Maconochie termed the most "trifling irregularities," and a "very large proportion" of ticket-of-leave holders were returned to government work as a result.[29]

Maconochie's reports criticized almost every aspect of the Australian convict system, including the ticket of leave. He condemned the framework of severe coercive discipline applied to convicts in both government and assigned work, including the rampant use of the lash, hard labor, and other debilitating punishments. Maconochie argued that a disciplinary system premised on physical abuse imposed with little process or restraint served only to humiliate and demoralize offenders. It also degraded their masters, turning them into overbearing, dissatisfied "slave-holders," too ready to resort to violence and coercion.[30] For prisoners, such a system inspired only fear and resistance.[31] For Maconochie, without an emphasis on the dignity of prisoners as social beings, there was no space for their meaningful reform.[32]

Reacting against what he had seen, Maconochie proposed his once-famous mark system of convict administration. Rather than a "time" sentence based on years, he sought the imposition of a "task" sentence based on labor and good conduct. Depending on the seriousness of the crime, a judge would impose a sentence of a specific number of marks as a form of prison currency. That prisoner would then receive concrete incentives, measured in marks, to earn release as early as possible. The ideas behind Maconochie's mark system would lead to a revolution in criminal sentencing, particularly in the United States.[33]

Maconochie accepted the idea of punishment as a mechanism of social control, but he focused on making the sentence productive and

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[29] ALEXANDER MACONOCHIE, AUSTRALIANA: THOUGHTS ON CONVICT MANAGEMENT AND OTHER SUBJECTS CONNECTED WITH THE AUSTRALIAN PENAL COLONIES 3–4 (London, John W. Parker 1938).

[30] *Id.* at 6, 12.

[31] *Id.* at 5–6, 11–12.

[32] *See* BARRY, *supra* note 18, at 77–78 (quoting MACONOCHIE, *supra* note 26, at 25–26 (describing Maconochie's philosophy on prisoner reform)).

[33] Several noted European scholars—such as Obermaier in Bavaria, Montesinos in Spain, and Bonneville de Marsangy and Charles Lucas in France—were advocating for reform-based indeterminate sentencing around the same time as Maconochie. U.N. DEP'T OF SOC. AFFAIRS, *supra* note 7, at 12.

geared toward reintegration.[34] In this, he was preoccupied with avoiding degradation in the execution of the sentence. Rather than relying on the threat of external coercion, he sought to ignite a prisoner's internal drive to succeed.[35] The mark system was meant to recognize and reward the achievements of prisoners.

Under the mark system, each prisoner had to earn a set number of marks, calculated in proportion to the seriousness of the offense, in order to qualify for release.[36] The use of marks was developed in a labor-based system, but release did not depend solely on physical exertion: Prisoners could earn marks for obeying the rules and through tasks such as attention and proficiency in school, reading aloud to others, and tending the sick.[37] Prisoners had to pay for food and clothing out of their marks: This was to encourage them to choose simpler rations in order to secure earlier release. Discipline would be addressed through the loss of marks, rather than through physical punishment.[38] Importantly for Maconochie, the gain and loss of marks was meant to be concrete and measurable, recorded from day to day, rather than at some distant point in the future.[39]

As prisoners earned the requisite number of marks and advanced through the stages of Maconochie's system, the restraints upon them lessened. The final stage of confinement was meant to resemble as much as possible the real-world circumstances the prisoners would encounter upon release.[40] Maconochie's stated aim was to allow prisoners to earn early remission of their sentences and at the same time to provide them with the skills and motivation to reenter society successfully.[41] Through these ideas, Maconochie laid the foundations for

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[34] BARRY, *supra* note 18, at 72–73.

[35] ALEXANDER MACONOCHIE, CRIME AND PUNISHMENT 42 (London, J. Hatchard & Son 1846) (arguing for a change in the incentive structure to produce more meaningful reform).

[36] Under Maconochie's system, punishment and reform were to be contemplated as separate objectives of the sentence. The first stage of the sentence would be punishment: Prisoners would be put to hard labor for short fixed periods in penal stations removed from the public. The second stage would be rehabilitative: Prisoners would earn marks independently and then in probationary groups of six, whose members chose one another. MACONOCHIE, *supra* note 29, at 17–18.

[37] *See* M.D. Hill, Society for Promoting the Amendment of Law, *Report*, *in* MACONOCHIE, CRIME AND PUNISHMENT, *supra* note 35, at 49, 55 (describing the operation of the mark system).

[38] BARRY, *supra* note 18, at 75; MACONOCHIE, *supra* note 29, at 18, 21. In a set of regulations proposed in 1840, however, Maconochie reserved the possibility of flogging and chains if deemed "absolutely necessary for security." BARRY, *supra* note 18, at 118.

[39] *See* 1 ALEXANDER MACONOCHIE, ON SECONDARY PUNISHMENT 3–4 (London, Walton & Mitchell 1856) (discussing the philosophy and logistics of the mark system).

[40] BARRY, *supra* note 18, at 75.

[41] *Id.* at 72–73 (drawing from Maconochie's regulations proposed in 1840).

the indeterminate sentencing movement, which placed great confidence in the potential of penal programs to inspire and achieve meaningful reform.

Maconochie designed his mark system to counteract the disparity and unfairness he had witnessed in the Australian ticket-of-leave system. In his reports back home, he criticized the ticket-of-leave process as too remote an incentive, too uncertain for prisoners, and too dependent on the discretion of sometimes indifferent masters.[42] In designing his system, he conceived of marks as a transparent measuring stick of a prisoner's progress.[43] To avoid abuses in the tabulation of marks, he provided for the public display of fixed tables of wages and fines. Inferior authorities could not deviate from these tables.[44] The accounts of each prisoner would be kept public in order to make the system open, invite scrutiny, and avoid corruption.[45]

Critically, Maconochie did not believe in the conditional nature of tickets of leave—that is, the possibility that release could be summarily terminated—at least for those who had gone through his system. He worried that post-release police supervision would impede reintegration and advocated against what he termed "clogging" a ticket of leave with restrictions.[46] He maintained that prisoners who had earned their freedom should not become "slaves to the police"[47] or subject to the discretionary will of a "malicious constable, or a single irritable magistrate."[48] In particular, he disparaged summary powers at revocation, emphasizing that "[s]ummary power is a snare alike to those who wield, and those who are subject to it."[49] Upon release, prisoners should receive the same safeguards and protections as "those claimed by the very highest,"[50] having "most dearly earned" their freedom.[51] The system he devised was indeterminate because the length of confinement was contingent upon an inmate's behavior. But release, when achieved, would be unconditional.

Maconochie was not alone in worrying about the effects of stigmatizing released offenders. In 1837, the British parliamentary

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[42] MACONOCHIE, *supra* note 29, at 3 (cataloging problems with the ticket-of-leave system).

[43] *Cf.* BARRY, *supra* note 18, at 77 (pointing out that this measuring stick approach was derived from Quaker reformers).

[44] Hill, *supra* note 37, at 56.

[45] *Id.* at 57.

[46] MACONOCHIE, *supra* note 29, at 22.

[47] *Id.* at 11.

[48] *Id.* at 75.

[49] *Id.* at 22.

[50] *Id.* at 75.

[51] *Id.* at 22.

committee charged with reviewing the transportation system—a committee that drew extensively on Maconochie's findings—cautioned that "under a good system of punishment," an offender should be considered to have atoned for his crime at the expiration of the sentence.[52] In particular, the committee emphasized:

> [T]he effect of preventing an offender from acquiring civil and constitutional rights after the expiration of his sentence, is in reality to give a most unjust, uncertain, and unequal extension to his punishment, to render him infamous in the eyes of his fellow-citizens, to degrade him in his own estimation, and to drive him back to crime.[53]

Between 1840 and 1844, Maconochie had an opportunity to implement his methods (at least partially) in his famed experiments at Norfolk Island, the most notorious of the penal settlements, located approximately 900 miles off the coast of Sydney.[54] Although Maconochie spent only four years as the governor of Norfolk Island, his achievements in bringing order out of chaos have been celebrated extensively in historical accounts.[55] As explained in Part II, Maconochie's writings and his accomplishments at Norfolk Island profoundly influenced the penal reformers who brought indeterminacy into the United States.

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[52] SELECT COMMITTEE REPORT, *supra* note 16, at xxix.

[53] *Id.*

[54] Maconochie was not allowed to put all his proposals into operation. Most significantly, the colonial government did not endorse Maconochie's plan for early release based on the accumulation of marks. He could only hold marks out as "affording grounds for expectation," but was eventually disappointed in this. ALEXANDER MACONOCHIE, THE MARK SYSTEM OF PRISON DISCIPLINE 4 (London, Mitchell and Son 1857); *see also* White, *supra* note 27, at 73–80 (describing how Maconochie was forced to implement tickets of leave at Norfolk Island because of the limitations in the law). However, on the whole his views were "unfavorable towards those elements in ticket-of-leave systems which developed into parole, especially when he had the power to do anything about them." White, *supra* note 27, at 74. Towards the end of his life, however, Maconochie defended the idea of using tickets of leave in England, perhaps under the influence of his friend, Matthew Davenport Hill. ALEXANDER MACONOCHIE, PRISON DISCIPLINE 21 (London, T. Harrison 1856).

[55] *See, e.g.*, BARRY, *supra* note 18, at 167–71 (discussing contemporary accounts of Maconochie's success at Norfolk Island); MARY CARPENTER, REFORMATORY PRISON DISCIPLINE xiii (London, Longman Longman Green Longman 1872) ("Captain Maconochie effected probably the greatest triumphs of reformatory prison discipline ever attained, in Norfolk Island, in 1840."); NORVAL MORRIS, MACONOCHIE'S GENTLEMEN 164 (2002) (noting the remarkable success achieved at Norfolk Island). *But see, e.g.*, BARRY, *supra* note 18, at 171–75 (discussing contemporaneous criticisms of Maconochie's prisoner reform program).

B. The Irish and English Convict Systems

Maconochie's mark system did not achieve any real prominence in the United Kingdom or elsewhere, however, until Sir Walter Crofton revived and adapted it for the Irish prison system in the mid-1850s.[56] Crofton, a former English county magistrate, chaired the Board of Directors of Convict Prisons for Ireland between 1854 and 1862.[57]

Crofton is regularly portrayed as Maconochie's ideological heir.[58] Both Crofton and Maconochie believed that allowing prisoners to earn their way out of prison was the key to meaningful reform. In Crofton's words, rehabilitation was possible when a convict was treated as the "arbiter of his own fate"[59] and persuaded through concrete rewards to begin "co-operating in his own amendment."[60] To this end, Crofton drew on Maconochie's mark system as a means of measuring and rewarding reform.

In important ways that have not been addressed in the scholarly literature, however, Crofton changed Maconochie's program by embracing conditional release. It was Crofton's system—which incorporated conditional release into indeterminacy theory[61]—that was adopted into the United States. On the question of whether to make release from prison conditional, the true heir to Maconochie's ideas was Sir Joshua Jebb, not Crofton.

Jebb, the longtime chair of the Board of Directors of Convict Prisons for England, was Crofton's archrival. Jebb entered penology as a royal engineer and became Surveyor-General of Prisons in 1844. He was first appointed to chair the English Convict Board in 1850.[62]

Crofton and Jebb led the Irish and English Convict Boards during a critical period in the mid-1850s that involved domestic

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[56] CLAY, *supra* note 27, at 22.

[57] *The Present State of the Prison Discipline Question*, 102 N. AM. REV. 210, 220–21 (1866).

[58] *See, e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 23, at 13 (stating that Crofton based his system of marks and stages on Maconochie's system).

[59] Walter Crofton, *The Irish System of Prison Discipline*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 66, 67 (E.C. Wines ed., Albany, The Argus Company 1871).

[60] WALTER CROFTON, CONVICT SYSTEMS AND TRANSPORTATION 9 (London, William Ridgway 1863).

[61] Any prison system that provides for conditional release is indeterminate in the sense that the time in confinement is indefinite. However, Maconochie developed a theory of indeterminate sentencing that rejected conditional release. *See infra* Part I.A. While Crofton relied heavily on Maconochie's theory, he also adapted it to include conditional release.

[62] *See* Eric Stockdale, *The Rise of Joshua Jebb, 1837–1850*, 16 BRIT. J. CRIMINOLOGY 164, 170 (1976).

experimentation with tickets of leave in the British Isles. Van Diemen's Land, the main Australian penal colony, had closed its doors to transported convicts in 1852, creating sudden pressure on the authorities to absorb convicts at home.[63] In response to this crisis, the British Parliament passed a penal servitude act in 1853 that authorized limited conditional release in England and Ireland under an adaptation of the colonial ticket-of-leave system.[64] Convicts under sentence of transportation could now receive tickets of leave at home after a minimum period of penal servitude.[65]

Crofton used tickets of leave as the final step in what became known as the "Irish Convict System." Prisoners had to pass through three stages before they were eligible for remission on tickets of leave. During the first stage, the penal stage, prisoners were held in solitary cells for approximately nine months.[66] The second stage involved communal labor in public works prisons.[67] For this stage, Crofton adapted Maconochie's mark system;[68] prisoners had to advance through four different classes by earning a set tally of marks.[69] By advancing through these classes, prisoners earned a progressive lessening of restraint, more interesting labor, and an increase in gratuities.[70] For the third stage, officials promoted prisoners in small numbers to "intermediate" prisons as a final test of their readiness for tickets of leave.[71] In the intermediate prisons, the inmates dressed as ordinary laborers, lived communally under minimal surveillance, and could run errands and attend church in the community.[72]

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63 CLAY, *supra* note 27, at 29–30.

64 CROFTON, *supra* note 60, at 3.

65 *Id.*

66 WALTER CROFTON, NOTES ON COLONEL JEBB'S REPORT ON INTERMEDIATE PRISONS 1 (1858).

67 *Id.*

68 CROFTON, *supra* note 60, at 8. Prisoners forfeited marks for misconduct. *See* CARPENTER, *supra* note 55, at 8 (referencing Crofton's description of the Irish Convict System).

69 *See* CROFTON, *supra* note 66, at 2–3 (listing four classes in a convict gratuity table, and stating that progress through these classes would be based on the accumulation of marks).

70 Crofton, *supra* note 59, at 67.

71 *See* CROFTON, *supra* note 66, at 4 (discussing the purpose of the third stage). Prisoners, here, means male prisoners. Crofton did not approve of intermediate facilities for female convicts; he believed "there would be considerable difficulty in obtaining employment for them on Discharge." *Id.* at 24.

72 *See* CARPENTER, *supra* note 55, at 42 (quoting E.B. WHEATLEY BALME, EDWARD AKROYD, SAML. WATERHOUSE, & THOS. FOLJAMBE, OBSERVATIONS ON THE TREATMENT OF CONVICTS IN IRELAND 38 (London, Simpkin, Marshall, & Co. 1862) (providing an account by four English prison magistrates who visited one of Crofton's intermediate prisons and noted that prisoners attended church and dressed as ordinary laborers); CLAY, *supra* note 27, at 49 (noting communal living, minimal surveillance, and dress as ordinary

Like Maconochie, Crofton worked to make the prisoner advancement system transparent and uniform. During the second stage, the mark stage, prisoners could earn nine marks per month: three for discipline; three for attention and improvement at school; and three for industry at work.[73] Prison officials, including the governor and schoolmaster, awarded these marks, and prisoners had the right to appeal.[74] Prisoners wore "conduct" badges on their arms, showing how many marks they had earned and the remainder yet to be earned before advancement to the next class.[75] At the end of each month, officials calculated each convict's new balance of marks and issued new badges.[76] Each class of prisoners wore different-color uniforms to demonstrate their stage of advancement.[77] According to Crofton, prisoners became deeply invested in the record of their achievement:

> There is not an intelligent officer in the Irish Convict Department who will not bear witness to the intense interest taken by each convict in the attainment of his marks, and the jealous care with which he notes them.[78]

The English Convict System adopted its own program of progressive stages of confinement,[79] but the two systems took opposite stances on post-release supervision and revocation. In both England and Ireland, the remission of a sentence through a ticket of leave (then also called a license) was expressly conditional—at least in theory. Stern admonitions about the government's powers of revocation were printed on all English and Irish licenses, including the following warning:

> To produce a forfeiture of the license it is by no means necessary that the holder should be convicted of any new offence. If he associates with notoriously bad characters, leads an idle and dissolute life, or has no visible means of obtaining an honest livelihood, &c., it will be assumed that he is about to relapse into crime, and he

laborers); WALTER CROFTON, A FEW REMARKS ON "THE CONVICT QUESTION" 6 (Dublin, William Bernard Kelly 1857) (noting running of errands outside prison under minimal surveillance).

[73] CARPENTER, *supra* note 55, at 8 (referencing Crofton's description of the Irish Convict System).

[74] *Id.* at 22.

[75] *See* GIBSON, *supra* note 24, at 18 (explaining the Irish badge system in detail).

[76] CLAY, *supra* note 27, at 47–48.

[77] GIBSON, *supra* note 24, at 19–20.

[78] CARPENTER, *supra* note 55, at 10 (quoting Crofton).

[79] *See* CLAY, *supra* note 27, at 56–57 (criticizing the staged incarceration program of the English system in which prisoners were divided into classes and given benefits based on their class).

> will be at once apprehended, and re-committed to prison under his original sentence.[80]

In England, however, nothing was done to supervise ticket-of-leave–holders. In echoes of Maconochie, Jebb believed that such surveillance would make released prisoners second-class citizens and undermine their reintegration:

> To impose conditions and restrictions that would effectually stamp them as individuals belonging to a criminal class, in this country would be manifestly a most inexpedient exercise of power, and one that would be calculated to defeat the entire object of an improved system of convict discipline. . . .
>
> . . . .
>
> To impose police supervision over a poor wretch struggling to find employment is the way to add to his difficulties and throw him back into crime instead of keeping him out of it.[81]

In England, the police were instructed to leave licensees alone; there was no effort to identify them to the public.[82] In Jebb's view, "a ticket-of-leave man, as a general rule, is a proscribed man with the public. However desirous he may be, and however hard he may strive to regain his character, a brand has been put upon him that follows him to his grave."[83] Jebb believed that informal, non-coercive supervision by "benevolent individuals" was the only form of supervision that would aid in actual reintegration.[84]

In Ireland, by contrast, release on a ticket of leave was closely monitored and rigorously conditional.[85] In the first place, prisoners could not receive a ticket of leave until they received an offer of employment from someone in the community. Then, when a prisoner accepted an offer of employment, the relevant local constabulary added him to the registry of licensed convicts.[86] This registry contained detailed information about the licensee's parentage and

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[80] CROFTON, *supra* note 60, at 11.

[81] Joshua Jebb, *Explanations Showing the Difficulties Which Would Attend the Introduction into England of the Probationary Stages of Discipline and Supervision of the Police, &c., Which Have Been Adopted in Ireland*, *in* TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE 402, 411, 414 (George W. Hastings ed., London, John W. Parker, Son, and Bourne 1863).

[82] CLAY, *supra* note 27, at 31.

[83] CROFTON, NOTES, *supra* note 66, at 18 (quoting Jebb's writing).

[84] *See id.* (quoting Jebb as recommending a benevolent form of supervision for licensees).

[85] *See* CROFTON, *supra* note 60, at 11 (stating that the conditions on the Irish ticket were strictly enforced, and describing how licensees were monitored).

[86] CARPENTER, *supra* note 55, at 50 (quoting Walter Crofton et al., *General Report of the Directors of Convict Prisons*, FOURTH ANN. REP. OF THE DIRECTORS CONVICT PRISONS IR. 1, 13 (1858) (reproducing rules for the supervision of convicts on tickets of leave).

circumstances, along with his photograph.[87] The licensee had to report to the local police station at the beginning of every month.[88] The local officers were instructed to inform the Inspector-General of Constabulary of any evidence of misconduct.[89]

Crofton justified this kind of police supervision as the key to overcoming stigma. Crofton believed that effective supervision and summary revocation—as a test of the reformatory work done in prison—would give the public (and particularly employers) the confidence necessary to accept convicts back into the community.[90] Everyone knew that swift punishment would follow a failure to abide by the conditions.[91] Tickets were revoked for infractions such as irregular reporting, loss of employment through drink, and brawling in public.[92]

Irish prison officials, meanwhile, became invested in helping prisoners secure the employment necessary for tickets of leave. Many of those eligible for early release could not find employment without assistance. A prison lecturer who worked for Crofton traveled to surrounding mills, factories, and farms, seeking to persuade employers to hire his men.[93] Finding jobs was very difficult at the beginning until a core group of employers had been recruited.[94] But reintegration

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[87] *See* CLAY, *supra* note 27, at 54 (noting that Crofton's registry is "of [the same] kind" as one that requires a "history of his birth, parentage, and previous life" as well as a photographed "portrait").

[88] CROFTON, CONVICT SYSTEMS, *supra* note 60, at 11.

[89] *See* CARPENTER, *supra* note 55, at 50 (reproducing rules requiring a police report if a licensee was observed "guilty of misconduct or leading an irregular life" (quoting Crofton et al., *supra* note 86)). Not all convicts were under police supervision. The prison lecturer supervised ticket-of-leave–holders in Dublin through bi-monthly visits. *See* CARPENTER, *supra* note 55, at 53–54 (quoting 2 REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE OPERATION OF THE ACTS RELATING TO TRANSPORTATION AND PENAL SERVITUDE 392 (London, George E. Eyre and William Spottiswoode 1863)); GIBSON, *supra* note 24, at 42 (noting that the lecturer, rather than the police, supervised the discharged convicts in Dublin).

[90] *See* CARPENTER, *supra* note 55, at 61, 65 (discussing evidence presented by Crofton noting that the employers preferred the system and would not employ licensees without it) (quoting REPORT OF THE COMMISSIONERS, *supra* note 89, at 275, 279); CROFTON, *supra* note 66, at 20–21 (noting that employers in Ireland consider supervised convicts well prepared for release and less of a danger to the public).

[91] *See* CARPENTER, *supra* note 55, at 65 (listing a need to "ensure *certainty* both in the minds of the convicts and of the public that all violation of the conditions of the license will involve return to punishment" for an effective ticket-of-leave system).

[92] *See* Walter Crofton, *Memoranda Relative to the Intermediate Convict Prisons in Ireland*, 4 ANN. REP. DIRECTORS CONVICT PRISONS IR. 25, 30 (1858).

[93] *See* REPORT OF THE COMMISSIONERS, *supra* note 89, at 372–73.

[94] *See* CARPENTER, *supra* note 55, at 53 (discussing the lecturer's account of employers' initial reluctance to employ licensees (quoting REPORT OF THE COMMISSIONERS, *supra* note 89, at 373)).

through reemployment was the motivating principle behind Crofton's ticket-of-leave system.[95]

II
The U.S. Adoption of Indeterminacy and Conditional Release

A. The Influence of Maconochie and Crofton

The penologists who brought indeterminacy and conditional release into American sentencing were part of a self-conscious reform movement that was based largely on the writings of Maconochie and Crofton.[96] The first U.S. effort to combine indeterminacy with conditional release was called "parole" and introduced at the Elmira Reformatory in New York in 1877.[97] Indeterminate sentencing and conditional release quickly became the dominant sentencing structure in the United States, with every state and the federal government adopting a parole release system.[98] For approximately one hundred years thereafter, rehabilitation would take the place of retribution as the central purpose of U.S. sentencing policy.[99]

The Prison Association of New York (NYPA), a group that rose to national and international prominence in the 1860s and 1870s, was the driving force behind the American parole movement. Dr. Enoch Cobb Wines, an internationally renowned penologist who served as the NYPA's corresponding secretary, organized the celebrated inaugural Congress of the National Prison Association (NPA) in 1870.[100] At this Congress, the NPA adopted its "Declaration of Principles."[101] This declaration, the charter for indeterminate sentencing in the United States, drew extensively on the principles of Maconochie and Crofton. The NYPA was also behind the establishment of the Elmira Reformatory.

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[95] *See* Clay, *supra* note 27, at 51–53 (arguing that Crofton's system was designed to convince prospective employers to give licensees a chance).

[96] *See* U.S. Dep't of Justice, *supra* note 23, at 17 ("The main arguments of early proponents of the indeterminate sentence in America were based upon the works of Maconochie and Crofton.").

[97] *See* Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. Am. Inst. Crim. L. & Criminology 9, 21–23 (1925) (enumerating and explaining the key provisions utilized at Elmira).

[98] Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. Rev. 702, 702 (1963) (noting that "[e]very state in the Union maintains some form of parole system . . ." (citing U.S. Dep't of Justice, *supra* note 23, at 7 (1939)).

[99] *See, e.g.*, United States v. Grayson, 438 U.S. 41, 46 (1978) (noting a century-old shift in the primary purpose of sentencing in the United States, from retribution to a more rehabilitative model).

[100] *See* Lindsey, *supra* note 97, at 18 (discussing Wines's role).

[101] *See infra* note 124 and accompanying text.

Between 1865 and 1870, the influential annual reports of the NYPA included many descriptions of the work of Maconochie and Crofton. The 1865 report, for example, included an account by Wines of Maconochie's mark system and the "wonderful success" achieved at Norfolk Island.[102] In 1866, Gaylord B. Hubbell, a member of the NYPA Executive Committee, traveled to Ireland to observe Crofton's system firsthand. Hubbell, who had served as the warden of Sing Sing Prison between 1862 and 1864, prepared an account of his experiences for the 1867 annual report.[103]

In the report, Hubbell described his visit to the Irish prisons as "like finding, in the midst of a dreary desert, some beautiful oasis . . . ."[104] In particular, Hubbell approved of the meaningful incentives afforded prisoners. The quasi-freedom of the intermediate prisons could be earned in four years of a seven-year sentence.[105] He considered the ticket of leave the "most critical" step in the system: The strict enforcement of conditions provided a real-world test of the reform program practiced in the prison.[106] According to Hubbell, after an initial period of hostility from the Irish public, there was now a waiting list to employ those on tickets of leave.[107] Based on his experiences, Hubbell called for an immediate trial of the Irish system in New York.[108]

In 1867, Wines and Theodore Dwight, the NYPA's president, submitted a report to the New York legislature that would eventually lead to the establishment of the Elmira Reformatory.[109] They called for the legislature to adopt "reformation sentences" and abandon the practice of "time sentences."[110] To do so, according to Wines and Dwight, the legislature should adopt the Irish model, the "best model" of which they had any knowledge.[111] The goal of the new system would be

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102 E.C. Wines, *The Progress of Prison Reform in England*, 20 ANN. REP. EXEC. COMM. PRISON ASS'N N.Y. 67, 92–93 (1865).

103 G.B. Hubbell, *Report on the Prisons of England and Ireland*, in 22 ANN. REP. EXEC. COMM. PRISON ASS'N N.Y. 95, 147–76 (1867).

104 *Id.* at 147.

105 *Id.* at 181.

106 *Id.* at 175.

107 *See id.* at 175–76 (describing how the licensees won over employers with their faithfulness and industriousness).

108 *Id.* at 188–91 (describing in some detail features of the envisioned system).

109 E.C. WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA MADE TO THE LEGISLATURE OF NEW YORK, JANUARY, 1867 (Albany, Van Benthuysen & Sons 1867).

110 *Id.* at 275.

111 *Id.* at 72.

reformation by "placing the prisoner's fate, as far as possible, in his own hands . . . ."[112]

In 1868, the NYPA recommended that the New York legislature open a new prison to test the Irish system on a small scale. In 1870, the legislature responded and approved an act to establish this new reformatory in the city of Elmira.[113] This reformatory opened its doors in 1876.[114]

Meanwhile, the 1870 NPA Congress prominently featured the ideas of Maconochie and Crofton. Delegates from twenty-five states and two foreign countries attended this week-long conference in Cincinnati. The aim of the conference was to create a system that would work "reformation in the soul" of each prisoner, and would "restore him to society regenerated and reformed."[115] According to Wines, the central ideas of Maconochie and Crofton (although not yet put into practice) already were accepted by the time of the Congress:

> The principle of rewards, as an incitement to good conduct and reformation, is one on which there is now little dissent. There is also a very general agreement that such rewards should consist of, (1) a diminution of sentence; (2) a share in the earnings; (3) a gradual withdrawal of restraint; and (4) a gradual enlargement of privilege.[116]

Franklin Sanborn, a founding member of the NPA and former Secretary of the Massachusetts Board of State Charities, delivered a paper on how the Irish Convict System could be adopted into the United States.[117] In Sanborn's view, most of the system could be implemented without controversy. He concluded that the use of an exact mark system was particularly indispensible, although it required "perfect honesty and impartiality on the part of the prison officers."[118] Only the ticket of leave proved divisive, provoking "innumerable

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112 *Id.* at 73.

113 Lindsey, *supra* note 97, at 17.

114 *Id.* at 21.

115 A.T. Goshorn, *Opening Address*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 1, 2 (E.C. Wines ed., Albany, The Argus Company 1871).

116 E.C. Wines, *The Present Outlook of Prison Discipline in the United States*, in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE, 15, 19 (E.C. Wines ed., Albany, The Argus Company 1871). Although Crofton could not attend, he contributed a paper on the Irish system. Crofton, *supra* note 59.

117 F.B. Sanborn, *How Far Is the Irish Prison System Applicable to American Prisons?*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 406 (E.C. Wines ed., Albany, The Argus Company 1871). As a result of the 1870 Congress on Penitentiary and Reformatory Discipline, the National Prison Association was founded; the Congress was renamed accordingly.

118 *See id.* at 407 (arguing for the introduction of the mark system into the United States).

objections" to its domestic implementation.[119] According to Sanborn, the public "shudder[ed]" at the idea that a convict "who may have committed heinous offenses, and who may be likely to repeat them" would be "let[ ] loose upon the community before his original sentence ha[d] fully expired . . . ."[120] With respect to the ticket of leave (i.e. conditional release), some objected that "this sort of betwixt-and-between condition, neither confinement nor liberty," was "contrary to our American notions . . . ."[121] Others raised concerns that police supervision created the prospect of gross abuses of power. And many feared that effective control over licensees would be impossible, given the possibility for escape across state lines.[122] Sanborn was confident that all such objections could be overcome.[123]

The 1870 Congress culminated in the unanimous adoption of a "Declaration of Principles."[124] Together with the founding of Elmira, this declaration launched the indeterminate era in U.S. sentencing practice. The Congress concluded that the "most valuable parts" of the Irish system, from the separate penal stage to the indeterminate establishments (i.e. without the tickets of leave), could be applied as easily in the United States as in Ireland.[125] The core philosophy, as reflected in the principles listed in the accompanying table, was lifted from the work of Maconochie and Crofton.

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119 *Id.* at 410.

120 *Id.*

121 *Id.* at 411.

122 *Id.*

123 *See id.* at 407, 410–12.

124 *Declaration of Principles Adopted and Promulgated by the Congress*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 541 (E.C. Wines ed., Albany, The Argus Company 1871).

125 *Principles of Penitentiary and Reformatory Discipline Suggested for Consideration by the National Congress*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 548, 548, 557 (E.C. Wines ed., Albany, The Argus Company 1871).

TABLE 1

Selected 1870 NPA Principles Drawn from Maconochie and Crofton[126]

. . . .

III. The progressive classification of prisoners, based on character and worked on some well-adjusted mark system, should be established in all prisons above the common jail.

IV. Since hope is a more potent agent than fear, it should be made an ever-present force in the minds of prisoners, by a well-devised and skillfully-applied system of rewards for good conduct, industry and attention to learning. Rewards, more than punishments, are essential to every good prison system.

V. The prisoner's destiny should be placed, measurably, in his own hands; he must be put into circumstances where he will be able, through his own exertions, to continually better his own condition. A regulated self-interest must be brought into play, and made constantly operative.

. . . .

VIII. Preemptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.

. . . .

XII. A system of prison discipline, to be truly reformatory, must gain the will of the convict. . . .

XIV. The prisoner's self-respect should be cultivated to the utmost, and every effort made to give back to him his manhood. There is no greater mistake in the whole compass of penal discipline, than its studied imposition of degradation as a part of punishment. . . .

The 1870 principles would prove deeply influential during the "reformatory" era, when indeterminate sentencing was first implemented in the United States. Over the ensuing decades, however, adherence to the principles would decline sharply. As I shall describe below, the extent of that decline would be reflected in the mode of indeterminacy introduced into federal sentencing law in 1910.[127]

B. The Elmira Reformatory Model

Zebulon Brockway, one of the organizers of the NPA Congress, was a defining force in bringing Irish-style indeterminate sentencing and conditional release into the United States.[128] Brockway was the first superintendent of the Elmira Reformatory and served in that capacity for nearly twenty-five years, from 1876 to 1900.[129] Working from the 1870 NPA principles, Brockway developed a reform program for Elmira that became a model for many other states.[130]

In 1877, for example, Brockway secured the passage of an indeterminate sentencing statute for Elmira that implemented key features of Maconochie's mark system.[131] Through the accumulation of

126 *Id*.

127 *See infra* Part II.C.

128 Some degree of indeterminacy was being introduced around the country through the adoption of good-time laws. U.S. DEP'T OF JUSTICE, *supra* note 23, at 15 (describing early good-time laws in the United States).

129 ZEBULON BROCKWAY, FIFTY YEARS OF PRISON SERVICE 161, 165 (1912).

130 Lindsey, *supra* note 97, at 30–40. *But see* ALEXANDER W. PISCIOTTA, BENEVOLENT REPRESSION: SOCIAL CONTROL AND THE AMERICAN REFORMATORY-PRISON MOVEMENT 33–34 (1994) (claiming that Brockway resorted to frequent physical violence and was not the benevolent figure often portrayed).

131 Lindsey, *supra* note 97, at 21.

marks, prisoners could secure increased privileges and earlier release. Marks were to be awarded for "good personal demeanor, diligence in labor and study, and for results accomplished . . . ."[132] Prisoners would forfeit marks if found guilty of derelictions or offenses.[133] As in Ireland, and as recommended by Maconochie, prison managers had to update prisoners regularly on their tallies of marks. By statute, these updates were to occur once a month, or more frequently if requested.[134]

Reminiscent of Maconochie and Crofton, Brockway also implemented a progressive classification system at Elmira.[135] Before entering this system, which consisted of three grades, prisoners were placed in a cell for one or two days to allow time for "contemplation."[136] New prisoners then entered the second (or intermediate) grade. As in the Irish system, they could earn up to nine marks a month: three for school progress, three for labor, and three for demeanor.[137] By earning sufficient marks, they were promoted to the first grade, where they received privileges such as better food and greater access to the library. For offenses such as deceitfulness, violence, or continued disregard of prison rules, they were demoted to the third grade, where they wore distinctive red uniforms and were denied visitors and other privileges.[138]

Despite the unease expressed at the 1870 Congress, Elmira's governing statute provided for the possibility of early conditional release on parole,[139] an adaptation of the Irish ticket of leave. Elmira's board of managers had full discretion to establish rules and regulations for paroling convicts outside the institution. While on parole, the convict would remain under the board's custody and control and could be supervised by "suitable persons," appointed by the board. The board could "retake and reimprison" any paroled convict upon a written order certified by its secretary.[140]

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132 Act of Apr. 24, 1877, ch. 173, § 8, 1877 N.Y. Laws 186, 188.

133 *Id.*

134 *Id.*

135 *See* ALEXANDER WINTER, THE NEW YORK STATE REFORMATORY IN ELMIRA 25–41 (London, Swan Sonnenschein & Co. 1891) (explaining in detail the mechanics and philosophy of Elmira's classification system).

136 *Id.* at 16.

137 *Id.* at 28–29.

138 *See id.* at 50–56 (describing the differences between the three grades).

139 The word "parole" comes from the French *parole d'honneur* (word of honor). Dr. S. G. Howe of Boston first used this word to describe early conditional release from prison in an 1846 letter to the Prison Association of New York. U.S. DEP'T OF JUSTICE, *supra* note 23, at 4–5 (citing PHILIP KLEIN, PRISON METHODS IN NEW YORK STATE 417 (1920)).

140 Act of Apr. 24, 1877, ch. 173, §§ 5, 10, 1877 N.Y. Laws 186, 187, 189.

Under Brockway's system, a prisoner could earn release on parole in as little as a year without regard to the length of the underlying sentence. Ultimately, all but ten percent earned release within three years.[141] Compared to Ireland, where tickets of leave were reserved for the very top inmates, parole at Elmira was much more widespread.

As in Ireland, employment was seen as the key to reintegration. Prison officials granted conditional release on parole only if the prisoner had secured prearranged employment.[142] If the prisoner could not find employment on his own, the prison managers found him a job based on the training he had received in prison.[143] Those who lost their jobs through misfortune could return to the reformatory as "guests," and a new position was found for them as quickly as possible. Those who lost their jobs through their own fault (but not through criminal conduct) and voluntarily returned on "request or order" were placed in an abbreviated version of the program. Those who violated their parole by crime or by "gross improprieties" were returned to either the second or third grade, as determined by the institution.[144]

Elmira prisoners generally were paroled for six months, followed by complete liberation.[145] In Brockway's view, a term longer than six months "would be discouraging to the average paroled man, and a shorter term insufficiently steadying."[146] During the parole period, convicts had to submit monthly reports, certified by a reliable person such as a clergyman or an employer. They were supervised by a prison "Transfer Officer," rather than the local police.[147] According to Brockway, approximately eighty-two percent of parolees adjusted successfully and did not return to crime.[148]

Based on the success achieved at Elmira, a reformatory movement swept through the United States. By 1901, twelve states had established reformatories built on the Elmira model.[149] The reformatory era, which peaked between 1870 and 1900, was characterized by

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141 WINTER, *supra* note 135, at 27–28 (supplying a numerical breakdown of prison terms served until release).

142 *Id.* at 34–35 (stating that a position of employment was secured for every Elmira prisoner released on parole).

143 *Id.* at 35; BROCKWAY, *supra* note 129 at 324–25.

144 *See* WINTER, *supra* note 135, at 42 (describing the rules at Elmira for dealing with unsuccessful parolees).

145 *Id.* at 41.

146 BROCKWAY, *supra* note 129, at 324.

147 WINTER, *supra* note 135, at 41.

148 BROCKWAY, *supra* note 129, at 325.

149 5 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PRISONS 23 (1940).

two central themes: (1) indeterminate sentencing and conditional release; and (2) the use of marks or some other system of earned positive rewards.[150] Indeterminate sentencing and conditional release would expand beyond this era. The mark system would not—despite its anchoring role in indeterminacy theory, as adopted by the 1870 Congress.

In 1940, the Department of Justice explained that the mark system failed because it was too difficult for ordinary prison officers to implement. The success of the reformatory program depended on the quality of the prison leadership and staff. Failing to recognize this, states continued to assign to reformatories "the same type of personnel that had been assigned to prisons plus a few underpaid and over-worked 'instructors.'"[151] As a result:

> The grading system also was too complicated for this type of staff to maintain, changing as it did with each new political administration. The tendency was to put every one who behaved himself into the first grade leaving only a few in the second grade and those actually under punishment in the third grade. The old "prison discipline" which placed the emphasis on being a "good prisoner" regardless of anything more fundamental, such as achievement in school or shop or character, was dominant still.[152]

Parole and indeterminate sentencing (without marks), by contrast, quickly spread beyond the reformatory model. By 1898, at least twenty states had adopted parole laws.[153] By the 1950s, every state in the Union, along with the federal government, had incorporated indeterminate sentencing and parole release into its core criminal justice policy.[154] These laws, like the system in place at Elmira, generally provided for indeterminate sentencing capped by a statutory maximum tailored to the offense.[155] Some state statutes mandated a minimum period of incarceration before a person could be considered for parole.[156] The first federal parole statute, adopted in 1910, included both of these features.[157]

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150 *See id.* at 22–23 (noting these features of the reformatory era).

151 *Id.* at 24.

152 *Id.* at 25.

153 *See* AM. BAR ASS'N, *Report of the Committee on Parole and Indeterminate Sentences of Prisoners*, 21 ANN. REP. AM. BAR ASS'N 466, 468 (1898) (listing states).

154 Note, *supra* note 98, at 702 (noting the presence of a parole system in every state).

155 U.N. DEP'T OF SOC. AFFAIRS, *supra* note 7, at 71.

156 *See id.* at 72 chart 1 (listing minimums and maximums by state).

157 *See infra* note 159 and accompanying text.

C. The Emergence of Federal Parole and Federal Probation

In this Section, I describe the enactment and evolution of federal parole. I also briefly note the passage in 1925 of the first federal probation statute. I do so because a description of probation's basic structure will become important to understanding the evolution of supervised release. Because federal probation is a strict alternative to incarceration, however, it is not a form of indeterminate sentencing, as discussed in this Article.[158]

On June 25, 1910, Congress enacted a parole statute for prisoners housed in federal institutions. The new statute applied only to those confined for a definite term of more than a year, whose record of conduct demonstrated that they had obeyed the rules of the institution, and who had served at least one-third of their sentences.[159]

The debate over passage of the bill reveals mainly practical concerns. Officials wanted to increase uniformity between federal prisoners housed in federal facilities and those housed in state facilities. Federal prisoners in state facilities were already subject to local parole laws, while those in federal facilities had no access to parole at all.[160] Members of Congress also emphasized the potential cost-savings: The federal government would save one hundred dollars per year for each prisoner released on parole.[161] The availability of parole would also ease the pressure on the overcrowded federal penitentiaries.[162]

Much less emphasis was placed on the reformatory purposes of parole. Representative Henry D. Clayton, the ranking member of the House Judiciary Committee and a former U.S. Attorney from Alabama, introduced the parole bill in the House. In so doing, he raised the goal of reform, but only in the most abstract terms:

> Mr. Speaker, after more than ten years of service in this House I am prepared to say that this bill is the most humane measure ever presented to Congress during that period. It is in the interest of humanity. It seeks to extend clemency and mercy to those deserving clemency and mercy. It is in accordance with the enlightened sentiment of the day, the progressive spirit of the times, and in harmony with the philanthropy of the day and age, that would aid suffering

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158 A complete account of federal probation, accordingly, is beyond the scope of this Article.

159 Parole Act, ch. 387, § 1, 36 Stat. 819 (1910), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2006)). See Part III.B for a discussion of how parole was repealed by the Sentencing Reform Act.

160 PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 65 (1991).

161 H.R. REP. NO. 61-1341, at 6 (1910).

162 KEVE, *supra* note 160, at 65.

> humanity and at the same time lend a helping hand toward the reformation of convicted criminals.[163]

The 1910 statute created parole boards for each of the federal penitentiaries. Each board was composed of three members: the Superintendent of Prisons of the Department of Justice, the warden of the penitentiary, and the physician of the penitentiary. Each board had the authority to parole prisoners from its own institution. Once out on parole, prisoners remained formally in the custody of the warden until the expiration of the term specified in their judgments, minus any good-time deductions authorized by Congress. A parole officer, appointed for each penitentiary, and the U.S. Marshals supervised the parolees.[164]

The statutory standards for parole release were vague. The board had the power to parole an inmate if it appeared that "there [was] a reasonable probability that such applicant [would] live and remain at liberty without violating the laws, and if in the opinion of the board such release [was] not incompatible with the welfare of society . . . ."[165] Each board could prescribe terms and conditions of parole release as it saw fit. The statute mandated only that the board stipulate the "limits of the residence of the person paroled," which it could then amend at its discretion.[166]

The statutory revocation powers were equally hazy. If a member of the parole board had "reliable information" that a prisoner had violated his parole, the warden could issue a warrant for the "retaking" of the prisoner.[167] The prisoner would then be given an opportunity to appear before the board of parole, which had full discretion to revoke the parole or amend the conditions.[168] If the board revoked the parole, the prisoner had to serve out the remainder of the sentence without credit for the time spent on parole.[169]

Some expressed concern during the House debate about the breadth of the discretion afforded to federal parole boards. Representative Adolph Sabath opposed the bill on the grounds that it favored those with social and political influence over the poor who had no influence.[170] In response, Clayton stressed that the proposed

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163 45 CONG. REC. H6374 (daily ed. May 16, 1910) (statement of Rep. Clayton).
164 Parole Act §§ 2–3, 7.
165 *Id.* § 3.
166 *Id.*
167 *Id.* § 4.
168 *Id.* § 6.
169 *Id.*
170 45 CONG. REC. H6375–76 (daily ed. May 16, 1910) (statement of Rep. Sabath). Sabath immigrated to the United States from Bohemia (now the Czech Republic) in 1881 as a penniless teenager, which may have influenced his position. JOINT COMM. ON

statute was a "philanthropic law" with "nothing suggestive of rich or poor or class or race in it."[171] Clayton denounced Sabath's concern as insulting to the integrity of the board: "Surely this House does not believe, as the gentleman from Illinois seems to believe, with his perfervid imagination, that the parole board will unjustly turn out the rich and let the poor, deserving of kindly consideration, unduly be punished."[172]

In September 1910, the Department of Justice promulgated regulations for its parole boards.[173] Under these regulations, the boards would only consider prisoners for parole if they had been in the highest grade of conduct for the six months preceding the application; this was soon transformed into a requirement that the applicant had obeyed the rules of the institution.[174] Applicants had to secure a "first friend or adviser," who would agree to employ them directly or try to find employment for them while on parole.[175] The rules on employment could be suspended if the board did not believe that the parole applicant was fit for employment or if there were other reasons that employment did not seem necessary.[176]

In 1925, fifteen years after adopting federal parole, Congress enacted a federal probation statute.[177] Probation provided for a period of community supervision as a conditional alternative to incarceration, rather than as a conditional release mechanism from incarceration. The original goal of probation was to "alleviat[e] the harshness of punishment" by "preventing contamination of the criminal novice in the unsavory atmosphere of the prison."[178] Accordingly, the 1925 probation statute empowered federal judges to suspend the execution of the prison sentence in order to provide a conditional opportunity to avoid prison through good behavior.[179] As explained by Chief Justice William Howard Taft in 1928, probation ameliorated

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PRINTING, 83D CONG., MEMORIAL SERVICES HELD IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, TOGETHER WITH REMARKS PRESENTED IN EULOGY OF ADOLPH JOACHIM SABATH 5, 31 (1953).

171 45 CONG. REC. H6376 (daily ed. May 16, 1910) (statement of Rep. Clayton).

172 *Id.*

173 *See, e.g.*, U.S. DEP'T OF JUSTICE, RULES AND REGULATIONS GOVERNING THE PAROLING OF UNITED STATES PRISONERS 21–22 (1910) (establishing regulations for a parole board at Leavenworth penitentiary).

174 *Id.* at 22; *see also* PETER B. HOFFMAN, U.S. DEP'T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 7 (2003).

175 HOFFMAN, *supra* note 174, at 7.

176 *See, e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 173, at 35 (establishing regulations for a parole board at McNeil Island, Washington).

177 Federal Probation Act, Pub. L. No. 68-596, ch. 521, 43 Stat. 1259 (1925).

178 2 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PROBATION, at vii (1939).

179 Federal Probation Act § 1.

the sentence by "delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict."[180]

D. Indeterminacy Under Federal Parole

The 1910 parole law established a form of federal indeterminate sentencing with conditional release. Indeterminacy under this parole law involved all three branches of government: Congress set the maximum for the offense, the judge imposed a sentence within the statutory range, and the executive's parole authorities decided the actual duration of the imprisonment.[181] Little about the new federal parole system as implemented, however, accorded with the ideas of Maconochie or Crofton, which originally had inspired the American parole movement.

For instance, Maconochie would have been horrified at the kind of arbitrary power awarded to parole authorities such as the federal parole board.[182] Maconochie thought that the key to reform was placing prisoners in control of their own destinies. Through the mark system, he sought to limit official discretion to the greatest extent possible and to make the release process transparent for prisoners. Maconochie would not "have cared for a system where the time of release depends, not on a prisoner's own efforts, but on a tribunal's estimate of the significance of those efforts, and of various other considerations which may not be known or disclosed to him."[183] Maconochie also would have opposed the sweeping revocation powers afforded the parole boards, particularly over conditions that invited broad discretionary judgments. Federal parolees, for example, had to conduct themselves "honorably" and refrain from associating with those of "bad reputation."[184]

The form of conditional release built into federal parole, meanwhile, left behind many of the principles of the Irish system, which also had been implemented at Elmira. For Crofton, conditional release was a means of publicly testing, and showing confidence in, the reformatory program of the prison. The ticket of leave was granted as

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180 Cook v. United States, 275 U.S. 347, 357 (1928).

181 Mistretta v. United States, 488 U.S. 361, 364–65 (1989).

182 John Vincent Barry, *Pioneers in Criminology: XII. Alexander Maconochie (1787–1860)*, 47 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 145, 159 (1956) (arguing that Maconochie was "a firm believer in the rights of the individual" and would have objected to the kinds of "arbitrary powers entrusted" to parole boards).

183 *Id.* at 160.

184 U.S. DEP'T OF JUSTICE, RULES AND REGULATIONS, *supra* note 173, at 14.

a public symbol of the trust that the prisoner had now earned. In addition, under both the Irish and Elmira systems, only those who had secured employment could be released on tickets of leave. Prison officials worked to find employment for releasees based on the practical skills they had developed in prison. By contrast, employment was not a prerequisite to release under the federal parole system, diluting the administrative incentive to train prisoners and recruit and win over potential employers.

Over the next several decades, the federal parole system became ever more removed from prisoners' daily lives, moving further away from the philosophy of Maconochie and Crofton. In 1930, a single parole board, the United States Board of Parole in Washington, D.C., replaced the institutional parole boards.[185] Over time, the members of the parole board had less and less direct contact with prisoners. The board appointed its first non-board member "hearing examiner" in 1939.[186] By 1971, hearing examiners were conducting approximately two-thirds of all hearings to give the then–five-member board more time to review files and vote on cases.[187] In general, decisions were made by a concurrence of two board members. A prisoner's file would be circulated among the board members at the D.C. office until two of the voters concurred.[188]

For many decades, federal courts did not oversee decisions to grant or revoke parole. Judges routinely denied challenges to the parole system raised through petitions for habeas corpus and actions for declaratory and injunctive relief, citing a variety of rationales.[189] First, parole (like probation) was considered a matter of grace, rather than a right, and therefore was not subject to adjudication.[190] Second, as the Supreme Court emphasized in a 1923 case, *Anderson v. Corall*, parolees remained in the legal custody and control of the warden: While parole was "an amelioration of punishment, it [was] in legal effect imprisonment."[191] Third, courts concluded that criminals had "exhausted" their rights until their prison sentences expired: Because prisoners had received full protections in the underlying prosecution,

185 HOFFMAN, *supra* note 174, at 7.

186 *Id.* at 10.

187 *Id.* at 18.

188 *Id.*

189 For an example of one such rationale, see *Hiatt v. Compagna*, 178 F.2d 42, 45 (5th Cir. 1949), which emphasizes that the federal parole statutes "bristle with discretion given the Board, and are silent about court interference."

190 *See, e.g.*, Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705, 706 (1968) (describing parole as a "legislative act of grace"); Note, *supra* note 98, at 704 (describing this school of thought as the "grace theory").

191 Anderson v. Corall, 263 U.S 193, 196 (1923).

these protections did not extend to the "later enforcement of punishment already validly imposed."[192] Fourth, parolees had accepted parole release as a contract and were therefore obligated by its terms. Fifth, courts viewed parole boards as acting in the role of *parens patriae*: The objectives of the board and the inmate were not adverse, obviating the need for due process protections.[193] On the basis of these theories, courts for many years did not recognize any legally protectable interest held by parolees in their status.

Eventually some courts—most notably the D.C. Circuit—began insisting on certain small procedural protections for parolees, but the basic understanding of parolees' status remained unchanged. In 1961, over the opposition of the U.S. Parole Board, the D.C. Circuit held that parolees had the right to retain counsel for parole revocation hearings and could present voluntary witnesses on their own behalf.[194] Two years later, however, the D.C. Circuit held that revocation proceedings did not trigger Sixth Amendment rights, including the right to appointed counsel and the right to the confrontation of witnesses, by invoking the *parens patriae* principle: "In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege."[195]

In 1972, the Supreme Court held in *Morrissey v. Brewer* that parole authorities had to provide some summary due process protections during revocation proceedings.[196] In so holding, the Court emphasized that parole revocation was not a stage in the criminal prosecution, which would necessitate the full complement of procedural rights. To the contrary, the state had an "overwhelming interest" in being able to reimprison a parolee without the "burden of a new adversary criminal trial . . . ."[197] Nevertheless, the parolee had

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[192] Comment, *The Parole System*, 120 U. PA. L. REV. 282, 286 (1971) (quoting Morrissey v. Brewer, 443 F.2d 942, 946 n.5 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972)).

[193] Comment, *supra* note 192, at 288–89 (citing Menechino v. Oswald, 430 F.2d 403, 407 (2d Cir. 1970)); *see also* Comment, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 843 (1975) (explaining *parens patriae* as a traditional judicial approach to parole hearings).

[194] *See, e.g.*, Reed v. Butterworth, 297 F.2d 776, 777 (D.C. Cir. 1961) (directing the U.S. Parole Board to allow the prisoner to call voluntary witnesses for a parole revocation hearing); Glenn v. Reed, 289 F.2d 462, 463 (D.C. Cir. 1961) (finding a prisoner's hearing and revocation was invalid because he "neither had nor was offered counsel" at the parole revocation hearing).

[195] Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963).

[196] Morrissey v. Brewer, 408 U.S. 471 (1972). This decision followed in the wake of a 1970 Supreme Court decision that held that whether the state was revoking a "right"—as opposed to a privilege—had no bearing on the requirements of the revocation hearing. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

[197] *Id.* at 483.

received an "implicit promise" that parole would not be revoked absent a violation of the conditions of release, requiring that at least some process be implemented.[198]

Accordingly, the Court held that due process required a system of informal hearings for parole revocation. Shortly after a parolee was arrested and detained, an impartial administrator would decide in a preliminary hearing whether there was probable cause or reasonable ground to believe that the parolee had violated the conditions of his or her parole. The retaken parolee was then entitled to a revocation hearing, during which the parole board would decide whether revocation was warranted. The parolee had a few basic rights at that hearing:

> (a) written notice of the claimed violations of parole; (b) disclosure . . . of evidence . . . ; (c) opportunity to be heard in person and to present . . . evidence; (d) the right to confront and cross-examine adverse witness (unless the hearing officer . . . f[ound] good cause for not allowing confrontation[ ]); (e) a "neutral and detached" hearing body such as a traditional parole board . . . ; and (f) a written statement . . . as to the evidence relied on and reasons for revoking parole.[199]

The rights adopted in *Morrissey* did not include the presumption of innocence or a requirement that a parole violation be proved beyond a reasonable doubt.[200] There was no right to a jury determination, no compulsory process, no exclusionary rule requirement, and no double jeopardy protection.[201] A 1973 Supreme Court case, which applied *Morrissey* to the probation system, confirmed that individuals lacked a constitutional right to appointed (as opposed to retained) counsel for either parole or probation revocation proceedings.[202] As described in Part IV, the precedent on parole and probation revocation would later be applied incongruously to supervised release.[203]

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198 *Id.* at 482.

199 *Id.* at 488–89.

200 *Id.*

201 *Id.*; *see also, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363–64 (1998) (emphasizing that the federal exclusionary rule does not apply outside of criminal trials); United States v. Hanahan, 798 F.2d 187, 189 (7th Cir. 1986) (holding that double jeopardy protections are not triggered by revocation of parole); Whitehead v. U.S. Parole Comm'n, 755 F.2d 1536, 1537 (11th Cir. 1980) (noting that the preponderance of evidence standard, rather than proof beyond a reasonable doubt, applies to parole revocation proceedings); Hyser v. Reed, 318 F.2d 225, 260 (D.C. Cir. 1963) (not requiring compulsory process for parole revocation).

202 Gagnon v. Scarpelli, 411 U.S. 778, 778, 790 (1973) (giving a state discretion to appoint counsel on a case-by-case basis).

203 The *Morrissey* standards on parole and probation revocation were later grafted onto supervised release, even though supervised release follows the completion of the full prison term imposed at judgment. Whereas diluted procedural protections may have been appropriate when a prisoner only serves a part of his prison term, as in a system of early

III
THE U.S. DETERMINACY MOVEMENT

In the end, federal parole did not last. Congress abolished the parole system prospectively in 1984. At the time, federal parole had been in operation for nearly seventy-five years.

Criticisms of indeterminate sentencing had been gaining ground since the 1960s, at both the federal and state levels.[204] As discussed below, a stream of mostly liberal scholars attacked the broad discretionary powers granted to parole boards and the resulting uncertainty and lack of transparency for prisoners. A growing consensus emerged that a system premised on coercive rehabilitation was fatally flawed—and that parole discretion worked against minorities and the poor. Meanwhile, a rising tide of crime-control sentiment in the 1970s helped energize conservative theorists around the idea of ending parole. These critics of parole, who viewed indeterminacy through a law-and-order lens, framed parole as the practice of indulging criminals by granting them early release from prison.[205] Although the justifications were different, a consensus formed, as all sides denounced parole release and indeterminate sentencing.

A. Criticisms of Parole and Coercive Rehabilitation

Notable early criticism of federal parole came from Professor Kenneth Culp Davis, a leading administrative law scholar. In 1969, Davis published *Discretionary Justice: A Preliminary Inquiry*, which urged legislators to exert more control over administrative agencies.[206] Davis's book held out the United States Board of Parole as an "outstanding example of completely unstructured discretionary power."[207] Davis eviscerated the Board for its secrecy and capricious procedures.[208] Because of the closed system of individual voting, typified by a lack of consultation among its members, even the Board could not explain why any particular person was denied or granted

conditional release, they are not appropriate when a released prisoner has served his full term, as in the system of supervised release. *See* discussion *infra* Part IV.B.

204 *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 29–37 (1998) (summarizing criticisms of indeterminate sentencing).

205 *Id.* at 31; *cf.* Willard Gaylin & David J. Rothman, *Introduction* to ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS at xxi, xxxvii (1976) (describing conservatives and liberals joining in a critique of the parole system, albeit for different reasons).

206 KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

207 *Id.* at 126.

208 *Id.*

parole. Prisoners and the public were left to guess at the reasons, creating a deep mistrust of the system.

In 1971, a widely cited report by the American Friends Service Committee went further, attacking the very concept of using rehabilitative needs as a standard for determining how long to imprison people.[209] The report, prepared by a panel of seventeen criminal justice scholars, questioned the effectiveness of coercive treatment and criticized as self-deceptive the belief that providing such treatment somehow lessened the sting of incarceration. The authors worried that the discretion exercised by parole boards and parole officers, ostensibly for the purposes of rehabilitation, was really a method of keeping the "powerless in line."[210] The report denounced the uncertainties inherent in indefinite sentencing as an "exquisite form[ ] of torture"[211] and "one of the most painful aspects of prison life."[212]

In 1973, Judge Marvin E. Frankel published *Criminal Sentences: Law Without Order*, a book that had a deep impact on federal sentencing reform—in part because of the status of its author.[213] Judge Frankel, a federal judge in the Southern District of New York, assailed the broad sentencing powers given to judges like himself. Although Judge Frankel's book is best known for its attack on disparity in federal sentencing, he dismissed indeterminacy and parole in equally stark language.[214] By indeterminacy, he meant "any prison sentence for which the precise term of confinement is not known on the day of judgment but will be subject within a substantial range to the later decision of a parole board or some comparable agency under whatever name."[215] For Judge Frankel, the vagueness and uncertainty created by indeterminate sentencing were "prima facie evils," at odds with the certainty and predictability that we otherwise value in the law.[216]

Echoing concerns about the efficacy of coercive rehabilitation, Judge Frankel concluded that rehabilitation, that great justifier of indeterminacy, was simply not possible in most cases.[217] He rejected

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209 AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 27 (1971) (lamenting that the American system follows the logic "[l]et the punishment fit the criminal, not the crime").

210 *See id.* at 28 (criticizing the opaque parole release process).

211 *Id.* at 29.

212 *Id.* at 93.

213 MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

214 *Id.* at 86–102 (discussing indeterminate sentences); STITH & CABRANES, *supra* note 204, at 35–36 (discussing Judge Frankel's role in sentencing reform).

215 FRANKEL, *supra* note 213, at 86.

216 *Id.* at 88, 96–97.

217 *Id.* at 96–98.

the medicalized understanding of rehabilitation that had come to dominate American penology by the middle of the twentieth century.[218] The typical offender was not sick with any identifiable disorder or diagnosable in a way that anyone knew how to cure. Judge Frankel proposed setting the presumption in favor of the definite sentence, "known and justified on the day of sentencing."[219]

Efforts to reform, rather than eliminate, the federal parole system attempted to address some of these criticisms.[220] In 1972, the U.S. Parole Board launched a pilot project to develop explicit guidelines for parole decisionmaking and provide for appellate review within the agency.[221] In 1976, Congress adopted the Board's reforms and renamed the agency the United States Parole Commission.[222] Under the new statute, any decision that fell outside the parole guidelines had to be for "good cause," and the parolee was to receive specific written reasons for the departure.[223] The Commission was to review any initial parole denial at regular intervals, depending on the length of the sentence.[224]

But such reforms did not satisfy many critics of the rehabilitative model, including members of an influential workshop series on federal sentencing and parole. This series, organized by Daniel Freed and Dennis Curtis, included Judge Frankel among its members.[225] A 1977 book, which grew out of the workshop, advocated for the abolition of parole, finding that the 1976 reorganization retained too much discretion for parole authorities.[226] Senator Edward Kennedy, the primary sponsor of the SRA, wrote the foreword for the book.[227]

At the same time, Andrew von Hirsch, a prominent penal theorist, was pushing for the return of retributive, rather than rehabilitative, justice. Von Hirsch maintained that the rehabilitative model,

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[218] *See, e.g.*, RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 4 (1979) (noting the prestige accorded the "medical-scientific-psychiatric approach to crime and criminality" by the mid-1950s).

[219] FRANKEL, *supra* note 213, at 98.

[220] I should note here, however, that Congress adopted a new mandatory form of parole for federal drug offenders in 1970. Janet Schmidt Sherman, *Special Parole: Challenges to the Imposition of Special Punishment for Drug Law Violators*, 3 CRIM. JUST. J. 55, 56 (1979). This was known as "special parole." *Id.* The special parole term ran consecutively to the ordinary period of parole supervision, significantly enhancing indeterminacy for these offenders. *Id.* at 56–57.

[221] HOFFMAN, *supra* note 174, at 18.

[222] *Id.* at 21.

[223] *Id.* at 22.

[224] *Id.*

[225] PIERCE O'DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM, at xii (1977).

[226] *Id.* at 12–13, 69–71.

[227] *Id.* at vii–x.

cloaked behind a benevolent exterior, was often more intrusive and punitive than a forthrightly penal model.[228] He argued that sentencing should be based on a fair and proportionate punishment for the crime itself, rather than on how the punishment might influence the offender's future behavior.[229]

Von Hirsch's "just deserts" model proved attractive across the political spectrum.[230] Conservative theorists, such as Ernest van den Haag, also began advocating for retributively based punishment. According to van den Haag, offenders deserved (and had effectively volunteered to risk) whatever legislatively determined punishment applied to their crimes.[231] Accordingly, punishment should be calibrated based on the gravity of the act, and not on the individual qualities of the offender.[232]

A 1974 article by New York sociologist Robert Martinson helped solidify opposition to penal rehabilitation and the indeterminate sentencing system it purportedly justified.[233] This article delivered the following oft-quoted conclusion: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[234] This conclusion was based on a survey of 231 studies measuring offender rehabilitation, encompassing both in-prison treatment programs and community-based treatment programs for those on probation and parole.[235] Martinson's findings received an enthusiastic airing in the press, spurring a flurry of articles under the catchy (and memorable) banner "Nothing Works!"[236] Martinson would recant the starkness of this conclusion several years later, emphasizing that some corrective treatment programs did in fact

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228 Andrew von Hirsch and Lisa Maher, *Should Penal Rehabilitationism Be Revived?*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 26, 28–30 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3d ed. 2009).

229 Andrew von Hirsch, *Proportionate Sentences: A Desert Perspective*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 115, 115–16 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3d ed. 2009).

230 *See* LYNNE GOODSTEIN & JOHN HEPBURN, DETERMINATE SENTENCING AND IMPRISONMENT: A FAILURE OF REFORM 25 (1985) (noting that a determinate sentencing model was favored by both liberals and conservatives); *cf.* Ernest van den Haag, *Punishment: Desert and Crime Control*, 85 MICH. L. REV. 1250, 1250 (1987) (discussing von Hirsch's coining of the phrase "just deserts").

231 ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 182 (1975).

232 *Id.* at 186, 190.

233 Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

234 *Id.* at 25.

235 *Id.* at 24, 40–41.

236 Jerome Miller, *Criminology: Is Rehabilitation a Waste of Time?*, WASH. POST, Apr. 23, 1989, at C3.

reduce recidivism.[237] But by that time, few were listening.[238] A new orthodoxy, uniting right and left, had already formed.[239]

The attacks on indeterminacy and coercive rehabilitation eventually led to a dramatic restructuring of federal and state sentencing laws. By the time the SRA was enacted in 1984, a group of ten states had already abolished early release on parole.[240] Roughly fifteen years later, only sixteen states were using parole boards with full discretionary powers.[241] In a signal of the overwhelming shift in the discourse towards a rejection of indeterminacy, the American Bar Association Sentencing Standards Section affirmatively recommended determinate sentencing in 1993, after having supported indeterminate sentencing for many years.[242] It is worth emphasizing, however, that none of the criticisms of indeterminacy were aimed at systems that closely adhered to the principles of either Maconochie or Crofton.

B. The SRA and the End of Federal Parole

Senator Kennedy was the primary sponsor of the SRA and its many predecessor bills in the Senate.[243] In this undertaking, Kennedy was deeply influenced by Judge Frankel, whom he called the "father of sentencing reform."[244] The Senator's earliest bill, introduced in November 1975, adopted Judge Frankel's recommendation of a sentencing commission to structure judicial discretion and reduce disparity among offenders.[245] However, this bill (and a number of subsequent bills) retained a basic system of parole and indeterminate sentencing. Nearly five years later, Senator Kennedy introduced a bill that proposed the end of parole, as recommended by Judge Frankel,

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[237] Rick Sarre, *Beyond 'What Works?': A 25-Year Jubilee Retrospective of Robert Martinson's Famous Article*, 34 AUSTL. & N.Z. J. CRIMINOLOGY 38, 41 (2001).

[238] *Id.*

[239] *Id.* at 39–41.

[240] Thomas B. Marvell & Carlisle E. Moody, *Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime*, 34 CRIMINOLOGY 107, 108 (1996).

[241] JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 65–67 (2003) (printing a table with the status of state and federal parole statutes as of 2002).

[242] Kevin R. Reitz & Curtis R. Reitz, *The American Bar Association's New Sentencing Standards*, 6 FED. SENT'G REP. 169, 170 (1993).

[243] For a detailed discussion of the legislative history of the SRA and its predecessor bills, see STITH & CABRANES, *supra* note 204, at 38–43; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993).

[244] 128 CONG. REC. 26,503 (1982); Sen. Edward M. Kennedy, *Commentary—The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. VA. L. REV. 423, 431 n.30 (1980).

[245] S. 2699, 94th Cong. (1975).

von Hirsch, and others.[246] After much debate, the complete elimination of indeterminacy had "won out" (in Kennedy's words) among the Senate reformers.[247] Although these proposals took four years to pass the House, President Ronald Reagan signed the SRA into law on October 12, 1984.[248]

Federal parole was consigned to history, inaugurating a new era of determinate sentencing—or so everyone believed at the time. The Senate Judiciary Committee Report on the SRA (the "Senate Report") had renounced indeterminate sentencing as "based largely on an outmoded rehabilitation model."[249] It described uncertainty over release dates, which had arisen as a consequence of this model, as a "grave defect of present law," because "no one is ever certain how much time a particular offender will serve if he is sentenced to prison."[250]

After the SRA's enactment, such uncertainty was supposed to cease. Going forward, release dates would be firm and predictable.[251] Prisoners sentenced to more than a year were still eligible for statutory good time: They could earn a deduction of thirty-six days at the end of each year (now fifty-four days) for complying with prison rules.[252] However, under the SRA, the good-time adjustment was capped at a relatively low maximum, which applied to all eligible offenders.[253] Compared to the good-time system in place before the SRA, which had applied different adjustment rates to different prisoners, this system was compatible with a determinist framework.[254]

The elimination of parole also meant the end of conditional release. A prison sentence would end the day the prisoner left prison: It would not spill over onto the street. Because of this, the SRA required the Bureau of Prisons ("BOP") to ensure, to the extent possible, that "the last ten percent of a prison term is spent 'under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community.'"[255] The BOP

246 S. 1722, 96th Cong. (1979).

247 Kennedy, *supra* note 244, at 431 n.34.

248 Stith & Koh, *supra* note 243, at 225, 266.

249 S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

250 S. REP. NO. 98-225, at 49 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3232.

251 S. REP. NO. 98-225, at 56–57 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3239–40.

252 18 U.S.C. § 3624(b) (2006) (as amended); Barber v. Thomas, 130 S. Ct. 2499, 2502–03 (2010).

253 18 U.S.C. § 3624.

254 *See* S. REP. NO. 98-225, at 146–47 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3329–30.

255 S. REP. NO. 98-225, at 57 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3240 (quoting proposed 18 U.S.C. § 3624(c)).

would be responsible for providing these "transition services" during the determinate prison term.[256]

IV
SUPERVISED RELEASE

When the SRA prospectively abolished parole, it created a different model of community supervision known as supervised release. But "[u]nlike parole, a term of supervised release d[id] not replace a[ny] portion of the [underlying prison] sentence . . . ."[257] Instead, supervised release would be imposed in addition to prison.[258] In other words, federal offenders were to begin a period of supervised release only after serving the complete, determinate prison sentence.

In this Part, I chart the evolution of supervised release since its enactment in 1984. I describe how supervised release began as a form of non-punitive supervision designed for people in particular need of post-release services. Before long, however, Congress adopted a mechanism for revoking supervised release, which marked the return of conditional release and indeterminacy. Once indeterminacy slipped back into the system, it took firmer and firmer hold. I explicate the rising indeterminacy of the system by outlining its current reach and scope and the expanding body of conditions imposed. I also consider the financial impact of modern-day supervised release.

A. The SRA and the Principle of Non-Coercive Rehabilitation

The SRA provided for three types of sentences: imprisonment, probation, and fines.[259] Judges had to impose at least one of these options at every sentencing.[260] The SRA also directed judges, in deciding which of the three options to select, to consider the four basic purposes of sentencing: punishment, deterrence, incapacitation, and rehabilitation.[261] Although judges always had to consult these four purposes, not all purposes applied equally to every sentence. Any judge who chose a sentence of imprisonment had to do so "recognizing that imprisonment [was] not an appropriate means of promoting correction and rehabilitation."[262]

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256 *Id.*

257 U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A(2)(b) (2012), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_7.pdf.

258 *Id.*

259 18 U.S.C. § 3551(b) (2006).

260 *Id.*

261 *Id.* § 3553(a)(2) (2006).

262 *Id.* § 3582(a) (2006).

Supervised release, meanwhile, was a discretionary supplement to prison, not a sentence in its own right. Only people who had been sentenced to prison could receive a term of supervised release.[263] For community supervision without prison, judges would continue to impose probation, rather than supervised release.[264] But like probation, supervised release was to be overseen by judges, not an administrative agency.[265] Under the SRA, the authorized maximum term of supervised release was originally between one year and three years, depending on the classification of the underlying offense.[266]

Because the prison term was determinate, the SRA explicitly limited the purposes of sentencing that courts could consider in deciding whether, and how, to impose a term of supervised release. In imposing supervised release, the court was explicitly not to consider the need: (1) "to reflect the seriousness of the offense, to promote respect for the law, [or] to provide just punishment for the offense"; or (2) "to protect the public from further crimes of the defendant . . . ."[267] As the Senate Report explained:

> The term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment.[268]

When imposing supervised release, judges were to consider the two remaining statutory purposes of sentencing—deterrence and rehabilitation.[269] Rehabilitation was defined as providing "needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . ."[270] In line with this, according to the Senate Report, the "primary goal" of supervised release was:

> to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short

263 *Id.* § 3583(a).

264 *Id.* § 3561(a)(3).

265 *Id.* § 3583.

266 *Id.* § 3583(b).

267 These two factors, found in 18 U.S.C. § 3553(a)(2)(A), (C) (2006), are missing from the list set forth in the Act of Oct. 12, 1984, § 3583(c). Like the Senate Report, I use the shorthand terms "punishment" and "incapacitation" to refer to these two statutory goals.

268 S. REP. NO. 98-225, at 125 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

269 18 U.S.C. § 3553(a)(2)(B), (D).

270 *Id.* § 3553(a)(2)(D).

> period in prison for punishment or other purposes but still needs supervision and training programs after release.[271]

The SRA provided for one mandatory condition of supervised release: that the defendant not commit any federal, state, or local crime.[272] Judges could devise other conditions as well, but only if they were "reasonably related" to deterrence and rehabilitation and involved "no greater deprivation of liberty than [was] reasonably necessary" for such purposes.[273]

Critically, although judges could set conditions of supervised release, they could not revoke supervised release if the person did not comply.[274] This was consistent with the criticisms of parole by Judge Frankel, the American Friends Service Committee, and other reformers.[275] Supervised release would provide rehabilitative services, but not in the guise of the coerced cure. There would be no mechanism to send violators back to prison with minimal process as a means of trying to compel rehabilitation. In this way, the experience of being on supervised release was to be fundamentally different from the experience of being on probation or parole.

By contrast, a sentence of probation under the SRA remained "conditional and subject to revocation until its expiration or termination."[276] Under the SRA, probation was a sentence in its own right—an alternative to prison that provided an *opportunity* to avoid the disgrace and disruption of prison by complying with the conditions of release that the court imposed.[277] The procedures for revoking probation, codified in Rule 32.1 of the Federal Rules of Criminal Procedure, remained largely the same before and after the SRA.

The sponsors of the SRA chose not to apply any of the infrastructure for parole and probation revocation to supervised release. Instead, the SRA allowed judges to treat a violation of the conditions

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271 S. REP. NO. 98-225, at 124 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3307.

272 Act of Oct. 12, 1984, Pub. L. No. 98-473, §§ 3563(a)(1), 3583(d), 98 Stat. 1837, 1993, 1999 (current version at 18 U.S.C. §§ 3563(a)(1), 3583(d) (2006)).

273 *Id.* at 1999–2000 (§ 3583(d)).

274 *See* Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT. R. 204, 204 (1994) ("Because supervised release was not to serve as a punitive measure at all, Congress deliberately excluded any provisions for revocation proceedings.").

275 *See supra* Part III.A (discussing criticisms by Judge Frankel and others of coercive rehabilitation and uncertainty in release dates).

276 Act of Oct. 12, 1984, § 3564(e), 98 Stat. at 1994.

277 *See* S. REP. NO. 98-225, at 59 (noting the new approach of treating "probation as a form of sentence with conditions rather than as a deferral of imposition or execution of a sentence" (citing Act of Oct. 12, 1984, Pub. L. No. 98-473, §§ 3551, 3561, 98 Stat. 1837, 1988, 1992)).

of supervised release as a criminal contempt.[278] The Senate Report cautioned, however, that judges were to hold offenders in contempt only in the face of "repeated or serious violations of the conditions of supervised release."[279]

Criminal contempt was a very different mechanism than revocation. To prove contempt, the government had to show that "the defendant *willfully* violated a decree that was clear and left no uncertainty in the minds of those that heard it."[280] Moreover, the government had to prove all elements of criminal contempt beyond a reasonable doubt, rather than by a preponderance of the evidence.[281] Criminal contempt required trial by jury (for all cases involving a sentence of more than six months),[282] along with all the other procedural protections applicable in a criminal proceeding.[283] Thus, by providing for criminal contempt rather than revocation, the SRA reinforced the distinction between supervised release on the one hand, and parole and probation on the other. The latter were discretionary alternatives to imprisonment and thus could be revoked, with prison imposed in their stead. Supervised release could not be revoked in favor of prison, because it was not an alternative to prison. Rather, a violation of supervised release could only result in reimprisonment if it rose to the level of a new crime—the criminal disregard of a court order.

B. The Return of Revocation and Conditional Release

Even before the SRA went into effect in 1987, however, Congress added a revocation mechanism. Change came in the form of the Anti-Drug Abuse Act of 1986 (ADAA),[284] a statute that created new mandatory minimum penalties for drug dealers and implemented the now-repealed hundred-to-one sentencing disparity between crack and powder cocaine.[285] Although much less sensational, the Act also

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278 Act of Oct. 12, 1984, § 3583(e)(3), 98 Stat. at 2000.

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

280 *In re* Gates, 600 F.3d 333, 338 (4th Cir. 2010) (quoting United States v. Linney, 134 F.3d 274, 278 (4th Cir. 1998)).

281 *See* United States v. Mourad, 289 F.3d 174, 180 (1st Cir. 2002).

282 *See* United States v. Agajanian, 852 F.2d 56, 57–58 (2d Cir. 1988) (holding that there is no right to a jury trial in contempt cases where the government specified that the sentence would not be more than six months and the actual penalty was three months); United States v. Pina, 844 F.2d 1, 15–16 (1st Cir. 1988) (holding that when a sentence for contempt exceeded six months, the defendant is afforded a jury trial).

283 *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826 (1994) ("Criminal contempt is a crime in the ordinary sense . . . and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.") (internal citations and quotation marks omitted).

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

285 *Id.* at 3207-2 to -3 (§ 1002).

inserted a critical new paragraph into the supervised release statute as one of several "miscellaneous technical amendments."[286] This new provision allowed the court to:

> revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on post[-]release supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission.[287]

With this "technical amendment" and the revocation mechanism it created, Congress brought back conditional release. In enacting the ADAA, however, little consideration seems to have been given to the conceptual differences between supervised release and probation incorporated into the SRA. The adoption of the revocation mechanism did not even warrant a separate header to draw attention to the change.

The concept of revocation had been proposed in an earlier bill. In 1985, Senator Strom Thurmond, the chair of the Senate Judiciary Committee, had introduced the very same revocation mechanism at the request of the Department of Justice.[288] This was one of several changes the Department had suggested to address what were characterized as small and technical problems in the implementation of sentencing reform. According to the Department of Justice, this revocation mechanism implemented a suggestion by the Administrative Office of the United States Courts for a "streamlined procedure for enforcing the conditions of supervised release."[289]

The U.S. Parole Commission had also been pressing for a revocation mechanism. In a March 1985 position paper, Benjamin F. Baer, then chair of the Commission, criticized the contempt mechanism for supervised release as cumbersome, inefficient, and "much more difficult" than revocation under federal parole.[290] Baer noted that under the SRA, even probation could be revoked after a "simple Rule 32.1 hearing."[291] This disparity made no sense to Baer. He argued that people on supervised release, having been jailed as dangerous offenders, presented a greater threat to society than those on

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286 *Id.* at 3207-6 to -7 (§ 1006).

287 *Id.*

288 131 CONG. REC. S7373, 7399–7402 (daily ed. June 4, 1985).

289 *Id.* at 7409.

290 Benjamin F. Baer, Position Paper on Post-Release Supervision 66 (March 1985) (on file with *New York University Law Review*).

291 *Id.* at 67.

probation. In advocating for the revocation of supervised release, Baer did not frame his argument in terms of the critical discourse that had underlain the passage of the SRA; rather, he wrote simply out of concern for what made it harder or easier to put people back in prison.

For those accustomed to parole and probation, the absence of a revocation mechanism for supervised release seemed like an "impractical oddit[y]."[292] Many actors in the system wondered how supervised release could be effective unless courts and probation officers were granted systematic leverage over offenders.[293] And leverage had always meant prison.

Procedurally, the ADAA grafted the revocation mechanism for probation onto supervised release, ignoring the different theoretical roots of those systems. Judges could now "revoke" a term of supervised release after finding, by a simple preponderance of the evidence, that the person had violated a condition of supervision. There was to be no trial and no jury; courts were to apply the same rules of diluted procedure applicable to parole and probation revocation hearings.[294]

The supervised release statute continued to instruct judges not to consider the goals of punishment and incapacitation when deciding whether to impose—and now revoke—supervised release.[295] And yet, the possibility of revocation made supervised release indisputably about punishment, oversight, and coercion. Judges and probation officers[296] were to gauge how well released prisoners were adjusting with the threat of more prison hanging overhead. Despite the statutory bar on punishment, people on supervised release could now be sent back to prison for conduct that did not even violate a federal criminal statute.

In revoking a person's supervised release, the court could impose a prison sentence of up to the entire original term of supervised

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[292] Harry B. Wooten, *Violation of Supervised Release: Erosion of a Promising Congressional Idea into Troubled Policy and Practice*, 6 FED. SENT'G REP. 183, 183 (1994) ("[The] original concept of [supervised release] produced what appeared as impractical oddities to those familiar with the parole system.").

[293] *See* Barbara Meierhoefer Vincent, *Supervised Release*: *Looking for a Place in a Determinate Sentencing System*, 6 FED. SENT'G REP. 187, 188 (1994) (noting that probation officers have traditionally had the power to move for the "offender's removal from the community by initiating revocation proceedings").

[294] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207, 3207-6 to -7; *supra* Part II.D (discussing the rights framework for federal parole and probation proceedings).

[295] 18 U.S.C. § 3583 (c), (e) (Supp. V 1987) (current version at 18 U.S.C. § 3583 (2006)).

[296] In the federal system, people on probation, parole, and supervised release all report to "probation" officers.

release.[297] Practically speaking, this meant a maximum of between one and three years in prison on a revocation when the underlying offense fell under Title 18. For drug trafficking offenses under Title 21, the ADAA created separate mandatory minimum terms of supervised release, ranging from two to ten years.[298] Thus, the potential exposure resulting from revocation was significantly higher for these crimes.

The enactment of mandatory minimum terms of supervised release for drug trafficking crimes also introduced the possibility of lifetime supervised release. The ADAA enumerated minimum supervised release terms for drug trafficking crimes, but it did not provide for any maximums. Based on this silence, courts concluded that defendants convicted under the drug trafficking laws could receive terms of up to lifetime supervised release.[299]

In 1987, when supervised release first went into effect, Congress made two significant changes. First, Congress allowed judges to consider the statutory purpose of incapacitation when making decisions about supervised release, although the purpose of punishment was still excluded.[300] Second, judges could impose longer terms of supervised release for all Title 18 offenses, along with longer revocation penalties.[301] Any defendant convicted of a Class A felony, for example, could receive up to five years of supervised release after prison. If the defendant violated a condition of supervised release at any time, he or she could be sent back to prison for up to another five years.[302]

A 1994 statute adopted two other far-reaching amendments.[303] First, the statute created new categories of violations for which revocation would be mandatory. Courts would now have to revoke

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297 Anti-Drug Act of 1986 § 1006, 100 Stat. at 3207-7.

298 *See* 21 U.S.C. § 841(b)(1)(A) (2006) (imposing a term of supervised release between five and ten years); *id.* § 841(b)(1)(B) (imposing a term of supervised release between four and eight years); *id.* § 841(b)(1)(C) (imposing a term of supervised release between three and six years); *id.* § 841(b)(1)(D) (imposing a term of supervised release between two and four years).

299 *See, e.g.*, United States v. Jackson, 559 F.3d 368, 369, 372 (5th Cir. 2009) (confirming the possibility of lifetime supervised release in drug trafficking cases); United States v. Sanchez-Gonzalez, 294 F.3d 563, 567 (3d Cir. 2002) (same); United States v. Mora, 22 F.3d 409, 412 (2d Cir. 1994) (same).

300 Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1266, 1267.

301 *Id.* § 8.

302 This statute increased the maximum supervised release term for A and B felonies to five years (from three) and for C and D felonies to three years (from two). *Id.* When supervised release was revoked, it also established maximum terms of reimprisonment for violations of five years (A felony); three years (B felony); or two years (C or D felonies). *Id.* § 25.

303 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20414, 108 Stat. 1796, 1830–32.

supervised release—and impose some sentence of imprisonment—if a person on supervised release possessed a controlled substance or refused to comply with drug testing.[304] Second, the statute granted judges explicit authority to order a new term of supervised release following a period of reimprisonment for a supervised release violation.[305]

C. Indeterminacy and the Courts

Defendants in revocation proceedings began challenging the application of these amendments to their cases on ex post facto grounds.[306] Typically, a defendant would argue that the court had to apply the version of the supervised release statute that had been in effect on the date of his or her crime. The government, on the other hand, would argue that the court had to apply the (generally more punitive) amended version in effect at the time of the violation.

These cases required courts to engage in a structural examination of supervised release revocation. When a court revoked supervised release and returned an offender to prison, what exactly was the new prison term for? Courts needed to answer this question before deciding what version of the supervised release statute to apply. If the punishment was for the violation of the supervised release conditions, there was no ex post facto difficulty in applying the statute as amended. However, if the punishment was for the underlying crime, applying the amended statute would create retroactivity problems.

Over several years, the courts of appeals decided a number of important supervised release cases, including a 1994 case, *United States v. Meeks*.[307] In this case, the Second Circuit Court of Appeals had to decide whether a mandatory minimum sentencing provision, added to the supervised release statute in December 1988, applied to someone whose crime had occurred before the date of the amendment.[308] Meeks had sold cocaine to an undercover officer in March 1988. At judgment, the district court sentenced him to thirteen months

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304 *Id.* at 1831.

305 *Id.*

306 The Constitution prohibits Congress from enacting any "ex post facto Law." U.S. CONST. art. I, § 9, cl. 3. "[T]he focus of the ex post facto inquiry is . . . on whether [a legislative] change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 506 n.3 (1995).

307 25 F.3d 1117 (2d Cir. 1994).

308 *Id.* at 1119. Under this mandatory minimum provision, which was repealed in 1994, judges were required to imprison anyone on supervised release found guilty of possessing a controlled substance. The imprisonment would be for at least one-third of the supervised release term. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7303, 102 Stat. 4181, 4464.

in prison for this crime followed by three years of supervised release. In 1993, the same court found that Meeks had violated the conditions of his supervised release by testing positive for cocaine and failing to note this cocaine use in monthly reports to the probation officer. As a result, applying the mandatory minimum provision, the court sentenced Meeks to a new term of twelve months in prison.[309]

In so doing, the district court found that the December 1988 amendment applied to the 1993 revocation proceeding because "the violation of supervised release is a separate and distinct offense from the original offense."[310] The Second Circuit reversed, finding the opposite: "[W]e are persuaded that any provision for punishment for a violation of supervised release is an increased punishment for the underlying offense."[311] Accordingly, applying the mandatory minimum—enacted before the violation, but after the crime—violated the ex post facto clause.

In approaching this issue, the Second Circuit Court of Appeals equated supervised release with parole, the very system that supervised release was supposed to replace. According to the court, supervised release, like parole, was an "integral part of the punishment for the underlying offense,"[312] as under both systems, the defendant "serves a portion of a sentence in prison and a portion under supervision outside prison walls."[313] Under established parole precedent, a statute enhancing penalties for parole violations could not be applied to anyone whose underlying offense predated the statute. The court extended this rule to supervised release, finding no reason to distinguish between the two systems.

The court in *Meeks* conflated two different sentencing systems. First, as I have discussed, judges were not to consider "punishment" at all in imposing or revoking supervised release, much less treat it as an "integral part of the punishment for the underlying offense."[314] Second, while parole and supervised release do both involve successive periods of imprisonment and community supervision, the character of supervision is different under the two systems. A person released on parole is granted early and conditional release from a still-existing prison sentence. Because of this, a violation of parole naturally relates back to the original offense: Any recommitment for a

309 *Meeks*, 25 F.3d at 1118.

310 *Id.*

311 *Id.* at 1123.

312 *Id.* at 1121, 1123.

313 *Id.* at 1121 (quoting United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993)).

314 *See supra* Part IV.A (discussing the supervised release statute's exemption of punishment from the purposes of imposing or revoking supervised release).

parole violation requires the "retaken prisoner" to *resume* the original prison sentence, not begin a new prison sentence. Those imprisoned for supervised release violations, however, are receiving additional time in prison, having already served the full original prison term.

External considerations may have encouraged the Second Circuit Court of Appeals to relate supervised release violations back to the underlying offense. Violations of supervised release were often based on non-criminal conduct, such as the failure to report to a probation officer. If revocation were treated as imposing punishment for the violation itself, these kinds of technical violations would pose a big problem: How could people be sent to prison for behavior that was clearly not criminal? The Second Circuit Court of Appeals avoided this issue by concluding that any new prison term was not for the violation. The violator, the court held, was going back to prison for the original crime.[315]

The *Meeks* court was also aware that fundamental constitutional protections (such as the right to counsel, the protection against double jeopardy, and the requirement of proof beyond a reasonable doubt) would be implicated in revocation hearings if it attributed the penalty to the violation, rather than the underlying crime. The Second Circuit Court of Appeals defended the lack of such protections in the supervised release context by citing pre-SRA decisions about the lack of such rights in probation and parole proceedings, again eliding supervised release with these structurally distinct concepts.[316] The court then used the absence of these rights in supervised release revocation hearings to conclude that any punishment for a revocation had to be part of the punishment for the underlying offense; otherwise the system would be unconstitutional. Because basic constitutional protections do not apply in revocation proceedings, the court concluded that "any enhancement of the punishment for the supervised-release violation should be viewed primarily as an enhancement of the penalties for the past acts, rather than for the subsequent acts."[317] The court thus based its conception of supervised release on the kinds of procedural rights that the district courts had been providing under Rule 32.1, instead of deriving its understanding from the actual conceptual and statutory framework.

Most circuits to address the question agreed with *Meeks*, holding that a penalty for a supervised release violation was not a penalty for

315 *Meeks*, 25 F.3d at 1122 ("If the individual may be punished for an action that is not of itself a crime, the rationale must be that the punishment is part of the sanction for the original conduct that was a crime.").

316 *Id.* at 1123.

317 *Id.*

the violation itself.[318] Rather, it was a penalty for the underlying crime, even if that crime had been committed years before. In *United States v. Wyatt*,[319] for example, the Seventh Circuit Court of Appeals considered a double jeopardy challenge to the supervised release statute. The court held that reimprisonment for a supervised release violation only modified the penalty for the underlying crime and, as a result, there was no double-jeopardy problem with also prosecuting the violation as a stand-alone crime.[320] In so holding, the court did not reference the statutory directive that supervised release was not to be used as punishment, because punishment was confined to the original, determinate prison sentence.

In 1995, the Sixth Circuit Court of Appeals rejected the *Meeks* and *Wyatt* line of reasoning and distinguished between revocation of parole and revocation of supervised release.[321] The case, *United States v. Reese*, involved an ex post facto challenge to the same mandatory minimum sentencing amendment at issue in *Meeks*. The court held that the mandatory minimum, imposed on offenders who possessed drugs while on supervised release, could not be understood as "adding more time to the sentence for the original offense . . . ."[322] The court reasoned that, unlike a parole violator, a supervised release violator was being imprisoned for the violation, rather than the original offense. Thus, there was no ex post facto problem in applying the amended statute to the revocation proceeding.

Cases such as *Meeks*, *Wyatt*, and *Reese* revealed the instability caused by grafting "revocation" onto supervised release. If the penalty for breaching a condition of supervised release was deemed a penalty for the violation itself, which seems intuitive, courts would need to increase the due process protections that applied to revocation proceedings. To avoid these constitutional problems, the penalty had to be attributed to the original offense, which collapsed structural and historical distinctions between supervised release and parole.

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318 *See, e.g.*, United States v. Eske, 189 F.3d 536, 539 (7th Cir. 1999) (finding an ex post facto violation because the court increased the quantum of punishment beyond what was available at the time the underlying crime was committed); United States v. Lominac, 144 F.3d 308, 316 (4th Cir. 1998) (holding that the district court could not apply supervised release provision that became effective after date of underlying crime); United States v. Collins, 118 F.3d 1394, 1398 (9th Cir. 1997) (same).

319 102 F.3d 241 (7th Cir. 1996).

320 *Id.* at 245. The Fourth, Ninth, and Tenth Circuits had rejected similar ex post facto challenges to the supervised release regime. United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996); United States v. Acuna-Diaz, 1996 WL 282262 (10th Cir. May 29, 1996) (unpublished decision); United States v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995).

321 United States v. Reese, 71 F.3d 582 (6th Cir. 1995).

322 *Id.* at 590.

In 2000, the Supreme Court addressed the question in *Johnson v. United States*,[323] which involved an ex post facto challenge to the supervised release statute. The amendment at issue in *Johnson*, adopted in 1994, empowered courts to order a new term of supervised release after a defendant served a prison sentence based on an earlier revocation.[324] Johnson had committed federal credit card fraud in 1993 and was sentenced to twenty-five months in custody and three years of supervised release. After his release from federal prison in 1995, he violated the terms of his supervised release in 1996 by committing four state forgery offenses and leaving the judicial district without permission. As a result of these violations, the federal district court revoked Johnson's supervised release and sentenced him to eighteen months in prison followed by twelve more months of supervised release.[325] On appeal, Johnson argued that the 1994 amendment did not properly apply to him and that the court should not have ordered the new term of supervised release.

The Supreme Court agreed that the amended statute did not apply. The Court concluded that all post-revocation penalties had to be attributed to the original federal credit card fraud conviction rather than to the 1996 supervised release violations. Accordingly, the Court determined that the amended statute would be an ex post facto law if applied to Johnson.[326]

The Supreme Court's reasoning was driven by the same instrumental analysis that animated the Second Circuit in *Meeks*. The revocation penalty had to be attributed to the original offense or else the existing supervised release revocation system would be unconstitutional. Citing cases like *Meeks* and *Wyatt*, the Court reasoned:

> While [the Sixth Circuit Court of Appeals'] understanding of revocation of supervised release has some intuitive appeal, the Government disavows it, and wisely so in view of the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release. Although such violations often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. . . . Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also

323 529 U.S. 694 (2000).

324 *Id.* at 698 (citing the Violent Crime Control and Law Enforcement Act of 1994).

325 *Id.* at 697–98.

326 *Id.* at 701.

> punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.[327]

The Court chose to "avoid" these due process problems, but at the cost of disregarding the policy impetus behind the creation of supervised release. The Court found that its decision in *Johnson* was "all but entailed" by its own prior summary affirmation of a parole case that had also dealt with an ex post facto issue.[328] In drawing on this case as direct precedent, *Johnson* (like *Meeks* and *Wyatt*) ignored the fact that when parole is revoked, there is no need to impose any new period of imprisonment; the parolee is "retaken" to finish out the still-extant sentence on the original crime. Thus, there is no question that the punishment for a parole violation (the resumption of the original prison sentence) is part of the punishment for the original crime.[329] Supervised release, however, was supposed to be different.

After *Johnson*, the supervised release system became structurally indeterminate in the classic sense. When a court imposed supervised release at sentencing, a defendant received what only could be described as an initial prison term for the crime at the time of judgment, followed by a conditional release. If the defendant failed to "adjust" properly in the future and violated a condition of supervised release, the court could extend the initial prison term.

D. The PROTECT Act

In another important development, the PROTECT Act of 2003 increased prison terms for multiple supervised release revocations, further expanding the indeterminacy of the system.[330] This statute, whose full title was the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, was targeted specifically at sex offenders. Among its many provisions, the statute authorized lifetime supervised release for certain federal sex crimes,

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[327] *Id.* at 700 (citing United States v. Wyatt, 102 F.3d 241, 244–45 (7th Cir. 1996); United States v. Beals, 87 F.3d 854, 859–60 (7th Cir. 1996), *overruled on other grounds by* United States v. Withers, 128 F.3d 1167 (7th Cir. 1997); United States v. Meeks, 25 F.3d 1117, 1123 (2d Cir. 1994); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)).

[328] 529 U.S. at 701. In one of the cases *Johnson* cites, *Greenfield v. Scafati*, 277 F. Supp. 644, 646 (D. Mass. 1967), *aff'd*, 390 U.S. 713 (1968), the Court had affirmed a lower court decision, finding that it would violate the ex post facto clause to apply a new statute imposing sanctions on parole violators to a prisoner sentenced before its enactment.

[329] In his dissent in *Johnson*, Justice Scalia criticized the majority's equation of parole with supervised release—in the separate context of objecting to the majority's conclusion that the supervised release statute in effect at the time of Johnson's original crime authorized post-revocation supervised release (even before the 1994 amendment). *Johnson*, 529 U.S. at 726 (Scalia, J., dissenting).

[330] Pub. L. No. 108-21, 117 Stat. 651.

including the possession of child pornography. Another amendment in the PROTECT Act had a much broader effect, lengthening the potential terms of reimprisonment for cumulative violations of the conditions of supervised release for all defendants.[331]

Before the PROTECT Act, the maximum possible term of reimprisonment for sequential supervised release violations was limited by an aggregation requirement. Judges had to "subtract the aggregate length" of any and all prior terms of reimprisonment (that is, imprisonment following prior revocations of supervised release) from a stated statutory cap on total reimprisonment.[332] This statutory cap ranged from five years of reimprisonment in a case involving an underlying Class A felony to one year of reimprisonment in a case involving an underlying misdemeanor.[333] Once the statutory cap had been reached, judges could no longer use prison as a sanction for violations of supervised release.[334]

The PROTECT Act eliminated the prison aggregation requirement. As amended, the statutory cap for reimprisonment applies to any *one* supervised release revocation. In cases in which a defendant's supervised release previously has been revoked, courts are no longer required to aggregate the time served on the prior revocations. Each revocation is now potentially subject to a new reimprisonment term of between one and five years—without regard to any statutory aggregate maximum.

Despite the significance of this change, the legislative history of the PROTECT Act includes only the barest reference to the amendment. The provision appears to have originated in a proposal by the Department of Justice. During a House Judiciary Subcommittee hearing on a related bill, Daniel P. Collins, an Associate Deputy Attorney General, testified:

> To ensure the efficacy of the reform proposed in [S]ection 101 [of the Act], we recommend that the Subcommittee make a conforming change in the provisions governing reimprisonment following the revocation of supervised release. Currently, 18 U.S.C. § 3583(e)(3) limits imprisonment following revocation to five years in case of a class A felony, three years in case of a class B felony, two years in case of a class C or D felony, and one year otherwise. This provision should be amended to make it clear that these are limitations on reimprisonment based on a *particular* revocation,

331 *Id.* § 101.

332 U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 45 n.213 (2010) (citation omitted).

333 18 U.S.C. § 3583(e)(3) (2000) (amended 2003).

334 *Id.*

> rather than limits on aggregate reimprisonment for an offender who persistently violates release conditions and is subject to multiple revocations on that basis. This clarification could be effected simply by inserting "on any such revocation" after "required to serve" in 18 U.S.C. § 3583(e)(3).[335]

Collins was discussing the amendment specifically in relation to Section 101 of the Child Abduction Prevention Act, which was incorporated into Section 101 of the PROTECT Act, to cover "supervised release term[s] for sex offenders."[336] Section 101 was the provision that sought to authorize lifetime supervision for this category of crime. As enacted, however, the DOJ amendment increases the potential length of reimprisonment terms for all successive supervised release violators, not just sex offenders. Based on a plain reading of the statute, courts have rejected claims that Congress intended the amendment to apply narrowly to sex offenders.[337]

The PROTECT Act dealt only with the term of imprisonment that can be imposed for successive revocations of supervised release. A separate section of the supervised release statute, 18 U.S.C. § 3583(h), limits the amount of additional supervised release that can be imposed after any particular violation of supervised release. Under § 3583(h), the new term of supervised release cannot "exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release."[338]

As the Sentencing Commission has emphasized, the § 3583(h) limitation is significant for most Title 18 offenses for which the maximum authorized term of supervised release is one, three, or five years.[339] The provision has no impact, however, when the maximum possible term of supervised release is life. Currently, this is true for convictions under the federal drug-trafficking laws, terrorism offenses, and many sex offenses.[340] In such cases, there is no cap on a potential lifetime cycle of reimprisonment for supervised release violations.

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[335] *Child Abduction Prevention Act: Hearing on H.R. 5422 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. 6 (2002) (testimony of Daniel P. Collins, Assoc. Deputy Att'y Gen., Dep't of Justice).

[336] PROTECT Act of 2003 § 101.

[337] *See* United States v. Epstein, 620 F.3d 76, 80 (2d Cir. 2010) (relying on plain text of the amendment, despite "some uncertainty as to whether Congress intended the amendment . . . to apply to all criminal defendants, or to sex offenders alone"); United States v. Lewis, 519 F.3d 822, 825 (8th Cir. 2008) (relying on plain language of amendment, despite header that suggested provision applied only to sex offenders).

[338] 18 U.S.C. § 3583(h) (2006).

[339] U.S. SENTENCING COMM'N, *supra* note 332, at 44–45.

[340] *Id.* at 6 n.22, 45.

E. Conditions of Supervised Release

The growing number of supervised release conditions has been another factor in the ballooning indeterminacy of the federal sentencing system. Twenty-five years after supervised release first went into effect, the experience of being on supervised release has come to mimic the experience of being on parole or on probation. The full range of conditions that were developed for probation and parole now routinely apply to supervised release. Each new condition imposes additional demands and expectations on what it means to be sufficiently "rehabilitated" to avoid the threat of more prison.

There are two basic categories of supervised release conditions: mandatory and discretionary. Currently, only seven conditions are mandatory. Of these seven, five apply in all cases: not committing new crimes; not possessing controlled substances; cooperating in DNA collection; submitting to drug testing (unless waived by the court); and paying court-ordered fees and penalties.[341] The remaining two conditions apply only to defendants with qualifying convictions: a registration requirement for sex offenders and a treatment requirement for first-time domestic violence offenders.[342]

The supervised release statute provides that judges *may* impose other conditions. Such conditions might include any discretionary condition of probation (as enumerated in the probation statute) or any other condition that the court deems "appropriate."[343] First, however, the judge must find that such a condition: (1) is "reasonably related" to the background of the offense, the offender, or to one of the purposes of sentencing (other than punishment); (2) involves no greater deprivation of liberty than "reasonably necessary" for the relevant purposes of sentencing; and (3) is consistent with the policy statements of the Sentencing Commission.[344]

Despite these limitations, people on supervised release became subject to a host of supposedly discretionary conditions, including most of the discretionary conditions devised for probation. In addition to the mandatory conditions, judges routinely apply a package of thirteen "standard" conditions when imposing supervised release—including, for example, geographic limitations, employment requirements, reporting obligations, and a ban on associating with felons. These "standard" conditions are among those recommended

341 18 U.S.C. § 3583(d); U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(a) (2012).

342 18 U.S.C. § 3583(d) (2006).

343 18 U.S.C. §§ 3563(b), 3583(d) (2006). However, the discretionary condition of probation permitting intermittent confinement is not available for supervised release.

344 *Id.* §§ 3583(d)(1)–(3) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (2012).

by the Sentencing Commission for both probation and supervised release cases.[345] Conditions that are supposed to be tailored are instead reflexively imposed.

The thirteen "standard" conditions have been pre-incorporated into Form AO-245B, the nationwide template for judgments in criminal cases.[346] By way of the AO-245B, people on probation and supervised release are mechanically made subject to exactly the same thirteen standard conditions. This occurs despite the fact that supervised release conditions (unlike probation conditions) are not to be imposed as punishment.

In laying out recommendations for the "standard" conditions of supervised release, the sentencing guidelines state: "Several of the conditions are expansions of the conditions *required by* statute."[347] In actuality, none of the recommended "standard" conditions are required by statute for supervised release; they are all expansions.

To supplement the mandatory and standard conditions, judges can also develop "special" conditions of supervised release. The sentencing guidelines recommend an array of thirteen special conditions for consideration on a case-by-case basis. These include, for example, substance abuse treatment, mental health treatment, deportation, curfews, home confinement, and occupational restrictions. Judges routinely develop other special conditions for individual defendants. Examples of more controversial special conditions include shaming sanctions,[348] requiring defendants to take prescribed medications, strict alcohol bans, and waiving the right to confidentiality for mental health treatment.[349]

Sex offenders have been subject to particularly intrusive special conditions. Some courts of appeals have upheld conditions that include periodic polygraph testing; bans on all pornography and "sexually explicit material"; penile plethysmograph testing to measure

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[345] For the guidelines' largely parallel recommendations on "standard" conditions of supervised release and probation, see U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.3(c), 5D1.3(c) (2012).

[346] AO-245B (Rev. 9/08) Judgment in a Criminal Case.

[347] U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.3(c), 5D1.3(c) (2012) (emphasis added).

[348] *See, e.g.*, United States v. Gementera, 379 F.3d 596, 598 (9th Cir. 2004) (upholding a condition that required a person convicted of mail theft to wear a sign that read, "I stole mail. This is my punishment").

[349] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5D1.3(d)–(e) (2012); U.S. SENTENCING COMM'N, *supra* note 332, at 14, 17, 27–28 (describing commonly challenged conditions).

arousal; complete Internet bans; and broad associational bans to prevent contact with any children.[350]

In general, probation officers have broad discretion in choosing how strictly to enforce particular conditions and how to respond to violations. The handbook for federal probation officers, *Monograph 109: Supervision of Federal Offenders*, does instruct probation officers to respond to each and every violation.[351] But the monograph lists many possible responses, including, for example, a reprimand, increased reporting, a curfew, punitive community service, home detention, or requesting revocation from the court.[352]

More conditions, administered through this kind of unregulated process, means less certainty about how long any defendant will spend in prison for any given crime. The depth of probation officers' discretion, exercised largely behind closed doors, also raises all the old concerns about disparity in punishment among defendants. It also raises the possibility of the unequal treatment of minorities, the poor, and the politically powerless, a central concern of the determinacy movement.

F. The Rising Scope and Cost of Supervised Release

The reintroduction of indeterminacy and conditional release has had far-reaching effect. Since the SRA was implemented in 1987, federal judges have sentenced approximately one million people to supervised release.[353] The most recent figures show that by the end of 2010, there were 103,423 people on supervised release and 206,968 people in the federal prisons.[354] In 1991, at its most expansive, the

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[350] United States v. Thielemann, 575 F.3d 265 (3d Cir. 2009) (upholding a ten-year ban on the use of the Internet without prior permission); United States v. Daniels, 541 F.3d 915 (9th Cir. 2008) (upholding a ban on the possession of any materials depicting or describing "sexually explicit conduct"); United States v. Johnson, 446 F.3d 272 (2d Cir. 2006) (upholding mandatory polygraph testing); United States v. Roy, 438 F.3d 140 (1st Cir. 2006) (prohibiting the defendant from contacting his girlfriend without approval from a probation officer, because the girlfriend had minor children); United States v. Dotson, 324 F.3d 256 (4th Cir. 2003) (upholding the use of penile plethysmograph testing).

[351] 8E GUIDE TO JUDICIARY POLICY AND PROCEDURES, SUPERVISION OF FEDERAL OFFENDERS § 620.10 (2010).

[352] *Id.* § 620.40. However, responses classified as moderate or severe require a report to the court. *Id.*

[353] U.S. SENTENCING COMM'N, *supra* note 332, at 3 n.13 (stating that 917,908 people were sentenced between 1989 and 2009).

[354] BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2010, at 8 (2011) [hereinafter BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE]; BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010 app. tbl.2 at 7 (2011) [hereinafter BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES].

federal parole system supervised 26,788 offenders,[355] about one-fourth of the number now on supervised release. In another significant marker of the rise of supervised release, federal probation has declined by about two-thirds since the passage of the SRA. Approximately 22,500 people are currently on federal probation,[356] down from a high of 61,029 in 1988.[357] Supervised release is now the dominant form of federal community supervision.

As suggested by these figures, federal judges are imposing supervised release at extremely high rates. Supervised release is required by statute in less than half of all cases subject to the federal sentencing guidelines.[358] But even when there is no statutory requirement, the guidelines provide that the court "shall order a term of supervised release to follow imprisonment" when a prison sentence of more than a year is imposed.[359] Even after the Supreme Court's decision in *United States v. Booker*,[360] which made the guidelines advisory, nearly everyone sentenced to federal prison is also sentenced to a term of supervised release.[361]

According to figures collected by the Sentencing Commission, judges imposed supervised release in 99.1% of cases in which it was not statutorily required between 2005 and 2009.[362] During the same period, the average term of supervised release was forty-one months (excluding offenders sentenced to lifetime supervised release).[363] The vast majority of offenders who avoided terms of supervised release were non-citizens subject to deportation.[364]

The broad application of supervised release has meant that indeterminacy has taken a firm hold of the federal sentencing system. Supervised release is responsible for sending a significant number of offenders back to prison. Only about "two-thirds of federal offenders successfully complete[ ] their terms of supervis[ed release]."[365] A full

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355 BUREAU OF JUSTICE STATISTICS, FEDERAL OFFENDERS UNDER COMMUNITY SUPERVISION 1987–96 (1998), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=884.

356 *Id.*; BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE, *supra* note 354, at 30.

357 BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 1989, at 25 (1989).

358 U.S. SENTENCING COMM'N, *supra* note 332, at 3.

359 U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(a) (2012).

360 543 U.S. 220 (2005).

361 U.S. SENTENCING COMM'N, *supra* note 332, at 4.

362 *Id.*

363 *Id.*

364 *Id.*

365 *Id.*

third have their terms revoked and are sent back to prison.[366] In any one year, roughly sixty percent of revocations are for non-criminal conduct.[367] Non-criminal violations, also known as technical violations, commonly include conduct such as failing to report to the probation officer, failing to submit monthly reports, and failing to attend drug or mental health treatment. In general, among defendants who were sent back to prison, the average term of re-imprisonment was eleven months.[368] In practical terms, given the possibility of revocation, and the frequency of reimprisonment, no one who receives supervised release receives a determinate sentence. And almost everyone receives supervised release.

Not surprisingly, given the reach of modern-day supervised release, the resources devoted to the system are substantial. The costs of supervised release now aggregate to nearly $400 million a year.[369] At a cost of $77.49 per day, moreover, the average prison sentence on a revocation costs the government about $26,000.[370] If one third of the 103,423 people currently on supervised release are likely to be reimprisoned, we can expect an additional cost—with respect to that extant cohort of releasees alone—of $858 million (33,000 people × $26,000).[371]

In addition, prosecutors, defense attorneys, and judges have now grappled with supervised release at over a million sentencing hearings, adding enormous cumulative administrative costs to the system. Each revocation proceeding adds to these costs, requiring a series of hearings before the court, involving the probation officer, the prosecutor,

366 *Id.*

367 This figure comes from data reflected in Table E-7A, prepared annually to capture federal judicial caseload statistics. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2011). The tables reveal that revocation was based on technical violations in the following percentage of cases: 57.3% (March 2011 Table E-7A); 60.5% (March 2010 Table E-7A); 62% (March 2009 Table E-7A). *Id.*; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2010); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2009).

368 U.S. SENTENCING COMM'N, *supra* note 332, at 4. Of the 40,217 supervised release cases that were closed during the twelve-month period ending on March 31, 2011, 34.3% closed because supervision was revoked. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.E-7A (2011).

369 Pulling from the available figures: 100,000 people × $10.79 a day × 365 days = $393,835,000 per year. *See* ADMIN. OFFICE OF THE U.S. COURTS, NEWLY AVAILABLE: COSTS OF INCARCERATION AND SUPERVISION IN FY 2010 (2011), *available at* http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx (listing the costs of federal supervision).

370 *Id.*

371 BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE, *supra* note 354 at 8 (noting that 103,423 people are on supervised release); ADMIN. OFFICE OF THE U.S. COURTS, *see supra* notes 368–69 (reflecting that the average prison sentence for a revocation costs the government about $26,000).

and defense counsel—all at so far unmeasured, but significant, expense.

It cannot persuasively be argued, moreover, that the availability of supervised release has indirectly led judges to impose shorter prison sentences. In the years since the advent of supervised release, the length of the average federal prison sentence has more than doubled.[372]

V
Conceptualizing Supervised Release Going Forward

In this final Part, I discuss ways to conceptualize the supervised release system going forward. Drawing on the insights of the determinists and indeterminists, I first identify four major elements of the supervised release system as it operates today. I argue that supervised release: (1) is structurally indeterminate; (2) restores broad discretion to gauge rehabilitation; (3) is premised on coercive rehabilitation; and (4) is the product of a steady expansion of control. I then propose three alternative approaches for assessing supervised release in the future: a crime-control approach, a transitional rehabilitation approach, and an autonomy approach.

A. The Core Elements of Supervised Release

1. Structurally Indeterminate

Federal offenders sentenced to supervised release receive a sentence with two components. First, they receive a fixed initial prison term. Second, they are conditionally released from prison to a period of supervised release, which renders the prison sentence on the underlying offense indeterminate.

In this Article, I have argued that supervised release creates a classically indeterminate sentence. Under the Supreme Court's decision in *Johnson*, discussed in Part IV, judges can impose more prison time for the underlying offense if a defendant fails to demonstrate sufficient rehabilitation after release.[373] This structure is based on post-release adjustment rather than adjustment during the fixed initial prison term, but it mirrors the basic concept of indeterminacy set out

[372] U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing 46 (2004) (showing that in 1986, the average federal prison term was 26 months); U.S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics tbl.14, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/sbtoc10.htm (reflecting that the mean length of imprisonment for federal offenders was 53.9 months in 2010).

[373] *See supra* Part IV.C.

at the 1870 NPA Congress: The length of a prison sentence for an offense should depend on satisfactory proof of subsequent reformation.[374]

2. *Restores Broad Discretion to Gauge "Rehabilitation"*

Defendants sentenced to supervised release have no way of knowing how long they will spend in prison: They are potentially subject to an extended prison term under summary process for any violation of the myriad conditions of release. Reimprisonment depends substantially on the discretion of the court and its probation officers. In the first instance, probation officers (who are employees of the court system) must exercise their own judgment in deciding which violations to bring to the attention of the judge. Then, by statute and under the federal sentencing guidelines, judges are given enormous discretion in deciding what kinds of violations, for which defendants, merit revocation and reimprisonment. In making revocation decisions, judges are directed to consult only the broad statutory sentencing factors (with the exception of the purpose of punishment).[375]

Supervised release provides for a different form of indeterminacy than the system proposed by Maconochie. Maconochie was a time indeterminist, but he was a "marks" determinist. Prisoners would be released after they had earned the requisite number of marks. The number of marks they needed to earn, tabulated according to the seriousness of their offense, would be disclosed to them upfront. Marks were framed as a means of creating transparency and certainty for prisoners and as a mechanism for reducing discretionary authority.

Indeterminacy came under attack in the 1960s precisely because parole boards had abandoned any effort to create certainty or transparency for prisoners. Prominent critics of parole, ranging from Judge Frankel to von Hirsch, were animated by the cruelty and degradation experienced by prisoners subject to arbitrary and obscure parole procedures. Like Maconochie, they denounced the practice of subjecting prisoners to officials who held broad authority and were charged with enforcing amorphous standards.

3. *Premised on Coercive Rehabilitation*

Supervised release, enforced by revocation and reincarceration, is premised on the notion that rehabilitation (in addition to deterrence) can be effectively generated by the threat of more punishment. As

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374 *See supra* Table 1 (quoting Principle VIII).

375 *See supra* Part IV.B (describing the revocation authority for supervised release violations).

shown in Part IV, the typical offender on supervised release must follow a minimum of five mandatory conditions, thirteen standard conditions, and any additional conditions that the judge considers appropriate.[376] The failure to comply with any condition of supervised release can be sanctioned by reimprisonment.

Supervised release conditions, like the conditions that applied to tickets of leave and parole, grant the government a cheapened form of leverage over people who have been previously adjudicated as criminals. Nobody in the United States, for example, is permitted to "unlawfully possess a controlled substance" or is authorized to commit a "federal, state, or local crime."[377] In making these proscriptions conditions of supervised release, Congress has not banned any additional activities; it has just made it significantly easier to send released "criminals" to prison for any alleged violation of existing law. The second-class status of those on supervised release is further magnified by the fact that releasees are subject to the same form of cheapened control with respect to substantial amounts of non-criminal conduct. This kind of control is what Jebb worried would brand releasees as "belonging to a criminal class" and undermine their reintegration.[378]

4. Reflects a Steady Expansion of Control

The supervised release system has expanded ever outward over the last twenty-five years. The Senate Report on the SRA assumed that judges would reserve supervised release for select offenders who presented the greatest risks of recidivism.[379] Today, nearly every single person who is sentenced to federal prison also receives a term of supervised release. The potential length of supervised release terms has steadily increased, with a substantial number of defendants now subject to the possibility of lifetime supervision.[380] The available reimprisonment terms for violations have also increased.[381] As the supervised release system expands, federal prison sentences become more and more indeterminate, while release from prison becomes more and more conditional.

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376 *See* 18 U.S.C. § 3583(d) (2006); *see also* discussion *supra* Part IV.E (describing the different categories of conditions).

377 AO-245B (Rev. 9/08) Judgment in a Criminal Case.

378 Jebb, *supra* note 81, at 411; *see also supra* Part I.B (discussing Jebb's philosophy of reintegration).

379 S. REP. NO. 98-225, at 124–25 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

380 *See supra* Part IV.B.

381 *See supra* Part IV.D.

B. Three Alternative Approaches for Assessing Supervised Release

Based on these structural understandings of the current system, I propose three different approaches for assessing the supervised release system going forward. First, I suggest a crime-control approach that might be invoked to justify the supervised release system as it exists today. Second, I offer an approach to supervised release that focuses on the goal of transitional rehabilitation. Third, I propose an autonomy approach, which questions whether there has been a sufficiently robust examination of the purpose and structure of supervised release to justify its impact on those affected.

1. A Crime-Control Approach

The modern-day supervised release system is not grounded in any clear set of principles. Rather, it consists of a hodgepodge of amendments and procedures that were cobbled together by different actors over many years. I have not found any case or law review article that attempts to provide a coherent theory to explain the system as it currently exists.

Given the time period in which supervised release evolved, however, it makes sense to analyze the system as a crime-control mechanism of deterrence and incapacitation. After all, process-oriented concerns did not provide the sole motivation for the movement to abolish federal parole. Those who pushed for passage of the SRA included scholars and legislators who believed that parole provided too much leniency for prisoners in an era of rising crime.[382] In addition, although the SRA omitted both punishment and incapacitation from the purposes of supervised release, Congress reincorporated incapacitation as a purpose of supervised release in 1987.[383] Locking up "dangerous individuals" was the impetus behind the 1985 addition of revocation, as least as articulated by proponents like the then-chair of the Parole Commission.[384]

A theory of supervised release from this perspective might therefore draw on a version of the "broken windows" theory. This theory, as articulated in an influential 1982 article by James Wilson and George Kelling, suggests that targeting minor incidents of disorder—such as panhandling, public drunkenness, and graffiti—can help control and prevent more serious offenses.[385] According to Wilson and

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[382] *See supra* Part III.A (describing the debates that led to passage of the SRA).

[383] Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1266, 1267.

[384] Baer, *supra* note 290, at 67.

[385] James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, Mar. 1982, at 29.

Kelling, "at the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence."[386] If one broken window is not repaired, the rest of the windows will be broken. The theory posits that the resulting disorder will leave the neighborhood more vulnerable to crime.[387]

The supervised release system could be interpreted through this lens. It could be argued, for example, that supervised release became more control-oriented over time because society decided to focus its enforcement resources on a particular group of people: those who had demonstrated a past willingness to break the law. Under this theory, any small violation could be interpreted as a sign of "disorder" that might lead to more serious crime. Monitoring the visible behavior covered by supervised release conditions, such as the failure to report one's address or the failure to keep mental health appointments, would keep the community safer as a whole.

This conception of supervised release is reminiscent of some of the ideas expressed by Crofton. According to Crofton, summary revocation powers, imposed for the remitted portion of the prison sentence, created the community confidence necessary for the acceptance of early release on tickets of leave.[388] Because everyone knew that a violation led to reincarceration, employers were more willing to hire released prisoners. If any ticket-of-leave–holder exhibited disorderly conduct—specifically by failing to report to the police on a monthly basis, associating with "bad characters," or leading an "idle and dissolute life"—the community would "assume[ ]" (in the words on the ticket) that the releasee was "about to relapse into crime."[389] In this way, monitoring compliance with the conditions became an early warning system to protect the community down the line.

In the Irish Convict System, however, licensees were subject to control in the community only during the period of early remission.[390] The use of summary process, for either non-criminal or criminal misconduct, did not extend beyond the expiration of the prison term. In this way, the modern supervised release system is very different from the ideas propounded by Crofton, as it continues penal control beyond the period of punishment.

A crime-control theory of supervised release raises a number of complicated issues. First, the "broken windows" premise is itself

386 *Id.* at 31.

387 *Id.* at 31–32.

388 *See supra* note 90 and accompanying text.

389 CROFTON, *supra* note 60, at 11; *see supra* Part I.B (discussing the ticket-of-leave system under Crofton).

390 *See* discussion *supra* at Part I.B.

controversial. Scholars such as Bernard Harcourt have concluded that policing data do not support the idea that targeting minor acts of disorder helps to reduce more serious crime.[391] Second, it is not at all clear that a broken windows theory, even if supported by policing data, would translate into the supervised release context. Separate data would need to be developed to demonstrate that controlling the behavior covered by supervised release conditions would independently reduce serious crime. So far, no such claim has been made.

A crime-control theory would also need to address the determinists' concerns about bias in a discretionary system. Kelling and Wilson acknowledged, for example, that a broken windows theory of policing raises serious equity concerns.[392] They worried that factors such as age, skin color, and national origin would become the basis for distinguishing the undesirable from the desirable.[393] Although highly conscious of this problem, Kelling and Wilson stated that they had no "satisfactory" response to concerns that the police might become "agents" of community bigotry.[394] The same concerns apply to probation officers and judges, who have great discretionary power over people on supervised release.

Furthermore, the crime-control theory would require an amendment to the supervised release statute to recognize and acknowledge that supervised release, as a form of conditional release, is by its very nature punishment. Like its direct predecessors, the ticket of leave and parole, supervised release extends punitive control over a class of "criminals" who are subject to reimprisonment: (1) under reduced standards of process and (2) for non-criminal conduct. Even if supervised release were framed primarily as a means of deterrence and incapacitation, such a system would necessarily also be experienced as imposing punishment.

2. A Transitional Rehabilitation Approach

Parole initially spread through the United States because a consensus emerged that it was better to return an offender to freedom "through a period of controlled liberty" than "abruptly to return him to complete freedom" at the end of the prison sentence.[395] There is continuing value in this insight, particularly in light of the length of federal prison sentences and the resulting challenges of reintegration.

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391 Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 271 (2006).

392 Wilson & Kelling, *supra* note 385, at 35.

393 *Id.*

394 *Id.*

395 Note, *supra* note 98, at 702.

Therefore it is appropriate to consider an approach to supervised release in which transitional rehabilitation (and by implication successful reentry) is the primary goal. In so doing, I examine four aspects of the current system that could be reconceived to make supervised release both constructive and coherent as a transitional tool: (a) the relationship of conditional release to the custodial sentence; (b) the use of summary process; (c) the conditions of supervision; and (d) the adaptation of behaviorist tools to promote cooperative rehabilitation.

a. The Relationship of Conditional Release to the Custodial Sentence

I have criticized the supervised release system for pretending that sending people back to prison, even for non-criminal conduct, is not punishment. If incarceration for a violation of supervised release is indeed additional punishment for the underlying offense, a more honest and transparent system for accomplishing this goal would be to re-link conditional release to the remitted portion of a prison sentence. Supervised release could essentially take the form of non-discretionary parole. Every federal prisoner would spend a predetermined period in the community under supervision at the tail end of the prison sentence. Release would be automatic and would follow a period of preparation and adjustment in a halfway house.

This approach would in effect create a split sentence of prison and supervised release, but without the contortions of current law. Because people on supervised release would still be under the control of the BOP, summary revocation powers would be justified. As in the old parole system, summary revocation would be co-extensive with the period when the releasee would otherwise have been in prison. Releasees would know that by violating the conditions of supervision, they would be "retaken" by order of the court to serve out the balance of the underlying prison term.

Unlike the old parole system, the period of supervision in the community would be uniform and transparent at the time of sentencing. For those sentenced to five years or more, for example, the last year might be served under supervised release. The precise line between prison and supervised release should be informed by the risk of recidivism. Modern-day research has confirmed, for instance, that the first six months after release—the period identified by Brockway—is the critical period for reintegration.[396]

[396] PETERSILIA, *supra* note 241, at 18 (noting that almost "30 percent of all released inmates are rearrested for a serious crime in the first six months").

If the term of prison plus supervised release is openly described as a split sentence, with the defendant remaining in the custody of the BOP for the entire duration, then all the parties involved in the sentencing process will be in a better position to evaluate their options and make rational decisions. Congress will understand that a statute that allows for lifetime supervised release creates the possibility of a life sentence, with certain portions conditionally served in the community. Prosecutors and defense attorneys will adjust the shape and focus of their arguments to address the actual consequences of supervised release. Judges will be better able to evaluate those arguments. And defendants considering plea bargains will have access to clearer information about the ramifications of those deals. Instead of considering a sentence of, for instance, two years followed by a (somewhat indistinctly defined) period of supervised release, all the parties involved will know they are considering a sentence of, for instance, five years with conditional release into the community after two.

b. The Use of Summary Process

If supervised release is not linked to a remitted prison term, I would eliminate the use of summary process in revocation proceedings. Under the present system, being on supervised release is not a reward for conduct in prison, and it does not provide an opportunity to avoid the experience or stigmatization of incarceration. Thus, summary process in revocation proceedings under the *Morrissey* standards,[397] cannot be justified for supervised release in the same way that it was for probation and parole. Unlike supervised release, both probation and parole were historically conceived as acts of grace that shortened or replaced time in prison.

Under this idea, the punishment for a supervised release violation would constitute a separate penalty for the violation itself, rather than a continuing penalty for the underlying crime. In this way, the prison term imposed for the crime at judgment would be determinate. Full process would be required before a court could impose a new prison term for a subsequent violation of the conditions of supervised release. Full process rights during revocation proceedings would reduce, but not eliminate, uncertainty for defendants about how much time they might spend in prison for failing to "rehabilitate" after release.

Extending full process rights to revocation hearings would not eliminate the purpose of revocation, nor would it take us back to the status quo of the SRA. Congress and the courts could still define

[397] See the discussion of the *Morrissey* standards *supra* Part II.D.

bodies of conduct that would render a releasee, but not other citizens, subject to reimprisonment. Extending full process would also reverse the ex post facto analysis applicable to the amended supervised release statutes, because punishment for a violation could be construed as just that, instead of being awkwardly attributed back to the original crime.

The writings of the indeterminacy movement are a valuable resource in thinking about other potential benefits of eliminating summary process. In 1837, Maconochie denounced summary process as a "snare" and a source of degradation for prisoners.[398] In 1870, the NPA warned: "There is no greater mistake in the whole compass of penal discipline, than its studied imposition of degradation as part of punishment."[399] In this vein, the elimination of summary process could be conceived as a reintegrative measure. Full process could push back against the degradation of former prisoners who have completed their prison terms and are being reintegrated into the community.

c. The Conditions of Supervision

A third idea would be to rework the conditions of supervised release. Despite the mounting body of conditions, there has been little analysis of the purpose underlying these conditions or the justification for applying them so broadly.

Conditions of supervision should be revamped even if summary process is eliminated or cabined. Courts should make individualized determinations about what conditions should apply in each case. In evaluating the utility of any particular condition, courts should distinguish between conditions that are aimed simply at establishing control over "criminals" and conditions that provide reintegrative services, such as job-training or mental health treatment. They should consider the regulatory and administrative costs of any condition they impose and require proof that this condition will actually lead to some desired societal goal.

In deciding which conditions to impose, courts also should be cognizant of the potentially corrosive impact of degradation. The bar on associating with felons without permission, for example, denigrates felons as a tarnished breed, even though the supervisees themselves are almost all felons. Supervisees currently have to submit monthly

398 MACONOCHIE, *supra* note 29, at 22.

399 *Declaration of Principles Adopted and Promulgated by the 1870 Congress of the National Prison Association*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 542 (E.C. Wines ed., Albany, The Argus Company 1871); *see supra* Table 1 (discussing Principle XIV).

"truthful" reports to probation officers.[400] They have to urinate regularly in a cup.[401] They must submit to visits from probation officers without notice at home, at work, or anywhere else.[402] They have to ask permission to travel out of district.[403] These conditions do not need to be applied in every case.

Courts should also make clear at the time of judgment which conditions will subject a person to potential reimprisonment. Under the Australian and Irish ticket-of-leave systems, which operated with many fewer conditions, any violation was a basis for revocation.[404] Although this principle theoretically applies to our current supervised release system, not all judges would put someone in prison for failing to support dependents (if indigent), associating with family members who are felons, submitting a monthly report late, getting drunk once at a party, or serving as a police informant without prior permission.[405] Instead of leaving open the possibility of reincarceration for these kinds of activities, which shifts open-ended power to the courts, the original judgment should demarcate each and every condition that might lead to reimprisonment as opposed to some lesser or differently structured consequence.

d. Adapting Behaviorist Tools

A fourth idea would be to rework the behaviorist framework embodied in the supervised release system. If the goals of supervised release are indeed rehabilitative, as the current statutes and guidelines provide, then we should draw on the best of behaviorist thinking to structure incentives and sanctions in a manner that actually encourages the behavior we purport to desire.[406]

Within this framework, both the conditions of release and the incentives and sanctions imposed in connection with those conditions could be reconceptualized in an effort to harness the active cooperation of the releasee. Incentives and sanctions could be relatively small. There could be a requirement that they be clear, transparent, and

400 *See* AO-245B (Rev. 9/08) Judgment in a Criminal Case (listing standard supervised release conditions).

401 *Id.*

402 *Id.*

403 *Id.*

404 *See supra* Parts I.A & I.B (discussing the Australian and Irish ticket-of-leave systems).

405 *See* AO-245B (Rev. 9/08) Judgment in a Criminal Case (listing standard supervised release conditions).

406 Whether or not to maintain the threat of reincarceration for punishment alone implicates a different set of moral, penological, and political questions. My point is that if we continue to believe that supervised release has non-punitive goals—and the current statute provides it has *only* non-punitive goals—those goals should draw on behaviorist thinking.

uniform. Judges and probation officers could announce the incentives and sanctions beforehand and apply them immediately.

The nineteenth-century mark system was premised on these ideas: Incentives and sanctions should be transparent, measured in small increments, and applied immediately. Although the societal goals associated with the mark system were overwhelmingly labor-based, the insights of this system remain relevant and could be applied to different sets of societal ambitions. With respect to sanctions, classic deterrence theory maintains that "the threat of a mild punishment imposed reliably and immediately has a much greater deterrent effect than the threat of a severe punishment that is delayed and uncertain."[407] The same principle applies to incentives. Behavioral economists have demonstrated that there is a common human tendency to respond to immediate burdens and rewards (even if small) and to discount (even larger) burdens and rewards that arrive in the future.[408]

A new community supervision program, Hawaii's Opportunity Probation With Enforcement (HOPE), has achieved success in harnessing these ideas. Launched in 2004, HOPE's central premise involves imposing certain, predetermined, and relatively mild sanctions (generally a few days in prison) on probationers immediately after a positive drug test.[409] The judge provides each probationer with formal notice of the sanction in open court, and that sanction is applied swiftly after any positive test.[410] An evaluation of HOPE, published by Angela Hawken and Mark Kleiman in 2009, supports the effectiveness of this program.[411]

HOPE focuses on sanctions, rather than on incentives. Using incentives as well as sanctions increases the tools available to the courts at sentencing. An additional benefit of incentive-based initiatives, moreover, is that they are less likely to degrade offenders and more likely to promote reintegration.

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407 Jeffrey Rosen, *Prisoners of Parole*, N.Y. TIMES MAG., Jan. 10, 2010, at 36, 38.

408 *Id.*; IAN AYRES, CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE 7 (2010).

409 *See* ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 27 (2009) (describing the HOPE process).

410 *Id.*

411 *Id.* at 17–26 (describing the results of their evaluation). Oregon also has achieved low recidivism rates by applying swift and certain sanctions for violations. Probation officers in Oregon use a "sanctioning grid to impose swift, certain consequences for violations" and to "creat[e] consistency across offenders." PEW CENTER ON THE STATES, STATE OF RECIDIVISM: REVOLVING DOOR OF AMERICA'S PRISONS 20 (2011), *available at* http://www.pewtrusts.org/our_work_report_detail.aspx?id=85899358613.

Courts and probation officers, therefore, should solicit empirical research on the use of incentives as an alternative to sanctions. Targeted incentives, such as those advocated by the indeterminists, may prove more adept at changing behavior at least with respect to certain types of conditions. In a controlled study, for example, releasees who have a history of drug abuse might earn a payment (of say $25) each time they meet with their probation officers and test negative for drugs. If such a strategy proved effective, it would counsel against using even a short term of reimprisonment as an enforcement strategy for this condition. Not all conditions are best enforced by the same blunt tool, especially when this tool interferes with reintegration.

A careful consideration of incentives and sanctions would be another way to assess the utility of individual conditions. Would courts let someone earn $25, for example, for each day that he or she refrained from associating with a felon? How would that decision be affected if the person's spouse or child was a felon? If courts did not want to spend $175 a week in promoting compliance with this condition—even if $175 a week was just the right amount to change behavior—this condition arguably should not be imposed.

In addition to incentives and sanctions, I propose a careful examination of other behaviorist tools. Both Maconochie and Crofton emphasized, for example, that true reform was only possible if prisoners cooperated in their own amendment.[412] To encourage this, they relied not only on concrete rewards and penalties, but also on factors such as enhancing due process protections and increasing the perceived fairness of the system.

Tom Tyler has argued that people are much more likely to cooperate with the law when they accept the law's legitimacy.[413] He has shown how people's perceptions of legitimacy are deeply impacted by their experiences of procedural justice. Tyler's insight—that cooperation with the law is more closely linked to an internalized acceptance of the law's legitimacy than to the externalized imposition of sanctions or rewards—should be integrated into the supervised release system.[414]

3. An Autonomy Approach

A third way of approaching supervised release is to question whether, given the lack of clear consensus as to the purpose of the

412 *See supra* Parts I.A & I.B (describing Maconochie and Crofton's theories of indeterminate sentencing).

413 TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178, 276 (2006).

414 *See id.* at 162–63.

current system, a sufficiently robust democratic determination has been made to justify its impact on the autonomy of released prisoners. Congress has never considered the issue facially; rather, the current system has evolved through a patchwork of technical amendments and court decisions, the overall structure of which has been largely misunderstood. Both the crime control approach and the transitional rehabilitation approach could be criticized on this front.

As an alternative idea, I therefore propose that we consider whether supervised release in its present form should be completely eliminated. Defendants would serve their full prison terms, minus any good time allowances, and then the possibility of prison would be over. Release dates would be predictable and certain, transparency would be restored, and the autonomy of released prisoners would be respected.

In this way, punishment would be confined to the determinate prison term. This would provide for a "good system of punishment"—in the words of the British parliamentary committee that investigated penal transportation in 1837—because at the end of the term, prisoners would be considered to have "atoned" for their crimes.[415] The Department of Probation could still provide post-release services, including drug treatment and job placement, but participation in these programs would be voluntary. This is reminiscent of the regime for released prisoners advocated by Jebb in England.[416]

Abandoning conditional release and indeterminacy would not mean abandoning efforts at reintegration. As advocated by Maconochie, the prison sentence, itself, could be used for rehabilitative treatment, job training programs, and preparing inmates for release.[417] As suggested by the Senate Report on the SRA, transition services implemented by the BOP could replace post-release community supervision as the primary locus of reintegrative efforts.[418] Currently, however, the BOP does relatively little to provide these kinds of services.[419]

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[415] SELECT COMMITTEE REPORT, *supra* note 16, at xxix. This, however, does not take into account the many collateral consequences affecting people with felony convictions, including restrictions on employment and access to government benefits.

[416] For a description of Jebb's philosophy, see *supra* Part I.B.

[417] For a description of Maconochie's philosophy, see *supra* Part I.A.

[418] S. REP. NO. 98-225, at 57 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3240.

[419] In 2010, for example, only four percent of federal prisoners were in community corrections centers (or halfway houses). *See* BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, *supra* note 354, app. tbl.2 at 7. The BOP severely restricts the number of inmates who may participate in its 500-hour Comprehensive Drug and Alcohol Program. *See* Alan Ellis & J. Michael Henderson, *Sentencing: Changes to the BOP Residential Drug Abuse Program*, THE CHAMPION, Nov. 2009, at 50 (describing several categories of inmates not eligible for the program).

If the ultimate goal is reintegration, for example, the sizable resources that we now spend on supervised release might be productively transferred to job programs inside and outside prison. As Joan Petersilia has documented, "[t]he majority of inmates leave prison with no savings, no immediate entitlement to unemployment benefits, and few employment prospects."[420] This kind of instability, a preoccupation of penologists like Crofton and Brockway, is perhaps the biggest impediment to reintegration for a broad category of offenders and must be addressed.

Conclusion

In this Article, I have traced the conceptual discourse that began with the indeterminacy movement of the nineteenth century and led into the determinacy movement of the twentieth century. I have shown how misunderstandings of this historical discourse have been incorporated into legislative and judicial decisions, resulting in the conceptually unstable supervised release system we have today. Based on this analysis, I have attempted to lay out a framework for understanding supervised release as it now exists. Without such a framework, we cannot hope to make principled decisions about how supervised release should be structured and experienced in the future.

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[420] Petersilia, *supra* note 8, at 5.