TERMINATING SUPERVISION EARLY[†]

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Abstract

Community supervision is a major form of criminal punishment and a major driver of mass incarceration. In 2022, over 3.5 million people in the United States were serving terms of probation, parole, or supervised release, and revocations account for nearly half of all prison admissions. Although supervision is intended to prevent crime and promote reentry, it can also interfere with the defendant's reintegration by imposing onerous restrictions as well as punishment for non-criminal technical violations. Probation officers also carry heavy caseloads, which forces them to spend more time on enforcing conditions and less on providing support.

Fortunately, the criminal justice system also includes a mechanism to solve these problems: early termination of community supervision. From the beginning, the law has always provided a way for the government to cut short a defendant's term of supervision if the defendant can demonstrate that they have reformed themselves. Recently, judges, correctional officials, and activists have all called to increase rates of early termination to save resources, ease the reentry process, and encourage rehabilitation. Yet despite this attention from the field, there are no law review articles on terminating supervision early.

In this Article, I provide the first comprehensive analysis of early termination of community supervision. First, I recount the long history of early termination, from the invention of probation and parole in the 1800s to the Safer Supervision Act of 2023. Second, I identify and critique recent legal changes that have made it harder for federal criminal defendants to win early termination of supervised release. Finally, I propose the first empirically-based sentencing guideline on terminating supervision early, which I recommend in most cases after eighteen to thirty-six months of supervised release. If community supervision drives mass incarceration, then early termination offers a potential tool for criminal justice reform.

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INTRODUCTION

Community supervision is a major form of criminal punishment and a "major driver" of mass incarceration.[1] In 2022, over 3.5 million people in the United States were serving terms of probation, parole, or supervised release,[2] which was about twice the number of people in jails and prisons.[3] Defendants sentenced to community supervision may be imprisoned without a jury trial for violating any of a long list of conditions regulating their "relationships, movement, activities, finances, and personal habits."[4] About one-third of defendants are "unsuccessful" in abiding by the conditions of their supervision.[5] In 2021, over 230,000 defendants

1. Press Release, Phila. Dist. Att'y's Off., New Philadelphia D.A.O. Policies Announced March 21, 2019 to End Mass Supervision (Mar. 21, 2019), https://www.docdroid.net/APYQxII/philadelphia-district-attorneys-offices-policies-to-end-mass-supervision-pdf.

2. DANIELLE KAEBLE, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2022, at 1 (2024), https://bjs.ojp.gov/document/ppus22.pdf. Although probation, parole, and supervised release are all forms of community supervision, they differ in their relation to the defendant's term of imprisonment. *See* Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381, 1389–90 (2024). In the federal system, probation is supervision imposed in lieu of imprisonment, parole is supervision imposed upon early release from imprisonment, and supervised release is supervision imposed to follow imprisonment. *Id.*; *see also id.* at 1389 n.39 (noting that some states use different terms to describe these forms of supervision).

3. JACOB KANG-BROWN, STEPHEN JONES, JOYCE TAGAL & JESSICA ZHANG, VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN 2022, at 2 (2023), https://www.vera.org/downloads/publications/People-in-Jail-and-Prison-in-2022.pdf.

4. Renagh O'Leary, *Supervising Sentencing*, 57 U.C. DAVIS L. REV. 1931, 1945 (2024); FED. R. CRIM. P. 32.1(b); *see also* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 300–15 (2016) (listing common supervision conditions).

5. PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 9 (2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf.

had their community supervision revoked and were sentenced to imprisonment,[6] accounting for nearly forty-four percent of all prison admissions.[7] A coalition of probation and parole leaders recently warned that "mass supervision" has become "overly burdensome" and "punitive . . . especially for people of color."[8]

In theory, community supervision plays a "dual role" that is "part law enforcement" and "part social work."[9] The system aims both to ensure that the defendant does not reoffend and to support their return to society. Balancing these dueling interests, however, is not always easy. A term of supervision can "provide meaningful assistance" in the form of treatment, training, resources, and encouragement, yet also "comes with the stigma of a criminal record, potentially degrading experiences . . . onerous financial and time constraints, and the threat of revocation."[10] In other words, the goal of protecting the community from the defendant may sometimes interfere with the goal of helping that defendant reintegrate into the community.

Critics argue that community supervision has become "too punitive and focused on suppression, surveillance, and control, rather than well-being and growth."[11] Supervision itself increases the risk of imprisonment by subjecting the defendant to enhanced surveillance as well as punishment for non-criminal technical violations.[12] This combination "can trap some defendants, particularly substances

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6. Press Release, Leah Wang, Prison Pol'y Initiative, Punishment Beyond Prisons 2023: Incarceration and Supervision by State (May 2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023.html#:~:text=In%202021%2C%20over%20230%2C000%20people,into%20a%20prison%20or%20jail.

7. COUNCIL OF STATE GOV'TS, SUPERVISION VIOLATIONS AND THEIR IMPACT ON INCARCERATION 4 (2024), https://projects.csgjusticecenter.org/supervision-violations-impact-on-incarceration/wp-content/uploads/sites/15/2024/01/Supervision-Violations-Impact-2024_508.pdf.

8. EXIT: EXECS. TRANSFORMING PROB. & PAROLE, STATEMENT ON THE FUTURE OF PROBATION & PAROLE IN THE UNITED STATES (2020), https://static1.squarespace.com/static/5d2cd5943236f70001aeee14/t/5fb2ef2eefbbc40e681ebbf1/1605562158191/EXiT+Statement.pdf.

9. *Probation and Pretrial Services—Mission*, U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission (last visited Feb. 22, 2025); *see also* United States v. Jennings, 652 F.3d 290, 301 (2d Cir. 2011) (explaining a probation officer's supervisory duties "necessarily overlap some law enforcement duties"); Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1, 5 (2024) (describing the "dual purposes" of supervised release as "rehabilitation" and "protection of the public").

10. Michelle S. Phelps & Ebony L. Ruhland, *Governing Marginality: Coercion and Care in Probation*, 62 SOC. PROBS. 799, 800 (2022).

11. EXIT: EXECS. TRANSFORMING PROB. & PAROLE, *supra* note 8; *see* VINCENT SCHIRALDI, MASS SUPERVISION: PROBATION, PAROLE, AND THE ILLUSION OF SAFETY AND FREEDOM 17 (2023); *see also* Underhill, *supra* note 9, at 3 (noting revocations of supervised release send defendants back to prison largely for technical violations).

12. *See* CLARENCE OKOH & ISABEL CORONADO, CTR. FOR L. & SOC. POL'Y, RELOCATING REENTRY: DIVESTING FROM COMMUNITY SUPERVISION, INVESTING IN "COMMUNITY REPAIR" 2 (2022), https://www.clasp.org/wp-content/uploads/2022/09/2022.9.7_Relocating-Reentry.pdf; *see also* CATIE CLARK, WILLIAM D. BALES, SAMUEL SCAGGS, DAVID ENSLEY, PHILIP COLTHARP & THOMAS G. BLOMBERG, ASSESSING THE IMPACT OF POST-RELEASE COMMUNITY SUPERVISION ON POST-RELEASE RECIDIVISM AND EMPLOYMENT 39 (2015), https://www.ojp.gov/pdffiles1/nij/grants/249844.pdf (noting reimprisonment of individuals under supervision may be due to technical violations).

abusers, in a cycle where they oscillate between supervi[sion] . . . and prison."[13] As the Department of Justice (DOJ) has warned, "overly lengthy supervision terms" and "numerous and potentially burdensome requirements . . . can lead to unnecessary violations and reincarceration."[14] Imprisonment, in turn, deprives the defendant of access to "jobs, housing, basic public benefits, and even the right to live in this country," creating a "revolving door of incarceration and poverty" that "contribute[s] to recidivism."[15] Studies show that one-quarter to two-thirds of revocations are for technical violations[16] and that "long probation sentences are not associated with lower rates of recidivism."[17]

Another reason that community supervision currently seems to emphasize law enforcement over social work is that the number of people under supervision has increased dramatically over recent decades, while funding for the system has not.[18] As a result, probation officers carry "significant caseloads that can exceed 100 cases per officer," which "limit[s] their ability to provide appropriate supervision to those who need it."[19] With resources stretched thin, probation officers are forced to "spend disproportionate time on enforcement (that is, investigating violations of conditions of supervised release and recommending punishments for the violators) and have little time left over for suggesting appropriate conditions and helping the probationer to comply with them."[20]

Fortunately, the criminal justice system also includes a mechanism to solve these problems: early termination of supervision. From the beginning, the law has always provided a way for the government to cut short a defendant's term of supervision if the defendant can demonstrate that they have reformed themselves. Recently, courts and correctional officials have called to increase rates of early

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13. United States v. Trotter, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018).

14. U.S. DEP'T OF JUST., RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE 1 (2023), https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf.

15. J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 42 (2009).

16. U.S. DEP'T OF JUST., *supra* note 14, at 16; COUNCIL OF STATE GOV'TS, CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISONS AND BURDENING BUDGETS 1 (2019), https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf.

17. PEW CHARITABLE TRS., STATES CAN SHORTEN PROBATION AND PROTECT PUBLIC SAFETY 1 (2020), https://www.pewtrusts.org/-/media/assets/2020/12/shorten_probation_and_public_safety_report.pdf.

18. AM. BAR ASS'N, RESOLUTION 604: ABA TEN PRINCIPLES TO REDUCE MASS INCARCERATION 18 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/604.pdf.

19. Safer Supervision Act of 2023, S. 2681, 118th Cong. § 2(3) (2023).

20. United States v. Thompson, 777 F.3d 368, 374 (7th Cir. 2015); *see also* SCHIRALDI, *supra* note 11, at 57–58. As Schiraldi narrates:

> Imagine yourself a probation or parole officer, with a hundred people on your caseload, in a risk-averse office, with limited resources for treatment, education, or employment services . . . . Meanwhile there is one, and only one, really expensive resource you can secure with the stroke of a pen—prison.

Id.

termination to save resources, ease the reentry process, and encourage rehabilitation. For example, Judge Richard Berman of the Southern District of New York urged district judges to "focus[] on early terminations" as a way to "save lots of heartache and millions of dollars."[21] Similarly, a federal probation officer and a rehabilitation clinician highlighted early termination as a positive incentive and a measure to contain costs in the judiciary without compromising the mission of public safety.[22] Even the DOJ has encouraged "reward[ing] good behavior with early termination" in order to "encourage successful reentry" and "focus supervisory resources on those most in need of them."[23]

Activists have also pushed for early termination to promote fairness and equality in the criminal justice system. For example, LaTonya Myers founded the nonprofit organization, Against All Odds, based on her experience serving a term of probation in Philadelphia, with a mission to "support and empower those impacted by mass supervision"[24] by educating them about "their right to petition for early termination."[25] Similarly, the Center for Law and Social Policy, an anti-poverty group, has urged lawmakers to expand programs that would "reduce the length of a term of supervision based on an individual achieving key reentry milestones."[26] Finally, Pew Charitable Trusts published a report arguing for jurisdictions to adopt more generous provisions for early termination as a means to "support[] and

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21. Jacob Schuman, *The Judicial Role in Supervision and Reentry*, 34 FED. SENT'G REP. 318, 321 (2022) (quoting Judge Richard Berman); *see also* Richard M. Berman, *Federal Court Involvement in Supervised Release*, REGUL. REV. (June 28, 2021), https://www.theregreview.org/2021/06/28/berman-federal-court-involvement-supervised-release (indicating that Judge Berman's chambers have taken a more "involved approach to supervised release" including "early termination"). Other district court judges like Jack Weinstein and Stefan Underhill have similarly argued in favor of early termination. *See, e.g.*, United States v. Trotter, 321 F. Supp. 3d 337, 364 (E.D.N.Y. 2018) (Weinstein, J.); Stefan R. Underhill, *Everyday Sentencing Reform*, 87 UMKC L. REV. 159, 166–67 (2018). On the national level, the Judicial Conference of the United States has "endorsed policies that encourage probation offices to terminate . . . offenders from supervision early as a means to limit projected workload growth in probation . . . services." Laura M. Baber & James L. Johnson, *Early Termination of Supervision: No Compromise to Community Safety*, 77 FED. PROB. 17, 17 (2013).

22. Laura Knollenberg & Valerie A. Martin, *Community Reentry Following Prison: A Process Evaluation of the Accelerated Community Entry Program*, 72 FED. PROB. 54 (2008); *see also* Sam Torres, *Early Termination: Outdated Concept in an Era of Punitiveness*, 63 FED. PROB. 35, 41 (1999) (noting early termination "can be used to encourage offenders toward compliance and cooperation"); *see also* David Adair, *Revocation of Supervised Release—A Judicial Function*, 6 FED. SENT'G REP. 190, 192 (1994) (describing early termination of supervised release as one "possible solution[] to the workload problem").

23. U.S. DEP'T OF JUST., *supra* note 14, at 20.

24. ABOVE ALL ODDS, https://www.aboveallodds.org (last visited Jan. 7, 2025).

25. Kirstie Brewer, *'I Studied Law in Jail—Now I Want to Change the System,'* BBC (Sept. 4, 2021), https://www.bbc.com/news/stories-58311196. As part of this work, Above All Odds uses an online worksheet entitled "Pathways to Freedom Probation Termination" which applicants can complete to obtain free assistance from a "dedicated team [who] will gather essential information about your case and provide guidance to maximize your chances of successful early termination." *AAO: Pathways to Freedom Probation Termination—Early Probation Termination Application Assistance Form*, ABOVE ALL ODDS, https://docs.google.com/forms/d/1ZmFJRN__SeGs6JNtf1Sf9OpC26n20wQ0MPaU0ugmSyo/viewform?edit_requested=true (last visited Jan. 7, 2025).

26. OKOH & CORONADO, *supra* note 12, at 11, 14.

encourage[] behavior change while reducing caseloads so probation agencies can concentrate their resources on individuals at higher risk of re-offending."[27]

Despite all this attention from the field, there are no law review articles on early termination of community supervision.[28] Instead, sentencing scholarship is largely prison-centric, focusing primarily on incarceration and capital punishment, not probation, parole, or supervised release. For example, many scholars have written about early-release mechanisms such as parole and compassionate release, yet they have all focused exclusively on early release from *prison*, not early termination of *community supervision*.[29] Even the scholarship that has addressed community supervision has emphasized the punishment of violations via imprisonment, not the administration of the supervision via early termination.[30] Data on this subject is also difficult to find. For example, the DOJ's annual report on probation and parole in the United States contains a surplus of information about the number of defendants sentenced to supervision and revoked for violations, but nothing comparable on early terminations.[31] The little data that does exist suggests that average rates of early termination are between ten and twenty percent, making this a

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27. PEW CHARITABLE TRS., *supra* note 17, at 19; *see also* Miriam Krinsky & Monica Fuhrmann, *Building a Fair and Just Federal Community Supervision System: Lessons Learned from State and Local Reform Efforts*, 34 FED. SENT'G REP. 340, 346 (2022) ("[F]ederal prosecutors, supervision officials, and judges should review cases for opportunities to terminate people from supervision early . . . ."); EXEC. SESSION ON CMTY. CORRS., HARV. KENNEDY SCH. PROGRAM IN CRIM. JUST. POL'Y & MGMT., TOWARD AN APPROACH TO COMMUNITY CORRECTIONS FOR THE 21ST CENTURY: CONSENSUS DOCUMENT OF THE EXECUTIVE SESSION ON COMMUNITY CORRECTIONS 4 (2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Consensus_Final2.pdf ("Supervision periods should . . . be able to terminate short of [the maximum] cap when people under supervision have achieved the specific goals mapped out in their individualized case plans . . . .").

28. The *Federal Probation Journal*, published by the Administrative Office of the United States Courts, has published two short but extremely helpful articles by practitioners on the subject. *See* Baber & Johnson, *supra* note 21; Torres, *supra* note 22.

29. *See, e.g.*, Kristen Bell, *The Forgotten Jurisprudence of Parole and State Constitutional Doctrines of Vagueness*, 44 CARDOZO L. REV. 1953 (2023); Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *The Future of Parole Release*, 46 CRIME & JUST. 279 (2017); Kathy Boudin, *Hope, Illusion, and Imagination: The Politics of Parole and Reentry in the Era of Mass Incarceration*, 38 N.Y.U. REV. L. & SOC. CHANGE 563 (2014); Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1 (2013); Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).

30. *See, e.g.*, Eric S. Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL L. REV. 1375 (2023); Nancy J. King, *Constitutional Limits on the Imposition and Revocation of Probation, Parole, and Supervised Release After* Haymond, 76 VAND. L. REV. 83 (2023); Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881 (2021); Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887 (2014); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180 (2013); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013).

31. *See* KAEBLE, *supra* note 2. All the report provides is the number of "unsatisfactory" exits from supervision, which includes "persons discharged because they were released to special sentence . . . closure due to deportation, pending parole institutional hearing, other revocations, other unsuccessful discharges, and early terminations." *Id.* at 31.

significant feature of the criminal justice system that deserves serious academic attention.[32]

In this Article, I provide the first comprehensive analysis of terminating supervision early, focusing on the federal system of supervised release. My argument sits at the intersection of two separate tracks in sentencing scholarship. The first is a small but growing body of work on probation, parole, and supervised release, which describes community supervision as "both an alternative to prison and as a net-widener that expands carceral control."[33] The second is an established literature on "back-end" prison release measures like clemency, compassionate release, and good-time credit, which identifies these mechanisms as "second look" devices that provide "important tool[s] for decarceration."[34] Tying these threads together, I argue that because community supervision is a net-widener for the prison system, terminating supervision early offers a potential tool for criminal justice reform.

My argument proceeds in three parts: history, law, and empirical analysis. In Part I, I describe the long history of early termination, from the invention of probation and parole in the 1800s to the Safer Supervision Act of 2023 (SSA). While many legal scholars claim that federal criminal law uses a determinate sentencing system, I show that the persistence of early termination makes federal community supervision fundamentally indeterminate. In Part II, I describe and critique recent legal changes that have made it harder for federal criminal defendants to win early termination of supervised release. Finally, in Part III, I propose the first empirically-based sentencing guideline on this subject in order to reduce disparities in rates of early termination. Using federal sentencing data, I recommend that judges grant early termination in most cases after eighteen to thirty-six months of supervised release.

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32. *See, e.g.*, United States v. Harris, 258 F. Supp. 3d 137, 149 n.10 (D.D.C. 2017) (providing federal early-termination rate of twelve percent); PEW CHARITABLE TRS., *supra* note 17, at 21 (noting that in 2012 the New York City early-termination rate for probation was seventeen percent).

33. Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 28 FED. SENT'G REP. 283, 283 (2016) (discussing the "relationship between probation and incarceration in the era of mass incarceration"); *see also* Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 2 (2023) (noting that community supervision methods were proposed as alternatives to incarceration but now drive mass incarceration); Jacobi et al., *supra* note 30, at 890 (describing parole as both a means of community reintegration and of "blackmailing parolees into . . . recidivism"); Scott-Hayward, *supra* note 30, at 182–213 (discussing supervised release as intended for rehabilitation but focused in practice on imprisonment); Doherty, *supra* note 30 (noting that supervised release was intended to be consistent with a determinate prison term, but has evolved so that prison terms are indeterminate).

34. Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 632–33 (2022); *see* Meredith Esser, *Unpunishment Purposes*, 102 MINN. L. REV. (forthcoming 2025) (discussing second look resentencing to demonstrate that a "rethinking of the purposes of punishment is required" for decarceration decisions); Aliza Hochman Bloom, *Reviving Rehabilitation as a Decarceral Tool*, 101 WASH. U. L. REV. 1989, 1994 (2024) (noting "second looks" allow for "reconsideration of lengthy prison sentences"); Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 101, 125–26 (2019); Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 155 (2015).

I. HISTORY OF EARLY TERMINATION

From the invention of probation and parole in the 1800s to the present day, the criminal law has always provided a way for the government to cut short a defendant's term of supervision if they demonstrated good behavior. The history of early termination complicates the standard narrative of federal sentencing law. While courts and scholars typically claim that the replacement of parole with supervised release in 1984 made federal sentencing more determinate, the persistence of early termination means that sentences of federal community supervision remain fundamentally indeterminate.

A. Parole, Probation, and Supervised Release

To understand the history of early termination, it is essential to start with the history of community supervision. Federal community supervision comes in "three basic forms: parole, probation, and supervised release."[35] Parole and probation emerged in the early 1800s, and Congress invented supervised release to replace parole in 1984.[36] Typically, scholars described parole and probation as indeterminate punishments, because both forms of supervision made the length of the defendant's sentence contingent on their future behavior.[37] According to this theory, supervised release made federal sentencing more determinate by fixing the length of the defendant's prison sentence at the time of sentencing, with no opportunity for early release.

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35. Schuman, *supra* note 2, at 1389.

36. *Id.* at 1391. In a prior article, I identified a Founding Era equivalent to community supervision, the "recognizance to keep the peace or for good behavior," a common-law device dating back to the 1300s. *See id.* at 1402–17. In this Article, however, I follow the conventional timeline, beginning with the invention of parole and probation in the early 1800s. Even during the Founding Era, however, there is evidence suggesting that defendants could win early termination of a "recognizance" as a reward for good behavior. *See, e.g.*, 2 THOMAS WALTER WILLIAMS & H. NUTTALL TOMLINS, THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE; COMPRISING ALSO THE AUTHORITY OF PARISH OFFICERS 489 (3d ed., London, J. Stockdale 1812) ("[I]f any person bound for his good abearing shall within the seven years come before the justices where the offence was committed, in quarter-sessions, and there confess his offence, that he is sorry therefore; and satisfy the party grieved according to this act, the justices may discharge the recognizance."); 6 JACOB GILES & T.E. TOMLINS, THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW 152 (London, I. Riley & P. Byrne 1811). Highlighted in the law dictionary:

> It is the constant course of the Court of King's Bench, to take a recognizance for twelve months, and if no indictment is within that time preferred against the party bound to keep the Peace, it may, at the expiration thereof, be discharged. This seems also to be the practice of the Court of Chancery; for upon a motion to discharge a writ of *supplicavit*, it was refused: And by my Lord *Macclesfield* Chancellor,—This application is too early; let the party stay till the year is out, and behave himself quietly all that time.

Id. (citation omitted); *see also* JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776), at 514 (1944) ("[W]e have noticed occasional examples, and even one case as late as 1737 where in open Sessions a defendant bound over was given a discharge 'on his promise that he will very well behave himself for the future.'").

37. *See infra* notes 73–76 and accompanying text.

The history of parole begins at the start of the nineteenth century, on the island of Tasmania, known at the time as "Van Diemen's Land."[38] In 1836, Alexander Maconochie, a British colonial official, visited the island to investigate the mistreatment of prison laborers.[39] He reported that prisoners were forced to work long hours, in rough conditions, for no pay, subject to "severe regulations" and "physical coercion."[40] After an "allotted period," he noted, prisoners could apply for a "ticket of leave," which would allow them relief from further labor.[41] However, ticket holders were still subject to strict surveillance and restrictions, with a "very large proportion" eventually sent back for violations.[42]

Maconochie published a book condemning what he saw in Van Diemen's Land as a "disguised system of slavery," which made prisoners "bad men instead of good."[43] Rather than exploit convicted criminals, he argued, the government should try to rehabilitate them.[44] To achieve this goal, he proposed that prisoners should be sent to the colony and required to earn a certain number of "marks of commendation" to win release, which they would be awarded for good behavior.[45] Once a prisoner obtained the required number of marks, they should be granted a ticket-of-leave from the colony, which would release them from confinement subject to restrictions on their "immediately succeeding conduct and associations."[46] By adjusting the period of confinement based on the prisoner's behavior, he argued, the system would "induce" them "to behave well, and work out their further liberation . . . by inspiring a just confidence in their future good intentions."[47]

Maconochie eventually tested out his theories as Governor of a prison colony on Norfolk Island, apparently to some success.[48] His real influence, however, was felt in the United Kingdom and United States, where reformers adopted his ideas.[49] After Australia stopped accepting prisoners in the 1850s, the "sudden pressure" on domestic prisons in England and Ireland led officials to begin offering earned release in exchange for good behavior.[50] Meanwhile, in the United States, humanitarian advocates declared support for the "progressive classification of prisoners,

38. *See* Doherty, *supra* note 30, at 966.

39. *Id.* at 964, 966; *see also* ALEXANDER MACONOCHIE, AUSTRALIANA: THOUGHTS ON CONVICT MANAGEMENT, AND OTHER SUBJECTS CONNECTED WITH THE AUSTRALIAN PENAL COLONIES (London, J.W. Parker 1839).

40. MACONOCHIE, *supra* note 39, at 2–10.

41. *Id.* at 3.

42. *Id.* at 4. Eventually, prisoners' sentences would "expire, with, or without, having obtained tickets-of-leave," at which point they would "become entirely free, and mix as such with the remainder of society." *Id.*

43. *Id.* at 5, 11, 17–18, 37.

44. *Id.* at 18.

45. *Id.* at 17–18, 21.

46. *Id.* at 17–18, 118–19. However, Maconochie cautioned against the "multiplication of such restrictions," which he said could "do much more harm than good." *Id.* at 119.

47. *Id.* at 18.

48. Doherty, *supra* note 30, at 970–77.

49. *Id.* at 971.

50. *Id.* at 972–80.

based on character and worked on some well-adjusted mark system," followed by a "stage of conditional liberty, or ticket-of-leave."[51] In 1876, the reform movement achieved its first major success in New York, where the state legislature created the "Elmira Reformatory" to implement Maconochie's ideas.[52]

Like in an ordinary prison, prisoners sentenced to Elmira had to serve a fixed number of years in confinement.[53] Unlike an ordinary prison, however, the prison's Board of Managers also had the "power to establish rules and regulations under which prisoners within the reformatory may be allowed to go upon parole outside of the reformatory buildings and inclosure . . . ."[54] If a parolee violated a rule or regulation, the Board of Managers could "return[]" them to prison to serve the rest of their original sentence.[55] As Elmira's first Superintendent, Zebulon Brockway, explained, this system was intended to encourage "reformation" by putting "the duty and responsibility of shortening" the sentence "upon the prisoner himself."[56]

Elmira was considered a success, inspiring similar legislation across the country.[57] "By 1898, at least twenty states had adopted parole laws."[58] "By the 1950s, every state in the Union . . . had incorporated indeterminate sentencing and parole release into its core criminal justice policy."[59] The federal government created its own parole system in the Parole Act of 1910, which allowed prisoners to earn early release after serving one-third of their sentences.[60] One supporter praised the law as embodying "the enlightened sentiment of the day, the progressive spirit of the times, and . . . the philanthropy of the day and age," with an aim to "aid suffering humanity and at the same time lend a helping hand toward the reformation of convicted criminals."[61]

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51. *Declaration of Principles Adopted and Promulgated by the Congress*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 541, 557 (Albany, Weed, Parsons & Co. 1871); *see also* BEN AUSTEN, CORRECTION: PAROLE, PRISON, AND THE POSSIBILITY OF CHANGE 10 (2023) (describing the National Congress on Penitentiary and Reformatory Discipline).

52. Doherty, *supra* note 30, at 980–81.

53. Warren F. Spalding, *The Indeterminate Sentence: Its History and Development in the United States*, *in* THE INDETERMINATE SENTENCE AND THE PAROLE LAW: REPORTS PREPARED FOR THE INTERNATIONAL PRISON COMMISSION, S. DOC. NO. 55-159, at 11 (1899).

54. *Id.* The word "parole" comes from the French for "word of honor." Doherty, *supra* note 30, at 981.

55. Doherty, *supra* note 30, at 981.

56. Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 27 (1925).

57. Doherty, *supra* note 30, at 982 (noting that after Elmira, twelve states established similar reformatories). Later reports cast Brockway's legacy as a penal reformer into doubt. *See* ALEXANDER PISCIOTTA, BENEVOLENT REPRESSION: SOCIAL CONTROL AND THE AMERICAN REFORMATORY-PRISON MOVEMENT 34 (1994) (describing allegations that Brockway engaged in "cruel, brutal, inhuman, degrading excessive and unusual punishment of inmates").

58. Doherty, *supra* note 30, at 983.

59. *Id.*

60. Parole Act of 1910, Pub. L. No. 61-269, 36 Stat. 819 (repealed 1984) (establishing a system of parole for United States prisoners).

61. Doherty, *supra* note 30, at 984–85.

Probation emerged around the same time as parole in Boston, Massachusetts.[62] During the 1820s and 1830s, prosecutors and judges in the city began to encourage low-level offenders to plead guilty by offering to postpone their sentencing hearings on the condition that they find sureties to post a bond for their good behavior.[63] This practice was described as putting a case "on file."[64] Originally, "on file" sentencing was reserved for defendants wealthy enough to find sureties.[65] In 1841, however, a cobbler named John Augustus spontaneously invented the probation system when he volunteered to serve as surety for an indigent defendant he "met in court one morning" charged with being a "common drunkard."[66] He spent the next three weeks counseling the man, and at the rescheduled sentencing hearing, the judge was so impressed with the defendant's progress that he agreed to forgo the "usual term of incarceration."[67] Augustus went on to volunteer as surety for hundreds of other indigent defendants, asking judges to release them under his supervision for a "season of probation."[68]

Inspired by Augustus's work, Massachusetts enacted the country's first probation statutes in 1878 and 1880, officially authorizing sentencing judges to "permit the accused to be placed on probation, upon such terms as it may deem best," under the supervision of a "paid probation officer."[69] Like parole, the probation system caught on and by 1925, "all forty-eight states . . . had enacted probation statutes."[70] Congress passed its own probation act that year giving judges the power to sentence defendants to terms of "probation," subject to such "terms and conditions as they may deem best," and to "revoke" it for violations.[71] Justice Taft vaunted the system as "the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence."[72]

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62. Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1700, 1707 (2019).

63. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 957–58 (2000).

64. Doherty, *supra* note 62, at 1707–08. If a defendant whose case was put "on file" behaved for long enough, then the judge would dismiss their case. *Id.* at 1708. But "if a prosecutor later came to believe that a defendant had violated one of the conditions," then they could "move for the defendant to be sentenced on the guilty plea." *Id.*

65. *Id.*

66. *Id.* at 1708–09.

67. *Id.* at 1709.

68. *Id.* The word "probation" comes from the Latin word for "period of proving or trial." Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 156 (1997).

69. Doherty, *supra* note 62, at 1710–11.

70. *Id.* at 1711–12.

71. Act of Mar. 4, 1925, Pub. L. No. 68-596, 43 Stat. 1259 (1925) (establishing a probation system in the United States courts except for in the District of Columbia). Before 1925, federal judges sometimes put cases "on file," but the Supreme Court held this practice unlawful without legislative approval in *Ex parte United States*, 242 U.S. 27 (1916), leading Congress to pass the Probation Act. *See* United States v. Murray, 275 U.S. 347, 357–58 (1928).

72. *Murray*, 275 U.S. at 358.

Legal scholars describe parole and probation as forms of "indeterminate" sentencing because the defendant's punishment was not fixed at the time the sentence was imposed but instead remained subject to change depending on their future conduct.[73] As Fiona Doherty explains, parole was indeterminate because the length of the prison sentence could be reduced as a reward for good behavior.[74] Similarly, she notes, probation was indeterminate because the "scale of the punishment" was influenced "not primarily by the defendant's past conduct (i.e., the offense of conviction), but by the defendant's future conduct (i.e., the extent to which the defendant obeys the rules of the game going forward)."[75] Although parole replaced the end of a prison sentence whereas probation allowed the defendant to avoid prison entirely, both were indeterminate because both varied the defendant's sentence to encourage rehabilitation.[76]

During the 1960s and 1970s, however, indeterminate sentencing began to lose support. Critics on the left questioned whether parole officials could accurately or fairly assess whether prisoners were rehabilitated, criticizing early-release decisions as "inconsistent, opaque, and rife with bias and discrimination."[77] Skeptics on the right challenged the rehabilitative theory of imprisonment itself, favoring a more retributive approach to punishment.[78] Both sides came to believe that parole terms were arbitrary because the duration of supervision depended on the "almost sheer accident" of how much time the prisoner had left on their sentence at the time of release, rather than their actual need for supervision.[79] A bipartisan consensus emerged against early release and in favor of more determinate punishments "known and justified on the day of sentencing."[80]

Based on this "explicit rejection of the rehabilitative ideal," states across the country began to repeal their parole laws and replace them with more "structured sentencing systems."[81] Some jurisdictions "made many crimes ineligible for

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73. *See* Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 3 & n.1 (2015); Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 381–83 (2005).

74. *See* Doherty, *supra* note 30, at 968–69, 976.

75. Doherty, *supra* note 62, at 1718.

76. *See Murray*, 275 U.S. at 355. The Court in *Murray* described the parole and probation systems as follows:

> Under the parole law the defendant must be committed and serve at least one-third of the sentence in full. . . . This usually means . . . branding of the delinquent as a convict and taking him away from his environment and associates in disgrace. The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to a prison than after it.

Id.

77. AUSTEN, *supra* note 51, at 49; Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 600 (2020).

78. Doherty, *supra* note 30, at 994.

79. S. COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 98-225, at 1, 122, 124 (1983).

80. Doherty, *supra* note 30, at 993 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 98 (1973)).

81. Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. STATE L.J. 387, 395 (2006).

parole, limiting the discretion of their parole boards to decide release dates," while others completely abolished parole.[82] By "the year 2000, every state in the country had enacted determinate sentencing reforms."[83] The federal government eliminated its own parole system in the Sentencing Reform Act of 1984 (SRA), which officially rejected the rehabilitative theory of imprisonment[84] and required federal criminal defendants to serve their prison sentences in full, with no opportunity for early release on parole.[85] Although the SRA retained probation as an option for sentencing judges, it was limited to minor offenders and is now rarely imposed.[86]

Even as jurisdictions made sentencing more determinate, they did not wish to leave defendants "without the community supervision inherent in the early release system."[87] To replace parole supervision after release, therefore, they created new kinds of post-release supervision known by a variety of names, such as "consecutive probation" or "special parole."[88] In the SRA, this form of supervision was called "supervised release."[89] Like parole, supervised release is a term of community supervision subject to a list of conditions with violations punishable by imprisonment.[90] Unlike parole, however, supervised release did "not replace a portion of the sentence of imprisonment," but was imposed by the judge at sentencing to be served after the completion of the prison term.[91] "In effect," the legislative history explains, "the term of supervised release . . . takes the place of parole supervision," except that "probation officers will only be supervising those releasees from prison

82. AUSTEN, *supra* note 51, at 55.

83. Schuman, *supra* note 77, at 601–03. More recently, a few states have reversed course and returned to systems of early release by "expanding eligibility and increasing the chances" for parole. AUSTEN, *supra* note 51, at 121.

84. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 1988 (codified as amended at 18 U.S.C. § 3582(a)). The Supreme Court has interpreted the SRA to require that a court deciding whether to impose a prison sentence, and what length that sentence should be, "consider the specified rationales of punishment *except for* rehabilitation, which it should acknowledge as an unsuitable justification for a prison term." Tapia v. United States, 564 U.S. 319, 327 (2011).

85. Doherty, *supra* note 30, at 995–96. Going forward, defendants would be required to serve eighty-five percent of their prison sentences, with a small amount of "good time" credit awardable at the sole discretion of the Bureau of Prisons. *Id*.

86. *See generally* Cecelia Klingele, *What's Missing? The Absence of Probation in Federal Sentencing Reform*, 34 FED. SENT'G REP. 322 (2022) (noting that there has been a decline in the use of probation following the enactment of the SRA).

87. Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1827–28 (2022) (quoting Barbara Meierhoffer Vincent, *Supervised Release: Looking for a Place in a Determinate Sentencing System*, 6 FED. SENT'G REP. 187, 187 (1994)).

88. Miranda A. Galvin, *Stacking Punishment: The Imposition of Consecutive Sentences in Pennsylvania*, 56 CRIMINOLOGY & PUB. POL'Y 567, 588 n.1 (2022); MICHELLE KIRBY, OFF. OF LEGIS. RSCH., SPECIAL PAROLE (2018), https://www.cga.ct.gov/2018/rpt/pdf/2018-R-0038.pdf.

89. S. COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 98-225, at 123, 125 (1983).

90. Originally, violations were punishable as contempt of court, but two years later, Congress provided for punishment via revocation proceedings. *See* Doherty, *supra* note 30, at 1000–03.

91. U.S. SENT'G GUIDELINES MANUAL ch. 7, pt. A(2)(b), introductory cmt. (U.S. SENT'G COMM'N 2024).

who actually need supervision, and every releasee who does need supervision will receive it."[92]

According to the standard "story line" of federal sentencing law,[93] the SRA marked "a significant break with prior practice"[94] that "ma[d]e prison terms more determinate."[95] Rather than using prisons to rehabilitate criminals until they were ready for release, lawmakers now wanted them to "serve the great bulk of [their] assigned term" in prison.[96] This change was intended to reduce sentencing disparities, improve transparency, and promote a more retributive approach to imprisonment.[97] The replacement of parole with supervised release also made sentencing more determinate because "[n]o matter how the prisoner behave[d]," he now had to "serve his term of imprisonment in full, followed by his term of supervised release."[98]

B. Early History of Early Termination

The claim that abolishing parole made sentencing more determinate, however, overlooks the long history of terminating supervision early.[99] From the beginning, the law has always provided a way for the government to cut short a defendant's term of supervision if the defendant could demonstrate good behavior. The possibility of early termination meant that the duration of supervision was not fixed at the time of sentencing but instead remained subject to change depending on the defendant's future conduct. Just like parole and probation gave defendants an incentive to rehabilitate themselves by offering to shorten their terms of imprisonment, so too did early termination offer to shorten terms of supervision to encourage reform outside prison walls.

Early termination is as old as community supervision itself. The inventor of parole, Alexander Maconochie, expressly advocated for terminating supervision early in order to encourage prisoners to reform themselves after their release from the penal colony.[100] Upon granting a ticket-of-leave, he argued, "the spirit of the system already begun should be continued unimpaired to the end," by providing higher classes of tickets as a way of "offering encouragements, rather than imposing restrictions."[101] He explained:

> For this purpose I would fix a period (say two or three years), when, in the absence of indictable offence, the lower class ticket should be exchanged for the

92. S. REP. NO. 98-225, at 125.
93. Tapia v. United States, 564 U.S. 319, 323 (2011).
94. Johnson v. United States, 529 U.S. 694, 724–25 (2000) (Scalia, J., dissenting).
95. United States v. Haymond, 588 U.S. 634, 651 (2019).
96. *Id*. at 651–52.
97. ARTHUR W. CAMPBELL, LAW OF SENTENCING § 4:3, Westlaw (3d ed. database updated Oct. 2023).
98. Schuman, *supra* note 77, at 627.
99. *See* Tapia v. United States, 564 U.S. 319, 323–25 (2011).
100. MACONOCHIE, *supra* note 39, at 17–18, 21.
101. *Id*. at 120.

> higher . . . . The absence of police offence also should . . . shorten this period;—length of service with one master, with a satisfactory certificate from him, should further abridge it . . . . Gradations of value might be further given to the higher ticket, according to the circumstances in which it was obtained. . . . [T]o this might be added various privileges, according to the time which the holders occupied in serving for it, and the consequent earnestness and steadiness which they evinced in seeking it. These privileges might be eligibility for employment under Government . . . or certain advantages in entering hospitals, or in old age,—or even early complete liberation . . . .[102]

Maconochie put this idea into practice as Governor of Norfolk Island, where he allowed well-behaved ticketholders to be released early from supervision in exchange for good behavior.[103] Without this enticement, he discovered, they "lacked any further incentive to obtain marks and were in danger of lapsing into complete idleness."[104]

The Elmira Reformatory in New York similarly provided a mechanism for parolees to win early termination of supervision. In addition to granting early release on parole, the prison's Board of Managers also had the power to grant parolees "absolute release" if there was "a strong or reasonable probability that [they] will live and remain at liberty without violating the law, and that [their] release is not incompatible with the welfare of society."[105] Typically, the Board of Managers would grant absolute release once a parolee displayed "satisfactory conduct" for at least six months.[106] The Board appears to have been generous in exercising this power. An 1889 report states that of Elmira parolees who were not later returned to prison, only 266 served out the full balance of their sentence, while 1,389 were terminated early.[107]

Zebulon Brockway, the first Superintendent of Elmira, argued that early termination of supervision was key to the rehabilitation of criminal defendants. He explained that his "system of prison treatment" included "three elements, namely: restraint, reformation, conditional and then absolute release."[108] Before granting absolute release, he said, it was "imperative" that the defendant "be trained and fitted for and introduced into his proper niche in the world's work and in the associated life of the community, there to be supervised and tested until . . . completely

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102. *Id*. at 120–21.

103. *See* Stephen White, *Alexander Maconochie and the Development of Parole*, 67 J. CRIM. L. & CRIMINOLOGY 72, 85 (1976) (discussing the work-based ticket-of-leave system on Norfolk Island).

104. *Id*. at 85.

105. Spalding, *supra* note 53, at 11; *see also* Doherty, *supra* note 30, at 981 (discussing the possibility of early conditional release for individuals on parole at Elmira).

106. ALEXANDER WINTER, THE NEW YORK STATE REFORMATORY IN ELMIRA 41 (London, Swan Sonnenschein & Co.1891). According to Brockway, the "minimum parole period was fixed at six months, for the reason that a longer period would be discouraging to the average paroled man, and a shorter term insufficiently steadying." ZEBULON REED BROCKWAY, FIFTY YEARS OF PRISON SERVICE 324 (1912).

107. WINTER, *supra* note 106, at 151–52.

108. Z.R. Brockway, *An Absolute Indeterminate Sentence*, 17 CHARITIES & COMMONS 867, 867 (1907).

established in self-sustenance and orderly conduct."[109] The rehabilitative process was a "trinal unity, a structure supported by these three props before mentioned, neither of which can be spared or weakened without injury to the system."[110] Early termination marked "the third term, the conclusion, of the syllogistic problem."[111]

The first informal forms of probation also offered the possibility of early termination. One study of "on file" cases from Massachusetts in 1847 found two dozen instances of Boston courts "permitting the defendant to plead to a liquor charge, continuing the case for two or more court sessions, and then ultimately entering a *nol pros*," effectively terminating their supervision.[112] Augustus himself described a case involving several youth offenders in which the judge continued to delay their sentencings until they had demonstrated good behavior and their supervision was brought to an end:

> [T]he question of the term of continuance caused considerable discussion. I always urged a protracted continuance, but Mr. Parker [the county attorney] was extremely anxious to have the cases disposed of as early as possible. I wished ample time to test the promises of these youth to behave well in future. Judge Cushing was disposed to allow such cases to stand continued from term to term, and if at the expiration of a certain period, a good report was given of their behavior during the time they had been on probation, their sentences were very light.[113]

In 1908, the Massachusetts Supreme Court even held that judges were *required* to terminate probation early if the defendant could show that they had rehabilitated themselves.[114] The defendant in that case had been convicted of assaulting his wife and "placed on probation," after which "the case was continued several times."[115] Eventually, the defendant asked the court to stop continuing the case and impose a sentence, and his wife testified that "she and her husband were living together and that everything was all right between them."[116] The judge acknowledged that "the object of the probation seemed to have been accomplished," yet decided to let the case "stand[] on the records of the court," at "any time [to] be called up and sentence . . . [to] be imposed."[117] On a writ of mandamus, the Massachusetts Supreme

109. *Id.*
110. *Id.*
111. BROCKWAY, *supra* note 106, at 324.
112. Fisher, *supra* note 63, at 939–41.
113. JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS, FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE: CONTAINING A DESCRIPTION OF HIS METHOD OF OPERATIONS; STRIKING INCIDENTS, AND OBSERVATIONS UPON THE IMPROVEMENT OF SOME OF OUR CITY INSTITUTIONS, WITH A VIEW TO THE BENEFIT OF THE PRISONER AND OF SOCIETY 33 (Boston, Wright & Hasty 1852); *see also* NICHOLAS S. TIMASHEFF, ONE HUNDRED YEARS OF PROBATION: 1841–1941, pt. 1, at 11 (1941) ("When the probation period is ended . . . [i]f for reasons it appears best to extend the period of probation, that is done, and the oversight is continued.").
114. *See* Marks v. Wentworth, 85 N.E. 81, 82 (Mass. 1908).
115. *Id.* at 81.
116. *Id.*
117. *Id.*

Court ordered the judge to immediately impose a sentence, holding that the defendant could not be "compelled to remain for years subject to the risk of being sentenced on this complaint."[118] "Probation looks to reformation," the court explained, "not to a final goal of punishment."[119]

The possibility of early termination means that parole and probation were both "indeterminate" not only with respect to the defendant's *prison sentence* but also with respect to the sentence of *community supervision*.[120] In other words, just like they offered to reduce the length of the defendant's prison term to encourage rehabilitation, they also provided the possibility of early termination of supervision as an "incentive" to "promote compliance with the rules and provisions of supervision that support[] and encourage[] behavior change."[121] Describing parole and probation as forms of "indeterminate" sentencing misses this important distinction between the prison and supervision components of the sentence. Changing a prison sentence and changing a term of supervised release both incentivize good behavior.

C. Federal Early Termination

The reason this distinction between the prison and supervision components of the sentence matters is that during the late twentieth century, federal sentencing law began to change. In the SRA, the federal government replaced parole with supervised release, making prison sentences more punitive and determinate. However, the SRA also retained the possibility of early termination of supervision for defendants who demonstrated their rehabilitation.[122] As a result, prison sentences became more determinate, yet sentences of community supervision remained highly indeterminate.

Originally, the federal government allowed early termination of probation but not parole. The Parole Act of 1910 required parolees to remain under supervision "until the expiration of the term or terms specified in his sentence," with no way to terminate their parole early.[123] As one member of Congress explained, the defendant was "discharged [from parole] by the expiration of sentence, just the same as if the sentence expired within the prison and he walked out as a free man."[124]

By contrast, the Probation Act of 1925 empowered judges to "discharge the probationer from further supervision" and "terminate the proceedings against him,"

118. *Id.*at 82.
119. *Id.*
120. *See* Schuman, *supra* note 73, at 3 & n.1; Chanenson, *supra* note 73, at 381–83.
121. PEW CHARITABLE TRS., *supra* note 17, at 19–20.
122. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 1999.
123. Parole Act of 1910, Pub. L. No. 61-269, § 3, 36 Stat. 819, 820 (repealed 1984).
124. *Parole of United States Prisoners: Hearing on S. 870 and H.R. 23016 Before H. Comm. on the Judiciary*, 61st Cong. 38 (1910) (statement of Rep. George La Dow).

based on his "conduct."[125] The decision to grant early termination of probation was based on the same standard as the decision to impose probation: whether the court was "satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant."[126] In practice, this meant judges could terminate probation early when it "appear[ed] that the defendant ha[d] rehabilitated himself and become a useful citizen."[127] One judge used grand terms to describe the humanitarian goals of the system:

> The statute in effect has accomplished at one stroke for the federal courts the redramatization of the criminal law, which modern theories of criminal administration, with their tremendous emphasis upon individualization, have been slowly effecting . . . a redramatization in which the controlling motif in the drama is the discovery of the true character of the individual before the bar, and the possibility of his readjustment without confinement, into the social scheme, instead of the nature and character of the offense, with fixed punishment for its happening, the vice of the classic school of criminology . . . .
>
> The statute . . . is drawn . . . to the end that, if it appear that the ends of justice and the interests of the public and of the defendant require, not only that the defendant be unconfined, but that he may redeem himself during the period of his probation so fully as to have the judge, under the statute, discharge the proceedings against him.[128]

In 1950, Congress expanded early termination to juveniles in the parole system,[129] and to adult parolees in 1958.[130] Although federal law at the time did not specify how parole officials should decide to grant early termination, the legislative history suggests that it was intended to "relieve the probation officer of unnecessary work when it is clear that the parolee has demonstrated fully his ability to conduct himself as a trustworthy citizen."[131]

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125. Probation Act of 1925, Pub. L. No. 68-596, § 2, 43 Stat. 1259, 1260; *see* Frad v. Kelly, 302 U.S. 312, 317–18 (1937). Formally, discharging a defendant from probation only freed him from supervision. The court's "jurisdiction" over the person continued, which meant that his probation could still be "revoked" if he was caught violating a condition (for example, if he was arrested for a new crime). *See* United States v. Swanson, 454 F.2d 1263, 1265 (7th Cir. 1972). However, the Sentencing Reform Act of 1984 changed this rule, so that judges can now grant defendants full termination from probation. *See* 18 U.S.C. § 3564(c).

126. United States v. Squillante, 144 F. Supp. 494, 495 (S.D.N.Y. 1956) (quoting Burns v. United States, 287 U.S. 216, 221 (1932)).

127. United States v. Antinori, 59 F.2d 171, 172 (5th Cir. 1932).

128. United States v. Maisel, 26 F.2d 275, 276 (S.D. Tex. 1928).

129. Act of Sept. 30, 1950, Pub. L. No. 81-865, sec. 2, § 5017, 64 Stat. 1085, 1088 (provision for the "[r]elease of youth offenders").

130. *See* Act of Aug. 25, 1958, Pub. L. No. 85-752, sec. 3, § 4208(d), 72 Stat 845, 846 (providing early termination of parole for adults); *see also* 28 C.F.R. § 2.42 (1963) (implementing this provision with the Parole Commission); 28 C.F.R. § 2.46(b) (1974) (same).

131. EDWIN WILLIS, IMPROVING THE ADMINISTRATION OF JUSTICE BY AUTHORIZING THE JUDICIAL CONFERENCE OF THE UNITED STATES TO ESTABLISH INSTITUTES AND JOINT COUNCILS ON SENTENCING, TO PROVIDE ADDITIONAL METHODS OF SENTENCING, H.R. REP. NO. 85-1946, at 11 (1958); *see also*

Finally, in 1976, lawmakers systematized the early-termination process by enacting the Parole Commission and Reorganization Act (PCRA), which required the Parole Commission, after a defendant had served two years on parole, to "annually . . . review the status of the parolee to determine the need for continued supervision."[132] After five years of supervision, the Commission had to grant the parolee early termination "unless it is determined, after a hearing" that "there is a likelihood that the parolee will engage in conduct violating any criminal law."[133] If the Commission found that the parolee was too dangerous for early termination, then it had to conduct hearings to reconsider that decision at least "biennially."[134]

Although Congress replaced parole with supervised release in the SRA, it still allowed defendants to seek early termination of supervised release.[135] Under 18 U.S.C. § 3583(e)(1), once a defendant has served at least one year of supervised release, the district court may "terminate" their supervision early and "discharge" them from their sentence "if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice."[136] The legislative history says little about the provision other than to compare it to early termination of parole.[137] Although some offenses carry mandatory minimum terms of supervised release, they are still eligible for early termination of supervision.[138]

The rehabilitative mission of early termination continues to this day. In 2023, a "bicameral, bipartisan" group of legislators introduced the SSA, which would make major changes to the federal supervised release system,[139] discussed in detail

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H. COMM. ON THE JUDICIARY, FEDERAL SENTENCING PROCEDURES, H.R. REP. NO. 85-H1373, at 76 (1958). The Federal Sentencing Procedures Report notes:

> We favor a grant of authority to the Board of Parole to discharge a paroled prisoner from further supervision because the maximum benefits had been achieved if a stable pattern had been established and in existence in the first 5 years, and that the continued reporting supervision and paperwork entailed in a longer supervision was entirely unproductive and unnecessary.

Id.

132. Parole Commission and Reorganization Act, Pub. L. No. 94-223, sec. 2, § 4211, 90 Stat. 219, 227 (1976) (repealed 1984).

133. § 4211, 90 Stat. at 227. The hearing had to provide the parolee with notice, the opportunity to be represented by an attorney, and the opportunity to appear, testify, present witnesses and evidence, hear the evidence against them, and cross-examine adverse witnesses. §§ 4211, 4214, 90 Stat. at 227–28.

134. § 4211, 90 Stat. at 227.

135. Sentencing Reform Act of 1984, Pub. L. No. 98-473, sec. 212, § 3583, 98 Stat. 1987, 1999 (codified at 18 U.S.C. § 3583).

136. 18 U.S.C. § 3583(e)(1).

137. *See* S. COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 98-225, at 101 (1983) ("While current law permits such early termination at any time without regard to the degree of the offense, it appears appropriate to retain the court's jurisdiction over an offender . . . for at least a one-year period."); *see also id.* at 124–25 (discussing the ability of a judge to terminate supervised release early).

138. *See, e.g.*, Pope v. Perdue, 889 F.3d 410, 414 (7th Cir. 2018); United States v. Spinelle, 41 F.3d 1056, 1060 (6th Cir. 1994); United States v. King, 551 F. Supp. 2d 1298, 1300–01 (D. Utah 2008); United States v. Scott, 362 F. Supp. 2d 982, 984–86 (N.D. Ill. 2005). *But see* United States v. Hovey, No. 11-CR-2672-WJ, 2024 WL 3873749, at *3 (D.N.M. Aug. 20, 2024) (suggesting that *Spinelle* was wrongly decided).

139. Chris Galford, *Legislative Push Spawns Safer Supervision Act to Improve Federal Supervised Release System*, HOMELAND PREPAREDNESS NEWS (Aug. 25, 2023), https://homelandprepnews.com/featured/81075-

in Part II, to "encourag[e] early termination."[140] Like Maconochie, Augustus, and Brockway, the sponsors of the SSA believe that terminating supervision early is a way to "encourage rehabilitation and reward good conduct."[141] The bill's "statement of findings" explains that early termination "can not only reduce burdens and save valuable judicial resources, but also create positive incentives for compliance and rehabilitation consistent with the purposes of supervision."[142]

The deep roots of early termination complicate the standard narrative of federal sentencing law. While courts and commentators typically claim that replacing parole with supervised release made federal sentencing more determinate,[143] this change only affected the determinacy of the prison sentence. The persistence of early termination means that community supervision remains highly indeterminate. Describing federal sentencing as determinate is not only inaccurate but also misses this fundamental similarity between parole, probation, and supervised release. The duration of all three forms of supervision depends "not primarily [on]

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legislative-push-spawns-safer-supervision-act-to-improve-federal-supervised-release-system. In the Senate, the bill was sponsored by Senators Coons (D-DE), Cornyn (R-TX), Durbin (D-IL), Lee (R-UT), Booker (D-NJ), Tillis (R-NC), Wicker (R-MS), Cramer (R-ND), and Lankford (R-OK). *See* Safer Supervision Act of 2023, S. 2681, 118th Cong. (2023). In the House, it was sponsored by Representatives Hunt (R-TX), Jackson Lee (D-TX), Owens (R-UT), Ivey (D-MD), Donalds (R-FL), Trone (D-MD), and Armstrong (R-ND). *See* Safer Supervision Act of 2023, H.R. 5005, 118th Cong. (2023). The bill not only won support from a broad array of Republicans and Democrats, but also was endorsed by law-enforcement and criminal-justice-reform organizations. *See* Press Release, Off. of Rep. Wesley Hunt, Congressman Wesley Hunt Introduces Bipartisan Safer Supervision Act (Aug. 16, 2023), https://hunt.house.gov/media/press-releases/congressman-wesley-hunt-introduces-bipartisan-safer-supervision-act (noting that the SSA was supported by "REFORM Alliance," "the Conservative Political Action Conference, Federal Law Enforcement Officers Association, Major Cities Chiefs Association, National District Attorneys Association, Right on Crime, Americans for Prosperity, Futures Without Violence, Faith and Freedom, Prison Fellowship, R Street Institute, [and] Texas Public Policy Foundation").

140. S. 2681 § 2(7).

141. Press Release, Off. of Sen. Chris Coons, Senators Coons, Cornyn, Colleagues Introduce Bipartisan, Bicameral Legislation to Improve Federal Supervised Release (Aug. 17, 2023), https://www.coons.senate.gov/news/press-releases/senators-coons-cornyn-colleagues-introduce-bipartisan-bicameral-legislation-to-improve-federal-supervised-release.

142. S. 2681§ 2.

143. *See, e.g.*, United States v. Haymond, 588 U.S. 634, 651 (2019) (noting the SRA "overhauled federal sentencing procedures to make prison terms more determinate"); Tapia v. United States, 564 U.S. 319, 324 (2011) ("[T]he [Sentencing Reform] Act [of 1984] abandoned indeterminate sentencing and parole in favor of a system in which Sentencing Guidelines, promulgated by a new Sentencing Commission, would provide courts with 'a range of determinate sentences for categories of offenses and defendants.'" (quoting Mistretta v. United States, 488 U.S. 361, 368 (1989))); *Mistretta*, 488 U.S. at 367 (highlighting that the SRA "makes all sentences basically determinate"). So far, the only dissenter from the indeterminate-to-determinate narrative has been Fiona Doherty, who argued that post-SRA sentencing is still "structurally indeterminate" because punishments for violating supervised release are legally considered "part of the penalty for the initial offense." Doherty, *supra* note 30, at 1009 (quoting Johnson v. United States, 529 U.S. 694, 700 (2000)). In other words, the defendant is sentenced to "an initial prison term for the crime at the time of judgment, followed by a conditional release," during which time if they "fail to 'adjust' properly . . . and violate[] a condition of supervised release, the court could extend the initial prison term." *Id.* While this analysis is persuasive, Doherty still defines the determinacy of the defendant's sentence based on the variability of the *prison term*, not the term of community supervision. By contrast, I argue that federal sentencing is indeterminate because judges can change the duration of *community supervision* based on the defendant's behavior.

the defendant's past conduct (i.e., the offense of conviction), but . . . the defendant's future conduct (i.e., the extent to which the defendant obeys the rules of the game going forward)."[144] Although the abolition of parole made prison sentences more determinate, the possibility of early termination makes supervised release fundamentally indeterminate.

II. LAW OF EARLY TERMINATION

Despite the persistence of early termination in federal sentencing law, rates of early termination have fallen over time. In 1979, for example, the Parole Commission granted early termination in approximately 9.5% of cases, and 40% of parolees who successfully completed their supervision were terminated early.[145] In 2022, by contrast, federal judges granted early termination of supervised release to 6.6% of defendants, and only 25% who successfully completed their supervision were terminated early.[146] Recent legal changes that make it harder for criminal defendants to obtain early termination help explain this decline.[147] To ensure full and effective access to early termination, these barriers should be removed from the process.

A. Initiated Versus Automatic Review

The first way that early termination has become more difficult for criminal defendants is that the SRA redesigned the system to provide for initiated rather than automatic review. Previously, the Parole Commission was required to undertake periodic assessments of each parolee's need for supervision, making review for early termination automatic.[148] Under the SRA, by contrast, the defendant or their probation officer must initiate early termination proceedings by filing a request with the district court.[149] Providing initiated rather than automatic review

144. Doherty, *supra* note 62, at 1718.

145. U.S. DEP'T OF JUST., UNIFORM CRIME REPORTS: PAROLE IN THE UNITED STATES 1979, at 24, 28–29 (1980), https://bjs.ojp.gov/content/pub/pdf/parus79.pdf (recording 2,195 early discharges versus 2,102 revocations).

146. 2022 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-7A, https://www.uscourts.gov/data-news/data-tables/2022/12/31/statistical-tables-federal-judiciary/e-7a (recording 8,546 early terminations versus 16,954 revocations); 2022 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-2, https://www.uscourts.gov/data-news/data-tables/2022/12/31/statistical-tables-federal-judiciary/e-2.

147. My discussion here focuses on early termination of supervised release, which is by far the dominant form of supervision in the federal system. *See* Klingele, *supra* note 86, at 323; MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2021, at 20 (2022) (12,332 federal probationers, compared to 108,060 supervised releasees). Of federal defendants terminated early, about 14% were serving terms of probation, compared to 86% on supervised release. 2022 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-7A, https://www.uscourts.gov/data-news/data-tables/2022/12/31/statistical-tables-federal-judiciary/e-7a.

148. Parole Commission and Reorganization Act, Pub. L. No. 94-223, sec. 2, § 4211, 90 Stat. 219, 227 (1976) (repealed 1984).

149. Sentencing Reform Act of 1984, Pub. L. No. 98-473, sec. 212, § 3583, 98 Stat. 1987, 1999 (codified at 18 U.S.C. § 3583).

unfairly limits access to early termination to defendants with the legal acumen and understanding to begin the proceedings on their own accord.

The PCRA ensured systematic evaluation of defendants for early termination by directing the Parole Commission to periodically review whether defendants needed continued supervision.[150] The Act was "notable for its degree of specificity."[151] After a parolee served two years of supervision, the Commission had to start reviewing them annually for early termination.[152] After they served five years, the Commission had to terminate their supervision unless it found, at a hearing, that they were likely to violate the law.[153] If the Commission did not terminate supervision after five years, then it had to hold a hearing "with respect to such termination of supervision not less frequently than biennially."[154] Finally, if the Commission failed to comply with any of these deadlines, the defendant could seek a writ of mandamus to compel compliance.[155] In the meantime, courts would order them "free of parole supervision" until the Commission conducted the required hearing.[156]

The SRA provides very different procedures for terminating supervised release. Under 18 U.S.C. § 3583(e)(1), the government is not required to undertake systematic review of defendants for early termination. Instead, the responsibility for initiating the proceedings falls on the defendant or their probation officer, who must file a motion affirmatively requesting early termination with the district court.[157] Judges are not even required to inform defendants of their right to apply for early termination, nor are there any references to early termination in the federal criminal judgment form.[158] Although the official policy of the Federal Probation and Pretrial Services Office, discussed in Part III.B, is to recommend early termination

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150. *Cf.* Torres, *supra* note 22, at 36 (noting the frequency with which a court was required to evaluate the "need for continued supervision").

151. *Id.*

152. § 4211, 90 Stat. at 227.

153. *Id.* The two-year deadline required a "review," but not a hearing. *See* Edwards v. Cross, No. 13-934, 2014 WL 2117221, at *3 (S.D. Ill. May 21, 2014). The hearing requirement, with its accompanying procedural protections, occurred after five years of being released from parole. *See id.*

154. § 4211, 90 Stat. at 227; *see also* United States v. Faherty, 692 F.2d 1258, 1262 (9th Cir. 1982) (Burns, J., concurring). Judge Burns noted:

> [T]he [Parole] Commission is to evaluate and "determine the need for continued supervision" annually, commencing two years after the parolee is released. At the end of five years, "ordinary" parole terminates unless, after a full blown hearing, the Commission determines that "there is a likelihood that the parolee *will* engage in conduct violating any criminal law."

Id. (citations omitted).

155. *See* Penix v. U.S. Parole Comm'n, 979 F.2d 386, 389 (5th Cir. 1992); Sacasas v. Rison, 755 F.2d 1533, 1535–36 (11th Cir. 1985); United States *ex rel.* Pullia v. Luther, 635 F.2d 612, 617 (7th Cir. 1980).

156. Valona v. U.S. Parole Comm'n, 165 F.3d 508, 511 (7th Cir. 1998); Valona v. U.S. Parole Comm'n, 235 F.3d 1046, 1049 (7th Cir. 2000) ("If the Commission again lapses into inaction, [the defendant] will again be entitled to interim cessation of supervision.").

157. *See* 18 U.S.C. § 3583(e)(1); FED. R. CRIM. P. 32.1(c).

158. *See* U.S. CTS., JUDGMENT IN A CRIMINAL CASE: FORM AO 245B, at 5–14 (2019), https://www.uscourts.gov/file/706/download.

for defendants who meet certain criteria, these guidelines are neither binding nor judicially enforceable.[159]

Why did the SRA replace automatic with initiated review? The legislative history does not say. Most likely, Congress was concerned that transferring early termination proceedings from a specialized executive agency (the Parole Commission) to generalist district courts would create workload concerns for federal judges.[160] Because the old Parole Commission was devoted entirely to the administration of community supervision, it had the time and energy to periodically review every parolee's need for continued supervision. By contrast, federal district courts have a broad mandate and busy dockets, with many responsibilities beyond managing terms of supervision. Congress may have sought to reduce the work of overseeing the supervision system by shifting the burden to initiate early termination to defendants.

Although current federal law gives criminal defendants the responsibility to initiate early terminations, it does not provide them with the right to appointed counsel to do so. In fact, the statute governing the appointment of counsel to defendants under supervision specifically omits early termination from its list of covered proceedings: "[r]epresentation shall be provided for any financially eligible person who . . . is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release."[161] Judges have the discretion to appoint counsel "when the interests of justice or due process so require," but rarely do so in early termination proceedings.[162] Multiple federal courts have also held that defendants have no constitutional right to appointed counsel to assist in filing a motion for early termination.[163]

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159. *See* 8 U.S. CTS., GUIDE TO JUDICIARY POLICY pt. E, § 360.20 (2018), https://www.uscourts.gov/file/78805/download; *infra* Part III.B.

160. *Cf.* Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. (forthcoming 2025) (discussing executive versus judicial control over revocations of supervised release); Owen Wilder Keiter, *Executive Revision of Minimum Sentences*, 84 ALB. L. REV. 665, 684–702 (2021) (discussing executive versus judicial review of requests for early release from prison).

161. 18 U.S.C. § 3006A(a)(1)(E); *see also* FED. R. CRIM. P. 32.1(b)–(c) (requiring notice of the ability to request counsel for revocation proceedings and the right to counsel at modification hearings). The federal parole system worked similarly, providing a statutory right to counsel for modifications of parole that disadvantaged the defendant, but not early termination. Parole Commission and Reorganization Act, Pub. L. No. 94-223, sec. 2, §§ 4211, 4214(a)(2)(B), 90 Stat. 219, 227 (1976) (repealed 1984); *see also* 28 C.F.R. § 2.43(e) (1984); 28 C.F.R. § 2.43 (1976).

162. United States v. Laughton, 644 F. Supp. 3d 390, 392 (E.D. Mich. 2022); United States v. Logan, No. 16-cr-00064-MR-WCM-8, 2022 WL 1185893, at *1 (W.D.N.C. Apr. 21, 2022). *But see* United States v. Clark, No. 14-70, 2022 WL 1522193, at *2 (W.D. Pa. May 13, 2022) (appointing counsel in the interests of justice to defendant seeking early termination of supervised release); United States v. Turpin, No. 18-cr-00031-BLW, 2020 WL 3052674, at *3 (D. Idaho June 8, 2020) (same, for early termination of probation).

163. *See, e.g.*, United States v. Norris, 62 F.4th 441, 447–48 (8th Cir. 2023); United States v. Vary, No. 22-cr-20544, 2023 WL 2055988, at *1 (E.D. Mich. Feb. 16, 2023); United States v. Laughton, 644 F. Supp. 3d 390, 392 (E.D. Mich. 2022); United States v. Easton, 755 F. App'x. 916, 919–20 (11th Cir. 2018); *see also* United States v. Sterling, 959 F.3d 855, 860 (8th Cir. 2020) (same, for modification of supervised release). These

Using initiated review, rather than automatic, makes it harder for defendants to win early termination of supervised release. As former federal prisoner Jabari Zakiya explained, "most people don't know" about the opportunity to apply for early termination because "your attorneys won't tell you, the judge won't tell you," and, "[u]sually, the probation officer won't tell you."[164] Defendants who are unaware they can apply for early termination obviously cannot take advantage of the procedure. Even defendants who know about the opportunity may lack the legal understanding to initiate the proceedings. Rates of mental illness in state prisons are over forty percent,[165] and illiteracy rates are as high as seventy-five percent.[166] It is difficult for these defendants to initiate early-termination proceedings on their own. Instead, they must rely on their probation officers to request early termination for them. Yet those officers are not legally required to do so.[167]

The SSA would make consideration for early termination of supervised release more systematic but would still require defendants to initiate the proceedings.[168] If enacted, the SSA would direct the Administrative Office of the U.S. Courts, "after a defendant has served 50 percent of the term of supervised release" to "provide notice to a defendant, defendant's counsel, and any local Federal Public Defender Organization . . . of the opportunity to seek early termination of supervised release . . . and the process for doing so."[169] This notification would help defendants initiate requests for early termination by informing them of their right to do so. However, the law still would not appoint public defenders to represent indigent defendants in early termination proceedings.[170] Furthermore, notice would only be provided after the defendant has served half of their term, long after they become eligible for early termination.[171] Even if the SSA passes, therefore, early

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decisions are probably correct under Supreme Court precedent, which holds that there is no right to appointed counsel in post-conviction or early-release proceedings. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1 (1979); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (finding a limited right to appointed counsel in revocation proceedings, to be decided on a case-by-case basis).

164. *See* Mansa Musa, *Federal Courts Use 'Supervised Release' to Doubly Punish Prisoners—It Should Be Abolished*, REAL NEWS NETWORK (July 1, 2024), https://therealnews.com/federal-courts-use-supervised-release-to-doubly-punish-prisoners-it-should-be-abolished.

165. Press Release, Leah Wang, Prison Pol'y Initiative, Chronic Punishment: The Unmet Health Needs of People in State Prisons (June 2022), https://www.prisonpolicy.org/reports/chronicpunishment.html.

166. Matthew Russell, *Illiteracy Leads to Higher Recidivism Among U.S. Prisoners*, GREATER GOOD: NEWS (June 4, 2024), https://blog.theliteracysite.greatergood.com/prison-illiteracy/.

167. *See* Torres, *supra* note 22, at 36.

168. *See* Safer Supervision Act of 2023, S. 2681, 118th Cong. (2023).

169. *Id.* § 3.

170. *See* 18 U.S.C. § 3006A(a)(1)(E). Although the SSA would allow courts to appoint counsel to assist defendants "seeking early termination of supervised release," this appointment would still be discretionary rather than mandatory, and would not be available until the defendant took the initiative to seek early termination in the first place. S. 2681 § 3(4).

171. Under 18 U.S.C. § 3583(e), a defendant is eligible for early termination after they have served one year of supervised release. Therefore, for any term of supervised release longer than two years, the SSA would not

termination of supervised release will still be effectively denied to defendants without the wherewithal to initiate the proceedings.

To ensure that criminal defendants have full access to early termination, legislators should provide for automatic rather than initiated review.[172] Automatic review would be fairer because it would ensure that defendants do not need to have the foresight or ability to initiate the proceedings in order to be considered. While periodically reviewing defendants for early termination would require more work from the courts, it also would improve efficiency and public safety by allowing probation officers to focus their resources on the defendants most in need of supervision.[173] Automatic review, moreover, could take many forms. For instance, Congress could require federal judges to evaluate every year whether the defendants they sentenced to supervision need continued surveillance.[174] Or, lawmakers could provide for appointed counsel to help indigent defendants file for early termination.[175] Because access should not depend on a defendant's legal skill or understanding, the law should provide automatic rather than initiated review for early termination.

B. Exceptional Behavior Versus Full Compliance

The second way that early termination has become more difficult for criminal defendants is that judges raised the standard by requiring exceptional behavior rather than full compliance with the law. Under probation and parole, defendants could win early termination if they showed that they had obeyed all their conditions of supervision. Although the SRA did not indicate any intent to change this standard, federal courts have interpreted the statute to require defendants seeking early termination of supervised release to exhibit exceptional behavior, beyond simply complying with the law.[176] Requiring exceptional behavior, rather than full compliance, misreads the SRA and incorrectly limits early termination to rare and extraordinary cases.

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require that the defendant be notified of their right to seek early termination until after they became eligible. S. 2681 § 3.

172. PEW CHARITABLE TRS., *supra* note 17, at 22 (urging states to adopt "automatic review of supervision" to "increase successful completion of supervision" and "ensure fairness").

173. The federal government currently spends hundreds of millions of dollars a year monitoring defendant on supervised release. Doherty, *supra* note 30, at 1016.

174. *Cf.* § 4211, 90 Stat. at 227 (requiring automatic review for termination of supervision).

175. *See* 18 U.S.C. § 3006A(a)(1)(E) (providing for appointed counsel for proceedings such as a modification of supervision).

176. In specific circumstances, courts will also grant early termination based on factors other than the defendant's conduct, for example, if the defendant overserved their prison sentence, *see* United States v. Parker, 219 F. Supp. 3d 183, 189–91 (D.D.C. 2016); United States v. Epps, 707 F.3d 337, 344–45 (D.C. Cir. 2013); United States v. Jeanes, 150 F.3d 483, 485 (5th Cir. 1998), if the defendant would have received a shorter prison term if sentenced today, *see* United States v. Johnson, 228 F. Supp. 3d 57, 63–64 (D.D.C. 2017), or if courts are presented extraordinary new information about the circumstances of the defendant's offense, *see* United States v. Lopez-Correa, 164 F. Supp. 3d 266, 267 (D.P.R. 2016).

For most of its history, the law of community supervision allowed defendants to win early termination if they complied with their conditions of supervision. For example, Maconochie explained that convicts should be released from a "ticket of leave" based on the "absence of police offense."[177] The Elmira Board of Managers similarly granted early termination of parole after six months of "good conduct."[178] Augustus noted that Boston judges would cease continuing cases laid on file "if at the expiration of a certain period, a good report was given of their behavior."[179] The Massachusetts Supreme Court even *ordered* a judge to grant early termination of probation where a defendant convicted of domestic abuse got his wife to testify that "everything was all right between them."[180]

In the PCRA, Congress continued this tradition by requiring early termination after five years "unless it is determined, after a hearing" that "there is a likelihood that the parolee will engage in conduct violating any criminal law."[181] In other words, refraining from criminal behavior was sufficient to win early termination of parole. Pursuant to the Act, the Parole Commission promulgated "early termination guidelines" that recommended "termination of supervision" whenever a parolee classified in the "very good risk category" completed two years of supervision "free from any indication of new criminal behavior or serious parole violation."[182] A parolee originally classified in the "other than the very good risk category" would be terminated early if they completed three years of supervision "free from any indication of new criminal behavior or serious parole violation."[183] Once again, law-abiding conduct was the standard.

The SRA does not indicate any intent to raise the standard for early termination. Instead, 18 U.S.C. § 3583(e)(1) states that a court should grant early termination of supervised release after considering all the purposes of sentencing except for retribution, "if it is satisfied that such action is warranted by the conduct of the

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177. MACONOCHIE, *supra* note 39, at 120–22.

178. WINTER, *supra* note 106, at 41; Brockway, *supra* note 108, at 867 (explaining that a parolee should be "supervised and tested until he is completely established in self-sustenance and orderly conduct").

179. AUGUSTUS, *supra* note 113, at 33.

180. Marks v. Wentworth, 85 N.E. 81, 82 (Mass. 1908).

181. Parole Commission and Reorganization Act, Pub. L. No. 94-223, sec. 2, § 4211, 90 Stat. 219, 227 (1976) (repealed 1984). The federal probation system similarly granted early termination if the probationer "reported faithfully . . . during the period of probation," "his record had been good," and he "conducted himself properly as a law-abiding citizen, and . . . proved himself worthy of the trust and confidence reposed in him . . . ." United States v. Maisel, 26 F.2d 275, 275 (S.D. Tex. 1928); *see also* United States v. Edminston, 69 F. Supp. 382, 384 (W.D. La. 1947) ("If their conduct has been good, they are commended by the court and the term of probation extended for another year until three years have expired, at which time it is terminated.").

182. *See* 28 C.F.R. § 2.43(e)(1)(i) (1984). Departures from the guidelines were permissible "where case-specific factors justify a conclusion that continued supervision is needed to protect the public welfare," such as "the current behavior of the parolee" or "the parolee's background." *See* 28 C.F.R. § 2.43(e)(2) (1984). Today, the guidelines still apply to the few remaining parolees who committed their crimes before 1984. *See* 28 C.F.R. § 2.43(g)(1) (2021); *see also* Charles D. Weisselberg & Linda Evans, *Saving the People Congress Forgot: It Is Time to Abolish the U.S. Parole Commission and Consider All "Old Law" Federal Prisoners for Release*, 35 FED. SENT'G REP. 106, 106–07 (2022).

183. *See* 28 C.F.R. § 2.43(e)(1)(ii) (1984); *see also* 28 C.F.R. § 2.43 (1976).

defendant released and the interest of justice."[184] Although this language is certainly vaguer than the PCRA, it does not suggest that judges must apply a higher standard to early termination of supervised release than the Parole Commission applied to early termination of parole.

Nevertheless, many federal courts have concluded that the SRA requires defendants seeking early termination of supervised release to demonstrate exceptional behavior, beyond mere compliance with the law. The most influential decision was the Second Circuit's 1997 opinion in *United States v. Lussier*, which held that a defendant could not seek to modify a condition of their supervised release on the ground that it was illegal because the proper avenue for challenging the legality of a condition was via a direct appeal or collateral attack.[185] In a key passage, the court of appeals explained that:

> Section 3583(e) provides the district court with retained authority to revoke, discharge, or modify terms and conditions of supervised release . . . in order to account for new or unforeseen circumstances. Occasionally, changed circumstances—for instance, exceptionally good behavior by the defendant or a downward turn in the defendant's ability to pay a fine or restitution . . . will render a previously imposed term or condition of release either too harsh or inappropriately tailored to serve the general punishment goals of section 3553(a).[186]

Lussier concerned *modification* of supervised release, not *early termination* of supervised release. That distinction matters because modification of supervised release is controlled by its own statutory provision—18 U.S.C. § 3583(e)(2), rather than § 3583(e)(1)—which uses different language.[187] Furthermore, modification of supervised release can be employed "either to the defendant's advantage or his disadvantage," whereas early termination can only work "to the advantage of the defendant."[188] Nevertheless, just one year after *Lussier*, the Second Circuit extended its analysis to early termination proceedings, holding that "early termination of supervised release . . . is only occasionally warranted due to changed circumstances of a defendant, such as exceptionally good behavior."[189] The court did not

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184. 18 U.S.C. § 3583(e)(1) (referencing section 3553(a)(1), (a)(2)(B)–(D), and (a)(4)–(7)).

185. United States v. Lussier, 104 F.3d 32, 35 (2d Cir. 1997). *But see* United States v. Arrington, 763 F.3d 17, 27 (D.C. Cir. 2014) ("[I]n determining 'the interest of justice' after the completion of one year of supervised release, the district court may take into account the illegality of the . . . term of . . . supervised release.").

186. *Lussier*, 104 F.3d at 36.

187. *Compare* 18 U.S.C. § 3583(e)(1) (explaining that a court can "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice"), *with id.* § 3583(e)(2) (explaining that a court can "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to . . . the provisions applicable to the initial setting of the terms and conditions of post-release supervision").

188. United States v. Truss, 4 F.3d 437, 439 (6th Cir. 1993), *abrogated by* Johnson v. United States, 529 U.S. 694 (2000).

189. Karacsonyi v. United States, No. 97-1220 (2d Cir. June 10, 1998) (quoting *Lussier*, 104 F.3d at 36).

address or even consider the differences between the statutory provisions governing modification and early termination. Instead, the court simply asserted that a defendant could not win early termination if he "complied with the terms of his supervised release," because "full compliance, after all, is merely what is expected of all people serving terms of supervised release."[190]

Other circuits quickly followed suit, citing *Lussier* to require exceptional behavior from defendants seeking early termination.[191] Today, the exceptional-behavior standard is dominant among federal courts.[192] This high standard makes it more difficult for defendants to win early termination of supervision because, by definition, it means that "early termination is not warranted as a matter of course."[193] Although "a defendant does not have to save a child from a burning building or start a major nonprofit to feed the poor," simply "doing what supervised release requires . . . may not be enough."[194] Even a "flawless record" and obedience to "every request of the United States Probation Department" is not considered sufficiently "exceptional" for early termination.[195] Instead, courts have typically found the standard satisfied where a defendant *both* complied with their conditions *and* also achieved unusual success in professional or public service.[196]

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190. *See id*. Notably, the Second Circuit did not apply the *Lussier* standard symmetrically, holding that judges could extend supervision "even in the absence of a new violation." United States v. Vargas, 564 F.3d 618, 624 (2d Cir. 2009).

191. *See, e.g*., United States v. Miller, 205 F.3d 1098, 1101 (9th Cir. 2000); United States v. Caruso, 241 F. Supp. 2d 466, 469 (D.N.J. 2003). Decisions before *Lussier* were split, with district courts adopting different standards for early termination. *Compare* United States v. Chapman, 827 F. Supp. 369, 371–72 (E.D. Va. 1993) ("full compliance"), *with* United States v. Spinelle, 835 F. Supp. 987, 992 (E.D. Mich. 1993) ("unusual [circumstances]").

192. *See, e.g*., United States v. Rodriguez, No. 17-CR-00128-3, 2024 WL 3912319, at *2 (D. Conn. Aug. 23, 2024); United States v. Laughton, 658 F. Supp. 3d 540, 545 (E.D. Mich. 2023); United States v. Thompson, No. 03-CR-30113, 2022 WL 16822483, at *2 (W.D. Va. Nov. 8, 2022); United States v. Ceccarelli, 607 F. Supp. 3d 321, 322 (W.D.N.Y. 2022); United States v. Merrill, 615 F. Supp. 3d 626, 629 (E.D. Mich. 2022); United States v. Mulay, 537 F. Supp. 3d 1269, 1273–74 (D.N.M. 2021); United States v. Haley, 500 F. Supp. 3d 6, 7–8 (W.D. N.Y. 2020); United States v. Morgan, No. 09-cr-186-pp, 2019 U.S. Dist. LEXIS 69716, at *2–3 (E.D. Wis. Apr. 24, 2019); United States v. Wesley, 311 F. Supp. 3d 77, 81–82 (D.D.C. 2018); United States v. Gutierrez, 925 F. Supp. 2d 1196, 1202 (D.N.M. 2013); United States v. Mathis-Gardner, 783 F.3d 1286, 1289–90 (D.C. Cir. 2015); United States v. Longerbeam, 199 F. Supp. 3d 1, 2–3 (D.D.C. 2016).

193. United States v. McKay, 352 F. Supp. 2d 359, 361 (E.D.N.Y. 2005) (citing United States v. Lussier, 104 F.3d 32, 36 (2d Cir. 1997)).

194. *Gutierrez*, 925 F. Supp. 2d at 1202.

195. *McKay*, 352 F. Supp. 2d at 361; *see also Rodriguez*, 2024 WL 3912319, at *2 (no exceptional behavior where defendant exhibited "continued compliance with the conditions of his supervised release and maintenance of full-time employment"); United States v. Ferrell, 234 F. Supp. 3d 61, 64 (D.D.C. 2017) (same, where defendant "has a steady job and found value in her counseling program" and "has avoided any further unlawful conduct and her probation seems to have had a positive effect"); United States v. Medina, 17 F. Supp. 2d 245, 246 (S.D.N.Y. 1998) (same, where defendant had "apparently unblemished" conduct and "various accomplishments").

196. *See, e.g*., United States v. Etheridge, 999 F. Supp. 2d 192, 196–97 (D.D.C. 2013) (granting early termination where defendant "regularly attends meetings and sponsors young addicts," "avoids parties or other places where alcohol or drugs will be served," "no longer associates with individuals who consume drugs," "reconciled with his adult daughters, from whom he had previously been estranged," "held a job as a scheduler at a well-regarded non-profit organization for more than five years," "has been promoted to a position of higher

Recently, however, some courts have advocated for a return to the full-compliance standard. The Second Circuit itself began this movement in 2016's *United States v. Parisi*, which limited *Lussier* on the ground that the decision did "not *require* new or changed circumstances relating to the defendant in order to modify conditions of release, but simply recognize[d] that changed circumstances may in some instances justify a modification."[197] A few years later, the Third Circuit agreed, citing both *Lussier* and *Parisi* for the proposition that "extraordinary circumstances may be *sufficient* to justify early termination of a term of supervised release, but they are not *necessary*."[198] Several district court judges have also argued forcefully in favor of the full-compliance standard.[199] Nevertheless, the exceptional-behavior test remains dominant in most of the country—at least for now.

The SSA would push judges toward the full-compliance standard but still would not definitely resolve the circuit split. If passed, the bill would create a "presumption of early termination of supervised release" for defendants who have served 50 to 66.6% of their term of supervision (depending on their original conviction), "demonstrated good conduct and compliance", and "will not jeopardize public safety."[200] Although this presumption would help defendants win early termination even if they have not achieved outstanding success under supervision, it does not

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responsibility," "received an award for Outstanding Employee Achievement," and "keeps himself busy with physical activities, exercise"); United States v. Nelson, No. 09-CR-108, 2012 WL 3544889, at *3 (E.D. Wis. Aug. 16, 2012) (same for probation, where defendant "holds down two jobs (full-time third shift and part-time first shift) in order to support his entire household, which includes disabled individuals; despite this hectic schedule, he has ensured that all supervision obligations are met," while completing "fifty hours [of community service] in just two years and continues to volunteer with Hunger Task Force, despite his schedule"); United States v. Harris, 689 F. Supp. 2d 692, 693–95 (S.D.N.Y. 2010) (same, where defendant was "a model prisoner during a long term of incarceration," "fully complied with the terms and conditions of supervised release," "obtained and is pursuing productive employment," "is caring for his family," and "demonstrates convincingly that being on supervised release . . . creates multi-faceted obstacles to his advancing in his company and the petroleum industry, which seemingly against the odds he has rejoined"). In a few cases, district courts have effectively lowered the standard by finding exceptional behavior based on what appears to be simple compliance. *See, e.g.*, United States v. Kapsis, No. 06-CR-827(WHP), 2013 WL 1632808, at *1 (S.D.N.Y. Apr. 16, 2013) (exceptional behavior where defendant "maintained steady employment, successfully completed treatment, and had no negative contacts with law enforcement"); United States v. Rentas, 573 F. Supp. 2d 801, 802 (S.D.N.Y. 2008) (same, where defendant had "steady employment since his release from prison," "married," "successfully completed an outpatient drug treatment program," "has not tested positive for drug use," "complied with all directives, has never been difficult to locate, and has had no arrests or run-ins with law enforcement").

197. United States v. Parisi, 821 F.3d 343, 347 (2d Cir. 2016).

198. United States v. Melvin, 978 F.3d 49, 52–53 (3d Cir. 2020); *see also* United States v. Hale, 127 F.4th 638, 639 (6th Cir. 2025); United States v. Ponce, 22 F.4th 1045, 1047 (9th Cir. 2022).

199. United States v. Mabry, 528 F. Supp. 3d 349, 358 (E.D. Pa. 2021); United States v. Hutchinson, 577 F. Supp. 3d 134, 134–35 (E.D.N.Y. 2021); United States v. Shaw, 611 F. Supp. 3d 1170, 1176 (D. Colo. 2020); United States v. King, No. 03-CR-249, 2019 WL 415818, at *4 (D.D.C. Feb. 1, 2019); United States v. Trotter, 321 F. Supp. 3d 337, 359–60 (E.D.N.Y. 2018); *Harris*, 258 F. Supp. 3d at 149–50.

200. Safer Supervision Act of 2023, S. 2681, 118th Cong. § 3 (2023). The law would also change several other aspects of the supervised release system, for example, requiring judges to conduct an individualized assessment when imposing terms of supervision and limiting mandatory revocation for drug-related violations. *Id.*

state what standard should apply before the defendant has served 50 to 66.6% of their sentence. Furthermore, the SSA includes a "Rule of Construction" stating that the presumption "shall not be construed to limit the discretion of a court" in deciding whether to grant early termination.[201] In other words, even though the bill would adopt a presumption in favor of early termination for fully compliant defendants, judges would not be bound to follow that presumption.

Regardless of whether Congress passes the SSA, a correct interpretation of the SRA would support the full-compliance standard for early termination. Textually, the references to the defendant's "conduct" and the "interest of justice" in 18 U.S.C. § 3583(e)(1) suggest that judges should engage in "broad[] consideration" and "flexible reexamination of the [defendant's] continued need for supervised release."[202] This language appears to have been adopted from a 1971 proposal by the National Commission on Reform of Federal Criminal Laws,[203] which was intended to "continue present law [the full-compliance standard] as to the power to terminate probation early."[204] Furthermore, the provision instructs judges to consider all the nonretributive purposes of sentencing (deterrence, incapacitation, and rehabilitation),[205] suggesting that the "task" is "not to determine whether [a] [d]efendant deserves additional punishment" but "whether he requires additional deterrence or correctional services."[206] As Judge Beryl Howell has argued, requiring defendants to demonstrate "objectively extraordinary or unusual conduct during supervision is a stretch not expressed in the statutory text."[207]

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201. *Id.* Law enforcement groups who support the SSA have stressed these limits as "important guardrails to ensure these reforms do not jeopardize public safety." Letter from Jeri Williams, Pres., Major Cities Chiefs Ass'n, to Sen. Coons & Cornyn (Sept. 29, 2022), https://majorcitieschiefs.com/wp-content/uploads/2022/10/2022.09.29S.-5040-Safer-Supervision-Act-of-2022-Support-Letter.pdf.

202. *Harris*, 258 F. Supp. 3d at 150; *see also Ponce*, 22 F.4th at 104 (noting the discretion enjoyed by a district court in deciding to grant early termination); *Melvin*, 978 F.3d at 53 (same).

203. NAT'L COMM'N ON REFORM OF FED. CRIM. L., FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: PROPOSED NEW FEDERAL CRIMINAL CODE § 3403(2) (1971) (suggesting a nearly identical provision for early termination of parole "at any time after the expiration of one year of successful parole if warranted by the conduct of the parolee and the ends of justice").

204. *Id.* § 3102 cmt.

205. 18 U.S.C. 3583(e)(1) (referencing several sentencing factors a court should consider when terminating supervision early, but excluding from consideration the need to "provide just punishment for the offense"); *see also* Tapia v. United States, 564 U.S. 319, 325–26 (2011) (interpreting factors for considering in identically worded § 3583(c) to exclude consideration of retribution).

206. United States v. Merrill, 615 F. Supp. 3d 626, 630 (E.D. Mich. 2022). Denying early termination to "a defendant whose behavior has been good, who has reintegrated into society, and who has satisfied all other conditions of supervised release, would suggest that the denial is for punishment and not for rehabilitation." United States v. Hutchinson, 577 F. Supp. 3d 134, 135 (E.D.N.Y. 2021). Notably, courts often erroneously justify the exceptional-behavior standard based on the retributive theory of punishment. *See, e.g.*, United States v. Woods, No. CR 23-0038-MSM-LDA, 2024 WL 81307, at *1 (D.R.I. Jan. 8, 2024); United States v. Rosenbaum, 643 F. Supp. 3d 602, 604 (W.D. Va. 2022); United States v. Mathis-Gardner, 110 F. Supp. 3d 91, 94–95 (D.D.C. 2015); United States v. Hernandez-Flores, No. CR 02-1020-JB, 2012 WL 119609, at *5 (D.N.M. Jan. 3, 2012); United States v. Grimaldi, 482 F. Supp. 2d 248, 251 (D. Conn. 2007).

207. *Harris*, 258 F. Supp. 3d at 149–50; *see also Ponce*, 22 F.4th at 1047 (noting the "exceptional behavior" standard is "incorrect as a matter of law"); *Melvin*, 978 F.3d at 53; United States v. King, No. 03-cr-249(BAH),

The purpose of supervised release also favors the full-compliance standard. The legislative history states that a term of supervised release should not be imposed "for purposes of punishment," which "will have been served to the extent necessary by the term of imprisonment."[208] Instead, the "primary goal" is to "ease the defendant's transition into the community" through "supervision and training programs."[209] Therefore, when a defendant has completed their transition by becoming a law-abiding member of the community, there is no further justification for supervised release. As Judge Eduardo Robreno explained, "early termination is warranted for laudable, but not necessarily unusual, conduct," because "the primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than punish them," and, therefore, it would be in the "interest of justice" to terminate supervision once "the purpose of supervised release . . . successful reentry into the community, has been accomplished."[210] The best interpretation of the SRA, therefore, is that judges should grant early termination to defendants who fully comply with the law, even if their behavior is not exceptional.

C. Early Termination Waivers

The final way that early termination has become more difficult for criminal defendants is that federal prosecutors began to require defendants who pled guilty to waive their right to seek post-conviction review of their sentences. Under the parole system, the government never asked defendants pleading guilty to waive their rights to appeal, collaterally attack, or otherwise challenge their sentences. After the SRA made sentencing appeals more common, however, federal prosecutors started to add appellate and post-conviction waivers to guilty plea agreements. Courts have incorrectly and unfairly interpreted these waivers to disqualify defendants who plead guilty from even initiating early-termination proceedings.

Plea bargaining in the federal system dates back to the early twentieth century,[211] but guilty pleas did not become an official part of the federal criminal justice system until 1944, when the Supreme Court enacted Federal Rule of Criminal Procedure 11 to govern their acceptance.[212] In 1975, the Court amended Rule 11 to

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2019 WL 415818, at *4 (D.D.C. Feb. 1, 2019) ("No 'extraordinary or unusual conduct' during supervision is required [for early termination].").

208. S. COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 98-225, at 125 (1983).

209. *Id.* at 124.

210. United States v. Mabry, 528 F. Supp. 3d 349, 358 (E.D. Pa. 2021) (quoting United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012)); *see also Hutchinson*, 577 F. Supp. 3d at 134–35; United States v. Shaw, 611 F. Supp. 3d 1170, 1176 (D. Colo. 2020); *Harris*, 258 F. Supp. 3d at 150; *King*, 2019 WL 415818, at *4.

211. *See* AM. L. INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS pt. 1, at 12 (1934) ("A method of handling cases which may be referred to as the guilty plea technique came into extensive use in 1916 and is responsible for the prompt and efficient disposition of business. This method has been condemned as 'bargaining,' but it shows no signs of disappearance.").

212. FED. R. CRIM. P. 11 (1944).

"expressly acknowledge[] the existence of plea bargaining outside the courtroom" and to require judges accepting guilty pleas to confirm that they were "voluntary and intelligent."[213] By this point, approximately ninety percent of criminal convictions resulted from guilty pleas.[214] The Court described plea bargaining as "an essential component of the administration of justice," that worked to the benefit of both the government and defendants and "[p]roperly administered, it is to be encouraged."[215]

Today, plea bargaining remains a significant part of federal criminal practice. Approximately ninety-seven percent of convictions result from guilty pleas,[216] of which seventy-five percent involve an agreement with the government.[217] As the Supreme Court put it, criminal justice is "for the most part a system of pleas, not a system of trials."[218] There is such a high rate of guilty pleas because they can benefit both the government and the defendant, and because federal prosecutors have significant leverage to pressure defendants to plead guilty. Prosecutors are permitted to "warn suspects of additional and more serious charges, and to offer sentencing discounts only to those who will 'play ball.'"[219] For defendants "in poverty, a plea agreement may be the only way in which to ensure social and economic stability following indictment."[220] In practice, most plea agreements are based on "boilerplate terms" imposed by the government "which are not negotiated."[221]

Although guilty pleas have long been a major part of the federal criminal justice system, prosecutors did not begin asking defendants to waive their right to post-conviction review until relatively recently. As Nancy King and Michael O'Neill have explained, the history of these waiver provisions begins with the invention of the appellate waiver in the late 1980s.[222] Before the SRA, defendants who pled guilty had "little to appeal" because their admission of guilt was considered a waiver of "most pretrial and trial rights."[223] They could appeal their sentences,

213. Leanna C. Minix, Note, *Examining Rule 11(b)(1)(N) Error: Guilty Pleas, Appellate Waiver, and* Dominguez Benitez, 74 WASH. & LEE L. REV. 551, 561 (2017).

214. Brady v. United States, 397 U.S. 742, 752 n.10 (1970).

215. Santobello v. New York, 404 U.S. 257, 260 (1971).

216. *Trial Judge to Appeals Court: Review Me*, N.Y. TIMES (July 16, 2012), https://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html.

217. THEA JOHNSON, AM. BAR ASS'N, PLEA BARGAIN TASK FORCE REPORT 12 & n.9 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

218. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

219. United States v. Chua, 349 F. Supp. 3d 214, 218 (E.D.N.Y. 2018) (quoting Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 74–75 (2015)).

220. *Id.*

221. *Id.* (citing Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 75 (2015)).

222. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 213 (2005); *see also* Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.").

223. King & O'Neill, *supra* note 222, at 219.

which came after trial, but they would have a low chance of success because the rules governing sentencing proceedings were "relatively uncomplicated" and "judges rarely spelled out factual findings or gave reasons for their sentences."[224] So long as the sentence fell within the statutory range, it was "virtually unreviewable" on appeal.[225] As a result, there was little reason for prosecutors to ask defendants who pled guilty to waive their right to appellate review. Although defendants could still seek other forms of post-conviction relief, such as habeas review, early release on parole, or early termination of parole, I could find no evidence of the DOJ asking defendants who pled guilty to waive their right to those forms of review.[226]

Things changed with passage of the SRA. The SRA both made prison sentences more determinate by replacing parole with supervised release and added structure to the sentencing process by creating the Sentencing Guidelines to limit the discretion of district court judges.[227] The Guidelines "subdivided statutory sentence ranges . . . into multiple, smaller ranges" and then "carefully regulated" movement between those ranges based on "the presence or absence of designated information," with "only acceptable factors" permitted to "enter the sentencing calculus."[228] Judges were required to apply the instructions in the Guidelines to determine the defendant's sentence.[229] The "glue" holding this system together was "appellate review," which served as "the primary enforcement mechanism" to ensure that judges did not misunderstand or misapply the Guidelines.[230]

These changes incentivized prosecutors to begin seeking appellate waivers because they meant that "almost every step in computing a sentence" could "potentially be challenged" on appeal.[231] In other words, by making sentencing more intricate, the Sentencing Guidelines also created "hundreds of new sentencing issues for defendants to raise on appeal, even after pleading guilty."[232] Federal prosecutors responded to that pressure in the 1990s by adding "appeal waivers" to guilty plea agreements that allowed them to "avoid" sentencing appeals.[233] They compared these waivers to "any other provision of a plea agreement, for which each party bargains and obtains something in exchange," and justified them as a way to "decrease the enormous amount of guideline sentencing litigation."[234]

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224. *Id.* at 213.

225. *Id.*

226. Given that the Parole Commission was statutorily required to consider all defendants for early release and early termination, it is not even clear whether such waivers would have been lawful. *See supra* Part II.A.

227. King & O'Neill, *supra* note 222, at 214.

228. *Id.*

229. *See id.*

230. *Id.* at 214–15.

231. Catharine M. Goodwin, *Summary: 1996 Committee on Criminal Law Memo on Waivers of Appeal and Advisement of the Right to Appeal*, 10 FED. SENT'G REP. 212, 212 (1998).

232. King & O'Neill, *supra* note 222, at 219–20.

233. *Id.* at 220.

234. *See* Goodwin, *supra* note 231, at 212.

Despite objections,[235] the federal circuit courts unanimously upheld the validity of appellate waivers.[236] Defendants who pled guilty, they held, could "waive any right, even a constitutional right, as long as the waiver is knowing and voluntary."[237]

At the same time that prosecutors began to add appellate waivers to guilty plea agreements, they also began to include waivers of the right to seek other forms of post-conviction relief.[238] The circuit courts quickly signed off on these waivers as well.[239] Why did prosecutors decide to introduce post-conviction waivers at this moment? Although King and O'Neil argue that appellate waivers were a reaction to the increase in sentencing appeals following the SRA,[240] defendants had always been able to seek other forms of collateral review.[241] The most likely explanation is a simple one: as waivers of appellate rights became more common and accepted, it was "relatively cheap" for prosecutors to toss in additional waivers of other post-conviction rights.[242]

In 1999, Federal Rule of Criminal Procedure 11 was officially amended to give the "green light" to waivers of appellate and post-conviction review, instructing district judges to "discuss with defendants any term in a plea agreement that waives the right to appeal or collateral attack."[243] The purpose of this amendment was "to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights."[244] The DOJ also encouraged federal prosecutors to use "waivers of sentencing appeal rights and post-conviction rights in plea agreements," in order to "reduc[e] the burden of appellate and collateral litigation involving sentencing issues."[245] In a memo to all U.S. Attorneys, the DOJ offered the following example of a "broad" waiver provision that prosecutors could include in plea agreements:

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235. *Id.*

236. *See* King & O'Neill, *supra* note 222, at 224; *see also* United States v. Powers, 885 F.3d 728, 733 (D.C. Cir. 2018) (upholding validity of appellate waivers).

237. Goodwin, *supra* note 231, at 212; *see also* United States v. Chua, 349 F. Supp. 3d 214, 219 (E.D.N.Y. 2018) (collecting cases on the permissibility of knowing and voluntary waiver); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1931 n.85 (1992) ("[T]he category of nonwaivable entitlements appears to be tiny.").

238. *See* King & O'Neill, *supra* note 222, at 221.

239. *See id.* at 224.

240. *See id.* at 220.

241. *See* 28 U.S.C. § 2255(a).

242. Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 18 (2006).

243. King & O'Neill, *supra* note 222, at 222, 224; *see also* FED. R. CRIM. P. 11(b)(1)(N) ("Before the court accepts a plea of guilty . . . the court must inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.").

244. FED. R. CRIM. P. 11(c) advisory committee's note to 1999 amendment.

245. John C. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 FED. SENT'G REP. 209, 209 (1998).

> The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. *The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack*, including but not limited to a motion brought under Title 28, United States Code, Section 2255.[246]

Waivers of post-conviction review are extremely common today. One study of guilty pleas in federal courts found that approximately sixty-six percent of agreements included a waiver of post-conviction review, and that nearly eighty percent of those waivers "barred both direct and collateral challenges."[247] Another study found that 67.5% of federal guilty plea agreements contained a waiver of collateral attack.[248] Waivers are typically based on "boilerplate language that the government uses in all of its agreements," which are "[r]arely . . . negotiated by defense counsel," who view them as a "necessary evil to pleading guilty."[249] Federal prosecutors and public defenders report that "the concessions given in exchange for a defendant's waiver" are often "negligible," the language of the waivers "sweeping," and that prosecutors refuse to negotiate over them: "The United States Attorney doesn't see this as deserving extra consideration. Nothing additional is given. . . . 'It's our way or the highway.'"[250]

Several circuit courts have interpreted waivers of post-conviction review to include requests for early termination. For example, in *United States v. Damon*, the Third Circuit granted the government's motion to dismiss a defendant's motion for early termination on the ground that his plea agreement included a waiver of the right to "file any appeal, any collateral attack, or any other writ or motion, . . . which challenges the sentence imposed by the sentencing court."[251] According to the court, the "plain language" of this agreement waived the right to seek early

246. *Id.* (emphasis added). In 2014, the DOJ issued a memorandum to U.S. Attorneys limiting their use of waivers of ineffective assistance of counsel claims, but emphasizing that they otherwise remained "free to request waivers of appeal and of post-conviction remedies to the full extent permitted by law as a component of plea discussions and agreements." Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to All Federal Prosecutors on the Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), http://sentencing.typepad.com/files/doj-policy-on-waivers-of-claims-of-iac.pdf.

247. King & O'Neill, *supra* note 222, at 231, 242–43.

248. Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 87 (2015).

249. Dale Chappell, *Attacking the Guilty Plea: Waivers, Breaches, and Getting More Time After a Successful Challenge*, CRIM. LEGAL NEWS (Oct. 15, 2020), https://www.criminallegalnews.org/news/2020/oct/15/attacking-guilty-plea-waivers-breaches-and-getting-more-time-after-successful-challenge/.

250. King & O'Neill, *supra* note 222, at 244–45.

251. United States v. Damon, 933 F.3d 269, 271 (3d Cir. 2019).

termination, which was a "challenge" to the original sentence.[252] Other courts have used similar logic to dismiss requests for modification of supervised release.[253]

Damon's reading of the waiver in that case is not persuasive. A defendant's request for early termination is not a "challenge" to their sentence; rather, it serves as an integral part of the supervision that is critical to the system's entire rehabilitative mission.[254] Even under its own logic, moreover, *Damon* would apply only to defendants who signed broadly written waivers of their right to "challenge" their sentences. More narrowly worded waivers would not preclude the defendant from seeking early termination. For example, courts have held that a defendant's waiver of their right to file an "appeal" or "collateral attack" does not prevent them from requesting early termination.[255] And of course, defendants may still seek early termination if the prosecutor agrees not to enforce their waiver.[256]

Unfortunately, the SSA does nothing to regulate early termination waivers. Although the Act is intended to encourage terminating supervision early, it will have little impact on the many defendants who plead guilty and waive their right to "challenge" their sentences. Despite their good intentions, the authors of the SSA forgot the critical role of plea bargaining in the federal criminal justice system, which disqualifies many defendants from even seeking early termination in the first place. To ensure the law's reforms are effective, lawmakers should add a provision banning the use of early-termination waivers.

Despite the SSA's failure to address this issue, early termination waivers are ineffective, unfair, and arguably unenforceable. In an analogous context, Judge Breyer of the Northern District of California rejected a guilty plea agreement containing a waiver of the defendant's right to seek compassionate release from prison, on the ground that it was "contrary to congressional intent" and

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252. *Id*. at 272–75; *see also* United States v. Laine, 404 F. App'x 571, 573 (3d Cir. 2010) (granting motion to enforce appellate waiver against request for early termination because "Laine's motion is at its core one to shorten the sentence originally imposed. . . . [B]y waiving his right to a direct appeal, Laine waived his right to challenge the duration of his term of supervised release.").

253. *See* United States v. Scallon, 683 F.3d 680, 683–84 (5th Cir. 2012); United States v. Zielke, 154 F. App'x 645, 646 (9th Cir. 2005).

254. *See supra* Parts I.B & I.C. For example, courts have held that waivers of the right to "contest" a sentence do not preclude a defendant from filing a motion for a sentence reduction based on guidelines amendments, because such motions "do not contest" but rather "bring to the court's attention changes in the guidelines that allow for a sentence reduction." United States v. Cooley, 590 F.3d 293, 296–97 & nn.11–14 (5th Cir. 2009) (collecting cases that waivers did not include sentence modification claims). So too, waiver of the right to "challenge" a sentence does not preclude requests for early termination, because such requests do not challenge the sentence but rather bring the court's attention to changes in the defendant's behavior that allow for early termination.

255. United States v. DeSanto, No. 20-cr-00206, 2022 WL 686380, at *3 (D.N.J. Mar. 7, 2022); *see also* Judgment at 1, United States v. Mala, No. 13-1093 (1st Cir. Mar. 5, 2014). In *Mala*, the court stated:

> Mala entered a plea agreement with a waiver of appellate rights. . . . The text of the waiver in question extends to the sentence imposed at the time of sentencing. However, it cannot be stretched to reach what would be a separate and discrete inquiry into the termination of supervised release . . . .

Id.

256. *See* United States v. Goodson, 544 F.3d 529, 535 & n.4 (3d Cir. 2008); Keeney, *supra* note 245, at 210.

"appallingly cruel."[257] He explained that it was "no answer to say that [the defendant] is striking a deal with the Government, and could reject this term if he wanted to," because as to "terms such as this one, plea agreements are contracts of adhesion."[258] So too, waivers of the right to seek early termination are contrary to the legislative intent to save resources and encourage rehabilitation, and they are "cruel," because they force defendants to endure years of unnecessary supervision.[259] For the benefit of defendants and the public, judges should not enforce and prosecutors should not seek waivers of the right to seek early termination.

III. EARLY TERMINATION GUIDELINE

Not only has early termination become more difficult for criminal defendants, there are also significant and unjustified disparities in rates of early termination. One reason for these disparities is that there are no federal sentencing guidelines on terminating supervision early. To reduce disparities in rates of early termination, I have created the first sentencing guideline for early termination of supervised release. Using federal sentencing data, I calculated the time at which the rate of revocation for defendants in each criminal history category falls below five percent. At this point, which typically falls between eighteen and thirty-six months, I recommend that judges terminate supervision early.

A. Early Termination Disparities

Studies show significant disparities in rates of early termination. Although the overall rate of early termination is twelve percent,[260] "belying th[is] national trend is considerable district-to-district variation, with early termination rates ranging from forty-six percent of successful closings in one district to zero in another."[261] There is no empirical research on whether rates of early termination vary based on categories such as race, gender, or class, but evidence from other parts of the criminal justice system suggests that they may.[262] As Federal Probation Officer Sam

257. United States v. Osorto, 445 F. Supp. 3d 103, 107–09 (N.D. Cal. 2020). *But see* United States v. Bridgewater, 995 F.3d 591, 601 (7th Cir. 2021) (upholding waiver of right to seek compassionate release).

258. *Osorto*, 445 F. Supp. 3d at 109.

259. *Id*. at 108–09.

260. United States v. Harris, 258 F. Supp. 3d 137, 148 n.10 (D.D.C. 2017).

261. Baber & Johnson, *supra* note 21, at 17; *see also* Krinsky & Fuhrmann, *supra* note 27, at 346. Some of this variation may be due to "[v]arying conditions and circumstances" between the districts, "such as unemployment, social unrest, changes in criminal statutes, etc." Victor H. Evjen, *The Federal Probation System: The Struggle to Achieve It and Its First 25 Years*, 78 FED. PROB. 27, 35 (2014); *see also* Baber & Johnson, *supra* note 21, at 17 (arguing that the "overall decline in the percentage of early-term cases from 2005" was "the result of the changing nature of persons under supervision, as the average risk prediction and criminal history scores of persons under supervision have been steadily rising"). But given the extraordinary range in early termination rates, it is likely that at least some of the disparities are driven by arbitrary differences in how judges decide whether to grant early termination.

262. *See* U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING 4–5 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf (describing racial disparities in sentencing); U.S. DEP'T OF JUST., *supra* note 14, at 15–16

Torres explained, "the most problematic issue with respect to early termination is the perpetual discretion/disparity concern."[263]

Disparities in rates of early termination are objectionable for the same reason that disparities in other aspects of sentencing are objectionable. Prison sentences that are too long are "clearly unfair to the offender," those that are too short are "just as plainly unfair to the public," and both "create a disrespect for the law."[264] So too, terms of supervision that are too long or too short are unfair to the defendant and the public and foster disrespect for the criminal justice system. In Torres's words, early termination "should not rely" on "where the offender lives and which officer he happens to have the good fortune or misfortune of drawing."[265]

One reason for the disparities in rates of early termination is that there are no federal sentencing guidelines on the subject. This oversight is remarkable given that the Guidelines are central to modern sentencing practice.[266] The SRA requires the Sentencing Commission to promulgate Sentencing Guidelines annually to "achieve uniformity" by ensuring that sentencing decisions are "anchored" to a "meaningful benchmark."[267] The Commission has issued Guidelines not only on the sentencing of every federal crime, but also on revoking supervision, accepting guilty pleas, and granting compassionate release.[268] Although their recommendations are advisory, empirical evidence suggests that the Guidelines have "the intended effect of influencing the sentences imposed by judges."[269] In all these proceedings, courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process."[270]

Despite the importance of the Sentencing Guidelines to federal sentencing practice, there are no guidelines on early termination of supervision.[271] In fact, the only real discussion in the Guidelines about how judges should decide to terminate supervision early comes in a *footnote* to the provision on imposing terms of

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(describing racial, gender, and other disparities in revocation rates of supervised release); Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, 17 AM. L & ECON. REV. 127 (2015); Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 MINN. J.L. & INEQUALITY 1 (2015); Sonja Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014).

263. Torres, *supra* note 22, at 41.

264. S. COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 98-225, at 45–46 (1983).

265. Torres, *supra* note 22, at 41.

266. The absence of sentencing guidelines on early termination of supervised release is also striking in comparison to the practices of the Parole Commission, which promulgated detailed guidelines for early termination proceedings. *See* 28 C.F.R. § 2.43(e) (1984); *see also* 28 C.F.R. § 2.43 (1976).

267. Peugh v. United States, 569 U.S. 530, 541 (2013).

268. *See* U.S. SENT'G GUIDELINES MANUAL §§ 1B1.13, 5B1.1, 5D1.1, 5E, 6B, 7B (U.S. SENT'G COMM'N 2024) (the sections cited cover these matters in the following order: compassionate release; imposition of probation; imposition of supervised release; fines, fees, and restitution; guilty pleas; and revocation of probation and supervised release).

269. *Peugh*, 569 U.S. at 543.

270. *Id.* at 541 (emphasis omitted) (quoting Gall v. United States, 552 U.S. 38, 50 n.6 (2007)).

271. United States v. Harris, 258 F. Supp. 3d 137, 145 (D.D.C. 2017).

supervised release.[272] That footnote explains that judges are "encouraged" to grant early termination "in appropriate cases," for example, "if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant."[273] Beyond this brief suggestion, there are only a few other vague or deleted references to early termination, which provide virtually no guidance to district judges.[274]

B. The Guide to Judiciary Policy

Although there are no sentencing guidelines on early termination, the Judicial Conference of the United States does publish a "Guide to Judiciary Policy" that includes advice on the subject.[275] The Guide is intended to provide "guidance to U.S. probation offices" on the supervision of federal criminal defendants.[276] The Guide contains instructions on when and whether probation officers should recommend defendants for early termination of supervision, but it is not legally enforceable and does not apply to district judges.[277] While some judges have cited the Guide as persuasive authority, others have entirely rejected it.[278]

The Guide to Judiciary Policy states that probation officers should recommend early termination for defendants who obey the law and do not pose a threat to the community.[279] Early termination is appropriate if a defendant has "substantially" complied with their conditions, demonstrated a "willingness and capability to remain lawful beyond the period of supervision," and is not identified as "higher risk to community safety."[280] After eighteen months of supervision, the Guide

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272. U.S. SENT'G GUIDELINES MANUAL § 5D1.2 cmt. n.5 (U.S. SENT'G COMM'N 2024).

273. *Id.*

274. *See id.* § 1B1.10 cmt. n.7(B). The note states:

> Modification Relating to Early Termination.—If the [guideline on sentence reductions as a result of amendments to the guidelines range] precludes a reduction in the term of imprisonment . . . the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release.

Id.; U.S. SENT'G GUIDELINES MANUAL § 5K2.19 (U.S. SENT'G COMM'N 2010) (deleted 2012) ("Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing a defendant for that offense. (Such efforts may provide a basis for early termination of supervised release.)").

275. United States v. Shaw, 611 F. Supp. 3d 1170, 1173 (D. Colo. 2020). The Judicial Conference is the "national policymaking body for the federal courts," and is composed of the Chief Justice of the Supreme Court, "the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit." *About the Judicial Conference of the United States*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (last visited Jan. 27, 2025).

276. 8 U.S. CTS., GUIDE TO JUDICIARY POLICY pt. E, §§ 110, 360.20 (2018), https://www.uscourts.gov/file/78805/download.

277. *Id.*

278. *See infra* notes 288–91 and accompanying text.

279. *See* 8 U.S. CTS., GUIDE TO JUDICIARY POLICY pt. E (2018).

280. *Id.* § 360.20.

adopts a "presumption in favor of recommending early termination" so long as the defendant does not "meet the criteria of a career drug offender or career criminal," has "not committed a sex offense or engaged in terrorism," poses no "risk of harm to the public or victims," has remained violation-free for twelve months, "demonstrates the ability to lawfully self-manage beyond the period of supervision," and "engages in appropriate prosocial activities and receives sufficient prosocial support to remain lawful well beyond the period of supervision."[281] Even high-risk defendants "must be considered for early termination" after eighteen months if they have "demonstrated a reduction in risk" and are in "substantial compliance with the factors [provided for termination after eighteen months]."[282]

Although the Guide sets a national standard for federal probation officers, it is not legally binding. Federal probation officers are managed at the district level and are not subject to the "operational authority" of the Judicial Conference.[283] Instead, each federal probation office is run by a chief probation officer who is appointed by the judges of that district,[284] making them "unique to other federal law enforcement agencies in that they are regionally aligned to their geographical districts, rather than a single headquarters element."[285] As a result, "U.S. probation officers, supervising probation officers, [and] deputy chiefs all seem to agree that policy does not translate into practice."[286] One study of early-termination policies found "significant disparity . . . between districts, between units in the same district, and between officers in the same unit."[287]

A few district judges have referenced the Guide in deciding requests for early termination.[288] In one case, for example, a district judge granted a defendant's request for early termination where he had "satisfie[d] nearly all of the Judicial Conference factors relating to post-release conduct."[289] Nevertheless, the Guide exerts limited influence over judicial decisions because it solely addresses

281. *Id.*

282. *Id.*

283. *History of U.S. Probation*, U.S. PROB. OFF. S. DIST. OF CAL., https://www.casp.uscourts.gov/history-us-probation (last visited Mar. 2, 2025); *Probation and Pretrial Services—Mission*, U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission (last visited Mar. 16, 2025); *see also* John M. Hughes & Karen S. Henkel, *The Federal Probation and Pretrial Services System Since 1975: An Era of Growth and Change*, 79 FED. PROB. 103, 106 (1997).

284. 18 U.S.C. § 3602(a), (c).

285. *History of Probation and Pretrial Services*, PROB. & PRETRIAL SERVS. OFF. N. DIST. OF ALA., https://www.alnp.uscourts.gov/history-probation-and-pretrial-services (last visited Feb. 22, 2025).

286. Torres, *supra* note 22, at 41.

287. *Id.* at 40.

288. *See* United States v. Shaw, 611 F. Supp. 3d 1170, 1173–75 (D. Colo. 2020); United States v. McGovern, 438 F. Supp. 3d 136, 138 (D.P.R. 2020); United States v. Weintraub, 371 F. Supp. 2d 164, 166 (D. Conn. 2005); *see also* Baber & Johnson, *supra* note 21, at 17 ("Policies on early termination have clearly influenced practices in the courts. The number of early terminations granted by the courts increased 50 percent in the year following the [Judicial Conference's] formal endorsement in 2002 of early termination as a cost-containment measure.").

289. United States v. Etheridge, 999 F. Supp. 2d 192, 197 (D.D.C. 2013); *see also* United States v. Grimaldi, 482 F. Supp. 2d 248, 251 & n.2 (D. Conn. 2007) (denying a request for early termination based in part on the Guide's "extra-statutory factors").

probation officers, not courts. As the Third Circuit explained in rejecting a defendant's request for early termination, the Guide's provisions "do not impose a presumption on district courts in favor of early termination" but instead "provide probation officers with a framework for when it is appropriate to *recommend* early termination of supervised release to district courts."[290] Because the Guide "governs probation officers, [and] does not bind courts," judges may require "something more to justify early termination."[291]

Finally, the Guide to Judiciary Policy, unlike the Sentencing Guidelines, is an internal government document created without any outside input or transparency. When the Sentencing Commission promulgates new Sentencing Guidelines, it must provide notice of its proposed changes to the public, accept comments on them, and submit the final revisions to Congress for review.[292] By contrast, there is no statutorily defined process for drafting or promulgating the Guide to Judiciary Policy. This lack of stakeholder or legislative participation makes the Guide more difficult for the public to influence, challenge in court, and use in legal advocacy.

C. Proposed Guideline

To reduce disparities in rates of early termination, I have created the first sentencing guideline for terminating supervision early. Over twenty years ago, Federal Probation Officer Sam Torres argued that early termination proceedings should "be associated with specific guidelines."[293] However, he did not suggest what those guidelines should look like. As this Article went to print, the Sentencing Commission proposed an amendment to the Sentencing Guidelines, based in part on an earlier draft of this Article, that for the first time would add a "policy statement" addressing "Modification, Early Termination, and Extension of Supervised Release."[294] Although this amendment would offer some guidance for district judges deciding whether to grant early termination, it consists primarily of a "non-exhaustive list of factors" to consider, and does not provide an empirically-based recommendation of how many months defendants should serve before being terminated from supervision.[295] Below, I use federal sentencing data to devise an

290. United States v. Fattah, No. 21-3177, 2022 WL 2437846, at *3 (3d Cir. July 5, 2022) (emphasis added).

291. United States v. Morgan, No. 09-cr-186-pp, 2019 U.S. Dist. LEXIS 69716, at *4 (E.D. Wisc. Apr. 24, 2019).

292. *See* 28 U.S.C. § 944(o), (p), (x).

293. Torres, *supra* note 22, at 41.

294. Proposed Amendments to the Sentencing Guidelines § 5D1.4, 90 Fed. Reg. 8968 (proposed Jan. 24, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf; *see also* E-mail from Con Reynolds, Exec. Assistant & Couns. to the Chair, U.S. Sent'g Comm'n, to Jacob Schuman (Jan. 24, 2025, 6:15 PM) (on file with author).

295. Proposed Amendments to the Sentencing Guidelines § 5D1.4, 90 Fed. Reg. 8968 (proposed Jan. 24, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250130_rf-proposed.pdf. The proposed guideline also states that courts are "encouraged to conduct such assessments upon the expiration of one year of supervision and periodically throughout the term of supervision thereafter," but does not indicate what length of time under supervision is appropriate before a judge should *grant* a defendant early termination. *Id.*

empirically-based sentencing table for early termination, which I recommend in most cases after eighteen to thirty-six months of supervised release. I offer this guideline as a model for courts, practitioners, and government officials to employ in deciding cases and formulating supervision policy.[296]

My sentencing guideline answers the most important yet difficult question that judges face when deciding requests for early termination: *how much time* should a defendant serve under supervision in order to be terminated early?[297] Most defendants conduct themselves well for at least the first few days after their release from prison, so there must be some minimum period of service necessary for them to win early termination of supervision. For judges applying the exceptional-behavior standard for early termination, this question is easier because attaining such a high level of achievement naturally takes some time. Under the full-compliance standard, however, judges must decide in every case what duration of compliance is enough.[298]

For my guideline, I decided that judges should grant early termination once a defendant has served enough time on supervised release that the probability of the defendant committing a violation resulting in revocation has fallen below five percent. I chose this threshold with the understanding that my selection of an appropriate level of risk is ultimately a policy judgment that depends on balancing multiple competing factors, including: public safety, the defendant's liberty interests, and the functioning of the supervision system.[299] This judgment also must take into account the effect of defendant's prior conviction, which according to the Supreme Court "justifies . . . extensive restrictions on the individual's liberty."[300] Given my empirical approach to the question, I selected the five percent threshold by analogy to the degree of statistical confidence traditionally required by social scientists, who "are prepared to discard chance as an [sic] hypothesis when its probability level is no more than 5%."[301] Similarly, when a defendant moves for early termination of supervised release, they are proposing to the judge the hypothesis that based on their conduct thus far, they will not violate their supervision in

296. My guideline is focused on defendants serving terms of supervised release, not probationers, who are a distinct population requiring a separate analysis. *See* Jacob Schuman, *The Secret Success of Federal Probationers*, CRIME REP. (Nov. 11, 2021), https://thecrimereport.org/2021/11/11/the-secret-success-of-federal-probationers/. My recommendations should not be used for early termination of probation.

297. The SRA answers this question in part by requiring that defendants serve at least one year of supervised release before they are eligible for early termination. 18 U.S.C. § 3583(e)(1). But it does not suggest when judges should grant early termination after that point. *See id.*

298. *See supra* Part II.B.

299. *See supra* Introduction.

300. Morrissey v. Brewer, 408 U.S. 471, 483 (1972); *see also* Burns v. United States, 287 U.S. 216, 220 (1932) ("The defendant stands convicted; he faces punishment, and cannot insist on terms or strike a bargain."); United States v. Haymond, 588 U.S. 634, 678 n.9 (2019) (Alito, J., dissenting) ("[A] convicted criminal on supervised release does not 'retain the core attributes of liberty' . . . ." (citation omitted)).

301. Equal Emp. Opportunity Comm'n v. Am. Nat'l Bank, 652 F.2d 1176, 1192 (4th Cir. 1981); *see also* Fred S. McChesney, *Statistics: The Language of Science (Part II)*, 9 KAN. J.L. & PUB. POL'Y 75, 83 (1999).

the future. For the judge to accept this hypothesis, there should be less than a five percent chance that the defendant's hypothesis is untrue.[302]

Having decided to recommend early termination once a defendant's probability of revocation falls below five percent, I needed data to make that calculation. Unfortunately, the Sentencing Commission does not regularly collect, analyze, or publish comprehensive data on the supervision system. Although the Commission publishes annual reports on criminal prosecutions, it has issued only three reports in its history on community supervision.[303] As District Judge Stefan Underhill pointed out, "[t]he failure of the U.S. Sentencing Commission to gather data regarding supervised release sentences is astounding because the Commission has the power, if not the duty, to gather such data."[304] This lacuna "allows those sentences to hide from public view and to escape academic and policy criticism."[305]

Combining three different sets of federal sentencing data, I calculated the time at which the rate of revocation for defendants in each criminal history category fell below five percent. First, I used a database published by the Sentencing Commission as part of a special 2020 report on *Federal Probation and Supervised Release Violations*.[306] The database contains information on revocation hearings in federal district courts between 2013 and 2017, including the defendant's criminal history category (numbered I through VI) and the months of supervision they served before the violation event.[307] Although these data are now several years old, the Commission "do[es] not use a standardized reporting system for sentences imposed following violations," and so they are the most recent information available.[308] Looking only at revocations of supervised release, and removing 3,313

302. Even in the social sciences, of course, the decision of "what level of confidence is appropriate in a particular case" is often a "policy question and not a statistical issue." Donald P. Land & Edward J. Imwinkelried, *Confidence Intervals: How Much Confidence Should the Courts Have in Testimony About a Sample Statistic?*, 44 CRIM. L. BULL. 5 (2008). Some scientists use a 10% threshold, some 1%, and others even question the value of a probability threshold itself. *See* Blakeley B. McShane, David Gal, Andrew Gelman, Christian Robert & Jennifer L. Tacket, *Abandon Statistical Significance*, 73 AM. STATISTICIAN 235, 235–36 (2019); *see also* Bertie Vidgen & Taha Yasseri, *P-Values: Misunderstood and Misused*, 4 FRONTIERS PHYSICS 1, 1 (2016).

303. U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS (2020) [hereinafter FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf; U.S. SENT'G COMM'N, REVOCATIONS AMONG FEDERAL OFFENDERS (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf; U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

304. Underhill, *supra* note 9, at 12.

305. *Id.*

306. FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS, *supra* note 303; *see also Commission Datafiles*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/datafiles/commission-datafiles (last visited Jan. 30, 2025).

307. U.S. SENT'G COMM'N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 1, 9, 14 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_Public_Release_Codebook_FY99_FY21.pdf.

308. FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS, *supra* note 303, at 12.

entries that did not contain information on criminal history or months of supervision served, the database contained a total of 99,096 revocations, including 22,562 defendants in criminal history category I, 11,999 in category II, 20,624 in category III, 14,977 in category IV, 10,151 in category V, and 18,783 in category VI.[309]

Second, I used statistical tables published annually by the U.S. Court system, which contain the total number of defendants serving terms of supervised release.[310] I had to use these tables for my calculation because the Sentencing Commission's revocation database only recorded the number of defendants whose supervised release was revoked, not the total number serving terms of supervised release. Without the latter piece of information, I could not determine the rate of revocation. The tables' total population under supervised release from 2013 to 2017 was 573,998.[311]

Finally, I used a third set of sentencing data collected and reported annually by the Sentencing Commission, which records the total number of defendants sentenced to supervised release within each criminal history category.[312] I had to use this dataset to incorporate criminal history into my analysis because the U.S. Courts' statistical tables on the number of defendants serving terms of supervised release did not provide a breakdown by criminal history. Nevertheless, I felt that it was important for my guideline to account for criminal history because it is "highly correlated" with "success rates in supervision" and judges weigh it heavily when deciding whether to grant early termination.[313] Based on this dataset, I found that the percentage breakdown of defendants sentenced to supervised release between 2013 and 2017 was 40.14% in criminal history category I, 14.02% in category II, 17.84% in category III, 10.64% in category IV, 6.23% in category V, and 11.13% in category VI.[314]

Finally, assuming that the criminal-history breakdown of defendants sentenced to supervised release was the same as defendants serving terms of supervised

309. These numbers are derived from the database that accompanied the Sentencing Commission's 2020 report on supervision violations. *See Commission Datafiles*, *supra* note 306.

310. *See* 2017 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-2, https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2017/12/31; 2016 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-2, https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2016/12/31; 2015 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-2, https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2015/12/31; 2014 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-2, https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2014/12/31; 2013 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-2, https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2013/12/31.

311. These numbers are derived from the U.S. Court system's statistical tables. *See supra* note 310.

312. *See Commission Datafiles*, *supra* note 306. The Sentencing Guidelines assign defendants to one of six different criminal history categories based on their prior sentences. *See* U.S. SENT'G GUIDELINES MANUAL ch. 4 (U.S. SENT'G COMM'N 2024).

313. U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 66, 70 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

314. These numbers are derived from the Sentencing Commission's annual sentencing reports. *See Commission Datafiles*, *supra* note 306.

release, I estimated the number of defendants serving terms of supervised release within each criminal history category. To do so, I multiplied the percentage breakdown of defendants sentenced to supervised release by the total defendants serving terms of supervised release. I found that there were approximately 230,391 defendants on supervised release in criminal history category I, 80,477 in category II, 102,408 in category III, 61,088 in category IV, 35,740 in category V, and 63,894 in category VI.

I acknowledge that this assumption is not perfect for two reasons. First, because supervised release follows imprisonment, the population of defendants *sentenced* to supervised release between 2013 and 2017 is not exactly the same as the population of defendants *serving* terms of supervised release during that same time period. However, the percentage breakdown of defendants sentenced to supervised release appears to be fairly constant over time, so the difference here is probably not significant.[315] Second, defendants with more aggravated criminal histories will tend to be sentenced to longer terms of supervised release[316] and therefore will make up a larger proportion of the total supervised population. Nevertheless, judges impose supervised release on virtually all eligible defendants regardless of criminal history, so I believe my assumption is close enough for model guidelines.[317]

Combining all this information, I could calculate how many months of supervision defendants in each criminal history category had to serve before their rate of revocation fell below five percent. First, I created a frequency table recording how many defendants in each criminal history category committed a violation resulting in revocation during each month of supervision served. Next, I added up the cumulative number of defendants in each criminal history category who committed violations resulting in revocation by the end of each month of supervision served. Finally, I calculated the probability of a defendant in each criminal history category committing a violation resulting in revocation after each month of supervision served, using the following equation:

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315. The percentage of defendants sentenced to supervised release between 2013 and 2017 was roughly the same as the percentage between 2005 and 2009. *See* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 56 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf (recording criminal history category I defendants as 41.85% of the population sentenced to supervised release, criminal history category II as 11.98%, criminal history category III as 16.70%, criminal history category IV as 10.70%, criminal history category V as 6.56%, and criminal history category VI as 12.21%).

316. U.S. SENT'G GUIDELINES MANUAL § 5D1.1 n.3(B) (U.S. SENT'G COMM'N 2024) (recommending that when imposing supervised release, judges "should give particular consideration to the defendant's criminal history" and that "[i]n general, the more serious the defendant's criminal history, the greater the need for supervised release"); *id.* § 5D1.2 (recommending longer terms of supervised release for defendants convicted of more serious offenses).

317. *See* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 56 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

$$\text{Probability of Violation Resulting in Revocation After Month X} = \frac{\text{Number of Violations Resulting in Revocation After Month X}}{\text{Number of Supervised Defendants After Month X}} = \frac{\text{(Total Violations Resulting in Revocation – Cumulative Violations Resulting in Revocation by Month X)}}{\text{(Total Supervised Defendants – Cumulative Violations Resulting in Revocation by Month X)}}$$

This formula is conceptually similar to a "hazard function," which is used in the statistical field of survival analysis to calculate the instantaneous potential of a subject experiencing an event at a particular point in time.[318] Here, the subject is the defendant under supervision, and the "event" is their committing a violation resulting in revocation. However, my equation is simpler than the typical hazard function because it calculates the probability of the subject experiencing the event *after* a particular point in time, not instantaneously. Ultimately, I found that the rate of revocation fell below five percent for defendants in criminal history category I after eighteen months, category II after twenty-six months, category III after thirty-two months, category IV after thirty-four months, category V after thirty-seven months, and category VI after thirty-eight months.[319]

My equation also does not account for what survival analysts call "censored data," which include any cases in which a subject did not experience an event before they leave the study.[320] For example, the population of supervised defendants falls not only as they commit violations resulting in revocation, but also as they leave supervision for other reasons, such as successful completion of their sentence or death. A traditional hazard function would account for these cases by factoring in the time at which each subject became censored. Unfortunately, although the U.S. Courts' statistical tables provide information on how many defendants left supervision each year for reasons other than revocation, they do not state how many months of supervision each defendant served before leaving.[321] As a result, I could not include censored data in my analysis.

Nevertheless, I do not believe that omitting censored data will have a major impact on my results because between 2013 and 2017, the vast majority of defendants who left supervision for reasons other than revocation did so because they successfully completed their sentences.[322] Furthermore, the average sentence of

318. *See* DAVID G. KLEINBAUM & MITCHEL KLEIN, SURVIVAL ANALYSIS: A SELF-LEARNING TEXT 11–14 (3d ed. 2012).

319. *See infra* Appendix.

320. KLEINBAUM & KLEIN, *supra* note 318, at 5–8.

321. *See infra* note 322.

322. *See* 2017 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-7A, https://www.uscourts.gov/statistics/table/e-7a/statistical-tables-federal-judiciary/2017/12/31 (6,268 early terminations, 21,153 successfully completed supervision terms, and 2,492 "other"); 2016 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl.

supervised release for defendants in all six criminal history categories is over forty months.[323] As I show below, the probability of violation resulting in revocation for defendants in all six criminal history categories falls under five percent *before* they have served forty months of supervision. Therefore, most of the censoring in my data likely occurred *after* the time period on which I am focused.

Having calculated the time at which the rate of revocation for defendants in each criminal history category fell below five percent, I had to translate my results into recommended ranges for early termination. Ultimately, I recommended that judges grant early termination to defendants in criminal history categories I and II after eighteen to twenty-four months, categories III, IV, and V after thirty to thirty-six months, and category VI after forty-two months. I selected these ranges based on natural groupings in the results, consistency with the rest of the Sentencing Guidelines, and my judgment on what judges would find reasonable. For the most part, I did not need to exercise much discretion in selecting these ranges. However, I chose to create a separate range for defendants in the most aggravated criminal history category of VI, which includes anyone with more than thirteen criminal history points and designated "career offenders," who the Guidelines subject to enhanced sentences.[324] A table summarizing my findings and recommendations are below, and my full results can be found in the Appendix.[325]

E-7A, https://www.uscourts.gov/sites/default/files/data_tables/stfj_e7a_1231.2016.pdf (6,261 early terminations, 21,606 successfully completed supervision terms, and 2,471 "other"); 2015 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-7A, https://www.uscourts.gov/sites/default/files/data_tables/stfj_e7a_1231.2015.pdf (6,020 early terminations, 21,376 successfully completed supervision terms, and 2,516 "other"); 2014 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-7A, https://www.uscourts.gov/sites/default/files/e7adec14.pdf (5,692 early terminations, 21,245 successfully completed supervision terms, and 2,340 "other"); 2013 U.S. CTS. STAT. TABLES FOR FED. JUDICIARY, at tbl. E-7A, https://www.uscourts.gov/sites/default/files/statistics_import_dir/E7ADec13.pdf (5,349 early terminations, 21,584 successfully completed supervision terms, and 2,334 "other").

323. *See* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 4 (2010) ("Offenders in each of the [criminal history categories] except [criminal history category] VI received an average term of 41 months of supervised release, while offenders in [criminal history category] VI received an average term of 48 months.").

324. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2024); *id.* at ch. 5, pt. A.

325. To save space, the Appendix only includes results for the first seventy-two months of supervision, after which the probability of violation for defendants in all criminal history categories falls to less than one percent.

Proposed Sentencing Guideline for Early Termination of Supervised Release

Criminal History Category	**I**	**II**	**III**	**IV**	**V**	**VI**
< 5% Revocation Probability After # Months	18 months	26 months	32 months	34 months	37 months	38 months
Terminate for Full Compliance At . . .	**18-24 months**		**30-36 months**			**42 months**

To be clear: I only intend this guideline, like the rest of the Federal Sentencing Guidelines, to be advisory, not binding.[326] I recommend early termination after a certain number of months in the "heartland" of cases, where the defendant's behavior is comparable to that of an "ordinary" supervisee.[327] In an "atypical" scenario, judges may wish to vary up or down from my recommended ranges, just as they do in other kinds of sentencing proceedings.[328] For instance, if a defendant is unusually well-behaved, then judges may wish to terminate supervision earlier than I advise. Or, if a defendant's conduct under supervision is especially poor, then judges might choose to wait longer than I recommend.

My recommendation of early termination after eighteen to thirty-six months of supervision in most cases is consistent with both past and present practice. From the very beginning, Alexander Maconochie suggested terminating tickets-of-leave after "two or three years."[329] In the 1970s, the Parole Commission similarly favored early termination for a parolee in the "very good risk category" after "two continuous years of supervision," and a parolee in the "other than the very good risk category" after "three continuous years of supervision."[330] More recently, empirical studies show that defendants on supervised release "serve[] an average of 26 months before being terminated [early]."[331]

Nevertheless, I acknowledge that my guideline differs from the rest of the Sentencing Guidelines in one significant respect—it is based solely on the

326. *See* United States v. Booker, 543 U.S. 220, 266 (2005).
327. Kimbrough v. United States, 552 U.S. 85, 109 (2007).
328. *See* Rita v. United States, 551 U.S. 338, 344 (2007).
329. MACONOCHIE, *supra* note 39, at 120.
330. *See* 28 C.F.R. § 2.43(e) (1984).
331. U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 62 (2010).

defendant's criminal history, not their original offense. In most sentencing proceedings, the Guidelines assign each defendant a "base offense level," and then use a series of upward and downward adjustments to calculate a "total offense level," which, together with the criminal history, determines the recommended sentence.[332] Because the Sentencing Commission's revocation database does not include information on each defendant's original offense level, however, I could not incorporate this factor into my guideline. If the Sentencing Commission ever decides to create an official guideline for early termination of supervised release, it may wish to include the original offense level in its analysis.

I believe my proposed guideline on early termination is superior to both the Guide to Judiciary Policy and the Safer Supervision Act of 2023. Although the Guide includes a "presumption in favor of recommending early termination" for low-risk defendants after they have served eighteen months of supervision, it is not legally enforceable nor does it provide a timeline for terminating higher risk defendants.[333] While the SSA would create a "presumption of early termination of supervised release" for defendants who "demonstrated good conduct and compliance" after they had served 50 to 66.6% of their term of supervision,[334] that presumption could take many years to activate for defendants sentenced to long terms of supervision. By providing a default range for early termination based on the defendant's criminal history, my guideline provides more consistency in more cases.

Safety-focused skeptics of my proposal might fear that even after the probability of a defendant committing a violation resulting in revocation falls to five percent, the danger of terminating their supervision early is still too great. Empirical research, however, suggests my recommendations will not endanger the public. For example, a 2010 study found that violations of supervised release that result in revocation "occur early in the supervision process," on average, by approximately seventeen months of supervision.[335] Similarly, a 2018 report concluded that "[m]ost re-offenses under community supervision occur within the first year or two of supervision, after which the impact and utility of supervision wanes."[336] By comparison, my guideline does not recommend termination until a defendant has served at least eighteen months of supervision at the earliest. In fact, early

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332. *See* U.S. SENT'G COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.

333. 8 U.S. CTS., GUIDE TO JUDICIARY POLICY pt. E, § 360.20 (2018), https://www.uscourts.gov/file/78805/download.

334. Safer Supervision Act of 2023, S. 2681, 118th Cong. § 3(B)(i)–(ii) (2023).

335. United States v. Harris, 258 F. Supp. 3d 137, 147 (D.D.C. 2017); *see also* James L. Johnson, *Federal Post-Conviction Supervision Outcomes: Rearrests and Revocations*, 87 FED. PROB. 20, 24 (2024) (reporting that approximately two-thirds of rearrests of defendants under federal community supervision occurred within first thirty-six months).

336. VINCENT SCHIRALDI, COLUM. UNIV. JUST. LAB, THE PENNSYLVANIA COMMUNITY CORRECTIONS STORY 5 (2018), https://justicelab.columbia.edu/sites/default/files/content/PACommunityCorrections4.19.18finalv3.pdf.

termination may enhance public safety by allowing officers to focus their resources and attention on higher-risk defendants.[337]

Alternatively, advocates for prison abolition might think my guideline does not go far enough because it does not recommend the complete elimination of community supervision. I admit that my intent here is evolutionary rather than revolutionary. Nevertheless, abolitionists should still find something to like in my proposal. Unlike past attempts to reform community supervision by providing more funding for probation officers or adding more protections for individual rights,[338] my guideline aims to "shrink the footprint" of the criminal justice system by recommending when judges should terminate supervision early.[339] Even supervision abolitionists like Vincent Schiraldi have endorsed early termination as an effective, if incremental, way to reduce the scope of carceral control.[340]

Finally, there are a potentially wide range of theoretical objections to my proposal, including to my use of sentencing guidelines,[341] algorithmic analysis,[342] and criminal history categories.[343] While I am sympathetic to aspects of all these arguments, my goal here is to propose a quick and effective solution to an urgent problem in federal sentencing law. Disparities in rates of early terminations do real harm to real people and threaten to undermine the integrity of the supervision system itself. I matched my proposal to current sentencing practice to make it as easy as possible for judges, practitioners, advocates, and government officials to consult my recommendations as empirical benchmarks for deciding cases and formulating policy.

CONCLUSION

From the birth of community supervision in the 1800s to the SSA, the American criminal justice system has always sought to provide a way to terminate supervision early for well-behaved defendants. Although the replacement of parole with supervised release made federal sentencing more determinate with respect to prison terms, the persistence of early termination means the law is still highly indeterminate with respect to community supervision. Unfortunately, recent legal changes have made it harder for defendants to win early termination, which undermines the system's goals of rehabilitation and public safety. To reduce disparities in rates of early termination, I propose the first sentencing guideline on the subject,

337. *See* United States v. Siegel, 753 F.3d 705, 710 (7th Cir. 2014).

338. *See, e.g.,* Schuman, *supra* note 2, at 1396; Fish, *supra* note 30, at 1410–11; Edward J. Latessa & Myrinda Schweitzer, *Community Supervision and Violent Offenders: What the Research Tells Us and How to Improve Outcomes*, 103 MARQ. L. REV. 911, 932–36 (2020); Doherty, *supra* note 4, at 344–53.

339. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 463 (2018).

340. *See* SCHIRALDI, *supra* note 11, at 181–82, 222–23.

341. *See* Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997).

342. *See* Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019).

343. *See* Guha Krishnamurthi, *Against the Recidivist Premium*, 98 TUL. L. REV. 411 (2024).

recommending early termination in most cases after eighteen to thirty-six months of supervision.

Legal scholars have identified numerous benefits to early release mechanisms, including "cost savings,"[344] "[r]educing . . . excessively punitive punishments,"[345] "[r]eleasing people with serious or terminal medical conditions,"[346] "addressing systemic racial disparities,"[347] and a "fundamental, longstanding belief in the possibility of redemption."[348] Although their arguments have so far focused only on the prison system, the same benefits would apply to early termination of community supervision. Early termination is an important form of second-look sentencing that promotes safety, efficiency, and fairness in the supervision system. If mass supervision drives mass incarceration, then terminating supervision early offers a potential tool for criminal justice reform.

344. Klingele, *supra* note 29, at 487.
345. Hopwood, *supra* note 34, at 110.
346. O'Leary, *supra* note 34, at 624
347. Bloom, *supra* note 34, at 1996.
348. Larkin, *supra* note 29, at 32.

APPENDIX

Table 1—Frequency Table + Violation Probability (Criminal History Categories (CHC) I & II)

CHC I				CHC II			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
0	0	0	9.79%	0	0	0	14.91%
1	138	138	9.74%	1	56	56	14.85%
2	328	466	9.61%	2	161	217	14.68%
3	491	957	9.42%	3	250	467	14.41%
4	586	1,543	9.18%	4	303	770	14.09%
5	680	2,223	8.91%	5	376	1,146	13.68%
6	794	3,017	8.60%	6	418	1,564	13.22%
7	782	3,799	8.28%	7	474	2,038	12.70%
8	779	4,578	7.96%	8	458	2,496	12.19%
9	823	5,401	7.63%	9	470	2,966	11.65%
10	766	6,167	7.31%	10	414	3,380	11.18%
11	767	6,934	6.99%	11	434	3,814	10.68%
12	810	7,744	6.66%	12	442	4,256	10.16%
13	683	8,427	6.37%	13	364	4,620	9.73%
14	696	9,123	6.07%	14	377	4,997	9.28%
15	620	9,743	5.81%	15	365	5,362	8.84%
16	639	10,382	5.54%	16	321	5,683	8.44%
17	583	10,965	5.29%	17	315	5,998	8.06%
18	563	11,528	5.04%	18	316	6,314	7.67%
19	543	12,071	4.81%	19	289	6,603	7.30%
20	514	12,585	4.58%	20	270	6,873	6.96%

Table 1—Continued

CHC I				CHC II			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
21	561	13,146	4.33%	21	283	7,156	6.61%
22	462	13,608	4.13%	22	242	7,398	6.30%
23	491	14,099	3.91%	23	267	7,665	5.95%
24	483	14,582	3.70%	24	224	7,889	5.66%
25	438	15,020	3.50%	25	258	8,147	5.33%
26	372	15,392	3.33%	26	222	8,369	5.03%
27	389	15,781	3.16%	27	173	8,542	4.81%
28	333	16,114	3.01%	28	182	8,724	4.56%
29	315	16,429	2.87%	29	183	8,907	4.32%
30	352	16,781	2.71%	30	184	9,091	4.07%
31	339	17,120	2.55%	31	166	9,257	3.85%
32	336	17,456	2.40%	32	198	9,455	3.58%
33	286	17,742	2.27%	33	171	9,626	3.35%
34	330	18,072	2.11%	34	164	9,790	3.13%
35	282	18,354	1.98%	35	128	9,918	2.95%
36	327	18,681	1.83%	36	138	10,056	2.76%
37	291	18,972	1.70%	37	159	10,215	2.54%
38	240	19,212	1.59%	38	128	10,343	2.36%
39	197	19,409	1.49%	39	119	10,462	2.20%
40	180	19,589	1.41%	40	97	10,559	2.06%
41	165	19,754	1.33%	41	95	10,654	1.93%

Table 1—Continued

CHC I				CHC II			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
42	162	19,916	1.26%	42	66	10,720	1.83%
43	158	20,074	1.18%	43	73	10,793	1.73%
44	119	20,193	1.13%	44	81	10,874	1.62%
45	131	20,324	1.07%	45	65	10,939	1.52%
46	136	20,460	1.00%	46	50	10,989	1.45%
47	109	20,569	0.95%	47	60	11,049	1.37%
48	133	20,702	0.89%	48	63	11,112	1.28%
49	114	20,816	0.83%	49	53	11,165	1.20%
50	95	20,911	0.79%	50	56	11,221	1.12%
51	104	21,015	0.74%	51	38	11,259	1.07%
52	88	21,103	0.70%	52	29	11,288	1.03%
53	78	21,181	0.66%	53	45	11,333	0.96%
54	80	21,261	0.62%	54	31	11,364	0.92%
55	78	21,339	0.59%	55	33	11,397	0.87%
56	71	21,410	0.55%	56	40	11,437	0.81%
57	80	21,490	0.51%	57	30	11,467	0.77%
58	54	21,544	0.49%	58	20	11,487	0.74%
59	62	21,606	0.46%	59	36	11,523	0.69%
60	73	21,679	0.42%	60	39	11,562	0.63%
61	63	21,742	0.39%	61	31	11,593	0.59%
62	66	21,808	0.36%	62	17	11,610	0.56%

Table 1—Continued

CHC I				CHC II			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
63	51	21,859	0.34%	63	24	11,634	0.53%
64	35	21,894	0.32%	64	26	11,660	0.49%
65	36	21,930	0.30%	65	19	11,679	0.47%
66	37	21,967	0.29%	66	15	11,694	0.44%
67	28	21,995	0.27%	67	15	11,709	0.42%
68	27	22,022	0.26%	68	11	11,720	0.41%
69	25	22,047	0.25%	69	14	11,734	0.39%
70	24	22,071	0.24%	70	13	11,747	0.37%
71	23	22,094	0.22%	71	7	11,754	0.36%
72	17	22,111	0.22%	72	12	11,766	0.34%
. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
284	2	22,562	0.00%	239	0	11,999	0.00%

Table 2—Frequency Table + Violation Probability (Criminal History Categories (CHC) III & IV)

CHC III				CHC IV			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
0	0	0	20.14%	0	0	0	24.52%
1	97	97	20.06%	1	89	89	24.41%
2	294	391	19.83%	2	228	317	24.12%
3	498	889	19.44%	3	357	674	23.67%
4	532	1,421	19.02%	4	455	1,129	23.10%
5	622	2,043	18.51%	5	527	1,656	22.41%
6	686	2,729	17.95%	6	521	2,177	21.73%
7	714	3,443	17.36%	7	576	2,753	20.95%
8	799	4,242	16.69%	8	534	3,287	20.22%
9	776	5,018	16.02%	9	559	3,846	19.45%
10	725	5,743	15.39%	10	513	4,359	18.72%
11	698	6,441	14.78%	11	559	4,918	17.91%
12	721	7,162	14.13%	12	559	5,477	17.08%
13	728	7,890	13.47%	13	474	5,951	16.37%
14	697	8,587	12.83%	14	464	6,415	15.66%
15	603	9,190	12.27%	15	436	6,851	14.98%
16	599	9,789	11.70%	16	438	7,289	14.29%
17	575	10,364	11.15%	17	404	7,693	13.64%
18	513	10,877	10.65%	18	411	8,104	12.97%
19	497	11,374	10.16%	19	343	8,447	12.40%
20	474	11,848	9.69%	20	348	8,795	11.82%

Table 2—Continued

CHC III				CHC IV			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
21	460	12,308	9.23%	21	374	9,169	11.19%
22	501	12,809	8.72%	22	324	9,493	10.63%
23	424	13,233	8.29%	23	326	9,819	10.06%
24	414	13,647	7.86%	24	291	10,110	9.55%
25	391	14,038	7.45%	25	273	10,383	9.06%
26	361	14,399	7.07%	26	261	10,644	8.59%
27	352	14,751	6.70%	27	234	10,878	8.16%
28	308	15,059	6.37%	28	229	11,107	7.74%
29	312	15,371	6.04%	29	219	11,326	7.34%
30	316	15,687	5.69%	30	254	11,580	6.86%
31	318	16,005	5.35%	31	212	11,792	6.46%
32	297	16,302	5.02%	32	223	12,015	6.04%
33	267	16,569	4.72%	33	222	12,237	5.61%
34	262	16,831	4.43%	34	191	12,428	5.24%
35	269	17,100	4.13%	35	173	12,601	4.90%
36	253	17,353	3.85%	36	162	12,763	4.58%
37	237	17,590	3.58%	37	156	12,919	4.27%
38	216	17,806	3.33%	38	121	13,040	4.03%
39	189	17,995	3.11%	39	131	13,171	3.77%
40	171	18,166	2.92%	40	115	13,286	3.54%
41	128	18,294	2.77%	41	110	13,396	3.31%

Table 2—Continued

CHC III				CHC IV			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
42	132	18,426	2.62%	42	89	13,485	3.13%
43	137	18,563	2.46%	43	101	13,586	2.93%
44	131	18,694	2.31%	44	75	13,661	2.77%
45	124	18,818	2.16%	45	96	13,757	2.58%
46	100	18,918	2.04%	46	83	13,840	2.41%
47	100	19,018	1.93%	47	47	13,887	2.31%
48	87	19,105	1.82%	48	65	13,952	2.17%
49	103	19,208	1.70%	49	56	14,008	2.06%
50	67	19,275	1.62%	50	57	14,065	1.94%
51	73	19,348	1.54%	51	51	14,116	1.83%
52	72	19,420	1.45%	52	38	14,154	1.75%
53	70	19,490	1.37%	53	39	14,193	1.67%
54	56	19,546	1.30%	54	42	14,235	1.58%
55	72	19,618	1.22%	55	54	14,289	1.47%
56	66	19,684	1.14%	56	36	14,325	1.39%
57	57	19,741	1.07%	57	32	14,357	1.33%
58	67	19,808	0.99%	58	36	14,393	1.25%
59	66	19,874	0.91%	59	35	14,428	1.18%
60	49	19,923	0.85%	60	29	14,457	1.12%
61	44	19,967	0.80%	61	31	14,488	1.05%
62	34	20,001	0.76%	62	27	14,515	0.99%

Table 2—Continued

CHC III				CHC IV			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
63	39	20,040	0.71%	63	25	14,540	0.94%
64	33	20,073	0.67%	64	24	14,564	0.89%
65	23	20,096	0.64%	65	25	14,589	0.83%
66	17	20,113	0.62%	66	27	14,616	0.78%
67	21	20,134	0.60%	67	25	14,641	0.72%
68	31	20,165	0.56%	68	18	14,659	0.68%
69	22	20,187	0.53%	69	19	14,678	0.64%
70	21	20,208	0.51%	70	13	14,691	0.62%
71	27	20,235	0.47%	71	13	14,704	0.59%
72	22	20,257	0.45%	72	16	14,720	0.55%
. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
230	1	20,624	0.00%	280	1	14,977	0.00%

Table 3—Frequency Table + Violation Probability (Criminal History Categories (CHC) V & VI)

CHC V				CHC VI			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
0	0	0	28.40%	0	0	0	29.40%
1	57	57	28.29%	1	121	121	29.26%
2	181	238	27.92%	2	380	501	28.84%
3	250	488	27.41%	3	494	995	28.28%
4	278	766	26.83%	4	572	1,567	27.62%
5	341	1,107	26.11%	5	724	2,291	26.77%
6	404	1,511	25.24%	6	717	3,008	25.91%
7	359	1,870	24.45%	7	746	3,754	24.99%
8	386	2,256	23.58%	8	713	4,467	24.09%
9	392	2,648	22.67%	9	726	5,193	23.15%
10	340	2,988	21.87%	10	711	5,904	22.21%
11	382	3,370	20.95%	11	679	6,583	21.29%
12	394	3,764	19.97%	12	674	7,257	20.35%
13	337	4,101	19.12%	13	564	7,821	19.55%
14	342	4,443	18.24%	14	580	8,401	18.71%
15	296	4,739	17.46%	15	531	8,932	17.92%
16	264	5,003	16.75%	16	512	9,444	17.15%
17	260	5,263	16.04%	17	488	9,932	16.40%
18	288	5,551	15.24%	18	438	10,370	15.72%
19	247	5,798	14.54%	19	468	10,838	14.97%
20	240	6,038	13.85%	20	486	11,324	14.19%

Table 3—Continued

CHC V				CHC VI			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
21	243	6,281	13.14%	21	435	11,759	13.47%
22	216	6,497	12.50%	22	379	12,138	12.84%
23	221	6,718	11.83%	23	383	12,521	12.19%
24	193	6,911	11.24%	24	360	12,881	11.57%
25	209	7,120	10.59%	25	317	13,198	11.02%
26	190	7,310	9.99%	26	295	13,493	10.50%
27	169	7,479	9.45%	27	275	13,768	10.00%
28	152	7,631	8.97%	28	283	14,051	9.49%
29	149	7,780	8.48%	29	282	14,333	8.98%
30	160	7,940	7.95%	30	268	14,601	8.48%
31	136	8,076	7.50%	31	271	14,872	7.98%
32	138	8,214	7.04%	32	260	15,132	7.49%
33	115	8,329	6.65%	33	213	15,345	7.08%
34	140	8,469	6.17%	34	254	15,599	6.59%
35	113	8,582	5.78%	35	211	15,810	6.18%
36	113	8,695	5.38%	36	205	16,015	5.78%
37	103	8,798	5.02%	37	191	16,206	5.40%
38	96	8,894	4.68%	38	191	16,397	5.02%
39	78	8,972	4.40%	39	143	16,540	4.74%
40	57	9,029	4.20%	40	135	16,675	4.46%
41	64	9,093	3.97%	41	115	16,790	4.23%

Table 3—Continued

CHC V				CHC VI			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
42	55	9,148	3.77%	42	123	16,913	3.98%
43	57	9,205	3.57%	43	118	17,031	3.74%
44	55	9,260	3.36%	44	107	17,138	3.52%
45	40	9,300	3.22%	45	89	17,227	3.33%
46	55	9,355	3.02%	46	86	17,313	3.16%
47	50	9,405	2.83%	47	94	17,407	2.96%
48	40	9,445	2.68%	48	93	17,500	2.77%
49	45	9,490	2.52%	49	77	17,577	2.60%
50	41	9,531	2.37%	50	71	17,648	2.45%
51	30	9,561	2.25%	51	58	17,706	2.33%
52	30	9,591	2.14%	52	65	17,771	2.19%
53	33	9,624	2.02%	53	60	17,831	2.07%
54	35	9,659	1.89%	54	68	17,899	1.92%
55	18	9,677	1.82%	55	60	17,959	1.79%
56	26	9,703	1.72%	56	56	18,015	1.67%
57	32	9,735	1.60%	57	46	18,061	1.58%
58	16	9,751	1.54%	58	46	18,107	1.48%
59	29	9,780	1.43%	59	47	18,154	1.38%
60	28	9,808	1.32%	60	40	18,194	1.29%
61	26	9,834	1.22%	61	33	18,227	1.22%
62	10	9,844	1.19%	62	32	18,259	1.15%

Table 3—Continued

CHC V				CHC VI			
Months	**Violations**	**Cumulative Violations**	**Violation Probability**	**Months**	**Violations**	**Cumulative Violations**	**Violation Probability**
63	11	9,855	1.14%	63	35	18,294	1.07%
64	17	9,872	1.08%	64	37	18,331	0.99%
65	16	9,888	1.02%	65	27	18,358	0.93%
66	14	9,902	0.96%	66	26	18,384	0.88%
67	11	9,913	0.92%	67	26	18,410	0.82%
68	13	9,926	0.87%	68	15	18,425	0.79%
69	4	9,930	0.86%	69	14	18,439	0.76%
70	10	9,940	0.82%	70	14	18,453	0.73%
71	9	9,949	0.78%	71	9	18,462	0.71%
72	13	9,962	0.73%	72	18	18,480	0.67%
. . .	. . .	. . .	. . .	. . .	. . .	. . .	. . .
273	1	10,151	0.00%	261	1	18,783	0.00%