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Improving the Federal Procedure for Imposing Recycled Conditions of Supervised Release

“If evidence-based sentencing is the new frontier in sentencing policy and practice, the use of evidence-based processes and data by judges . . . is the most important terrain in that frontier.”¹

INTRODUCTION

Jose Morales-Cruz, age 61, sits in federal court waiting for his sentence. Sixteen years ago he was convicted of sexual assault, and he has just been convicted for failing to register as a sex offender. Jose admits that since his release from prison he has used drugs, but he hasn't committed another sex crime. The judge sentences Jose to a 48-month prison term. At the probation officer's recommendation, the judge orders Jose to attend sex-offender treatment as a condition of supervised release.

According to the Court of Appeals for the First Circuit, this condition was appropriate because it related to Jose's failure to register and his prior offenses.² This note takes issue with the First Circuit's reasoning and argues that when the probation office recommends a condition of supervised release unrelated to the specific crime before the court, the defendant should have an evidentiary hearing to assess that recommendation.

Recent research has changed the way criminal justice practitioners think about sentencing.³ Scholars have made great strides in advocating for sentences tailored to a specific defendant, and in the process, they have drawn attention to the concept of making sentencing decisions based on evidence instead of intuition. This notion of “evidence-based” decision-making has dominated many fields—from medicine to finance to consumer

¹ Margareth Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAP. J. CRIM. JUST. 43, 47 (2009).

² *United States v. Morales-Cruz*, 712 F.3d 71, 72 (1st Cir. 2013).

³ MATTHEW KLEINMAN, USING EVIDENCE-BASED PRACTICES IN SENTENCING CRIMINAL OFFENDERS 299-303 (2012), available at, http://knowledgecenter.csg.org/kc/system/files/matthew_kleiman_2012.pdf.

products—in recent years.⁴ In particular, an “evidence-based sentence” draws on scientific research to address a specific defendant’s culpability and rehabilitative needs.⁵

Literature on the benefits of evidence-based sentencing has exploded in recent years, but no work has considered whether the current legal framework makes it possible to fully implement evidence-based sentencing. The current framework is especially problematic in the context of the “recycled condition”—that is, a condition of supervised release based on a prior, unrelated conviction. Courts impose recycled conditions on the belief that a prior crime can both predict the likelihood of re-offense and inform the court of the most appropriate sanction. Modern research calls this belief into question.⁶ Yet the current model for challenging those conditions provides little chance to test the government’s recommendations. In short, evidence suggests that recycled conditions should be treated with skepticism, but there is little procedural opportunity to give that conclusion much meaning. An evidentiary hearing before sentencing, however, would provide a meaningful opportunity for the defense to cross-examine the probation officer.

This change would be consistent with recent trends in the criminal justice system and with constitutional law scholarship. For years the criminal justice system operated on hunches and subjective beliefs, but recently, pockets of the criminal justice system have incorporated more evidence-based processes. Police forces, for instance, have become more efficient crime fighters by identifying areas with disproportionate amounts of crime—known as “hot spots”—and focusing their attention on those areas. The result has been reduced crime in the areas surrounding the “hot spot.”⁷ Based on such documented successes, some commentators have contemplated “moneyballing” criminal justice—the idea being that quantitative analysis should dominate decision-making throughout the system.⁸ Indeed, even constitutional scholars acknowledge that procedural due process “must adapt to

⁴ *Id.*

⁵ *See id.*

⁶ *See infra* Part II.B.

⁷ *Hot Spot Policing Can Reduce Crime*, NAT’L INST. OF JUSTICE: OFF. OF JUST. PROGRAMS (Oct. 14, 2009), <http://www.nij.gov/topics/law-enforcement/strategies/hot-spot-policing/Pages/welcome.aspx>; *Implementing and Institutionalizing COMPSTAT in Maryland*, U. OF MD., http://www.compstat.umd.edu/what_is_cs.php (last visited Feb. 26, 2015).

⁸ Francis T. Cullen et al., *Eight Lessons from Moneyball: The High Cost of Ignoring Evidence-Based Corrections*, 4 VICTIMS & OFFENDERS 197, 206-07 (1999), available at <http://www.cpoc.org/assets/Realignment/moneyball%20and%20ebp.pdf>.

changing facts and circumstances.”⁹ Taken together, criminal justice advancements and the adaptable nature of judicial process suggest that sentencing procedures are ripe for change.

Part I of this note describes the background of supervised release and the role supervised release plays in criminal punishment. Part II discusses the current model for challenging conditions of supervised release, focusing on the duties of the Federal Probation Office and the defense attorney, and examines important scholarship suggesting that: (1) recycled conditions undermine the purpose of supervised release; (2) conditions can be unnecessary if criminal behavior decreases over time; and (3) even if a condition is necessary, courts still need to determine what type of condition should be imposed. Part III argues that an evidentiary hearing would be consistent with procedure in related stages of supervised release and would address the troublesome nature of recycled conditions.

I. OBJECTIVES AND STRUCTURE OF THE SENTENCING REFORM ACT

Supervised release is part of the 1984 Sentencing Reform Act (SRA), which Congress passed in response to the perceived failure of “indeterminate sentencing.”¹⁰ An indeterminate sentence “impose[s] a minimum and maximum incarceration term, allowing the possibility of release on parole sometime between the expiration of those terms.”¹¹ This sentencing model comes from a strong belief in rehabilitation: not just that rehabilitation is possible, but that it can be achieved before the end of a prison term.¹² The indeterminate sentence regime puts these ideals into action by providing parole as a release mechanism.¹³

The blueprint for indeterminate sentencing originated and developed abroad.¹⁴ In the early 1840s, Australian penologist Alexander Maconochie devised a plan to reintegrate prisoners into society.¹⁵ In his “mark” system, the goal was to “ignite a

⁹ Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1317 (2012).

¹⁰ Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 997 (2013); OFFICE OF THE FED. PUB. DEFENDER, W. DIST. OF TEX., AN INTRODUCTION TO FEDERAL SENTENCING 1 (Bradford W. Bogan ed., 14th ed. 2012) [hereinafter WEST TEXAS DEFENDER].

¹¹ ARTHUR W. CAMPBELL, LAW OF SENTENCING § 4:2 (3rd ed. 2004).

¹² *Id.*

¹³ *Id.*

¹⁴ Doherty, *supra* note 10, at 976 (“The penologists who brought indeterminacy and conditional release into American sentencing were part of a self-conscious reform movement that was based largely on the writings of Maconochie and Crofton.”).

¹⁵ *Id.* at 967-76.

prisoner's internal drive to succeed," and prisoners worked to shorten their sentences.¹⁶ Maconochie believed, moreover, that released prisoners should not be supervised or controlled.¹⁷ English and Irish reformers in the 1850s echoed this sentiment, believing that such supervision would "effectually stamp [prisoners] as individuals belonging to a criminal class."¹⁸

Meanwhile, the United States used retributive sentencing.¹⁹ In the retributive model, punishment serves not to rehabilitate the offender but to rectify the perceived imbalance of a criminal act.²⁰ Retribution can take two forms, one "weak" and one "strong."²¹ The "weak" conception is that a criminal should receive a punishment proportionate to his crime because that is what he deserves; the "strong" conception is "the criminal *must* be punished, regardless of the consequences."²²

In 1877, United States policymakers replaced retributivism with indeterminacy.²³ But in the 1960s, crime rates spiked,²⁴ and by the 1970s, retributivism was back in vogue.²⁵ In 1974, American sociologist Robert Martinson argued that rehabilitation efforts had little or no positive impact on recidivism rates.²⁶ His findings inspired the slogan "nothing works" and popularized the determinacy movement.²⁷ Determinate sentences carry flat terms with no possibility for parole.²⁸ Eventually, the determinacy movement received substantial bipartisan support.²⁹ Despite its

¹⁶ *Id.* at 968.

¹⁷ *Id.* at 969.

¹⁸ *Id.* (quoting Joshua Jebb, *Explanations and Showing the Difficulties Which Would Attend the Introduction into England of the Probationary Stages of Discipline and Supervision of the Police, &c., Which Have Been Adopted in Ireland*, in TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE, 402, 411, 414 (George W. Hastings ed.1863)).

¹⁹ Doherty, *supra* note 10, at 976.

²⁰ CAMPBELL, *supra* note 11, § 2:5.

²¹ Dan Markel, *Are Shaming Punishments Beautifully Retributive: Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2158-59 (2001).

²² *Id.*; see also ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 4 (2013) (describing "just deserts" as the principle that "punishment should be scaled to the offender's culpability and the resulting harms").

²³ Doherty, *supra* note 10, at 976.

²⁴ Darryl K. Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 MICH. L. REV. 2146, 2146 (1998).

²⁵ CAMPBELL, *supra* note 11, § 2:5.

²⁶ Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUBLIC INTEREST 22, 25 (1974).

²⁷ Rick Sarre, Presentation at The History of Crime, Policing, and Punishment Conference: Beyond 'What Works?': A 25 Year Jubilee Retrospective of Robert Martinson 2-3 (Dec. 9, 1999), *manuscript available at* http://www.aic.gov.au/media_library/conferences/hcpp/sarre.pdf.

²⁸ CAMPBELL, *supra* note 11, § 4:3.

²⁹ Sarre, *supra* note 27, at 2-3.

initial wave of support, the idea that nothing works in corrections has been debunked by researchers pointing out the various flaws in Martinson's study.³⁰ Even Martinson abandoned his findings in a 1979 law review article.³¹

By the time Martinson beat his hasty retreat, however, the determinacy movement had significant support.³² Judge Marvin Frankel of the Southern District of New York drew particular attention to the divergent sentences produced by the indeterminate system and advocated for reduced judicial discretion.³³ Also in favor of a determinate system was penologist Andrew Von Hirsch, who advocated for a return to the retributive model of sentencing.³⁴ Ultimately, Congress "sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system" and to ensure that similar crimes were treated similarly and that different crimes were treated differently.³⁵ Some criticized the new determinate system as destructive of the judge's discretion,³⁶ and indeed some judges took offense, arguing that criminal sentencing is the most important part of the job.³⁷ In their view, the new regime merely shifted discretion to prosecutors.³⁸ The Supreme Court's decision in *United States v. Booker*, however, likely allayed these concerns by making the sentencing guidelines advisory rather than mandatory.³⁹

Even before *Booker*, judges had authority over supervised release, which replaced parole.⁴⁰

³⁰ *Id.* at 3-4.

³¹ *Id.* at 4 (citing Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOF. L. REV. 243, 244, 255 (1979)); Doherty, *supra* note 10, at 994-95.

³² See Doherty, *supra* note 10, at 995.

³³ *Id.* at 992-93 (summarizing Frankel's position).

³⁴ *Id.* at 993-94.

³⁵ HAINES, JR. ET AL., *supra* note 22, at 2-3.

³⁶ Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940 (1988) ("[T]he Commission can cure the guidelines' most fundamental flaws by proposing amendments that draw on the model of guided, or structured, discretion developed in the context of the Supreme Court's death penalty jurisprudence.").

³⁷ See Hon. William W. Schwarzer, *Judicial Discretion in Sentencing*, at the National Conference on Sentencing Advocacy (1989), in NATIONAL CONFERENCE ON SENTENCING ADVOCACY 1991: COURSE HANDBOOK SERIES 27 (Mar. 11, 1991).

³⁸ See *id.* at 25.

³⁹ 543 U.S. 220, 245 (2005); see also WEST TEXAS DEFENDER, *supra* note 10, at 1 ("Under the system created by *Booker*, judges enjoy far more discretion in their sentencing decisions than they were allowed under the mandatory-guidelines regime. The fact that the guidelines are now advisory rather than mandatory can have a tremendous effect on a particular defendant's sentence.").

⁴⁰ See U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 1 (July 2010), available at <http://www.ussc.gov/sites/default/>

Supervised release is a “unique” type of post-confinement monitoring that is overseen by federal district courts with the assistance of federal probation officers, rather than by the United States Parole Commission. A sentencing court is authorized (and, in some cases, required) to impose a term of supervised release in addition to a term of imprisonment. While on supervised release after reentry into the community following release from imprisonment, an offender is required to abide by certain conditions, some mandated by statute and others imposed at the court’s discretion. If an offender violates a condition, a court is authorized (and, in some cases, required) to “revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on post[-]release supervision”⁴¹

Congress designed supervised release to promote rehabilitation and reintegration.⁴² Unlike parole, though, supervised release begins only after the prison term. Moreover, supervised release was never intended to incorporate a revocation mechanism,⁴³ which authorizes the judge to “impose a new sentence which includes a prison sentence.”⁴⁴ Yet Congress “grafted the revocation mechanism for probation onto supervised release, ignoring the different theoretical roots of those systems.”⁴⁵ Fiona Doherty makes the interesting point that revocation actually creates a perverse form of indeterminacy, the very model Congress hoped to avoid.⁴⁶ Others argue that revocation makes supervised release an agent of sustained punishment rather than reintegration.⁴⁷ Notwithstanding the internal inconsistencies created by the revocation mechanism, the procedure for revoking supervised release will help analyze recycled conditions.⁴⁸

files/pdf/training/annual-national-training-seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf.

⁴¹ *Id.* (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) and 18 U.S.C. § 3583(e)(3) (2006)).

⁴² *Id.* at 2 (quoting *United States v. Johnson*, 529 U.S. 53, 59 (2000)).

⁴³ Jennifer Gilg, Research & Writing Specialist, Presentation at the District of Nebraska Multi-Track Federal Criminal Defense Seminar: The Fine Print: Strategies for Avoiding Restrictive Conditions of Supervised Release 1 (Aug. 2011), *manuscript available at* http://www.fd.org/docs/select-topics—common-offenses/fine_print.pdf (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromise Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 125 (1988)); *see also* Doherty, *supra* note 10, at 999-1000.

⁴⁴ *Supervised Release*, FED. DEFENDERS OF N.Y., <http://federaldefendersny.org/information-for-client-and-families/supervised-release.html> (last visited Feb. 22, 2015).

⁴⁵ Doherty, *supra* note 10, at 1002.

⁴⁶ *Id.* at 1009.

⁴⁷ *See* Gilg, *supra* note 43, at 2 (citing Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT’G REPORT 204 (1994)).

⁴⁸ *See infra* Part III.B.

18 U.S.C. § 3583 provides the framework for imposing discretionary conditions of supervised release.⁴⁹ A condition must “be ‘reasonably related’ to ‘the nature and circumstances of the offense, the history and characteristics of the defendant, deterrence of criminal conduct, protection of the public, and treatment of the defendant’s correctional needs.’”⁵⁰ A valid condition needs to meet only one of these sentencing goals.⁵¹ Still, conditions may involve “no greater deprivation of liberty than is reasonably necessary” to deter further criminal behavior, protect the public, and rehabilitate.⁵²

Courts have held that § 3583 authorizes conditions of supervised release that are unrelated to the instant conviction,⁵³ including recycled conditions based on prior convictions.⁵⁴ Courts seem particularly willing to impose recycled conditions against defendants with prior sex offenses.⁵⁵ Indeed, commentators have observed that sex offenders bear the brunt of deterrent efforts, as judges have been imposing severe prison terms and conditions of supervised release.⁵⁶

But defendants have some ammunition against recycled conditions. If the defendant challenges a condition, the government bears the burden of proving its validity.⁵⁷ And there are some stock arguments against the recycled condition.⁵⁸ The next sections describe these defenses, and their deficiencies, in greater detail.

II. CHALLENGING THE CONDITIONS OF SUPERVISED RELEASE

Sentencing procedure comes from the Supreme Court’s statement in *Mathews v. Eldridge* that the appropriate process is determined “by balancing (1) the nature of the individual interest

⁴⁹ HAINES, JR. ET AL., *supra* note 22, at 1431.

⁵⁰ *Doe v. U.S. Parole Comm’n*, 958 F. Supp. 2d 254, 261 (D.D.C. 2013) (citing 18 U.S.C. §§ 3553, 3583 (2012)).

⁵¹ *United States v. Dupes*, 513 F.3d 338, 344 (2d Cir. 2008) (citing *United States v. Abrar*, 58 F.3d 43, 46 (2d Cir. 1995)).

⁵² 18 U.S.C. § 3583(d)(2).

⁵³ *See, e.g., United States v. Camp*, 410 F.3d 1042, 1044, 1046 (8th Cir. 2005) (deeming permissible a condition that defendant “reveal financial information to the probation office” for possessing a firearm in light of prior unpaid child support).

⁵⁴ *See, e.g., Dupes*, 513 F.3d at 342 (deeming permissible a condition related to prior sex offense in case involving securities fraud).

⁵⁵ *See* HAINES, JR. ET AL., *supra* note 22, at 1461 n.118 (collecting cases).

⁵⁶ *Gilg*, *supra* note 43, at 3-4.

⁵⁷ *United States v. Weber*, 451 F.3d 552, 558 (9th Cir. 2006).

⁵⁸ *See, e.g., United States v. Scott*, 270 F.3d 632, 633 (8th Cir. 2001) (“The conditions do not relate to the offense of conviction, and the record does not show that they were reasonably necessary to deter the defendant from repeating his sex crime, which occurred 15 years ago.”).

affected, (2) the risk of an erroneous deprivation of that interest through the procedure used, (3) the probable value, if any, of additional safeguards, and (4) the government's interest, including fiscal and administrative burdens."⁵⁹ More concretely, two basic rules guide much of sentencing: the defendant is not entitled to all protections of the rules of evidence, and he does not have all the protections of the Constitution.⁶⁰ These rules drastically reduce a defendant's ability to challenge and defeat conditions of supervised release.

A. *Current Model*

Defense counsel and the probation office are the primary players at sentencing. Indeed, defense counsel's responsibilities continue well past the end of trial, and sentencing arguably "has as much—and often more—ultimate impact on clients and society than verdicts of guilt."⁶¹ A large portion of the government's work, on the other hand, shifts to the probation office, which devises the presentence report (PSR).⁶² "The importance of the presentence report cannot be overstated. In it, the probation officer will recommend fact findings, guideline calculations, and potential grounds for departure The report can also affect the conditions of probation or supervised release."⁶³ In addition to playing a major role in determining the sentence, the PSR continues to be used by correctional officials long after the sentence has been entered, including for such purposes as designation and custody classification within the federal prison system.⁶⁴

⁵⁹ *United States v. Prescott*, 920 F.2d 139, 144 (2d Cir. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

⁶⁰ David Debold, *Sentencing Procedure*, in PRACTICE UNDER THE FED. SENTENCING GUIDELINES § 8.03 (2015); see also 2011 FEDERAL SENTENCING GUIDELINES MANUAL § 6A1.3 (Resolution of Disputed Factors (Policy Statement)), available at http://www.uscourts.gov/Guidelines/2011_Guidelines/Manual_HTML/6a1_3.htm.

⁶¹ CAMPBELL, *supra* note 11, § 13:1.

⁶² *Id.* § 10:2 ("In the federal system, where court rule directs probation officers to make presentence reports for all offenders, a sentencing judge must take affirmative action in order to halt the report's preparation." (citing FED. R. CRIM. P. 32(c)(1))).

⁶³ WEST TEXAS DEFENDER, *supra* note 10, at 26.

⁶⁴ Gregory W. Carman & Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 ST. JOHN'S L. REV. 1, 6 (2004); see also U.S. DEP'T OF JUSTICE FED. BUREAU OF PRISONS, PROGRAM STATEMENT: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION 4 (2006), available at http://www.bop.gov/policy/progstat/5100_008.pdf.

1. The Contents of the Presentence Report

The PSR may be described generally as a “mixture of facts, conclusions, and recommendations.”⁶⁵ The PSR is prepared by the Federal Probation Office, which may use its “virtually unlimited sources, including files of the prosecutor and court records normally sealed from public scrutiny.”⁶⁶ For example, it is likely that the probation officer handling a defendant previously convicted of a sex offense will examine the records of that prior offense.⁶⁷ There are dangers to this lenient policy, not least of which is inaccurate information. Indeed, “[m]any presentence report recommendations, while nominally objective, have a significant subjective component. The probation officer’s attitude toward the case or the client may substantially influence the report’s sentencing recommendations.”⁶⁸ Nevertheless, the PSR serves as the sentencing judge’s primary point of reference; in fact, the judge can simply adopt the PSR.⁶⁹ And as general legal policy, appellate courts fully support the trial judge’s pursuit of any and all relevant information at sentencing, rarely reversing trial judges “for considering too much information, although sometimes for considering too little.”⁷⁰

Still, in an effort to balance the PSR and the high amount of deference it receives, courts maintain that the “defendant has a due process right not to be sentenced on the basis of information that is materially false.”⁷¹ As a result, the defendant has an opportunity to refute the PSR,⁷² and the defendant must see the PSR before sentencing.⁷³ In the current system, though, the available methods for challenging the PSR make this step little more than a formality.

⁶⁵ CAMPBELL, *supra* note 11, § 9:6.

⁶⁶ *Id.* § 11:1.

⁶⁷ Gilg, *supra* note 43, at 7.

⁶⁸ WEST TEXAS DEFENDER, *supra* note 10, at 26; *but see* United States v. Flores, 725 F.3d 1028, 1038 (9th Cir. 2013) (noting that a court may not “adopt conclusory statements unsupported by facts” (citing United States v. Navarro, 979 F.2d 786, 789 (9th Cir. 1992))).

⁶⁹ *See, e.g.*, United States v. Dupes, 513 F.3d 338, 341-42 (2d Cir. 2008) (“In addition to the mandatory and standard conditions of supervised release, the court imposed several special conditions relating to Dupes’s prior sex offenses. The court adopted these special conditions from the presentence report that the probation office had prepared.”).

⁷⁰ CAMPBELL, *supra* note 11, § 9:5.

⁷¹ Hili v. Sciarrotta, 140 F.3d 210, 215 (2d Cir. 1998).

⁷² CAMPBELL, *supra* note 11, § 10:4.

⁷³ *Id.* § 9:7 (“[W]here defense counsel is not allowed to inspect the court’s presentence report, and where the trial court does not state honestly the reasons for its sentence, it is difficult—and often impossible—for an appellate court to determine whether a sentence is based upon incorrect information.”).

2. Defense Counsel's Limited Ability to Challenge the PSR

There are a few methods of challenging conditions of supervised release. Defense counsel can submit a memorandum in opposition to the government's PSR.⁷⁴ Presentence studies may also be an effective means of challenging the PSR, although they sometimes require the "client's institutionalization during that period."⁷⁵ Short of requesting a study, defense counsel may submit current correctional literature supporting his recommendations.⁷⁶

Additionally, some stock objections to recycled conditions have emerged. For instance, counsel might challenge the condition's relationship to the current crime, its effect on liberty, or its temporal distance from the present case.⁷⁷ For defendants with a prior sex offense, recent studies may afford the most persuasive challenge to their recycled conditions.⁷⁸ Although the government must overcome these challenges and there may be an increased judicial receptiveness to such findings, these arguments are generally difficult because the offender receives little sympathy.⁷⁹

B. *Evidence-Based Sentencing*

As defendants toiled under this model for challenging conditions, scholars were radically changing the criminal justice community's view of criminality and corrections. Abandoning traditional notions of sentencing, scholars used quantitative analyses to identify traits that cause crime, to better determine risk, and to tailor sanctions in productive ways.⁸⁰ The preference for quantitative decision-making at sentencing has been dubbed "evidence-based sentencing."⁸¹

This is a welcome development and, compared to other disciplines utilizing statistical approaches to problem solving, criminal sentencing is late to the game. Actuarial assessment in other fields has proven more effective than "clinical judgment."⁸²

⁷⁴ WEST TEXAS DEFENDER, *supra* note 10, at 21.

⁷⁵ CAMPBELL, *supra* note 11, § 13:6 (warning that "before requesting presentence studies, counsel should discuss their relative benefits—including treatment potential—with client as part of an overall sentencing strategy").

⁷⁶ *Id.*

⁷⁷ *See, e.g.*, Gilg, *supra* note 43, at 9-18.

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 8.

⁸⁰ *See* EDWARD J. LATESSA & PAULA SMITH, CORRECTIONS IN THE COMMUNITY 215 (5th ed. 2011).

⁸¹ KLEINMAN, *supra* note 3.

⁸² J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1336 (2011).

Other aspects of the criminal justice system have been improved by evidence-based approaches. New York City's CompStat system, for instance, revolutionized the way police departments target crime,⁸³ and in the pre-trial phase, statistical assessment has produced risk models that better predict a defendant's risk of flight and re-arrest.⁸⁴ In each instance, substantive outcomes improved because evidence guided the decision-making process.

The current procedure for challenging conditions of supervised release, though, does not adequately incorporate the recent advances in the science of criminal justice. Specifically, the current procedure provides no meaningful opportunity to test recommendations—particularly in the context of recycled conditions—that may have little or no justifiable foundation. Recent articles on the goal of reintegrating offenders,⁸⁵ the trajectory of criminal behavior over an individual's life,⁸⁶ and the risk-needs analysis⁸⁷ suggest that in many cases, a recycled condition will have little or no correctional or protective value. Defendants need more opportunities to bring that information to bear in the sentencing process.

1. Preventing Reintegration

Various authorities make clear that supervised release has become a punitive measure.⁸⁸ But the United States Sentencing Commission maintains that supervised release eases the defendant's transition into society by promoting reintegration

⁸³ *Implementing and Institutionalizing COMPSTAT in Maryland*, *supra* note 7.

⁸⁴ *See, e.g.*, CHARLES SUMMERS, PH.D. & TIM WILLIS, PH.D., PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY 1-3 (2010), available at <https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf>; *see generally* LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 1-5 (2013), available at http://arnoldfoundation.org/sites/default/files/pdf/LJAF-research-summary_PSA-Court_4_1.pdf.

⁸⁵ John Braithwaite, *Crime, Shame, and Reintegration*, in CRIMINOLOGICAL THEORY: PAST TO PRESENT 253, 253 (Francis T. Cullen et al. eds., 2011).

⁸⁶ *See* Terrie E. Moffitt, *Pathways in the Life Course to Crime*, in CRIMINOLOGICAL THEORY: PAST TO PRESENT, *supra* note 85, at 477; Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 556-57 (2003).

⁸⁷ LATESSA & SMITH, *supra* note 80, at 215; PATRICIA VAN VOORHIS ET AL., CORRECTIONAL COUNSELING & REHABILITATION 250 (7th ed. 2009).

⁸⁸ *United States v. Meeks*, 25 F.3d 1117, 1121, 1123 (2d Cir. 1994) (“[S]upervised release, like parole, is an integral part of the punishment for the underlying offense.”); *United States v. Paskow*, 11 F.3d 873, 883 (9th Cir. 1993) (noting that supervised release is “simply part of the whole matrix of punishment which arises out of a defendant’s original crimes” (internal quotations omitted)); WEST TEXAS DEFENDER, *supra* note 10, at 5 (“Unlike probation, supervised release is a common punishment, imposed in addition to the sentence of imprisonment.”).

and rehabilitation.⁸⁹ Indeed, the Sentencing Commission describes reintegration as the “primary purpose of supervised release.”⁹⁰ In light of a number of factors, recycled conditions undermine that purpose.

First, we must accept that a recycled condition is shameful to a defendant. The fact that a condition is shameful doesn’t automatically make it an inappropriate sanction, though. It merely poses a question: is the shaming consistent with the goals of supervised release? That depends on the nature of the shaming condition.

Reintegrative shaming is shaming which is followed by efforts to reintegrate the offender back into the community of lawabiding or respectable citizens through words or gestures of forgiveness or ceremonies to decertify the offender as deviant . . . *Stigmatization* is disintegrative shaming in which no effort is made to reconcile the offender with the community. The offender is outcast, her deviance is allowed to become a master status, degradation ceremonies are not followed by ceremonies to decertify deviance.⁹¹

Discerning integration from stigmatization can be fact-intensive, but the issue can be simplified by asking whether the sanction promotes interdependence or labels the offender.⁹² To the extent that the condition stems from control theory or repulsion, it undermines a goal of supervised release—reintegration.⁹³ As a result, policymakers should provide a mechanism to determine which kind of sanction is at issue.⁹⁴ If the recycled condition appears to stigmatize the defendant, there needs to be serious consideration as to how much stigmatization can be tolerated before the condition begins to undermine the system.

⁸⁹ U.S. SENTENCING COMM’N, *supra* note 40, at 2 n.11 (describing the “primary purpose of supervised release” as “facilitat[ing] the reintegration of federal prisoners back into the community”). It may be that one must be careful in comparing the systems, as they operate much differently; after all, supervised release is added to incarceration, while parole replaces part of incarceration. Doherty, *supra* note 10, at 1005. Still, courts have generally compared the legal frameworks of parole and supervised release. *See, e.g.*, Johnson v. United States, 529 U.S. 694 (2000) (holding that revocation penalties must be attributed to the original offense rather than the reason for revocation).

⁹⁰ U.S. SENTENCING COMM’N, *supra* note 40, at 2 n.11.

⁹¹ Braithwaite, *supra* note 85, at 258-59.

⁹² *Id.* at 255; *see also* Doherty, *supra* note 10, at 1025 (“In evaluating the utility of any particular condition, courts should distinguish between conditions that are aimed simply at establishing control over ‘criminals’ and conditions that provide reintegrative services, such as job-training or mental health treatment.”).

⁹³ *See* U.S. SENTENCING COMM’N, *supra* note 40, at 2.

⁹⁴ *See* Doherty, *supra* note 10, at 1023 (“[I]t is appropriate to consider an approach to supervised release in which transitional rehabilitation (and by implication successful reentry) is the primary goal.”).

2. Trajectory of Criminal Behavior

The key difference between supervised release and parole is that supervised release begins only after the defendant completes his prison term.⁹⁵ This is a crucial facet of the recycled condition: the condition, based on already-punished behavior, begins at a distant point in the future. (Recall that Jose Morales-Cruz's sex offender treatment was set to begin almost twenty years after his conviction for sexual assault.) In other words, there is an undeniable gap between the punishment and the conduct.

This implicates a major focus of recent criminological study: what naturally happens to an offender's criminal behavior over time?⁹⁶ Professor Terrie Moffitt, for instance, distinguishes between the adolescent offender and the "life-course" offender,⁹⁷ but she notes that even in the life-course offender, criminality often manifests itself differently depending on the stage of life.⁹⁸ So even if an offender has a persistent criminal disposition, he may not repeat the same type of criminal behavior. Others believe that the type of offense, rather than age, is the best indicator of re-offense.⁹⁹ Probably the most common example of this "typological approach"¹⁰⁰ is that sex offenders have prolonged criminal careers.¹⁰¹

But in recent years, the work of Professors Robert Sampson and John Laub has carried the day.¹⁰² They believe

⁹⁵ See *supra* Part I.

⁹⁶ See Moffitt, *supra* note 86, at 479; Sampson & Laub, *supra* note 86.

⁹⁷ Moffitt, *supra* note 86, at 479.

⁹⁸ *Id.* at 479-87. Sampson and Laub describe Moffitt's "dual taxonomy focusing on [the] life-course persistent and adolescence-limited offenders [as] the leading example" of the developmental approach. Sampson & Laub, *supra* note 86, at 557.

⁹⁹ Todd R. Clear, Ph.D., Presentation at The Unintended Consequences of Incarceration Conference: Backfire: When Incarceration Increases Crime 7 (Jan. 1996), available at <http://www.vera.org/sites/default/files/resources/downloads/uci.pdf> ("It is now becoming clear that different types of crime have different patterns of replacement and age-rate deterioration."); but see Sampson & Laub, *supra* note 86, at 557 (observing that such "typological approaches" actually rest on very old notions of criminality, i.e. the atavistic type).

¹⁰⁰ Sampson & Laub, *supra* note 86, at 557.

¹⁰¹ BARBARA BOSLAUGH HANER, UNDERSTANDING SEX OFFENDERS: WHAT THE SEX OFFENDER TELLS US 1, available at http://www.ferry-county.com/Courts%20and%20Law/Sex%20Offender%20Info/Understanding_Sex_Offenders.pdf ("[W]hile most other criminals decrease their criminal activity as they age, sex offenders typically do not. Instead, most sex offenders continue to offend their targeted populations until they are physically incapable.").

¹⁰² Their work resulted in the 2011 Stockholm Prize. See Robert J. Sampson, *Henry Ford II Professor of the Social Sciences; Director of the Boston Area Research Initiative*, HARV. U., <http://scholar.harvard.edu/sampson/content/crime-and-life-course> (last visited Feb. 26, 2015).

that offenders offend less as they age,¹⁰³ and although re-offense may decline at different rates, Sampson's and Laub's lengthy longitudinal study of individuals with delinquent childhoods¹⁰⁴ uncovered a definite downward trend:

[F]or those men who survived to age 50, 24% had no arrests for predatory crime (crimes of violence and property) after age 17 (6% had no arrests for total crime); 48% had no arrests for predatory crime after age 25 (19% for total crime); 60% had no arrests for predatory crime after age 31 (33% for total crime); and 79% had no arrests for predatory crime after age 40 (57% for total crime).¹⁰⁵

In the context of recycled conditions, this raises a red flag. If individual criminal behavior naturally decreases over time, it is reasonable to question a sanction that takes effect so long after the crime occurs.

3. Matching Defendants to the Appropriate Type of Sanction.

Another crucial element of accurate sentencing is matching the defendant to the correct *type of sanction*, and in this area criminal justice research has made great strides by applying the risk and needs principles.¹⁰⁶ These principles are simple and powerful. According to the risk principle, "supervision and treatment levels should match the offender's level of risk," and according to the needs principle, "treatment services should target an offender's *criminogenic needs*—those dynamic risk factors most associated with criminal behavior."¹⁰⁷

In conjunction with the risk/needs approach, researchers advocate the use of "actuarial assessment[, which] involves using an objective, mechanistic, reproducible combination of predictive factors, selected and validated through empirical research, against

¹⁰³ Sampson & Laub, *supra* note 86, at 555-56; *see also* Etienne, *supra* note 1, at 57 (noting that "even high-risk offenders 'age out' of crime by their forties").

¹⁰⁴ Sampson & Laub, *supra* note 86, at 556.

¹⁰⁵ *See id.* at 569.

¹⁰⁶ PAMELA M. CASEY ET AL., USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 1 (2011), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx> ("During the last two decades, substantial research has demonstrated that the use of certain practices in criminal justice decision making can have a profound effect on reducing offender recidivism. One of these practices is the use of validated risk and needs assessment (RNA) instruments to inform the decision making process.")

¹⁰⁷ *Id.* at 4 (emphasis added).

known outcomes that have been also been quantified.”¹⁰⁸ Studies have shown that these approaches “provide significantly more accurate predictions” than prior methods.¹⁰⁹ And although actuarial prediction models have raised constitutional concerns,¹¹⁰ state judges say these practices promote “smarter” sentencing.¹¹¹ Lastly, in addition to risk and need, officials must consider the defendant’s responsiveness—his capacity to internalize sanctions and change behavior. “Taken together, the three preceding RNR principles call for assessing an offender’s risk of reoffending [and] matching supervision and treatment to the offender’s risk level.”¹¹²

In short, evidence-based sentencing makes one thing clear: static factors, like criminal history, “have no treatment implications.”¹¹³ For example, even if a defendant is still a threat to commit crimes,¹¹⁴ criminal history alone will not reveal which sanctions are most likely to prevent future crimes by this particular defendant.¹¹⁵ In fact, focusing on prior conduct and failing to consider all the relevant factors can be shockingly counterproductive. Studies have shown, for instance, that although “intensive rehabilitation supervision program[s] worked for higher-risk offenders, [they] actually increased recidivism rates for lower-risk offenders.”¹¹⁶

Furthermore, it is crucial to base sentencing decisions on appropriate information because, for all intents and purposes, after sentencing, there is no turning back. Even if correctional officers eventually identify an error in the risk-needs assessment of the defendant, they are “required to implement the sentence even though it is not an effective use of resources and may even increase the offender’s likelihood of reoffending.”¹¹⁷ Commentators have observed a similar pattern in the context of probation,

¹⁰⁸ Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAP. J. CRIM. JUST. 1, 4 (2009) (quoting Kirk Heilbrun et al., *Risk-Assessment in Evidence-Based Sentencing: Context and Promising Uses*, 1 CHAP. J. CRIM. JUST. 127, 127 (2009)).

¹⁰⁹ *Id.* at 4.

¹¹⁰ See Etienne, *supra* note 1, at 49.

¹¹¹ CASEY ET AL., *supra* note 106, at 3.

¹¹² *Id.* at 6.

¹¹³ VAN VOORHIS, *supra* note 87, at 250.

¹¹⁴ See *supra* Part II.B.2.

¹¹⁵ Cf. *United States v. Morales-Cruz*, 712 F.3d 71, 77 (1st Cir. 2013) (Torruella, J., dissenting) (explaining that the court should adjust its conditions to the type of criminal conduct imagined; for instance, sex-offender treatment is not reasonable for someone with general criminal tendency).

¹¹⁶ LATESSA & SMITH, *supra* note 80, at 218; see also CASEY ET AL., *supra* note 106, at 4 (“One program, in particular, is most illustrative of the risk principle: it showed (relative to a comparison group) a decrease in recidivism of 32 percent for high risk offenders and an increase in recidivism of 29 percent for low risk offenders.”).

¹¹⁷ CASEY ET AL., *supra* note 106, at 7.

noting that the judge's conditions create the "legal framework . . . for the probationer's supervision," and that "unnecessary or counterproductive probation conditions distract[] and impede[] both the probation department and offender."¹¹⁸

In summary, the success of the correctional process depends in large part on painting an accurate portrait of the defendant at the time of sentencing. And the procedure for marshalling and challenging facts seriously affects the final outcome. The current procedure, though, is dated and inaccurate.

III. A NEW METHOD FOR CHALLENGING RECYCLED CONDITIONS

The federal system provides defendants with an opportunity to be heard before sentencing.¹¹⁹ Defense counsel is charged with objecting to the contents of the PSR, and there may be an opportunity to have a presentence study done in order to gauge the defendant's needs.¹²⁰ But criminal justice researchers are increasingly discovering how important it is to develop an accurate picture of the defendant's likelihood to reoffend, as the information collected at sentencing impacts the defendant's reintegration and the success of any conditions.¹²¹ After collecting all this information, it is still up to the judge to apply that information appropriately.¹²²

In order to optimize evidence-based practices, information must be conveyed in the best possible manner.¹²³ This is particularly important in the case of recycled conditions, where the defense can potentially make significant challenges to the government's recommendations.¹²⁴ Indeed, since evidence-based sentencing is here to stay, it may be time to consider how to regulate its use and to maximize its benefits.¹²⁵ Some have

¹¹⁸ HON. J. RICHARD COUZENS, EVIDENCE-BASED PRACTICES REDUCING RECIDIVISM TO INCREASE PUBLIC SAFETY: A COOPERATIVE EFFORT BY COURTS AND PROBATION 7 (2011), available at <http://www.courts.ca.gov/documents/EVIDENCE-BASED-PRACTICES-Summary-6-27-11.pdf>.

¹¹⁹ See *supra* Part II.A.2.

¹²⁰ See *id.*

¹²¹ Etienne, *supra* note 1, at 47-48 ("What judges do at sentencing—and by correlation, what the statutes permit them to do—inevitably determines the flexibility that evidence-based corrections and supervision officials can exercise later.").

¹²² HON. COUZENS, *supra* note 118, at 10.

¹²³ See CASEY ET AL., *supra* note 106, at 8 ("Jurisdictions need to carefully plan the incorporation of offender assessment information into the sentencing process to optimize its benefits.").

¹²⁴ See, e.g., *United States v. Moralez-Cruz*, 712 F.3d 71, 79 (2013) (Torruella, J., dissenting); see also *supra* Part II.A.2.

¹²⁵ Redding, *supra* note 108, at 8.

suggested, for example, that “[i]n most instances, the use of risk-assessment tools ‘are not subject to any form of external scrutiny.’ This lack of scrutiny raises important problems of reliability and transparency.”¹²⁶

It may be that the most effective means of updating criminal sentencing is educating the judiciary and its agents.¹²⁷ But even if such programs effectively educate probation officers,¹²⁸ there is still the most important government agent to consider: the judge. Some suggest that the judge should be party to these training sessions,¹²⁹ but that approach may compromise the integrity of the judicial institution and the adversarial system, which is generally responsible for conveying information to the court.¹³⁰

Although defendants are not afforded the full protection of the Constitution at sentencing,¹³¹ there is the possibility of an evidentiary hearing before the final disposition. An evidentiary hearing offers greater opportunity to examine facts and witnesses, which would facilitate evidence-based sentencing in the context of recycled conditions. These hearings, however, can be difficult to obtain.

A. *Standard Process for Obtaining an Evidentiary Hearing*

A criminal defendant’s protections decrease after his or her conviction: “the defendant may have a limited opportunity to take discovery and ‘has no absolute right either to present his own witnesses or to receive a full-blown evidentiary hearing.’”¹³²

¹²⁶ Etienne, *supra* note 1, at 54 (quoting Justice David P. Cole, *The Umpire Strikes Back: Canadian Judicial Experience with Risk Assessment Instruments*, 49 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 493, 494 (2007)).

¹²⁷ CASEY ET AL., *supra* note 106, at 21.

¹²⁸ Etienne, *supra* note 1, at 54 (describing the cross-examination of a Canadian probation officer, who admitted that he had only minimal training on a particular assessment instrument, and “did not feel he was properly trained to comment on the risk of re-offending”).

¹²⁹ CASEY ET AL., *supra* note 106, at 21.

¹³⁰ *Part 1 of Q&A with Chief Justice John Roberts*, YOUTUBE.COM (Oct. 24, 2010), <http://www.youtube.com/watch?v=dqP5o6AnRMk> (last visited Feb. 23, 2015) (When asked whether judges look to outside expertise when resolving cases, Chief Justice Roberts responded, “The answer is pretty much no, and that’s a good thing. The people who are supposed to do that for us are the lawyers. That’s the way the system works. . . . It means the lawyer’s job is harder.”).

¹³¹ *See, e.g., Williams v. New York*, 337 U.S. 241 (1949) (holding that the right to confront witnesses does not apply to statements made in a presentence report); *see also supra* Part II.A.

¹³² *See, e.g., Kosinski v. C.I.R.*, 541 F.3d 671, 677 (6th Cir. 2008) (distinguishing criminal sentencing from civil proceedings) (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 305 (2d Cir. 1999)).

As a result, in the vast majority of cases it suffices that “the defendant is afforded some opportunity to rebut the Government’s allegations.”¹³³ This opportunity normally takes the form of written memoranda to the court, although the intrepid defense counselor may have a study prepared.¹³⁴

Though defendants do not receive evidentiary hearings as a matter of course, the analysis of technical or scientific data—for instance, the chemical characteristics and similarities between two types of narcotics—may require a hearing.¹³⁵ The Supreme Court has even applied similar reasoning in requiring evidentiary hearings before the revocation of supervised release.¹³⁶ Since revocation has similar conceptual and policy concerns to recycled conditions, that process would also be appropriate before imposing recycled conditions.

B. *Copying the Revocation Process*

The defendant sentenced to a term of supervised release is entitled to a hearing in two instances, although in both cases this occurs *after* the initial sentencing order. First, the defendant must have a hearing before his term of supervised release is modified,¹³⁷ meaning that the defendant must have “notice and an opportunity to be heard.”¹³⁸ But this is not an evidentiary hearing;¹³⁹ rather, this opportunity to be heard seems more like a standard sentencing hearing.¹⁴⁰

¹³³ United States v. Ford, 530 F. App’x 77, 79 (2d Cir. 2013).

¹³⁴ See *supra* Part II.A.2.

¹³⁵ See United States v. Figueroa, 647 F.3d 466 (2d Cir. 2011) (regarding the similarity for sentencing purposes of two drugs).

¹³⁶ *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); United States v. Lowenstein, 108 F.3d 80, 84 (6th Cir. 1997).

¹³⁷ *Lowenstein*, 108 F.3d at 84 (“A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person’s request or the court’s own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.” (quoting FED. R. CRIM. P. 32.1(b))).

¹³⁸ United States v. Begay, 631 F.3d 1168, 1171 n.2 (10th Cir. 2011) (discussing advisory committee’s note to FED. R. CRIM. P. 32.1).

¹³⁹ United States v. King, 608 F.3d 1122, 1130 (9th Cir. 2010) (“But a Rule 32.1(c) *modification*—as opposed to a Rule 32.1(b) *revocation*—does not require an evidentiary hearing or a violation finding.”).

¹⁴⁰ Compare *King*, 608 F.3d at 1130 (“[P]roviding for ‘a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation’ before ‘modification]” (quoting FED.R.CRIM. P 32.1(c)), with *Rita v. United States*, 551 U.S. 338, 351 (2007) (Breyer, J.) (“The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation

Second, before revocation of supervised release,¹⁴¹ the defendant is entitled to an evidentiary hearing.¹⁴² The procedural requirements of revocation hearings are drawn from those required at parole hearings in the pre-Guidelines era.¹⁴³ Specifically, the defendant is entitled to:

- (a) [W]ritten notice of the claimed violation of parole; (b) disclosure to the parolee [individual on supervised release] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.¹⁴⁴

So an evidentiary hearing provides greater opportunity than an ordinary hearing to test facts and credibility. In *Morrissey v. Brewer*, the Supreme Court described its justifications for requiring this level of process before revocation.¹⁴⁵ Those justifications are present in cases of recycled conditions, too.

1. The Qualified Liberty Interest

The *Morrissey* court began by noting the purpose of parole in the federal system: “to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed.”¹⁴⁶ Since parole concerned early release from prison, it differed from supervised

of the Guidelines. [] He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply, [] perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless []. Thus, the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure.”)

¹⁴¹ Revocation can occur for a variety of reasons, ranging from substantive conduct violations to simple technical violations. Doherty, *supra* note 10, at 1016 (“Non-criminal violations, also known as technical violations, commonly include conduct such as failing to report to the probation officer, failing to submit monthly reports, and failing to attend drug or mental health treatment. In general, among defendants who were sent back to prison, the average term of re-imprisonment was eleven months.”).

¹⁴² *Lowenstein*, 108 F.3d at 85.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

¹⁴⁵ *Morrissey*, 408 U.S. at 477.

¹⁴⁶ *Id.*; see also *supra* Part II.B.1.

release, but both processes share the goal of reintegration.¹⁴⁷ The Court went on to describe two primary reasons for the requirement of a hearing before revocation.

Since this is a question of procedural due process, the first consideration is the nature of the liberty interest at stake. “Implicit in the system’s concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole.”¹⁴⁸ In other words, parole grants a special type of liberty. On one hand, parole creates “not [an] absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.”¹⁴⁹ On the other hand, “the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee and often on others.”¹⁵⁰

Under the supervised release statute, defendants with prior convictions have a similarly qualified liberty. If convicted of another crime, § 3583 opens the door to sanctions based on the prior conviction, provided that the sanction is reasonably related to the defendant’s history and the accepted goals of sentencing.¹⁵¹ Thus, § 3583 subjects federal defendants to supervised release in much the same way parole subjected them to imprisonment: they are free of the original charge unless there is another violation, in which case they may resume punishment related to that offense.

Undoubtedly, the stakes are different for these two offenders: parolees risk going back to prison, whereas defendants faced with recycled conditions—like Jose Morales-Cruz—risk losing free time to mandatory sanctions like sex offender treatment. Still, both scenarios present punishments, and individuals on supervised release stand a fair chance of returning to prison.¹⁵² One-third of federal offenders have supervised release revoked, and in around 60% of those cases revocation was based on mere technical violations.¹⁵³ In other words, “no one who receives supervised release receives a determinate sentence.”¹⁵⁴ As a result, both the parolee and the defendant faced with a recycled condition are at risk of extended confinement.

¹⁴⁷ See U.S. SENTENCING COMM’N, *supra* note 40, at 2 & n.11.

¹⁴⁸ *Morrissey*, 408 U.S. at 479.

¹⁴⁹ *Id.* at 480.

¹⁵⁰ *Id.* at 482.

¹⁵¹ See 18 U.S.C. § 3583 (2012).

¹⁵² Doherty, *supra* note 10, at 1015-16.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Some appellate courts avoid the idea that a recycled condition is duplicative, holding that a recycled condition relates only to the instant conviction.¹⁵⁵ In *United States v. Dupes*, for instance, a defendant convicted of securities fraud challenged his conditions of supervised release related to prior sex offenses, and the Second Circuit rejected his double jeopardy challenge.¹⁵⁶ The Court reasoned that because federal law permits consideration of prior offenses in devising the current sentence, any conditions would be considered punishment for “his *current* securities fraud offense,” and for that reason could not be considered “successive punishment.”¹⁵⁷ Other judges have challenged similar lines of reasoning.¹⁵⁸ For example, Judge Torruella, in his *United States v. Morales-Cruz* dissent, disagreed with the imposition of sex offender treatment because he found

the majority’s reasoning [] ripe for double counting, rationalizing a district court’s discretion to impose a special condition outside the Sentencing Guidelines to increase a sentence due to a harm that has already been fully accounted for and based on temporally distant sex-offense and failure-to-register convictions that the defendant has already served sentences for.¹⁵⁹

Nevertheless, § 3583 enables the district court to impose these conditions, so the question is not whether courts have the power to do this in the first place. The question is what process increases the odds of a good decision. Accordingly, the *Morrissey* court reasoned that a hearing is required before revocation because although the government has an interest in returning criminals to prison in some cases, “the State has no interest in revoking parole without some informal procedural guarantees.”¹⁶⁰

2. Significant Questions of Correctional Utility

The *Morrissey* court stressed that the review board should revoke parole only if it would be useful. So revocation requires a two-pronged inquiry. First, the court determines if parole was violated, which will likely be a straightforward appraisal of the

¹⁵⁵ See *United States v. Dupes*, 513 F.3d 338 (2d Cir. 2008).

¹⁵⁶ *Id.* at 344.

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ *United States v. Morales-Cruz*, 712 F.3d 71, 79 (1st Cir. 2013) (Torruella, J., dissenting) (noting that the condition of supervised release was for a conviction which had already been prosecuted and the sentence served). Furthermore, the Supreme Court has held that in the context of revocation of supervised release, the revocation must be attributed to the original conduct. *United States v. Johnson*, 529 U.S. 694 (2000).

¹⁵⁹ *Morales-Cruz*, 712 F.3d at 78.

¹⁶⁰ *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972).

facts.¹⁶¹ But revocation does not necessarily follow from the mere fact of a violation; the second inquiry is whether revocation is warranted.¹⁶² This second inquiry “involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts.”¹⁶³ Thus, the defendant has a liberty interest in this prediction and the state “has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole.”¹⁶⁴

Recycled conditions present a similar issue. When the court is trying to predict the necessity of future sanctions, the facts are only part of the process. Implementing evidence-based sanctions requires a full consideration of the defendant’s risk and needs,¹⁶⁵ as well as the likelihood of re-offense in the absence of additional sanctions.¹⁶⁶ This is particularly important in the context of recycled conditions, where courts impose sanctions wholly on the basis of a prior wrong.¹⁶⁷

United States v. Morales-Cruz is an excellent example of the dangers involved with recycled conditions and how an evidentiary hearing could promote conditions based on a nuanced approach to the facts.¹⁶⁸ There, the District Court determined that the defendant

has a lack of respect for other individuals. He has prior records that include criminal sexual assault, failure to register, and battery, among others. It reflects that as an individual he has a lack of control, and there is a need to protect the community from this individual . . . The Court must protect the community from individuals like Mr. Morales who openly disrespect the law by engaging in continuous criminal conduct and fail to abide by their supervision convictions, as failing to register as reflected in the presentence investigation report.¹⁶⁹

¹⁶¹ *Id.* at 479.

¹⁶² *Id.* at 479-80. But a defendant waives his right to an evidentiary hearing by admitting that a violation occurred. *United States v. Shidler*, 337 F. App’x 772, 777 (10th Cir. 2009) (“When a defendant admits guilt, a full revocation hearing is not necessary.” (citing *United States v. Fay*, 547 F.3d 1231, 1234 (10th Cir. 2008))); *United States v. Farrell*, 393 F.3d 498, 500 (4th Cir. 2005). This seems to contradict the Supreme Court’s rationale in *Morrissey*.

¹⁶³ *Morrissey*, 408 U.S. at 480.

¹⁶⁴ *Id.* at 484.

¹⁶⁵ *See supra* Part II.B.3.

¹⁶⁶ *See supra* Part II.B.2.

¹⁶⁷ *See id.*

¹⁶⁸ *See United States v. Morales-Cruz*, 712 F.3d 71, 72-74 (1st Cir. 2013).

¹⁶⁹ *Id.* at 74.

The First Circuit held that this approach met the “critical test [] whether the condition is reasonably related to one or more of the goals of supervised release.”¹⁷⁰ The majority found that the defendant’s “continuing failures certainly permit a rational inference that [he] presented a recidivism risk,” and the “imposition of sex-offender treatment was reasonably related to [his] present offense as well as to his criminal history.”¹⁷¹ Judge Torruella’s dissent suggested that the majority’s line of reasoning was speculative at best.¹⁷² In addition to noting that the prior sex offense happened long ago,¹⁷³ Judge Torruella said that neither the defendant’s failure to register under SORNA nor his recent assault conviction necessitated the use of sex-offense treatment.¹⁷⁴ In sum, the defendant “may have demonstrated a proven proclivity towards criminal conduct, but not towards sexual offenses.”¹⁷⁵

This dialogue demonstrates the need for more effective delivery of evidence to the court. At sentencing in this case, defense counsel objected to the imposition of sexual treatment on supervised release.¹⁷⁶ The current adversarial model had been utilized, yet it appears that the District Court and the First Circuit failed to consider some of the basic tenets of evidence-based sentencing that Judge Torruella mentions in his dissent, such as matching risk to need.¹⁷⁷

Having an evidentiary hearing before revocation would therefore be helpful. In *Morales-Cruz*, the court was faced with difficult facts to reconcile: the distant sex-offense, the recent assault, and the defendant’s age and disrespect for court

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 75.

¹⁷² *Id.* at 76.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 77 (“[The majority] confuses a possible rational inference of recidivism and deterrence concerns as to criminal conduct *generally* with the entirely unfounded speculation that Morales-Cruz presented recidivism risks and needed deterrence from committing further sexual offenses.”).

¹⁷⁵ *Id.* at 78.

¹⁷⁶ Although the First Circuit’s statement that the defendant’s “sole objection” does not indicate whether or not defense counsel raised this objection for the first time on appeal, the court reviewed for abuse of discretion, *id.* at 72, which means defense counsel must have objected before the District Court. Had defense counsel failed to object, the 1st Circuit would have reviewed for plain error—a difficult position from which to win appeal. *United States v. Padilla*, 415 F.3d 211, 218 (1st Cir. 2005) (*en banc*) (“A court of appeals typically reviews a sentencing court’s imposition of a condition of supervised release for abuse of discretion. That standard shifts, however, when the sentencing court affords the defendant an opportunity to object to the condition but the defendant holds his tongue. In such circumstances, appellate review is for plain error.” (internal quotations marks and citations omitted)).

¹⁷⁷ *See supra* Part II.B.3.

orders. On the basis of those facts the court had to predict the likelihood of re-offense and the best condition, if any, to impose.

Two elements of the revocation procedure would have helped: the “opportunity to be heard in person and to present witnesses and documentary evidence; [and] the right to confront and cross-examine adverse witnesses.”¹⁷⁸ The District Court appears to have adopted the condition from the probation officer’s PSR.¹⁷⁹ Defense counsel could have cross-examined the probation officer on some of the points eventually raised by Judge Torruella in his dissent. Indeed, the PSR can contain the biases of its creators.¹⁸⁰ Thus, it is crucial that the defendant put forth a legitimate challenge to the government’s position.

C. *Rising to the Challenge*

The evidentiary hearing will be helpful only if defense counsel can and will make it meaningful. That may be a dubious assumption.¹⁸¹ Limited resources and uncertainty as to the strength of claims can influence notions of professionalism and the choices that attorneys make.¹⁸² And given the fact-intensive¹⁸³ nature of pursuing an evidentiary hearing and the unfamiliarity with evidence-based approaches, research suggests that attorneys will opt for a less strenuous form of advocacy.¹⁸⁴ As Darryl Brown notes, however, the mere fact that a form of advocacy presents logistical difficulties does not mean that it should be avoided; on the contrary, “[o]nce we recognize that attorneys may make strategic choices with important substantive consequences among basic advocacy tasks as well as among tasks that define the outer boundaries of zeal, we see a need for more guidance (and self-awareness) of those decisions.”¹⁸⁵

In the context of recycled conditions and the evidentiary hearing, the notion that education should now rise to meet the needs of criminal procedure indicates the interconnection of scientific research, judicial practice, and legal education. Research has provided the data to justify a change in procedure, but the institution of legal education must train lawyers to use that procedure.

¹⁷⁸ *United States v. Lowenstein*, 108 F.3d 80, 85 (6th Cir. 1997).

¹⁷⁹ *Morales-Cruz*, 712 F.3d at 72.

¹⁸⁰ *See supra* Part II.A.

¹⁸¹ *See Brown, supra* note 24, at 2151-52.

¹⁸² *Id.* at 2152.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Id.* at 2154.

CONCLUSION

By the end of the 1970s, Apple Computer, Inc. had already enjoyed success building computers. But the company reached a kind of plateau. It ran great programs, but, as Steve Jobs put it in 1980, there was a significant “barrier” between the user and the computer—the difficulty of learning to use the computer. In Jobs’s view, the challenge facing Apple and the fledgling personal computer industry lay not in designing new programs, but in creating a new computing environment that made existing apps easier to use.¹⁸⁶ In the context of recycled conditions, a similar barrier exists between judges and the great insights of evidence-based sentencing. Like the late-1970s Apple, the traditional method of challenging conditions—the written challenge—simply does not provide enough horsepower for defense counsel and the sentencing judge to fully utilize the principles of evidence-based sentencing. A new system is needed.

The process for challenging a recycled condition should include an evidentiary hearing, which would allow defense counsel to thoroughly test the probation officer’s recommendations. Specifically, defense counsel could probe the reasons and expectations underlying the recommendations. This is crucial because research suggests recycled conditions will be unnecessary, or even counterproductive, in many cases. Certain types of sanctions can stigmatize a defendant, which undermines the purpose of supervised release. What’s more, recent studies show a downward trend in criminal behavior as offenders age. And even if re-offense is likely, it is crucial to identify the likely type of offense and impose sanctions in response. Indeed, failing to match sanctions with criminal propensity can be even more disastrous than imposing no sanctions at all. In short, if a probation officer recommends a recycled condition, that recommendation, which carries so much weight and will dramatically affect the defendant’s life, should be tested in court, under oath, and subject to cross-examination.

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¹⁸⁶ *Steve Jobs Rare Footage Conducting A Presentation on 1980 (Insanely Great)*, YOUTUBE.COM (Dec. 11, 2011), <https://www.youtube.com/watch?v=0lvMgMrNDlg>.

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