

The Trap Chronicles Vol. 2: A Call to Reconsider “Risk” in Federal Supervised Release

Lahny Silva

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Lahny Silva, *The Trap Chronicles Vol. 2: A Call to Reconsider “Risk” in Federal Supervised Release*, 82 Md. L. Rev. 530 ()

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol82/iss3/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**THE TRAP CHRONICLES, VOL. 2: A CALL TO RECONSIDER
“RISK” IN FEDERAL SUPERVISED RELEASE***

LAHNY SILVA[†]

INTRODUCTION.....	531
I. HISTORY – “LIFE CAN ONLY BE UNDERSTOOD BACKWARDS; BUT IT MUST BE LIVED FORWARDS.”	536
A. The Start	536
1. Passage of the Probation Act of 1925	539
2. Development of the Federal Probation System.....	541
B. The 1960s & 1970s.....	544
1. Questioning the Effectiveness of Supervision	545
2. The Court Weighs In.....	547
C. The War	549
1. Prominent Theoretical Frameworks.....	549
2. Wartime Legislation.....	551
a. 1984.....	551
b. 1986.....	553
c. 1988.....	554
D. Wave of Reform	555
1. Recent Research.....	556
2. Rules Governing Supervised Release	558

© 2023 Lahny Silva.

* This volume of the *Trap Chronicles* is the second installment in a planned series of works concerning the War on Drugs’ impact on today’s criminal justice policy. The first volume is Lahny Silva, *The Trap Chronicles, Vol. 1: How U.S. Housing Policy Impairs Criminal Justice Reform*, 80 MD. L. REV. 565 (2021).

[†] Lahny R. Silva, Professor of Law, Indiana University Robert H. McKinney School of Law. To my family—Ma, Dad, Lu, Avery, and Monique—thank you for making me believe and care in a world of doubt and apathy. A sincere thank you to my colleagues at McKinney, especially Professors Joel Schumm and Carrie Hagan, for the constant support. A special thanks to Professors Florence Roisman, George Wright, and Max Huffman for reviewing drafts of this Article. To my mentor, Professor Eric Miller, thank you for believing in “The Trap” and the Southwest Criminal Legal Scholarship Conference, especially Professors Jack Chin, Dan Epps, Sam Kamin, and Thomas Frampton for comments on the draft. To the federal bench—Judge Doris Pryor, Chief Judge Tanya Walton Pratt, Judge Tim Baker, Judge Sara Evans Barker, and Judge Jane Magnus-Stinson—thank you for doing real justice and believing in redemption. To Ridley and my people who came through the REACH Program on federal supervised and left “off paper”—this Article is dedicated to you.

II. MODELS – PROGRESS NOT PERFECTION	560
A. Risk-Need-Responsivity	560
B. Social Learning Theory	564
III. A NEW FRAMEWORK – “TO BE FREE IS NOT MERELY TO CAST OFF ONE’S CHAINS, BUT TO LIVE IN A WAY THAT RESPECTS AND ENHANCES THE FREEDOM OF OTHERS.”	566
A. Desistance Theory	567
B. Good Lives Model (“GLM”).....	570
IV. BEST PRACTICES	573
A. Forty Years of Supervision Practices—What is “Best”?	573
1. Prosocial Modeling	574
2. Problem Solving	575
3. Use of Authority	576
B. Bonus Best Practices	577
CONCLUSION	579

Ma-ah-an, it ain’t easy
They got me goin’ cold-hearted
Probation, violation, incarceration, frustration, you know¹

INTRODUCTION

One of the biggest traps in the American criminal justice system is correctional supervision, an amalgamation of criminal management and control practices that include parole, probation, community corrections, and federal supervised release. The current system involves a complicated web of vague statutes and amorphous rules mostly generated during the War on Drugs. Preoccupied with risk, contemporary models continue to encourage techniques based on stale research and seemingly ignore fresh data that highlights evidence-based practices producing superior outcomes. The result—an explosion in the American population under correctional supervision. In 2020, close to four million people, or one in sixty-six, were under some form of state or federal supervision in the United States.² This is an improvement from five million people, or one in forty-five, in 2009.³ And as with most matters in criminal justice, race plays a decisive role with Black

1. 2PAC, *Life’s So Hard*, on GANG RELATED—THE SOUNDTRACK (Death Row Recs. 1997).

2. DANIELLE KAEBLE, BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES, 2020, at 1 (2021), <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf>.

3. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF CORRECTIONS (2009), https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf.

adults four times more likely than their white counterparts to be under correctional control and close to ten percent of the African American population under some form of correctional supervision.⁴

While the War on Drugs is infamous for the institution of harsh sentences for drug offenders and the consequent mass incarceration of millions in American prisons, scant attention is paid by the legal academy to the battles waged in the nether land of correctional supervision. The irony is that the detonation of the biggest bomb during the War on Drugs was not in the prisons. Instead, it was in post-imprisonment supervision, a form of federal correctional supervision and a massive component of the federal carceral state.⁵ The statutes enacted during the War created a post-imprisonment structure that continues to keep prisoners hostage after release—under continued correctional surveillance with the threat of re-incarceration constantly looming.

As we enter a new era in criminal justice, it is critical that we include correctional supervision in our reform discussions. Recently, scholars have highlighted the perception of supervision as “a staging area for eventual imprisonment.”⁶ Probation thus works as a systematic purgatory, where probationers are held for a term of years dangling between freedom and incarceration. “[This is] . . . the sinister side of probation[,] . . . [the place] where the promise of redemption is subverted by a lurking punitiveness.”⁷ This situation can trap defendants in a cycle where they oscillate between correctional supervision and prison.⁸

Early twenty-first century federal criminal justice legislation aimed at modifying or repealing wartime⁹ legal rules, including the Fair Sentencing Act of 2010¹⁰ and the First Step Act of 2018,¹¹ fail to address federal supervision. Perhaps more importantly, the statutes and regulations that

4. *Id.* at 6; AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 23 (2014).

5. PEW CTR. ON THE STATES, *supra* note 3, at 1.

6. Ronald P. Corbett Jr., *Probation and Mass Incarceration: The Ironies of Correctional Practice*, 28 FED. SENT’G REP. 278, 279–80 (2016).

7. *Id.* at 278; *see also* Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 FED. SENT’G REP. 231, 235 (2016).

8. *See United States v. Trotter*, 321 F. Supp. 3d 337 (E.D.N.Y. 2018).

9. Any use of the term “wartime” refers to the War on Drugs. It is meant to contextualize the concept it modifies.

10. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended at 21 U.S.C. § 801).

11. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended at 18 U.S.C. § 4042(a)); *see also* CONG. RSCH. SERV., R45558, *THE FIRST STEP ACT OF 2018: AN OVERVIEW* (2019), <https://crsreports.congress.gov/product/pdf/R/R45558> [hereinafter First Step Act Overview].

govern supervision remain steeped in wartime policy and promote supervision models whose effectiveness have since been seriously questioned. Reinforced by the notion of second chances and redemption for individuals in the criminal justice system we should approach supervision in a way that encourages individual desistance from criminality, emphasizes individual agency, and shows this support “by the community (‘social rehabilitation’), by the law, and by the state (‘judicial rehabilitation’).”¹² Such principles and practices are often found in the historical origins of probation as a system and recent best practice literature. If our intention is to reconsider and modify severe criminal policies and practices promoted during the War on Drugs, correctional supervision is a critical and necessary topic of scrutiny.

This Article hopes to encourage a fresh socio-legal frame to examine the current rules and policies. The Article’s aspiration is to capture the attention of decision-makers, namely congressional legislators and federal courts. It aims to provide a comprehensive assessment of the structural condition of supervised release and offer alternatives to current models and practices. This Article also seeks to rouse the legal academy. In an era of criminal justice reform, legal academics have an opportunity to make a significant contribution by offering legal solutions based on sound theory and recent data. Evidence of this type often comes from other disciplines, such as criminology, sociology, and psychology, and should be considered by legal practitioners when crafting rules and suggesting policy.¹³ Such interdisciplinary cross pollination allows for the creation of legal rules based on comprehensive and often more current data as opposed to policies based on wartime theory and dated models of supervision. In doing so, we should reflect on the theoretical foundations of supervision with an aim towards creating a firmer frame and improving our practices.

This Article focuses solely on the system of federal supervised release.¹⁴ Although the number of individuals on federal supervised release is relatively

12. Beth Weaver & Fergus McNeill, *Lifelines: Desistance, Social Relations, and Reciprocity*, 42 CRIM. JUST. & BEHAV. 95, 105 (2015).

13. See, e.g., JAMES ANDREWS & DONALD A. BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (2016); Tony Ward, Ruth E. Mann & Theresa A. Gannon, *The Good Lives Model of Offender Rehabilitation; Clinical Implications*, 12 AGGRESSION & VIOLENT BEHAV. 87 (2007); see also Joan Petersilia, *Community Supervision: Trends and Critical Issues*, 31 CRIME & DELINQ. 339 (1985).

14. 18 U.S.C. § 5037; 8E U.S. CTS., *GUIDE TO JUDICIARY POLICY* § 210 (2018) (on file with author) [hereinafter *Monograph 109*]. While the focus on federal rules presents limitations, it also offers advantages. This Article is limited in that it lacks an examination of supervision practices cross-nationally thus failing to account for variation in other systems that may have better outcomes. In addition, a general analysis based on federal policy also fails to consider approaches employed by individual states, which also may have better outcomes. The advantage of analyzing federal policies is that federal rules typically influence and serve as a model for state policies.

small, approximately 115,000 people, the decision to concentrate on this form of correctional supervision was made for three reasons.¹⁵ First, federal legislation often prompts state legislation and regularly serves as the legislative model at the state and local levels. This is particularly true of criminal justice policy over the past forty years, and specifically with the origin and evolution of supervision in America. And although much of the discussion applies to supervision practices in a general sense, the need to focus on one specific supervision approach was critical to an extensive case study examination. Second, federal supervised release is now the dominant form of supervision in the federal system.¹⁶ Federal correctional supervision includes five types: probation, supervised release, parole and mandatory release, conditional release, and juvenile supervision.¹⁷ Probation and supervised release are substantive sisters, governed by the same statutory and regulatory rules and sharing the same purpose (public safety and rehabilitation), though imposed for different theoretical reasons.¹⁸ At the federal level, probation is currently a criminal sentence reserved for low level offenders, while supervised release is imposed *in addition to* a prison sentence. During the War on Drugs, the imposition of probation decreased significantly, while supervised release was imposed regularly.¹⁹ Finally, I focused on federal supervised release because my reentry clinic works with individuals on federal supervised release.²⁰ This Article is dedicated to them.

15. PEW CHARITABLE TRS., NUMBER OF OFFENDERS ON FEDERAL SUPERVISED RELEASE HITS AN ALL-TIME HIGH 1 (2017), https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf; 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/>; see also U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 3 (2020), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf (reporting that the number of individuals on federal probation and supervised release ranged between 130,224 to 136,156 people between 2015 and 2020).

16. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1015 (2013).

17. Monograph 109, *supra* note 14; 18 U.S.C. § 3561 (probation); *id.* § 3583 (supervised release); *id.* § 4201 et seq. (repealed 1984) (parole and mandatory release); *id.* §§ 4243, 4246, 4248 (conditional release); *id.* § 5037 (juvenile supervision).

18. 18 U.S.C. § 3601; see also ADMIN. OFF. OF THE U.S. CTS., PROB. & PRETRIAL SERVS. OFF., OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 5 (2016), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf [hereinafter Administrative Office Overview 2016]; Monograph 109, *supra* note 14; Doherty, *supra* note 16, at 1012.

19. Brent E. Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 312–13 (2016).

20. Lahny R. Silva, *Reaching for Reentry: Indiana University Robert H. McKinney School of Law's Contribution to the Reentry Movement*, 54 IND. L. REV. 527 (2021). I supervise a federal mentor-advocacy program as part of the reentry problem solving court called REACH in the Southern District of Indiana.

Part I of this Article delivers a rather extensive historical overview of correctional supervision in the United States.²¹ This Part reviews significant federal legislation and jurisprudence as well as important theoretical and research developments that shaped our system of supervision today. Chronicling the history will demonstrate the way the theoretical and political pendulums shifted from redemptive and rehabilitative ideals to control and risk paradigms and again back to notions of “second chances” and rehabilitation. Although this Article focuses on federal supervised release, an examination of the origins of probation is necessary for a proper understanding of the congressional intent underlying supervised release. The same theories, models, and practices that influenced the evolution of probation in America also prompted the development of supervised release during the War on Drugs. Showing supervision’s historically unclear mandate and its haphazard establishment as a criminal justice intervention will highlight the chaotic landscape of supervision today.

Part II examines two models of supervision that inform federal supervision policy: The Risk-Need-Responsivity (“RNR”) model and the Social Learning Technique model (“SLT”).²² The RNR model, implemented during the War on Drugs, is *the* current federal approach to supervision. It heavily shaped wartime supervision practices and continues to influence current American criminal justice policy. With its focus on criminal risk and public safety, RNR stresses the need for controls with an emphasis on monitoring. In the last decade, these principles and practices have come under fire for their inconsistency with evidence-based best practices.²³ On a more political level, the control rhetoric of the War on Drugs is inconsistent with current notions of “second chances” and redemption. The SLT model is also presented in this Part, for two reasons. First, SLT influenced the development of the RNR approach, and its tenets are still seen in current federal supervision policy and practices. Though to a lesser extent, SLT contemplates criminal risk and, like RNR, SLT concentrates on criminogenic needs. Second, more recent SLT work is producing promising developments and should be considered by those crafting contemporary supervision policy.²⁴

Part III offers an alternative framework in which to think about federal supervised release: desistance theory.²⁵ Instead of policies emphasizing control and risk, desistance focuses on long-term reintegration plans and interventions. With its focus on individual agency and internal capacity

21. *See infra* Part I.

22. *See infra* Part II.

23. *See infra* Part IV.

24. *See infra* Section III.A.

25. *See infra* Part III.

building, this Article urges decision-makers to seriously consider this frame when re-imagining a new theoretical paradigm. This Part also provides a different model, the Good Lives Model (“GLM”), as a new way to approach federal supervision. Very different from the RNR and SLT models, GLM concentrates on developing individual capacities and creating prosocial relational and community supports to facilitate longer term individual change. Such an approach underlines principles consistent with best practices that produce better outcomes.

Part IV provides an objective catalogue of evidence-based practices for the purpose of highlighting contemporary data and its inconsistency with outcomes produced by the current wartime approach.²⁶ Without promoting a particular model, this Part aims to provide decision-makers with a summary of the data on best practices in the context of supervision. These practices produce the best outcomes and should be considered regardless of the frame and model adopted.

The final Part concludes with a summary of the Article and recommendations for next steps. Recognizing that America is in the midst of a criminal justice overhaul, the Article concludes with a call for action on this topic.

I. HISTORY – “LIFE CAN ONLY BE UNDERSTOOD BACKWARDS; BUT IT MUST BE LIVED FORWARDS.”²⁷

To understand federal supervised release, it is critical to understand where it started: probation. As mentioned above, federal supervised release is probation’s twin sister, sharing theoretical principles, federal rules, and administrative practices. This Part will recount the history of probation to the birth of supervised release, providing an extensive survey in Section D of the current rules and practices. The purpose is to show the way supervision developed from a criminal justice intervention promoting rehabilitation and rooted in the ideals of penal welfarism, to a system focused on criminal risk and built on control theory with officers trained to employ surveillance and restrictive interventions.

A. *The Start*

The prototype of “probation” as a legal mechanism was conceived over one thousand years ago.²⁸ The American form of “probation” can be traced

26. See *infra* Part IV.

27. 18 SØREN KIERKEGAARD, *JOURNALEN* 306 (Palle Jorgensen trans., 1997) (1843), <https://homepage.math.uiowa.edu/~jorgen/kierkegaardquotesource.html>.

28. In the Middle Ages, “judicial reprieve” was used as a practice to suspend sentences. Charles W. Webster, *The Evolution of Probation in American Law*, 1 *BUFF. L. REV.* 249, 251 (1952). In

to English common law as a juridical custom allowing the early release of prisoners.²⁹ Probation as a method of criminal justice administration began in the mid-1800s in Boston, Massachusetts.³⁰ The formula was quite simple: investigate, screen, interview, and provide services (such as employment, education, and other types of relief).³¹ Though initially met with resistance by law enforcement wanting to punish lawbreakers, the court was convinced that not all offenders need be imprisoned.³²

From the 1890s until 1970, “penal-welfarism” served as the framework for criminal policy.³³ Penal welfarism emphasized rehabilitative measures instead of retributive punishments.³⁴ Criminological thought perceived criminality as an issue of “poorly adapted individuals and families, or else as a symptom of need.”³⁵ Criminal justice scholars and practitioners alike understood that individuals engaged in criminal behavior because of poor education, lack of opportunity, and inadequate mental health treatment.³⁶ The

early England, “right of sanctuary” provided an exemption from arrest in an officially recognized legal protection, “sanctuary,” for individuals accused of a felony. *Id.* By going to a church, a criminal defendant could seek protection from the law for up to forty days. There the defendant would decide whether to go to trial or leave the country. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 335–36 (1762); *The Privilege of Sanctuary*, ENG. LEGAL HIST. (May 27, 2013, 5:14 PM), <https://englishlegalhistory.wordpress.com/2013/05/27/the-privilege-of-sanctuary/>. In fourteenth-century England, “recognizance” was used to authorize release from prison with a surety or bond. Francis H. Hiller, *Adult Probation Law of the United States*, 1930 Y.B. 147, 148. Accounts in the English city of Birmingham in 1844 reported that there were “arrangements made by the local magistrates, in cooperation with representatives of private welfare organizations, for better volunteer service in the supervision of defendants conditionally released by the courts.” *Id.* However, the first probation statute in England was not adopted until 1907. *Id.*

29. Webster, *supra* note 28, at 251.

30. *Id.* at 252. The father of probation, a shoemaker named John Augustus, requested a Boston court permit him to assist individuals released from jail or prison in a volunteer capacity. *Id.* In doing so Augustus coined the phrase “probation” and the court granted his request. *Id.*

31. NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, REPORT ON CORRECTIONS 312 (1973), <https://www.ojp.gov/pdffiles1/Digitization/10865NCJRS.pdf>.

32. Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 155 (1997); see also Webster, *supra* note 28, at 252 (citing Sheldon Glueck, *Introduction to JOHN AUGUSTUS*, NAT’L PROB. ASS’N, JOHN AUGUSTUS: FIRST PROBATION OFFICER, at vi (1939)). Augustus “bailed out over 1800 persons in the Boston court.” Petersilia, *supra*, at 156. Upon his death in 1859, Augustus was personally liable for \$243,234 in bail for those he helped divert from pretrial incarceration. *Id.* at 155.

33. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 34 (2001); Fed. Corr. & Supervision Div., Admin. Off. of the U.S. Cts., *U.S. Probation in the 1930s: Excerpts from the Ye News Letter*, 61 FED. PROB., Dec. 1997, at 58, 58 [hereinafter *U.S. Probation in the 1930s: Excerpts from the Ye News Letter*]. The theoretical underpinnings continued to be humanitarian in its efforts throughout the 1950s with a focus on individualized treatment.

34. GARLAND, *supra* note 33, at 34; *U.S. Probation in the 1930s: Excerpts from the Ye News Letter*, *supra* note 33, at 58.

35. GARLAND, *supra* note 33, at 15.

36. *Id.*

key to the protection of society lay with restoring the individual to “good citizenship.”³⁷ Social welfare programs that emphasized education and employment were encouraged and the provision of individual and familial support was promoted.³⁸ Indeterminate sentencing laws were the order of the day, with prison viewed as counterproductive to individual reform.³⁹ Instead, the state played an important role in rehabilitation efforts as “[t]he state was to be an agent of reform as well as repression, of care as well as control, of welfare as well as punishment.”⁴⁰ Individual deviance could be reformed; with a little hope and encouragement, people could have a prosocial and productive life.⁴¹ And the state was responsible for their care.⁴²

In the early days of American criminal justice, many courts assumed the inherent authority to suspend criminal sentences.⁴³ If the courts had power to suspend sentences, then surely, they could require correctional supervision to ensure successful completion of a sentence. In suspending a prison sentence, an agreement was brokered between a criminal defendant and the state; criminal charges would not be filed in exchange for a promise not to reoffend.⁴⁴ With the posting of a bond by a private person, usually a police officer or church volunteer, and the arrangement sanctioned by the court, the defendant would not be imprisoned for her offense.⁴⁵ At the federal level, and before the enactment of the 1925 Probation Act, federal district courts suspended sentences of imprisonment and instead imposed probation as a matter of course.⁴⁶ Criminal cases remained open while the person served her sentence living outside prison on “probation” status.⁴⁷

By 1900, only six states had enacted probation legislation and by 1952, some states still had not implemented a probation regime.⁴⁸ Massachusetts

37. Richard A. Chappell, *The Federal Probation System Today*, 14 FED. PROB., June 1950, at 30, 33.

38. GARLAND, *supra* note 33, at 15.

39. *Id.* at 34–35.

40. *Id.* at 38.

41. Chappell, *supra* note 37, at 33.

42. GARLAND, *supra* note 33, at 34.

43. Webster, *supra* note 28, at 251; *see also* *People ex rel. Forsyth v. Ct. of Sessions of Monroe Cnty.*, 36 N.E. 386, 387 (N.Y. 1894).

44. *Forsyth*, 36 N.E. at 388.

45. Petersilia, *supra* note 32, at 156.

46. Victor H. Evjen, *The Federal Probation System: The Struggle to Achieve It and Its First 25 Years*, 78 FED. PROB., Dec. 2014, at 27, 27.

47. *Id.*

48. Webster, *supra* note 28, at 252. Probation service had a bumpy start and failed to spread quickly. *Id.* at 253. It was often incumbered by political influence with leaders appointing unqualified and incompetent people to serve as officers. Hiller, *supra* note 28, at 149–50. This, coupled with a lack of training and problematic rules governing supervision, caused probation to be chaotically developed. *Id.* In the federal courts, and prior to the enactment of the Probation Act, there was no legal authority for the appointment of paid officers. Chappell, *supra* note 37, at 30.

was naturally the legislative leader, enacting laws in 1878 that officially recognized “probation” as a criminal justice intervention.⁴⁹ In 1891, the Commonwealth enacted legislation that required criminal courts to appoint probation officers and define their duties and powers.⁵⁰ Nevertheless, the federal government and other states were slow to follow.

1. Passage of the Probation Act of 1925

In 1915, the Department of Justice (“DOJ”) began to challenge judicially-imposed suspended sentences as illegal.⁵¹ The United States Supreme Court heard the issue in the case of *Ex Parte United States*⁵² and issued an opinion agreeing with the government in 1916.⁵³ The Court held that suspended sentences were illegal because there was no federal statute authorizing such a practice.⁵⁴ In response, several bills creating probation as a sentencing option in federal court were introduced in Congress resulting in the Probation Act of 1925.⁵⁵ By 1930, following suit, thirty-four states and the District of Columbia adopted laws creating adult probation.⁵⁶ However, a systematic set of rules and practices governing supervision, would not begin to take shape until the latter half of the twentieth century. With the constant ebb and flow of correctional theory and the heavy pendulums of political dogma and public opinion swinging back and forth throughout its history, federal supervision as a system was unable to develop on firm ground. The Federal Probation Act of 1925 was introduced to Congress by Senator Copeland as S. 1042 and Representative Graham as H.R. 5195.⁵⁷ The bill was described by proponents as a “humanitarian measure”⁵⁸ and promoted as a model that was working in the states and in Great Britain.⁵⁹ The U.S. Senate passed the bill unanimously, although the House passed the law by a vote of

Federal officers who volunteered “generally were not qualified by formal education, experience, or understanding of human nature to perform the important investigation responsibilities of a probation officer and to render adequate and helpful supervision.” *Id.*

49. Webster, *supra* note 28, at 252; NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARD GOALS, *supra* note 31.

50. Hiller, *supra* note 28, at 149.

51. *See Ex parte United States*, 242 U.S. 27 (1916).

52. 242 U.S. 27 (1916).

53. *Id.* at 51–53.

54. *Id.*

55. Probation Act of 1925, ch. 521, 43 Stat. 1259; *see also History of U.S. Probation*, U.S. PROB. OFF. S. DIST. CAL., <https://www.casp.uscourts.gov/history-us-probation> (last visited Jan. 17, 2023).

56. Hiller, *supra* note 28, at 149.

57. J.M. Master, *Legislative Background of the Federal Probation Act*, 14 FED. PROB., June 1950, at 9, 15–16; *see also History of U.S. Probation*, *supra* note 55.

58. 66 CONG. REC. 5079, 5201 (1925) (statement of Rep. Upshaw).

59. *Id.*

170 in favor and 49 opposed.⁶⁰ The Act was hastily passed, with Representative Blanton requesting a suspension of House rules governing debate.⁶¹ By the early spring of 1925, President Calvin Coolidge signed the bill into law.⁶²

The Probation Act was initially composed of five primary sections.⁶³ The first section of the Act authorized federal judges to suspend the execution of a term of imprisonment and instead place defendants on probation.⁶⁴ The second section entrusted the federal courts with overseeing the supervision of probationers by requiring probation officers to report the conduct of probationers to the court.⁶⁵ In addition, the Act limited probation terms to five years.⁶⁶ Federal courts were also authorized to discharge probationers and terminate supervision.⁶⁷ The third section allowed courts to appoint volunteer probation officers and one salaried officer.⁶⁸ This section also permitted judges to remove officers.⁶⁹ The fourth section outlined officer duties in detail,⁷⁰ while the fifth section provided the United States Attorney

60. *Id.* at 5199–201 (1925) (statement of Rep. Graham moving to suspend the rules to pass Senate Bill 1042).

61. On the floor of the House, Congressman Thomas L. Blanton of Texas said:

Mr. Speaker, this existing situation illustrates the present attitude of the mind of Congress, when a bill of this great importance can be called up under a suspension of the rules, where you can not change one single syllable in it, where you have got to vote it either up or down, where you have got to accept it just like it is written, with only 20 minutes debate

Id. at 5200 (statement of Rep. Blanton); *see also id.* at 5204 (statement of Rep. Woodrum).

62. *Id.* at 5311; Evjen, *supra* note 46, at 29–30.

63. Probation Act of 1925, ch. 521, 43 Stat. 1259; George W. McClintic, *Probation*, 17 AM. BAR ASS'N J. 589, 589 (1931).

64. McClintic, *supra* note 63; 18 U.S.C. § 724 (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), (2), 98 Stat. 1837, 1987 (repealing or renumbering 18 U.S.C. §§ 3651–3656 (1982)); *see also* Chappell, *supra* note 37, at 30.

65. McClintic, *supra* note 63, at 589.

66. Probation Act of 1925 § 1, 43 Stat. at 1260.

67. McClintic, *supra* note 63, at 589.

68. *Id.* at 589–90.

69. *Id.* at 589.

70. 18 U.S.C. § 3655 (1982) read:

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

He shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor and shall make at least monthly returns thereof; shall make such reports to the Director of the

General the power to promulgate rules for probation officers, investigate their work, and collect statistics and other information for publication.⁷¹ More attention was thus paid to two main functions of probation: (1) pre-sentence investigation for the courts and (2) the correctional supervision and treatment of probationers.⁷²

The Probation Act itself provided for many of the conditions of probation.⁷³ While most conditions codified the customary expectations of probationers, there were some striking statutes that are no longer codified or even encouraged today.⁷⁴ The rehabilitative ideal embraced in the first half of the century all but vanished by the 1980s in favor of more stringent and severe penal policy.⁷⁵ For example, “[t]he purpose of probation is to give you another chance to become a law-abiding citizen”⁷⁶ and “[t]he United States District Judge and the probation officers are your friends, and will assist you in becoming a law-abiding citizen.”⁷⁷ These provisions are gone. Also, “the United States Government is more interested in your becoming a law-abiding citizen than it is in having to send you to prison as a lawbreaker.”⁷⁸ This too no longer exists.

2. *Development of the Federal Probation System*

The first five years of the Act’s implementation proved to be less than ideal. Those executing the Act’s mandate encountered many hurdles.⁷⁹ The United States Probation Service was first managed by the Federal Bureau of Prisons under the umbrella of DOJ in 1927.⁸⁰ The first eight officers were without office space, office resources, or travel funding.⁸¹ They were met by skeptical federal law enforcement officers who viewed probation as soft as

Administrative Office of the United States Courts as he may at any time require; and shall perform such other duties as the court may direct.

He shall report to the court any failure of a probationer under his supervision to pay an amount due as a fine or as restitution.

Each probation officer shall perform such duties with respect to persons on parole as the United States Parole Commission shall request.

Id.; see also McClintic, *supra* note 63, at 590–91.

71. McClintic, *supra* note 63, at 590.

72. Hiller, *supra* note 28, at 150.

73. McClintic, *supra* note 63, at 590–91.

74. *Id.* These conditions included employment and caring for dependents. *Id.*

75. See *infra* Section III.C.

76. McClintic, *supra* note 63, at 591.

77. *Id.*

78. *Id.*

79. Chappell, *supra* note 37, at 30. The first eight officers started serving in 1927. *Id.*

80. *Id.* at 30, 35.

81. *Id.* at 30.

well as wary prosecutors and judges who were indifferent or unreceptive to the efforts of probation officers.⁸²

The twenty-year period beginning in 1930 was spent creating and constructing the foundational pillars of supervision that we see today. Jurisprudentially, the United States Supreme Court offered a pronouncement on the purpose of probation in the 1932 case of *Burns v. United States*.⁸³ There, the Court examined the legislative intent underlying Federal Probation Act and concluded that it was, “to provide a period of grace in order to aid the rehabilitation of a penitent offender.”⁸⁴ Writing for the majority, Chief Justice Hughes found the Act was designed to allow an offender the chance to make the most of rehabilitative opportunities for which the execution of the sentence of imprisonment would likely foreclose.⁸⁵

In the early 1930s, the case load for each of the eight officers was over 500 probationers.⁸⁶ Congress subsequently enlarged the appropriation for probation from \$25,000 to \$200,000.⁸⁷ By 1940, when the probation department was shifted to the Administrative Office of the United States Courts, it had expanded to include 233 officers.⁸⁸

In 1940, the Administrative Office of the United States was led by recently appointed Director Henry P. Chandler.⁸⁹ Director Chandler not only professionalized the federal probation service, but he also implemented a research strategy so that supervision would be based on empirically based practices. He viewed supervision as an ever-changing system that made smart

82. The Honorable George McClintic, a District Court judge for the United States District Court for the Southern District of West Virginia, reported:

[D]uring the first three years that this system was used, one of the grave difficulties was to make the people, and especially the officers, look upon the probationer with any degree of compassion and show to him any courtesy, or give to him any help. The general idea seemed to be that it was the proper thing to catch a probationer doing something wrong and to persuade him into some evil action instead of trying to keep him from it.

McClintic, *supra* note 63, at 590.

83. 287 U.S. 216 (1932).

84. *Id.* at 220; GARLAND, *supra* note 33, at 34.

85. *Burns*, 287 U.S. at 220; Chappell, *supra* note 37, at 33.

86. Chappell, *supra* note 37, at 32.

87. Hiller, *supra* note 28, at 151.

88. Chappell, *supra* note 37, at 31. The transfer of the probation department to the Administrative Office from the Bureau of Prisons pronounced an official recognition that under certain conditions the most effective means of promoting justice and the public interest, laid in permitting certain types of offenders to remain in the community. Henry P. Chandler, *Court Administrative Agency to Supervise Federal Probation*, 4 FED. PROB., May 1940, at 4, 4–5 [hereinafter Chandler, *Court Administrative Agency*].

89. Chandler, *Court Administrative Agency*, *supra* note 88, at 4; Henry P. Chandler, *Probation: What It Can Do and What It Takes*, 12 FED. PROB., Mar. 1948, at 11, 11–16 [hereinafter Chandler, *What it Can Do*]; Chappell, *supra* note 37, at 31.

decisions based on data and experience.⁹⁰ For him, the continuous study and assessment of probation practices was necessary to the effectiveness of supervision.⁹¹

Director Chandler soon started working on three primary areas: personnel standards, case load reduction and appropriate officer compensation.⁹² He developed rules, procedural manuals, and offered trainings on recent research and supervision models.⁹³ The first Monograph governing federal supervision was published in 1943 by the Administrative Office, providing guidance to officers on drafting presentence reports.⁹⁴

By the 1950s, treatment-centered case work was considered effective probation.⁹⁵ Probation officers were to help probationers change their attitudes about themselves and society by providing guidance through a counseling-type relationship.⁹⁶ Officers were to aid probationers in developing prosocial feelings about themselves, such as “self-worth, self-respect, and a sense of belonging,” while teaching the probationer “that he as an individual in society must accept certain socially imposed responsibilities, restraints, and deprivations.”⁹⁷ Customary practices included the use of

90. Henry P. Chandler, *Plans for the Development of Probation in the United States Courts*, 4 FED. PROB., Nov.–Dec. 1940, at 4, 7 [hereinafter Chandler, *Development of Probation*].

Of one thing I am sure: that the conduct of probation in order to be vital and effective must be a continuing study on the part of those who engage in it; that the door to learning is never closed, and that along with the day to day performance of duties, must go unceasing thought upon the possibilities of improved methods, of better understanding of the mysterious motives and factors that influence the conduct of human beings, and consequently of more effective help to probationers and parolees in adjusting themselves suitably to society.

Id.

91. *Id.*

92. *Id.* at 6.

93. Chappell, *supra* note 37, at 31.

94. *Probation and Pretrial Services History*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history> (last visited Mar. 14, 2023). A heavy emphasis was placed on “character, understanding, and patience.” Chandler, *What it Can Do*, *supra* note 89, at 14; *see also* McClintic, *supra* note 63, at 590. And officers were expected to produce quality work with a focus on encouraging and helping probationers that need assistance. McClintic, *supra* note 63, at 590.

He must be honest. He must be industrious and energetic. He must have real ability. He must have tact, that more or less undefinable quality required of a man who has to get along in a peaceable and quiet way with a number of difficult human beings. He must be capable of making a proper investigation of a case and of finding testimony. A probation officer needs training as much as a school teacher. It is, in itself, a real profession. He must be able and capable of giving a helping hand and real encouragement to those persons upon probation who need help, and most of them do.

Id.

95. *U.S. Probation in the 1930s: Excerpts from the Ye News Letter*, *supra* note 33, at 58.

96. GARLAND, *supra* note 33, at 33–34.

97. Chappell, *supra* note 37, at 33.

research and experts to prepare reports and shape case plans.⁹⁸ Social services were provided to offenders and their families while prosocial relational and community supports upon release were emphasized.⁹⁹ The probation officer was also to work within the probationer's community and social networks to cultivate resources and internal capacities.¹⁰⁰ With this, the probationer would be able to effectively problem solve issues and needs, facilitating a successful term of supervision and post-probation life.¹⁰¹

In 1950, probation was developing into a cost-effective system of criminal justice. There were 30,000 probationers being supervised by 304 full time probation officers in 137 field offices.¹⁰² The average case load for federal probation officers was ninety-eight cases, which was quite a reduction from twenty years earlier.¹⁰³ The cost of probation was proving significantly cheaper than prison, with the daily cost of probation being 18.5 cents compared with the daily cost of \$3.12 for federal prisoners.¹⁰⁴ One of the earliest recidivism studies tracked 403 federal probationers and found that 337, or 83.6%, of probationers were crime free over a period of 5.5 to 11.5 years after completion of probation.¹⁰⁵ With a firm foundation in the rehabilitative ideals of the day, the system was beginning to take shape. As it did, the sociopolitical tremors of the 1960s and 1970s shook the theoretical foundation of the system, and probation began to receive harsh critiques challenging its effectiveness as a criminal justice approach.

B. The 1960s & 1970s

The 1960s to the mid-1970s was a period of theoretical and jurisprudential exploration. During this time, new research institutions were created to examine the effectiveness of probation while the United States Supreme Court tussled with the constitutional parameters of federal supervision. By the end of the 1970s, America was experiencing high rates of violent crime and probation was branded ineffective.¹⁰⁶ The rehabilitative

98. *Id.* at 34.

99. *Id.* at 34–35.

100. Chappell, *supra* note 37, at 33.

101. *Id.*

102. *Id.* at 30.

103. *Id.* at 32.

104. *Id.* at 38. The figure is from 1949. “On yearly basis the comparative cost is \$67.53 for probationers and \$1,138.80 for persons who are imprisoned.” *Id.*

105. Henry P. Chandler, *The Future of Federal Probation*, 14 FED. PROB., June 1950, at 41, 46. Director Chandler discussed an early study being conducted by Dr. Morris G. Caldwell, a sociologist from the University of Alabama. *Id.*

106. See Robert Martinson, *What Works—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 42, 49 (1974) (discussing the ineffectiveness of supervision); JAMES ALAN FOX & MARIANNE W. ZAWITZ, BUREAU OF JUST. STAT., HOMICIDE TRENDS IN THE UNITED STATES 9

principles that guided criminal justice policies up to this point were replaced with a more punitive paradigm that underscored just deserts and deterrence.¹⁰⁷ The theoretical underpinnings of probation would soon shift to a more penal paradigm that exploded into a full-blown government War on Drugs.

1. *Questioning the Effectiveness of Supervision*

In the late 1960s and 1970s, government agencies and academics began to evaluate the effectiveness of supervision.¹⁰⁸ During this time the Federal Judicial Center (“FJC”) was statutorily created, offering extensive research and training opportunities.¹⁰⁹ The FJC not only assessed supervision as a system, but it also piloted community-engaged projects.¹¹⁰ The President’s Commission on Law Enforcement and Criminal Justice Administration also conducted a study in 1967.¹¹¹ The study comprehensively examined the national crime trends, the causes of such crime, and the effectiveness of corrections including supervision.¹¹² In doing so, it reported that the current

(2006), <https://bjs.ojp.gov/content/pub/pdf/htius.pdf> (reporting that from 1963 to 1973, the homicide rate doubled).

107. Donald A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL’Y & L. 39, 40 (2010) [hereinafter Andrews & Bonta, *Rehabilitating Policy and Practice*].

108. NICHOLAS N. KITTRIE ET AL., SENTENCING, SANCTION, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY AND PRACTICE 949 (2d ed. 2002); Ben S. Meeker, *The Federal Probation System: The Second 25 Years*, 39 FED. PROB., June 1975, at 16, 16.

109. Pub. L. No. 90-219, 81 Stat. 664 (1967); Meeker, *supra* note 108, at 17–18. The project was headed by Norval Morris, a prominent criminologist, former Dean of the University of Chicago Law School, and advocate for criminal justice reform. *See generally* NORVAL MORRIS & GORDON J. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* (1970); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982); NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1986).

110. Meeker, *supra* note 108, at 17–18. One of the first initiatives was a collaboration with the National Institute of Mental Health and the University of Chicago Law School Center for Studies in Criminal Justice examining the effectiveness of “nonprofessional case aides” in the administration of supervision. *Id.* The project was piloted in the United States District Court for the Northern District of Illinois in Chicago, Illinois. It required the employment of up to 40 probation officer case aides in the district. The case aides were comprised of largely blue-collar, sometimes ex-offender, residents of probationers’ neighborhoods. Case aides were found to be useful leading to the creation of a probation officer assistant position within probation offices in the various federal judicial districts. Twenty positions were authorized in 1973. *Id.* at 18. The project outcomes were positive, showing that peer and social supports were an asset to supervision. *Id.*; *see also* Herbert Vogt, *An Invitation to Group Counseling*, 35 FED. PROB., Sept. 1971, at 30 (discussing the District of Columbia where more experimentation was occurring with the implementation of group counseling techniques as a new supervision method).

111. *The Challenge of Crime in a Free Society*, PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST. (1967), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf>.

112. *Id.*

supervision practices were ineffective.¹¹³ The Commission noted that supervision suffered from overworked probation officers, a lack of community resources and the need for a review of internal organizational and management structures and supervision practices.¹¹⁴ Since nothing rehabilitative appeared to be working, the Commission recommended increasing law enforcement resources to prepare for a war on crime.¹¹⁵

In the 1970s, the “get tough” on crime philosophy was advanced and soon eclipsed the rehabilitation approach to punishment and corrections.¹¹⁶ In 1974, sociologist Robert Martinson published his very influential piece, *What Works?—Questions and Answers about Prison Reform*, criticizing probation as ineffective and influencing the theoretical trajectory of supervision.¹¹⁷ Martinson’s piece called for an assessment to determine whether probation was a necessary intervention tool in the administration of criminal justice.¹¹⁸ For him, “it is possible that there is indeed something that works . . . that might be made to work better—something that deters rather than cures.”¹¹⁹ The article quickly gained national attention, prompting the conception of the “Nothing Works” doctrine.¹²⁰ The “Nothing Works” doctrine asserts that rehabilitation programming, such as probation, is a waste of resources and futile in terms of outcomes.¹²¹ The principle was quickly advanced by conservative scholars including James Q. Wilson and Ernest van den Haag who advocated for the imposition of more severe prison sentences to incapacitate and deter criminal offenders.¹²² For them, rehabilitation rhetoric was hollow and unsupported by the evidence.¹²³

113. *Id.* at 159 (stating that “[f]or a great many offenders, then, corrections does not correct.”); Barefoot Sanders, *President’s Crime Commission*, 30 TEX. BAR J. 583, 584 (1967).

114. KITTRIE ET AL., *supra* note 108; *The Challenge of Crime in a Free Society*, PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST. 166–69 (1967), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf> (stating that “[f]or a great many offenders, then corrections does not correct”).

115. Sanders, *supra* note 113, at 585.

116. Andrews & Bonta, *Rehabilitating Policy and Practice*, *supra* note 107, at 40.

117. Martinson, *supra* note 106, at 47–49.

118. *Id.* at 22–23.

119. Martinson, *supra* note 106, at 50.

120. Stuart Adams, *Evaluation: A Way Out of Rhetoric*, in ROBERT PARTINSON, TED PALMER & STUART ADAMS, REHABILITATION, RECIDIVISM, AND RESEARCH 75 (Matthew Matlin ed., 1st prtg. 1976).

121. Martinson, *supra* note 106, at 48–50.

122. See generally JAMES Q. WILSON, THINKING ABOUT CRIME (1975); Adams, *supra* note 120.

123. James Q. Wilson, *A Reader’s Guide to the Crime Commission Reports*, PUB. INT., Fall 1967, at 64, 79, https://www.nationalaffairs.com/public_interest/detail/the-crime-commission-reports; JAMES Q. WILSON, THINKING ABOUT CRIME 45, 172 (1975); see ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING VERY OLD AND PAINFUL QUESTION (1975); see also Adams, *supra* note 120.

Martinson's work was immediately challenged producing more studies and experiments about offender rehabilitation.¹²⁴ Many of these studies reported positive conclusions on the effectiveness of offender treatment.¹²⁵ Though Martinson later modified his *What Works* examination of rehabilitation, the retributive ideology had already taken hold directing national criminal justice policy for the next forty years.¹²⁶

2. *The Court Weighs In*

During the late 1960s and 1970s, the United States Supreme Court also weighed in on supervision. The Court handed down three opinions that shaped the constitutional procedural parameters of parole and probation: *Mempa v. Rhay*,¹²⁷ *Morrissey v. Brewer*,¹²⁸ and *Gagnon v. Scarpelli*.¹²⁹ In doing so, the Court provided a glimpse into its understanding of the purposes of probation while simultaneously pronouncing constitutional procedural

124. Andrews & Bonta, *Rehabilitating Policy and Practice*, *supra* note 107, at 44.

125. *Id.*

126. Andrews & Bonta, *Rehabilitating Policy and Practice*, *supra* note 107, at 41; Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Prison Reform.*, 7 HOFSTRA L. REV. 243, 244 (1979).

127. 389 U.S. 128 (1967). Beginning with *Mempa v. Rhay* in 1967, the Court started to grapple with the rights and freedoms of those on probation and parole. *Id.* at 133. In *Mempa*, the Court opened the door for future inquiry into the constitutional rights of probationers when it determined that a probationer was entitled to counsel during a combined sentencing and revocation hearing. *Id.* Although this case is known primarily for establishing the right to counsel at sentencing, it provided a constitutional springboard into the realm of supervision.

128. 408 U.S. 471 (1972). The Court in *Morrissey v. Brewer* held that parolees facing revocation were entitled to a hearing, though a parole revocation was not part of a criminal prosecution. *Id.* at 487–88. The Court noted that:

[T]he minimum requirements of due process . . . include (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee 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 [probation or] parole.

Id. at 488–89. The Court still found that due process required two hearings: a preliminary hearing to determine whether probable cause existed to believe a parole violation occurred and a more comprehensive revocation hearing to determine whether the parolee should be revoked. *Id.* at 485–88; *see also* *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

129. 411 U.S. 778 (1973). The Court addressed whether due process required a hearing and the appointment of counsel during probation revocation proceedings. *Id.* at 779. The Court held that due process could be violated if a probationer were denied a hearing and counsel. *Id.* at 791. Stopping short of requiring an appointment of counsel in all indigent revocation cases, the Court concluded such decisions be made on a case-by-case basis. *Id.* at 790.

requirements to govern in the event of a “failure of supervision.”¹³⁰ These three decisions remain good law.

Beginning with *Mempa* in 1967, the Court started to grapple with the rights and freedoms of those on probation and parole.¹³¹ In determining constitutional questions, the Court hinted at its understanding of the purpose and goals of supervision in its reasoning. The Court recognized the “double duty” of the supervision officer “to the welfare of his clients and to the safety of the general community.”¹³² The Court continued to reiterate the premise first announced in *Morrissey* that the “purpose is to help individuals reintegrate into society.”¹³³ It acknowledged that probation was meant “to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.”¹³⁴ The objective was thus to work with individuals through the process of rehabilitation outside of the prison wall.¹³⁵ For the Court “[r]evocation . . . is, if anything, commonly treated as a failure of supervision.”¹³⁶ Though public safety was recognized as a legitimate supervision goal in *Gagnon*, the central focus remained helping the individual adjust to a prosocial life. Revocation was nothing less than a failure.

As America closed the 1970s, there was a statistical increase in violent crime.¹³⁷ The social trends of the 1960s, including the consumer boom, the loosening of informal social controls, and a large population of teenage males worked to impact the crime rate.¹³⁸ Taken together with Martinson’s article and President Nixon’s declaration of a “[W]ar on [D]rugs”¹³⁹ the pendulum shifted from a rehabilitative ideal toward a law-and-order approach to criminal policy. New psychological and criminological theories were also

130. *Id.* at 785 (“Revocation . . . is, if anything, commonly treated as a failure of supervision.” (quoting FRANK J. REMINGTON ET AL., CRIMINAL JUSTICE ADMINISTRATION: MATERIALS AND CASES 910 (1969))); *Morrissey*, 408 U.S. at 485–86 (“[R]ealistically the failure of the parolee is in a sense a failure for his supervising officer.” (citing Note, *Observations on the Administration of Parole*, 79 YALE L.J. 698, 704–06 (1970))).

131. *Mempa*, 389 U.S. at 133.

132. *Scarpelli*, 411 U.S. at 783–84.

133. *Morrissey*, 408 U.S. at 477.

134. *Scarpelli*, 411 U.S. at 785 (quoting REMINGTON ET AL., *supra* note 130, at 910)

135. *Id.*

136. *Id.*

137. FOX & ZAWITZ, *supra* note 106.

138. GARLAND, *supra* note 33, at 90–91.

139. *Thirty Years of America’s Drug War: A Chronology*, PBS FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Mar. 14, 2023); Editorial, *It Is Time to End the War on Drugs*, 93 J. AM. JUDICATURE SOC’Y 48, 83 (2009); JILL JONNES, HEP-CATS, NARCS, AND PIPE DREAMS: A HISTORY OF AMERICA’S ROMANCE WITH ILLEGAL DRUGS 261 (1996); EDWARD JAY EPSTEIN, AGENCY OF FEAR: OPIATES AND POLITICAL POWER IN AMERICA 178 (1977).

beginning to percolate, perceiving criminality as the result of inadequate government and social controls as opposed to a symptom of social deprivation.¹⁴⁰ These theories gained prominence over the next fifty years and substantially shaped our current system of supervision.

C. The War

The early 1980s marked the government mobilization in the “War on Drugs.” The political rhetoric declared an “enemy” in this War—drugs—that had to be defeated.¹⁴¹ The strategy to do so was laid out in legislation providing millions of dollars toward the effort and long and severe sentences for those captured.¹⁴² Wartime statutes and judicial policies that developed promoted more regulation and less social programming.¹⁴³ In terms of criminal justice policy, concern for probationer risk replaced the rehabilitative ideal.¹⁴⁴ The prior emphasis on assistance and behavior modification was superseded by enforcement, monitoring, and surveillance.¹⁴⁵ In the context of supervision, wartime policy stressed the law enforcement function of probation officers concerned with control, risk management and punishment, while de-emphasizing the social service role of officers.¹⁴⁶

1. Prominent Theoretical Frameworks

Control theories of crime became the preeminent frame during the War.¹⁴⁷ Such theories think of crime in terms of inadequate controls— “[s]ocial controls, situational controls, self-controls.”¹⁴⁸ For control theorists, individuals will engage in crime unless constrained by controls, which include social and familial restraints as well as community and government controls.¹⁴⁹ Instead of providing assistance and welfare, control theorists

140. GARLAND, *supra* note 33, at 15.

141. DAVID FAULKNER, CRIME, STATE, AND CITIZEN: A FIELD FULL OF FOLK 144 (2d ed. 2006).

142. 21 U.S.C. §§ 841(a), 960(b); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. C.L. UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 11 (2006), https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

143. Ros Burnett & Shadd Maruna, *So ‘Prison Works’, Does It? The Criminal Careers of 130 Men Released from Prison under Home Secretary, Michael Howard*, 43 HOW. J. CRIM. JUST. 390, 399 (2004).

144. GARLAND, *supra* note 33, at 12.

145. *Id.*

146. *Id.*

147. *Id.* at 15.

148. *Id.*

149. *Id.*

posit that criminal policy should focus on effective enforcement and the tightening of social controls.¹⁵⁰

Rational Choice Theory (“RCT”) in particular gained significance as a credible criminological theory in the 1970s.¹⁵¹ Based on the economic model of rational choice, the frame views the individual as a calculating, benefit-maximizing person making rational choices.¹⁵² The offender is a rational decision-maker who plans (albeit minimally) and takes account of situational factors.¹⁵³ Though in the field of criminology, rationality assumes limitations so that the offender is limited by “lack of information, structural constraints, values, and other ‘non-rational’ influences,” the offender is still thought to exercise at least minimal or partial rationality.¹⁵⁴ Increasing the sanction or “cost” of criminal behavior reduces the utility of committing the offense.¹⁵⁵

A significant feature of control theory, including RCT, is that crime is viewed as an event as opposed to a manifestation of a symptom with an individual’s internal and external capacities.¹⁵⁶ The criminal event is the result of criminogenic situational factors and opportunity.¹⁵⁷ The social needs of the individual are not a chief concern.¹⁵⁸ Instead, the implementation of effective criminogenic situational and social controls is the perennial concern.¹⁵⁹ Laws created during the War were going to punish violations with harsh sanctions bearing out a system of surveillance and risk control.¹⁶⁰

150. *Id.*

151. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 9 (Gary S. Becker & William M. Landes eds., 1974) (discussing Rational Choice Theory in terms of costs and benefits); Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 *J. CRIM. L. & CRIMINOLOGY* 653, 661 (1990); Burnett & Maruna, *supra* note 143, at 400.

152. BECKER, *supra* note 151, at 9; GARLAND, *supra* note 33, at 15–16.

153. BECKER, *supra* note 151, at 13.

154. Akers, *supra* note 151, at 661; Stephen G. Tibbetts & Chris L. Gibson, *Individual Propensities and Rational Decision-Making: Recent Findings and Promising Approaches*, in *RATIONAL CHOICE AND CRIMINAL BEHAVIOR: RECENT RESEARCH AND FUTURE CHALLENGES* 7–11 (Alex R. Piquero & Stephen G. Tibbetts eds., 2002).

155. Michael Massoglia & Ross Macmillan, *Deterrence, Rational Choice, and Criminal Offending: A Consideration of Legal Subjectivity*, in *RATIONAL CHOICE AND CRIMINAL BEHAVIOR: RECENT RESEARCH AND FUTURE CHALLENGES* 325–26 (Alex R. Piquero & Stephen G. Tibbetts eds., 2002); GARLAND, *supra* note 33, at 34.

156. GARLAND, *supra* note 33, at 16.

157. *Id.*

158. *Id.*

159. *Id.*

160. Monograph 109, *supra* note 14, § 310 (d)–(g).

2. *Wartime Legislation*

The enactment of crime legislation in the 1980s was comprehensive and multifaceted.¹⁶¹ As the War progressed, the original purpose of supervision shifted from rehabilitation to risk.¹⁶²

From 1984 to 1988, Congress enacted three major pieces of legislation that launched an all-out offensive on drug offenders.¹⁶³ The rules promoted a law-and-order approach to crime and gradually ratcheted up the restrictions, tightening the government and social controls on those convicted in the War.¹⁶⁴

a. 1984

War on Drugs legislation commenced in 1984 with the Comprehensive Crime Control Act of 1984 (“CCCA”)—an extensive overhaul of federal criminal justice policy with a particular focus on drug crimes.¹⁶⁵ As part of the CCCA, the Sentencing Reform Act of 1984 (“SRA”) was enacted with the stated purpose of achieving transparency, uniformity, and proportionality in federal criminal sentencing.¹⁶⁶

The SRA created the United States Sentencing Commission (“Sentencing Commission”), abolished parole, and created supervised

161. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. § 1); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

162. GARLAND, *supra* note 33, at 8.

163. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. § 1 et seq.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

164. John C. Cleary & Alan Ellis, *An Overview of the Comprehensive Crime Control Act of 1984*, 31 PRAC. LAW. 31, 31–32 (1985); KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 35 (2011); Priscilla Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1564 (2012).

165. Comprehensive Crime Control Act of 1984, 98 Stat. at 1976.

166. *Id.*; U.S. SENT’G GUIDELINES MANUAL § 1.A.1 (U.S. SENT’G COMM’N 2018). *See generally* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008). With transparency, Congress sought to avoid “confusion” and “implicit deception” in indeterminate sentencing schemes that allowed parole boards to grant prisoners early release. U.S. SENT’G GUIDELINES MANUAL § 1.A.3. Uniformity in sentencing was pursued in order to treat like offenses similarly. *Id.* And, finally, proportionality was sought to account for differences in the severity of harm and criminal conduct. *Id.*

release.¹⁶⁷ Congress further provided statutory guidance to probation officers by codifying specific duties.¹⁶⁸

Eliminating parole and implementing supervised release was meant to respond to criticisms that the parole system lacked uniformity and transparency, and often worked against poor and minority populations.¹⁶⁹ With parole, a person was conditionally released from prison, meaning she did not technically complete the sentence of incarceration.¹⁷⁰ A person on supervised release, on the other hand, would complete her prison term and subsequently serve a separate term of supervision.¹⁷¹ The 1984 legislation provided federal courts, rather than parole officers, with the discretion to impose terms of supervised release and also set out specific factors to be considered by judges in making such determinations.¹⁷² Moreover, the SRA provided courts with the discretion to terminate supervision after one year.¹⁷³

The original intent of supervised release was to effectuate deterrent and rehabilitative ideals.¹⁷⁴ A congressional statement of policy accompanying the SRA stated:

The primary goal of [Supervised Release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.¹⁷⁵

Thus, supervised release was not meant to punish or incapacitate, as these ideals would be served by the term of imprisonment.¹⁷⁶ Supervised release was to be ideologically separated from the punitive character of the

167. Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 190 (2013). The Sentencing Commission promulgates the rules, known as the Federal Sentencing Guidelines ("FSG"), governing sentencing practices today, including federal supervision. 28 U.S.C. § 994. At first mandatory, the guidelines were later deemed only advisory by the United States Supreme Court in 2005 in *United States v. Booker*, 543 U.S. 220, 222 (2005).

168. Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3603 (1984); 98 CONG. REC. 31,706, 31,811 (1984).

169. Scott-Hayward, *supra* note 167. While the parole board used its discretion to shorten an individual's sentence, supervised release was ordered by a sentencing judge as part of the criminal sentence for violating federal law. *Id.*; Doherty, *supra* note 16, at 992.

170. Doherty, *supra* note 16, at 985.

171. *Id.*

172. Comprehensive Crime Control Act of 1984, § 212, Pub. L. No. 98-473, 98 Stat. 1976, 1999; 18 U.S.C. § 3583.

173. *Id.*

174. Scott-Hayward, *supra* note 167, at 185, 191.

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

176. Scott-Hayward, *supra* note 167, at 191.

prison term and reflect the rehabilitative aims of the individual's transition from prison back into the community.¹⁷⁷

b. 1986

The Anti-Drug Abuse Act of 1986 (the "1986 Act") enacted even more restrictive and punitive rules in the context of federal supervised release.¹⁷⁸ The rehabilitative purpose of supervised release led Congress to first reject the use of revocation of supervised release as an enforcement mechanism in the Comprehensive Crime Control Act of 1984 and instead ensure compliance through contempt proceedings.¹⁷⁹ This approach quickly changed with the passage of the Anti-Drug Abuse Act of 1986.¹⁸⁰ The 1986 Act amended the SRA by instituting revocation to ensure compliance with conditions of supervised release.¹⁸¹ With this, individuals serving a term of supervised release could now be re-imprisoned for non-criminal conduct and technical violations.¹⁸² Supervision's rehabilitative origin was twisted and "recast not as an end but as a means or a mechanism for reducing crime."¹⁸³

The 1986 Act also statutorily enumerated offenses that would require a term of supervised release, particularly drug crimes, whereas before

177. Mica Moore, *Escaping from Release: Is Supervised Release Custodial Under 18 USC § 751(a)?*, 83 U. CHI. L. REV. 2257, 2263 (2016).

178. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-1 to -3 (amending 21 U.S.C. § 841(b)(1)); Anti-Drug Abuse Act of 1986 § 1006, 100 Stat. at 3207-7; 21 U.S.C. §§ 960, 962 (1988).

179. Scott-Hayward, *supra* note 167, at 191–92. The contempt proceedings were only supposed to be used after an individual engaged in repeated or serious violations. In addition, if a probationer committed a new crime, then a new charge would or should be filed. *Id.* at 191 (citing S. REP. NO. 98-225, at 125 (1983)).

180. *Id.*

181. Anti-Drug Abuse Act of 1986 § 1006, 100 Stat. at 3207-7; 21 U.S.C. §§ 960, 962 (1986); *see also* Scott-Hayward, *supra* note 167; Doherty, *supra* note 16, at 1000–01. Revocation was originally introduced by Senator Strom Thurmond, in 1985, and was adopted as a "technical" change contained within the Anti-Drug Abuse Act of 1986. With this technical amendment and the revocation mechanism it created, Congress resurrected conditional release. In enacting the 1986 Act, however, little consideration seems to have been given to the conceptual differences between supervised release and probation incorporated into the SRA. The adoption of the revocation mechanism did not even warrant a separate header to draw attention to the change. Doherty, *supra* note 16, at 1000–01.

182. Doherty, *supra* note 16, at 1002.

183. Fergus McNeill, *What Works and What's Just?*, 1 EUR. J. PROB. 21, 21 (2009); *see also* GARLAND, *supra* note 33, at 16; Gwen Robinson & Fergus McNeill, *Purpose Matters: Examining the 'Ends' of Probation*, in WHAT MATTERS IN PROBATION 277–304 (George Mair ed., 2004). By 1992, forty-seven percent of the supervised release cases were closed by violation with seventy-two percent of those cases being revocations for technical violations. Harold B. Wooten, *Violation of Supervised Release: Erosion of a Promising Congressional Idea into Troubled Policy and Practice*, 6 FED. SENT'G REP. 183, 185 (1994).

imposing supervised release was wholly discretionary.¹⁸⁴ The legislation mandated a term of supervised release of up to ten years depending on the drug, drug weight, and whether the individual had prior convictions.¹⁸⁵ The courts were now required to impose terms of supervised release for certain crimes, while retaining discretionary authority to impose supervision for other crimes based strictly on statutorily enumerated factors.¹⁸⁶

c. 1988

The Anti-Drug Abuse Act of 1988 further tightened the control and surveillance of individuals convicted of drug offenses, and this seeped into supervised release. The Act required revocation of terms of supervised release for possession of a controlled substance and authorized courts to require supervisees to serve one-third of the imposed supervised release term in prison.¹⁸⁷ In addition, individuals on supervised release were mandated to submit to urinalysis every sixty days.¹⁸⁸ And further, individuals on supervised release were also denied eligibility for a passport.¹⁸⁹

As a result of wartime legislation, the rate of probationary sentences dropped from around half of all federal sentences in the decades before the guidelines went into effect in late 1987 to slightly less than a quarter of federal sentences shortly after the guidelines were first implemented nationwide in the early 1990s.¹⁹⁰ Parole as a system of federal supervision was phased out, and supervised release sentences exploded; it is now the dominant form of federal supervision.¹⁹¹

Nationally, the expenditures on supervision increased exponentially during wartime years. From 1982 to 2001, state corrections expenditures increased annually from \$15 billion to \$53.5 billion.¹⁹² Supervision programming such as probation and nonresidential halfway houses comprised 20.4% and 27.3% of total corrections expenditures, ranging from \$3.8 billion to \$12.9 billion.¹⁹³

184. Anti-Drug Abuse Act of 1986, 100 Stat. at 2307-1, 3207-2, 3207-3 (amending 21 U.S.C. § 841(b)(1) (1982)).

185. *Id.*

186. 18 U.S.C. § 3583.

187. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7303, 102 Stat. 4181, 4464; 18 U.S.C. § 3583(g) (1988).

188. Anti-Drug Abuse Act of 1988 § 7304, 102 Stat. at 4465; 18 U.S.C. § 3150 (1988).

189. Anti-Drug Abuse Act of 1988 § 4603, 102 Stat. at 4287; 22 U.S.C. § 2714 (1988).

190. Newton, *supra* note 19, at 311–12.

191. Doherty, *supra* note 16, at 1015.

192. TRACEY KYCKELHAHN, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., STATE CORR. EXPENDITURES, FY 1982–2010, at 1 (2014).

193. *Id.* at 2.

Over time, supervised release was beginning to look more and more like a probation sentence that could be revoked and result in reimprisonment rather than a system of transitional assistance.¹⁹⁴ Twenty-five years after supervised release was implemented, the experience of being on supervised release mimics that of probation.¹⁹⁵ The full range of conditions that were developed for probation now routinely apply to supervised release.¹⁹⁶

The 1980s brought with it one of the longest wars in history: The War on Drugs. The War left America internationally embarrassed, further exacerbated the racialization of the criminal justice system, and created a massive carceral state with millions imprisoned or under supervision.¹⁹⁷ If America is truly to be considered “the land of second chance[s],”¹⁹⁸ then criminal justice reform must include a close examination of not only offense penalties but also supervision policies and practices. Remaining wartime legislation should be reevaluated to ensure that supervision is grounded in evidence-based practices supported by empirical research showing positive outcomes.

D. Wave of Reform

The twenty-first century ushered in a wave of criminal justice reform. Beginning with President George W. Bush’s declaration of America as the “land of second chance[s]”¹⁹⁹ to the First Step Act of 2018, the federal government has worked to restructure the way it dispenses criminal justice.²⁰⁰ However, the wave of reform has not exactly splashed onto the shores of

194. Doherty, *supra* note 16, at 1012.

195. *Id.*

196. Monograph 109, *supra* note 14, § 220; Doherty, *supra* note 16, at 1012.

197. CHRISTOPHER J. COYNE & ABIGAIL R. HALL, CATO INST., FOUR DECADES AND COUNTING: THE CONTINUED FAILURE OF THE WAR ON DRUGS 2–3 (2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-811-updated.pdf>; MATTHEW B. ROBINSON & RENEE G. SCHERLEN, LIES, DAMNED LIES, AND DRUG WAR STATISTICS: A CRITICAL ANALYSIS OF CLAIMS MADE BY THE OFFICE OF NATIONAL DRUG CONTROL POLICY 12 (2007); see Editorial, *supra* note 139, at 83; MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 82 (1995); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427, 431, 481 (2000); Michael Tonry, *Race and the War on Drugs*, 82 U. CHI. LEGAL F. 25, 26 (1994); Doug Bandow, *War on Drugs or War on America*, 3 STAN. L. & POL’Y REV. 242, 242 (1991); see also PEW CTR. ON THE STATES, *supra* note 3; SENT’G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1, 2 (2021), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

198. George W. Bush, *User Clip: President Bush on Prisoner Re-Entry Initiative*, C-SPAN, at 01:08 (Jan. 20, 2004), <https://www.c-span.org/video/?c4574544/president-bush-prisoner-entry-initiative> (quoting language from the video of President Bush’s 2004 State of the Union Address).

199. *Id.*

200. See generally First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (providing retroactive application of 18:1 crack to powder cocaine sentencing principle established in the Fair Sentencing Act of 2010 and an allocation of federal dollars to support reentry related initiatives in the Federal Bureau of Prisons).

supervised release. New laws pay scant attention to supervision as an area in need of reform and recently modified judicial policies continue to perpetuate wartime theory and practice.

1. Recent Research

By the early 2000s, theories that gained momentum during the first two decades of the War on Drugs, such as RCT, were criticized as ineffective.²⁰¹ Studies reported that “rehabilitation programs . . . *not based on rational choice theory* have the greatest promise.”²⁰² One pair of researchers concluded that the most significant hindrance to the effective use of rehabilitative treatment “[is] a correctional system that does not use the research available and has no history of doing so.”²⁰³ Interventions that increased the internal capacity of those returning home were most effective as they provided opportunities to create social bonds and networks as well as learn prosocial behaviors.²⁰⁴ Programs deemed “therapeutic and emphasize[ing] a human-service approach” achieved better recidivism outcomes.²⁰⁵ Furthermore, the central tenet of control theory, the implementation of effective government and social control, failed to apply equally across social groups.²⁰⁶

Research produced several reports showing the racial impact of wartime policies.²⁰⁷ Nationwide, across state and federal jurisdictions, Black people are the demographic most likely to be under supervision. Compared to their white counterparts, Black adults experience a higher prevalence rate of

201. Paul Gendreau et al., *Effects of Community Sanctions and Incarceration on Recidivism*, 12 F. CORR. RSCH. 10, 13 (2000). See generally Francis T. Cullen et al., *Dangerous Liaison? Rational Choice Theory as the Basis for Correctional Intervention*, in RATIONAL CHOICE AND CRIMINAL BEHAVIOR: RECENT RESEARCH AND FUTURE CHALLENGES 279 (Alex R. Piquero & Stephen G. Tibbetts eds., 2001).

202. Cullen et al., *supra* note 201, at 282.

203. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 315 (2007).

204. Gendreau et al., *supra* note 201, at 13; Cullen et al., *supra* note 201, 279–81.

205. Francis T. Cullen, *Correctional Rehabilitation*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION AND RELEASE 235, 249 (Erik Luna ed., 2017).

206. Massoglia & Macmillan, *supra* note 155.

207. DRUGS AND DRUG POLICY IN AMERICA: A DOCUMENTARY HISTORY 334 (Steven R. Belenko ed., 2000); Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2180 (2016); Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 288–89 (2010); Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 22, 2012), <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>; see also Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 231 (2009) (finding that one in eight Black men in their twenties is in prison or jail on any given day, and 69% of Black high school dropouts are imprisoned over their lifetime, compared with just 15% for white high school dropouts).

supervision overall.²⁰⁸ At the end of 2007, 1 in 11 Black adults were under some form of correctional supervision and were 4 times more likely than whites and 2.5 times more likely than Hispanic adults to be under supervision.²⁰⁹ Young Black men in particular comprise the largest demographic group under supervision and are the group at the highest risk for such supervision.²¹⁰ From 2014 through 2016, 16% of Black men between the ages of 20–34 who dropped out of high school reported being on supervision in the past year, while the prevalence rate of white counterparts was 12%.²¹¹ Black women aged 20–34 years old under supervision also outpace their white counterparts at all education levels, reaching 3% for Black women and 2% for white women.²¹² In the federal system, Black people continue to make up the largest racial demographic convicted of drug trafficking, which requires the imposition of federal supervised release.²¹³

Finally, studies conducted on the effect of wartime policies on communities demonstrated that the War on Drugs disproportionately impacted poor, mostly minority communities. These communities overwhelmingly bear the brunt of wartime sentencing policies.²¹⁴ Those returning home from prison are often returning to the same zip codes, known in the literature as “hot spots,” which are communities that are already disadvantaged by poverty, crime, and racial seclusion.²¹⁵ Research shows there is “a tipping point when incarceration becomes so heavily concentrated in disadvantaged communities that it works against the safety and well-being of that community” and these communities are severely damaged when those returning home face reduced economic and social opportunities.²¹⁶

208. Michelle S. Phelps, *Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision*, 3 ANN. REV. CRIMINOLOGY 261, 265–66 (2020) (showing that Black men outpace their white counterparts in other categories including with some college experience, five percent compared for Black men compared to four percent for white men).

209. PEW CTR. ON THE STATES, *supra* note 3.

210. Phelps, *supra* note 208, at 265.

211. *Id.*

212. *Id.* at 265–66.

213. GLENN R. SCHMITT & AMANDA RUSSELL, U.S. SENT’G COMM’N, FISCAL YEAR 2020: OVERVIEW OF FEDERAL CRIMINAL CASES 6 (2021); Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration*, 139 DÆDALUS 20, 20–21 (2010).

214. Sampson & Loeffler, *supra* note 213, at 20–21.

215. *Id.*

216. Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS. L.J. 423, 435 (2013) (“While one family can bear the strain of a family member’s imprisonment by relying on ‘networks of kin and friends,’ multiple families relying on the same network eventually strain and weaken the community.”); Sampson & Loeffler, *supra* note 213, at 20; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1282 (2004).

2. Rules Governing Supervised Release

In 2022, federal supervised release is comprised of an amalgamation of statutory and administrative rules and policy guidelines built on wartime theory and policy.²¹⁷ It is a system preoccupied with monitoring, enforcement, and risk management. The values underlying penal welfarism are noticeably absent, though the rules do endorse utilitarian ideologies such as deterrence and public safety.²¹⁸ Perhaps the most significant principle in the current set of rules is the recognition that retribution is not a proper consideration in the imposition of a discretionary term of or condition for supervised release.²¹⁹ Supervised release is not to be considered a punishment in the theoretical sense, but the rules and guidelines are built on models that require interventions that operate like punishment, where the releasee is treated as a criminal risk and the overarching objective is to protect the public from potential relapse into recidivism.

Despite the recent surge in federal criminal justice legislation overhauling wartime legal rules, including the Fair Sentencing Act of 2010²²⁰ and the First Step Act,²²¹ supervised release is missing. The Fair Sentencing Act fails to substantively address supervised release. The First Step Act mentions probation tangentially and only to determine supervision levels, home confinement supervision, and the supervision of sexually dangerous persons.²²² It also requires a biennial audit of the risk assessments used for supervised release.²²³

The current judiciary policy governing the administration of supervised release is a series of rules set out in Monograph 109 which provides guidance to the courts and probation officers on the implementation of statutory directives and supervision practices.²²⁴ The history of these rules remains somewhat of a mystery. We know that the first Monograph was published in 1943 by the Administrative Office of the United States and the current monograph governing supervision policy and practices, Monograph 109, was

217. 18 U.S.C. § 3583; U.S. SENT'G GUIDELINES MANUAL ch. 5 (U.S. SENT'G COMM'N 2018); Monograph 109, *supra* note 14, § 210.

218. 18 U.S.C. § 3583(c); Monograph 109, *supra* note 14, § 210.10.20(c)(2)(A)–(C).

219. Monograph 109, *supra* note 14, § 210(d).

220. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; 18 U.S.C. § 801.

221. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; 18 U.S.C. § 4042(a); *see also* First Step Act Overview, *supra* note 11.

222. First Step Act of 2018 §§ 602, 609, 132 Stat. at 5238 (amending 18 U.S.C. § 3624); First Step Act Overview, *supra* note 11.

223. First Step Act of 2018 § 103, 132 Stat. at 5213; *see also* First Step Act Overview, *supra* note 11.

224. Monograph 109, *supra* note 14; 18 U.S.C. § 3561. *See generally* U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2018).

revamped in 2013 and again in 2018.²²⁵ While modifications were made, the current version relies heavily on a 1990 model of supervision, the Risk-Need-Responsivity (“RNR”) model.²²⁶ The Monograph sounds in wartime theory focusing on risk to the community and intense accountability interventions for behavior.²²⁷ It lacks the rehabilitative ideal long ago espoused by Director Chandler that showed promising outcomes.²²⁸ It also fails to acknowledge a different approach that involves an individualized and treatment-centered approach to supervision found most effective by recent research.²²⁹

The current federal supervision model is risk-based²³⁰ and encompasses “both controlling and correctional strategies.”²³¹ According to Monograph 109, the philosophy and purpose of postconviction supervision includes: (1) execution of the sentence; (2) reduction of reoffending; and (3) protection of the community from offenses committed by the person under supervision during and after supervision.²³² The stated goals include accountability, success, and desistance from crime.²³³ Though the Monograph encourages the use of evidence-based practices for supervision and guides officers to engage in “evidence-informed methods of decision-making,” it promotes the use of the RNR model and fails to take into account modern and effective methods of supervision.²³⁴

To understand the need for re-examination and modification of supervision standards, it is critical to understand RNR’s principles as well as the most recent research. No doubt, RNR was an innovative model of supervision and made significant contributions to the practice of supervision.²³⁵ As we continue to progress, it is only natural that we evaluate the effectiveness of systems and implement fresh, empirically based practices that have evidence supporting more substantial outcomes. This Article is not suggesting abandonment of the RNR model, as it has served as the structural foundation for a wide array of concepts that continue to influence the

225. Monograph 109, *supra* note 14.

225. *Id.*

226. *Id.* § 160(c)(1)–(3).

227. *Id.* § 150(a).

228. *See infra* Section I.A.2.

229. Tony Ward & Clare-Ann Fortune, *The Good Lives Model: Aligning Risk Reduction with Promoting Offenders’ Personal Goals*, 5 EUR. J. PROB. 29, 33 (2013).

230. Administrative Office Overview 2016, *supra* note 18, at 7.

231. *Id.* at 5.

232. Monograph 109, *supra* note 14, § 150(a).

233. *Id.*

234. *Id.* §§ 150(f), 170; *see id.* § 160(a)(1)–(3).

235. *Id.* § 160(c)(1)–(3); Michael E. Lester et al., *Is Risk-Need-Responsivity Enough? Examining Differences in Treatment Response Among Male Incarcerated Persons*, 47 CRIM. JUST. & BEHAV. 829, 830 (2020); Faye S. Taxman, Meredith Thanner & David Weisburd, *Risk, Need, and Responsivity (RNR): It All Depends*, 52 CRIME & DELINQ. 28, 29 (2006).

development of supervision. Instead, the hope is that decision-makers will look beyond wartime models and consider the original purpose of supervision—rehabilitation and successful reintegration—as well as more recent models, modern literature, and fresher data. The next Section discusses two models of supervision that continue to influence our current system of supervision, Social Learning Theory and Risk-Need-Responsivity.

II. MODELS – PROGRESS NOT PERFECTION

The dual functions of probation officers, that of both social worker and law enforcement, muddle the understanding of the role of the probation officer. If the goal of supervision is, according to the rules, a “reduction of reoffending” and to protect the public, then empirically supported best practices producing strong outcomes should be considered and used to achieve that goal.²³⁶ Since the early 2000s, research in the areas of sociology, criminology, social work, and psychology produced volumes of studies and articles that should be considered in forming the foundation of an effective supervision policy.²³⁷ This Part provides an overview of two models of supervision that continue to be significant in practice and in contemporary academic discourse: Risk-Need-Responsivity (“RNR”) and Social Learning Theory (“SLT”).

There are parallels between the models. First, both target criminogenic needs and character traits, though in different ways. Criminogenic needs or traits are considered directly related to criminality and include antisocial peers, antisocial personality (impulsivity, aggression, and pleasure seeking), and procriminal attitudes.²³⁸ Second, both models also share a concern for the probationer’s internal capacity, motivations, learning styles, and values, though for different reasons. Notwithstanding the congruence, the variation in the models’ approaches requires individual consideration.

A. Risk-Need-Responsivity

The RNR model is based on a 1990 article, *Classification for Effective Rehabilitation: Rediscovering Psychology*, published by Professors

236. Monograph 109, *supra* note 14, §§ 150(b)(2), 420.30(a).

237. Donald A. Andrews, James Bonta & R.D. Hodge, *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 CRIM. JUST. & BEHAV., 19 (1990); Stephen Farrell & Benjamin Bowling, *Structuration, Human Development and Desistance from Crime*, 39 BRIT. J. CRIMINOLOGY 253, 261 (1999); Fergus McNeill & Shadd Maruna, *Giving Up and Giving Back: Desistance, Generativity and Social Work with Offenders*, in DEVELOPMENTS IN SOCIAL WORK WITH OFFENDERS 224, 225 (Gill McIvor & Peter Raynor eds., 2007).

238. James Bonta & Donald Andrews, *Viewing Offender Assessment and Rehabilitation Through the Lens of the Risk-Need-Responsivity Model*, in OFFENDER SUPERVISION: NEW DIRECTIONS IN THEORY, RESEARCH AND PRACTICE 19, 19–40 (Fergus McNeill et al. eds., 2010).

Andrews, Bonta, and Hoge, well known and celebrated Canadian psychologists.²³⁹ The Article was based on a decade of empirical research conducted in response to the “Nothing Works” doctrine.²⁴⁰ In the article, three principles of classification for effective offender rehabilitation were outlined and discussed—risk, need, and responsivity.²⁴¹

Risk of recidivism, criminogenic need, and the responsivity of offenders to different service options are the characteristics of offenders that may determine level, targets, and type of rehabilitative effort.²⁴²

The classification system is used to link categories of offenders with appropriate services for the purpose of enhancing the effectiveness of the services to reduce recidivism.²⁴³

Since its inception in 1990, the RNR model remains popular in supervision.²⁴⁴ Internationally recognized and hugely influential, the RNR model inspired correctional risk assessment tools and treatment initiatives that are used today.²⁴⁵ In terms of current federal supervised release, the RNR model is *the* model. While the RNR approach is packaged as a “rehabilitation” model, it is essentially a risk management approach to supervision.²⁴⁶ The locus of concern is not the individual probationer but instead, the approach centers on the protection of the public.

The three principles underlying the RNR approach are risk, need, and responsivity.²⁴⁷ The headlining tenet of the model is risk: the idea that supervisees continue to be a risk for criminal activity.²⁴⁸ It articulates “*who* should be treated.”²⁴⁹ The *risk* principle assumes that the risk of reoffending is predictable and that the intensity of the intervention treatment should correspond to the supervisee’s risk level.²⁵⁰ The risk may pose public safety concerns and thus must be minimized to keep the community safe.²⁵¹ Thus,

239. Andrews et al., *supra* note 237, at 19–20.

240. Donald A. Andrews, James Bonta & J. Stephens Wormith, *The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?*, 38 CRIM. JUST. & BEHAV., 735, 748 (2011).

241. Andrews et al., *supra* note 237, at 20.

242. *Id.* at 19–20.

243. *Id.*

244. Clare-Ann Fortune, Tony Ward & Gwenda M. Willis, *The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives*, 19 PSYCHIATRY, PSYCH. & L. 646, 647 (2012); Andrews & Bonta, *Rehabilitating Policy and Practice*, *supra* note 107, at 49.

245. Andrews et al., *supra* note 237, at 19–52.

246. Monograph 109, *supra* note 14, §§ 150, 160.

247. James Bonta et al., *An Experimental Demonstration of Training Probation Officers in Evidenced-Based Community Supervision*, 38 CRIM. JUST. & BEHAV. 1127, 1127 (2011).

248. Andrews et al., *supra* note 237, at 20; Bonta & Andrews, *supra* note 238.

249. Andrews & Bonta, *Rehabilitating Policy and Practice*, *supra* note 107, at 45.

250. Bonta & Andrews, *supra* note 238.

251. Monograph 109, *supra* note 14, § 150(a)–(b).

high-risk cases should receive more intensive treatments and services, while low-risk supervisees should receive minimal or no interventions.²⁵² This is because without intervention services, low-risk cases maintain a low probability of reoffending.²⁵³

The *need* principle directs interventions to address the criminogenic needs of the supervisee.²⁵⁴ This principle speaks to “*what* should be treated.”²⁵⁵ Individual criminogenic needs must be directly addressed to facilitate change.²⁵⁶ Because these characteristics may manifest in unpredictable behaviors, the RNR approach suggests tackling these issues immediately through targeted interventions.²⁵⁷ Noticeably absent is a mention of the individual’s personal agency—interests, priorities, and sense of ownership over her life.

The *responsivity* principle focuses on the individual’s learning style and capacity.²⁵⁸ It “addresses the *how* of intervention.”²⁵⁹ In doing such, the responsivity principle encourages the delivery of interventions and treatments according to the individual’s ability and most effective method of learning.²⁶⁰ Responsivity may be enhanced by factors other than learning style and capacity, including personality and culture.²⁶¹

Monograph 109 is chock-full of directives on *risk* to the exclusion of the two other principles in the model—*need* and *responsivity*.²⁶² The language of the policy frames supervision in terms of managing risk, assessing risk, determining supervision risk level, and identifying criminogenic factors.²⁶³ This risk is to be controlled with monitoring and surveillance practices as opposed to addressing the individual’s needs—a job, stable housing, healthy relationships, and a valid driver’s license.²⁶⁴ Need is discussed in terms of “criminogenic needs,” factors heavily associated with risk of reoffending.²⁶⁵ Criminogenic needs include antisocial cognitions, criminal peers and social networks, lower education, dysfunctional family

252. Donald A. Andrews & Craig Dowden, *Risk Principle of Case Classification in Correctional Treatment: A Meta-Analytic Investigation*, 50 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 88, 89 (2006); Bonta & Andrews, *supra* note 238.

253. Andrews & Dowden, *supra* note 252. *See generally* ANDREWS & BONTA, *supra* note 13.

254. Bonta & Andrews, *supra* note 238.

255. Andrews & Bonta, *Rehabilitating Policy and Practice*, *supra* note 107, at 45.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 46.

260. *Id.*

261. *Id.*

262. Monograph 109, *supra* note 14, §§ 150, 310, 330, 350, 420.

263. *Id.* §§ 310, 330.

264. *Id.* § 420.

265. *Id.* §§ 140(g), 310, 330.

relationships, and poor employment.²⁶⁶ Responsivity is peripherally mentioned in the context of analyzing past criminal behaviors to help evaluate the supervision plan and instances of non-compliance.²⁶⁷

Over the years, the RNR model has been examined and critiqued. One criticism is that the model fails to engage individuals appropriately in the rehabilitative process.²⁶⁸ Studies show that concentrating only on the criminogenic needs of an individual hinders engagement.²⁶⁹ Risk management models concentrate on addressing criminogenic needs and maintain a heavy emphasis on public safety and recidivism²⁷⁰:

In brief, limitations of RNR type programs are that they are based on negative or avoidance goals (i.e., the aim is to reduce or avoid reoffending, to eliminate personal risk factors etc.), are poorly integrated with desistance factors (variables that promote non offending lifestyles), do not engage individuals at the level of agency and their core values, are insufficiently motivating, and because of their focus on risk factors and technology, underplay the importance of the therapeutic relationship in the change process.²⁷¹

In addition, risk management goals typically are enforced rather than used to cultivate the mutual identification of goals between the probationer and the officer.²⁷² Instead, there is often a lack of coordination of probationer goals, a limited collaboration between the officer and probationer, and minimal attention to non-criminogenic issues.²⁷³ Critics also claim that the RNR model fails to consider the need to establish initial intervention buy-in and to address mental health risks when relevant.²⁷⁴ As is shown in Part III, these RNR practices are inconsistent with methods correlated with positive outcomes.

266. Andrews & Bonta, *Rehabilitating Policy and Practice*, *supra* note 107, at 46 (listing examples of criminogenic needs, such as procriminal attitudes, antisocial personality, procriminal associates, social achievement, family/marital, substance abuse, leisure/recreation, criminal history); Monograph 109, *supra* note 14, §§ 140, 350.50(b); Faye S. Taxman, *The Role of Community Supervision in Addressing Reentry from Jails*, 21 AM. JAILS 16, 25 (2007).

267. Monograph 109, *supra* note 14, § 340.

268. TONY WARD & SHADD MARUNA, REHABILITATION: BEYOND THE RISK ASSESSMENT PARADIGM 23 (2007); Tony Ward, J. Mesler & Pamela Yates, *Reconstructing the Risk-Need-Responsivity Model: A Theoretical Elaboration and Evaluation*, 12 AGGRESSION & VIOLENT BEHAV. 208, 210 (2007).

269. WARD & MARUNA, *supra* note 268, at 23; Ward et al., *supra* note 268, at 210; Fortune et al., *supra* note 244, at 653.

270. Fortune et al., *supra* note 244, at 652–53.

271. Ward & Fortune, *supra* note 229, at 33.

272. Fortune et al., *supra* note 244, at 652–53.

273. *Id.*

274. Lester et al., *supra* note 235, at 830.

B. Social Learning Theory

Social learning theory entered the field of psychology in the 1940s and was applied to criminology in the 1990s.²⁷⁵ Recently, European scholars have used this model and are applying it specifically in the context of supervision.²⁷⁶ The model explains criminal behavior by analyzing causal relationships between deviance and social learning constructs.²⁷⁷ The main tenets include the use of reinforcements and imitation or behavior modeling.²⁷⁸ The most recent research offers an approach that minimizes the role of enforcer and instead tasks the officer with behavior modification.²⁷⁹ One of the more recent SLT models emphasizes the relationship between probationer and officer, focusing on four major goals in the contacts between the probationer and officer: engagement, early change, sustained change, and deportment.²⁸⁰ Thus, case plans should be viewed as joint ventures between the officer and probationer, where the probationer is empowered with a voice and decision-making authority.²⁸¹

The goal of engagement is for the probationer to “own” her behavior.²⁸² This ownership stems from the probationer’s understanding of rules and conditions, sanctions for noncompliance, and rewards for meeting goals and exhibiting prosocial behaviors.²⁸³ Engagement involves using risk assessment tools to inform the probationer about her behavior.²⁸⁴ Traditionally, officers collect information from a probationer but provide little to no information to her.²⁸⁵ Engagement requires the free and transparent flow of information between probationer and officer, with information actually being shared with the probationer.²⁸⁶ It is also important that the probationer be clear and take ownership of the way in which her criminogenic needs could impact her recidivism outcomes.²⁸⁷ Officers should thus be assisting probationers in this ownership.²⁸⁸ It is important that officers use a

275. See generally B.F. SKINNER, *VERBAL BEHAVIOR* (1948); Noam Chomsky, Book Review, 35 *LANGUAGE* 26 (1959) (reviewing B.F. SKINNER, *VERBAL BEHAVIOR* (Appleton-Century-Crofts, Inc. 1957)); Akers, *supra* note 151, at 653–55.

276. Akers, *supra* note 151, at 675; Taxman, *supra* note 266, at 18.

277. Charles R. Tittle, Olena Antonaccio & Ekaterina Botchkovar, *Social Learning, Reinforcement and Crime: Evidence from Three European Cities*, 90 *SOC. FORCES* 863, 864 (2012).

278. *Id.*

279. Taxman, *supra* note 266, at 17.

280. *Id.* at 18.

281. *Id.* at 25–26.

282. *Id.* at 18.

283. *Id.*

284. *Id.* at 24.

285. *Id.*

286. *Id.*

287. *Id.* at 18.

288. *Id.*

positive tone, offer a supportive environment, and include the probationer in conversations concerning her supervision plan, goals, and needs.²⁸⁹ “[B]ehavior change cannot occur in an environment where the person is being devalued as a human being.”²⁹⁰

Early change is critical. In order to set the probationer on a productive path for herself as well as for society, the officer must address criminogenic needs in conjunction with non-criminogenic interests identified by the probationer.²⁹¹ Everyone has interests that can be leveraged to motivate individual change.²⁹² The officer must then leverage the probationer’s interests, allowing her to act on these interests while the officer begins to tackle criminogenic needs (one at a time).²⁹³ The outcome is a win-win.²⁹⁴ The officer and society win by addressing criminogenic needs that affect public safety, while the probationer wins by working toward a self-identified goal.²⁹⁵ In employing such an approach, the probationer takes ownership in her metamorphosis, which provides the officer with the necessary engagement to effectively address criminogenic needs.²⁹⁶

Sustained desistance is the goal of supervision.²⁹⁷ Eventually, the formal state controls (probation conditions and requirements) will be transferred to informal social controls (peers and social networks).²⁹⁸ With this, officers should identify informal supports and foster the development of these relationships to achieve sustained change once external state controls are lifted.²⁹⁹

Department, or “the process of developing a trusting relationship with” the probationer, should be a focus of the probation office.³⁰⁰ Department occurs where the probationer believes that the state, in the form of the probation officer, is acting fairly.³⁰¹ In such an environment, the probationer must “own” her conduct.³⁰² Reinforcement is a necessary ingredient in supervision technique. With this, rewards are distributed for positive,

289. *Id.* at 26.

290. *Id.*

291. *Id.* at 18.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 18–19.

300. *Id.* at 18.

301. *Id.*

302. *Id.*

incremental changes while negative behaviors are discouraged through swift and certain sanctions.³⁰³

Principles of SLT can be seen throughout Monograph 109.³⁰⁴ For example, the use of actuarial tools, a concentration on addressing criminogenic needs, and the employment of positive reinforcements are emphasized.³⁰⁵ Though SLT continues to influence supervision, it is not without critique. For instance, researchers note the difficulty of measuring causal processes.³⁰⁶ Much of the prior research failed to assess causal structures, and recent research that does attempt to measure causal relationships uses ancillary markers of antisocial reinforcements as opposed to direct indicators.³⁰⁷ Aside from causal processes, critiques discuss the neglect of the individuals' perceptions and observations regarding the system.³⁰⁸

America never had a chance to firmly plant a theoretical ideal in the context of supervision. Serious thought should be given to the theoretical frame that will drive a reformed policy. In thinking about how to move forward, it is critical to consider what does work. As we approach the centennial of the federal system of supervision, we have sufficient information to construct a well-informed federal supervision policy supported by the current data. Since the 1980s, the supervision agenda has been driven largely by partisan politics and ignored by recent reform legislation. Now is the time to scrutinize and improve.

III. A NEW FRAMEWORK – “TO BE FREE IS NOT MERELY TO CAST OFF ONE’S CHAINS, BUT TO LIVE IN A WAY THAT RESPECTS AND ENHANCES THE FREEDOM OF OTHERS.”³⁰⁹

With reform in mind, decision-makers should develop a firm theoretical foundation and closely examine the volumes of research that show us empirically supported best practices. America's current model of federal supervision is based on outdated theories of control that were popular during the War on Drugs. The RNR approach to supervision continues to be

303. *Id.* at 19.

304. *See infra* Section I.D.2.

305. *See generally* Monograph 109, *supra* note 14.

306. Jonathan R. Brauer, *Testing Social Learning Theory Using Reinforcements Residue: A Multilevel Analysis of Self-Reported Theft and Marijuana Use in the National Youth Survey*, 47 *CRIMINOLOGY* 929, 932–33 (2009).

307. *Id.* at 957–58; *see* Patrick M. Horan & Scott Phillips, *Theory-Mapping in Social Research: An Application to Social Learning Theory*, in *SOCIAL LEARNING THEORY AND THE EXPLANATION OF CRIME* 289–315 (Ronald L. Akers & Gary F. Jensen eds., 2003).

308. Tittle et al., *supra* note 277.

309. NELSON MANDELA, *LONG WALK TO FREEDOM* 115 (1995), <https://zalelalemkibret.files.wordpress.com/2012/01/the-autobiography-of-nelson-mandela.pdf>.

criticized and inconsistent with the ideals promoted during this wave of reform. Courts, the overseers of the United States Probation Department, should be an active participant in the administration of probation practices and reforming wartime rules.³¹⁰ This Part provides an alternative theoretical paradigm for the purpose of positioning supervision within the “second chance” principle—desistance theory. This Part also offers an innovative model, the Good Lives Model, to consider when crafting a new supervision approach.

A. *Desistance Theory*

Contemporary theories addressing criminal behavior are built on decades of study and improve upon existing theories. One such theory is desistance theory. It is a criminological theory that describes how offenders stop engaging in criminal behavior.³¹¹ Desistance is a treatment-based model (as opposed to a risk or control model of supervision) that focuses on the positive contributions of individuals as opposed to their character deficits.³¹² The research is rich and interdisciplinary emphasizing collaborative supervision relationships and best practices meant to curb criminal offending.³¹³

In essence, desistance theory contemplated previous models of supervision and constructed a frame that considered focus factors that produce positive outcomes. On a basic level, to desist from an activity is to stop doing it.³¹⁴ To operationalize the idea of desisting from crime, criminologists view desistance as a process as opposed to a static event.³¹⁵ It occurs through change—an identity change which involves working towards goals and establishing social supports.³¹⁶ Desistance is therefore characterized by periods of vacillation and equivocation—“a process of ‘to-ing’ and ‘fro-ing’, of progress and setback, of hope and despair.”³¹⁷

Desistance theorists concentrate on specific variables such as aging, social relationships, and the probationer’s sense of self.³¹⁸ It is the

310. Chandler, *supra* note 105, at 45 (Director Chandler encouraged courts to give more attention to probation administration, probation policies, and conference).

311. Craig Harper, *Desistance Theory: A Brief Introduction*, MEDIUM (Aug. 2, 2013), <https://medium.com/craig-harper-essays/desistance-theory-a-brief-introduction-8033c97bd0a4>.

312. McNeill & Maruna, *supra* note 237, at 234.

313. Taxman, *supra* note 266, at 26.

314. McNeill & Maruna, *supra* note 237, at 225.

315. *Id.*

316. Chris Trotter, *Reducing Recidivism Through Probation Supervision: What We Know and Don’t Know from Four Decades of Research*, 77 FED. PROB., Sept. 2013, at 43, 43; Fortune et al., *supra* note 244, at 649.

317. McNeill, *supra* note 183, at 27.

318. *Id.* at 27.

convergence of these factors, what they mean, and whether they represent powerful enough reasons to change.³¹⁹ The desistance process is thus influenced by the “interplay between individual choices, and range of wider social forces, institutional and societal practices which are beyond the control of the individual.”³²⁰

Several subjective and objective factors are involved in the desistance process.³²¹ Such factors include adequate internal capacity and cognition, positive identity and self-image, employment, prosocial modeling, stable and positive intimate relationships, and social and community support.³²² The development of social capital and capacity is vital to desistance as is the opportunity to exercise these traits.³²³ Without opportunity, desistance is incredibly difficult.³²⁴ Thus, other factors associated with positive program outcomes include basic education (math and reading), vocational training, and face-to-face meetings that include a treatment component.³²⁵

Perhaps more importantly, and of particular significance in the SLT branch of the desistance literature, is the establishment of a positive, cooperative, and collaborative rapport between the probationer and the officer.³²⁶ One study reported that probationers’ “commitment to desist appeared to be generated by the personal and professional commitment shown by their probation officers, whose reasonableness, fairness, and encouragement seemed to engender a sense of personal loyalty and accountability.”³²⁷ With this, an officer’s advice is interpreted as concern for the probationer’s “wellbeing.”³²⁸

Some scholars discuss a difference between primary and secondary desistance.³²⁹ Desistance appears to be more about personal redemption where one desires to make good on a troublesome past by positively

319. *Id.*

320. Farrell & Bowling, *supra* note 237, at 261.

321. McNeill & Maruna, *supra* note 237, at 228.

322. Fortune et al., *supra* note 244, at 646, 649; FRIEDRICH LÖSEL, UNIV. OF CAMBRIDGE INST. OF CRIMINOLOGY & UNIV. OF ERLANGEN-NUREMBURG INST. OF PSYCH., WHAT WORKS IN OFFENDER REHABILITATION: A GLOBAL PERSPECTIVE 17 (2010), <https://www.yumpu.com/en/document/read/51114216/what-works-in-reducing-reoffending-a-global-perspective>.

323. McNeill & Maruna, *supra* note 237, at 230.

324. *Id.*

325. LÖSEL, *supra* note 322, at 17.

326. Taxman, *supra* note 266, at 25–26.

327. Sue Rex, *Desistance from Offending: Experiences of Probation*, 38 HOW. J. CRIM. JUST. 366, 375 (1999).

328. *Id.*

329. McNeill, *supra* note 183, at 26.

contributing to her family and community when released.³³⁰ Primary desistance is thought to be a crime-free break in a pattern of criminality, while secondary desistance is a change in a probationer's overall sense and perception of self.³³¹ Secondary desistance occurs when a probationer stops viewing herself as a criminal and finds a positive and constructive identity.³³² With this, secondary desistance ought to be the ultimate goal of supervision; at its core, supervision has always been about fundamentally changing the direction of a probationer's life in the long-term. Secondary desistance promotes internal changes within the probationer while simultaneously providing public protection that endures long after the removal of short-term government controls.³³³

Desistance theory offers a new supervision frame, differing in many respects from the current core principles supporting today's federal supervision model. Instead of focusing on risk and criminogenic traits, desistance theory concentrates on building internal capacity and developing healthy relationships and strong community supports. Recent research suggests that focusing on goals "and a sense of meaning" is more important than focusing on risk reduction.³³⁴

Public safety and recidivism concerns are addressed through the achievement of secondary desistance; changing the individual's view of herself and her relationship with both the community and the state. The Good Lives Model provides a new way to approach supervision, with a focus on individual probationer agency and the development of internal capacities.

330. *Id.* at 28. "Psychologists refer to this as 'generativity'; it takes little imagination to see the generative potential that resides in community penalties and indeed generativity may provide one hypothesis about why reparative community penalties sometimes outperform rehabilitative ones in terms of reducing reoffending." *Id.*

331. *Id.* at 26; McNeill & Maruna, *supra* note 237, at 226.

332. McNeill, *supra* note 183, at 26.

Though not all researchers concur that this kind of reconstruction of identity is a necessary aspect of desistance, it is at least more likely to be necessary for those whose offending has been persistent and who have deeply entrenched criminal identities, but not for those whose engagements with crime and justice have been more transitory.

Id. (citations omitted) (first citing Anthony Bottoms et al., *Towards Desistance: Theoretical Underpinnings for an Empirical Study*, 43 *HOW. J. CRIME & JUST.* 368 (2004); and then citing JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE SEVENTY* (2003)); McNeill & Maruna, *supra* note 237, at 225.

333. McNeill, *supra* note 183, at 26–27.

334. Trotter, *supra* note 316, at 43, 45–46; Fortune et al., *supra* note 244, at 649.

B. Good Lives Model (“GLM”)

The Good Lives Model was introduced in the 2000s as an alternative to the RNR model.³³⁵ GLM was also developed in response to the punitive approach taken concerning sexual offenders.³³⁶ Instead of a focus on risk, GLM provides a focus on probationers’ agency and their individual interests, capabilities, and goals. The model views offending as a reaction to “distortions in self-identity and criminogenic needs.”³³⁷ GLM theorists criticize the notion of criminogenic needs or traits as neglecting the basic human needs underlying personal fulfillment, which in turn reduces criminogenic needs or traits.³³⁸ Grounded in concepts of human dignity and universal human rights, the GLM approach emphasizes human agency and the ability of individuals to act freely in setting goals, developing plans to achieve these goals, and employing the strategy necessary to achieve these goals.³³⁹ Accomplishing these goals will thus result in a decline of criminogenic needs.³⁴⁰

The GLM framework conceptualizes offending in terms of searching and securing primary goods. The model assumes that people maintain a certain set of values or interests, which are called “primary goods.”³⁴¹ Under this paradigm, offending is an attempt to secure a primary good in a socially unacceptable or illegal manner.³⁴²

The GLM divides primary goods into eleven categories: [L]ife (including healthy living and functioning), (2) knowledge, (3) excellence in play, (4) excellence in work . . . (5) excellence in agency (i.e., autonomy and self-directedness), (6) inner peace (i.e., freedom from emotional turmoil and stress), (7) friendship (including intimate, romantic, and family relationships), (8) community, (9) spirituality (in the broad sense of finding meaning and purpose in life), (10) happiness, and (11) creativity.³⁴³

335. Fortune et al., *supra* note 244, at 653–54; Andrews et al., *supra* note 240, at 736; *see also* McNeill, *supra* note 183, at 26–27.

336. Andrews et al., *supra* note 240.

337. *Id.* at 739.

338. Tony Ward & Chris Stewart, *Criminogenic Needs and Human Needs: A Theoretical Model*, 9 PSYCH., CRIME & L. 125, 142 (2003).

339. Fortune et al., *supra* note 244, at 654.

340. Andrews et al., *supra* note at 240, at 736.

341. Fortune et al., *supra* note 244, at 654. Primary goods include “certain states of mind, personal characteristics, experiences[,] and activities.” *Id.*

342. *Id.* at 655; Tony Ward, *The Good Lives Model of Offender Rehabilitation: Basic Assumptions, Aetiological Commitments, and Practice Implications*, in OFFENDER SUPERVISION: NEW DIRECTIONS IN THEORY, RESEARCH AND PRACTICE 47 (Fergus McNeill et al. eds., 2010).

343. Fortune et al., *supra* note 244, at 654 (citing Tony Ward & Theresa A. Gannon, *Rehabilitation, Etiology, and Self-Regulation: The Comprehensive Good Lives Model of Treatment for Sexual Offenders*, 11 AGGRESSION & VIOLENT BEHAV. 77, 79 (2006)).

Primary goods are obtained through instrumental goods or secondary goods.³⁴⁴ Secondary goods are the processes and methods employed to secure the primary goods. Thus, secondary goods are a critical component of offending in the GLM model with a call to formulate interventions designed to secure primary goods in a safe and legitimate manner.³⁴⁵

The GLM framework offers two routes to offending.³⁴⁶ The first route, the “direct” path, occurs when an individual seeks to secure a primary good through criminal conduct.³⁴⁷ The second path is “indirect” and occurs when an unexpected “ripple” arises in the pursuit of primary goods leading the individual into criminality.³⁴⁸ Within the GLM frame, criminogenic needs are considered internal or external impediments blocking the ability of the individual to obtain primary goods, such as inner peace, excellence, and happiness.³⁴⁹

According to the GLM, individuals may experience various complications in the pursuit of primary goods including the use of unacceptable strategies to attain primary goods and “acute psychological stress.”³⁵⁰ With this, strategies and case plans should address the probationers’ interests by providing for officer assistance in cultivating the internal capabilities of the probationer and in accessing external resources relevant to securing primary goods and identified interests.³⁵¹ Criminogenic needs are to be addressed through cognitive behavioral techniques (“CBTs”) designed to assist the probationer in developing the internal capabilities necessary to realize her life plan while simultaneously reducing the risk of

344. *Id.*

345. *Id.* at 654–55. *See generally* Ward, *supra* note 342.

346. Fortune et al., *supra* note 244, at 655.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* There are four types of complications that individuals experience in their pursuit of primary goods. *Id.* The most common issue is the use of unacceptable strategies to attain primary goods. *Id.* The second problem occurs when important goods are not considered in an individual’s life plan resulting in a lack of foresight in the overall good lives plan. *Id.* “Third, acute psychological stress” may arise in attempting to secure a primary good. *Id.* Lastly, difficulties develop when an individual lacks the internal capabilities and external supports to obtain the primary goods necessary to fulfill their life plan. *Id.*

351. *Id.* at 653–54.

reoffending.³⁵² Interventions should be individualized and center on the values and interests of that particular probationer.³⁵³

There is no imprint of GLM on the current version of Monograph 109. GLM views criminality as a symptom of social deprivation and addresses criminogenic needs by utilizing CBTs, as opposed to employing monitoring and surveillance strategies. Moreover, Monograph 109 tackles issues of noncompliance by ratcheting up the surveillance, while GLM seeks to adopt a psycho-social intervention to a desistance relapse.

Critical commentary notes a few limitations. One critique acknowledges that though GLM produces a list of reinforcements and objectives with a wide range of application, it fails to recognize the individualistic nature of motivation.³⁵⁴ In addition, the GLM frame offers a positive view of human kind with a focus on therapeutic interventions that maximize “a life fulfilled,” but it underestimates the criminogenic effects that may cause criminality.³⁵⁵ Finally, critics note that GLM interventions do not really differ from RNR interventions.³⁵⁶ Both models seek to manage risk and assist probationers in obtaining primary goods.³⁵⁷ Moreover, both seek to address criminogenic and needs.³⁵⁸ GLM has two objectives: supporting the prosocial achievement of human goods and reducing criminogenic needs.³⁵⁹ The reduction of criminogenic needs is classic RNR.³⁶⁰ And though GLM was introduced as an alternative to RNR, both developed as reactions to punitive practices in

352. *Id.* at 656. There are five phases of GLM:

Phase one involves identifying the social, psychological and material aspects of individuals’ offending including their level of risk and their social, physical and psychological resources (e.g., substance use, housing financial situation, personality patterns such as impulsivity) at the time of their offending and in the past. The second phase identifies the function of offending through exploration of the primary goods which are directly and indirectly associated with the criminal activity. The third phase involves identifying core practical identities and their associated primary goods or values to assist with the development of a life plan. Phase four involves fleshing out the details from the previous phase including the identification of secondary goods that will help with translating the primary goods/values into possible nonoffending and personally fulfilling lives. . . . The fifth and final stage involves developing a detailed intervention plan that is holistic and incorporates both the internal and external conditions which are required in order to accomplish offenders goals; and which revolves around their core goals/values and practical identities.

Id. (citing Ward, *supra* note 342).

353. *Id.*

354. Andrews et al., *supra* note at 240, at 736.

355. *Id.* at 749–50.

356. *Id.* at 750.

357. *Id.* at 740.

358. *Id.* at 741.

359. *Id.*

360. *Id.*

the criminal justice system and both understand the importance of identity, reinforcements, and relationships.³⁶¹

Desistance theory and the GLM model together present a new way to approach federal supervision. Replacing control theories with desistance affords the probationer a central role in her reintegration, customizing the case plan to the *needs* of the individual as opposed to concentrating on the probationer's *risk* to public safety. The emphasis on the development of individual capacities in the GLM model offers probation officers a checklist of key focus areas that are correlated with better outcomes. Aiming to assist probationers with the acquisition of primary goods and helping build a prosocial community safety net will outlast supervision controls and is a better long-term crime prevention strategy.

IV. BEST PRACTICES

It is common sense that individual desistance and successful societal reintegration will naturally lead to big returns on public safety and recidivism rates. In rethinking and reshaping federal supervised release, it is necessary to catalogue the practices that produce the best outcomes regardless of the political climate, public opinion, or fidelity to a supervision model. The important aspect is that the supervision practice be effective. To move forward, decision-makers need an objective baseline from which to begin. This Part aspires to provide a preliminary reference point.

Since 2011, researchers conducted meta-analyses, reviewing hundreds of studies that examine supervision practices.³⁶² In doing so, researchers identified, isolated, and scrutinized different supervision methods and techniques. Studies show that some practices are correlated with lower recidivism rates.³⁶³ While models of supervision are necessary to the cultivation of effective policy, empirically based best practices provide overwhelming evidence of what is actually working.

A. Forty Years of Supervision Practices—What is “Best”?

Generally speaking, the research demonstrates that the more successful programs implement cognitive-behavioral techniques (“CBT”).³⁶⁴ The use of cognitive techniques as a supervision practice was reported by one study to be the *only* intervention predicting lower recidivism.³⁶⁵ Referred to as the

361. *Id.* at 748–49.

362. Trotter, *supra* note 316, at 43.

363. *Id.*

364. LÖSEL, *supra* note 322, at 17.

365. Bonta et al., *supra* note 247, at 1127–48; *see also* Paul Raynor, Pamela Ugwudike & Maurice Vanstone, *The Impact of Skills in Probation Work: A Reconviction Study*, 14

“ABC technique,” it involves teaching that Antecedents lead to Behaviors that lead to Consequences.³⁶⁶ It is important to understand that there is overlap in the definitions and understanding of cognitive skills.

The earliest study, published in 1979 by Professors Andrews, Kiessling, and Grant, identified supervision practices significantly related to a reduction in recidivism: prosocial modeling and reinforcement techniques, problem solving, and the appropriate use of authority.³⁶⁷ Later studies confirmed the effectiveness of the practices reported in the study.³⁶⁸ The research suggests that control and punishment strategies are “ineffective at reducing recidivism.”³⁶⁹ And the most successful supervision practices concentrate on medium to high-risk individuals with a specific focus on addressing criminogenic factors through behavioral interventions and social services.³⁷⁰

1. Prosocial Modeling

Most studies reviewing the use of prosocial modeling and reinforcement practices found a strong relationship to lowered recidivism.³⁷¹ One study found that prosocial modeling, as reflected in the notes of supervision officers, was the most closely related to a reduction in recidivism of any other supervision practice or skill.³⁷² A study published in 2020 suggests that changing procriminal attitudes is a substantial component in long-term desistance.³⁷³

Prosocial modeling involves the development of prosocial values that include value-laden principles such as fairness and reliability.³⁷⁴ It also involves encouraging a crime-free lifestyle through the positive reinforcement of the probationer’s statements and behaviors that reflect prosocial values.³⁷⁵ In the same vein, prosocial modeling also involves challenging pro-criminal statements and behaviors but doing so

CRIMINOLOGY & CRIM. JUST., 235, 243 (2014) (finding that cognitive restructuring significantly related to reduced offending but only at the follow up at year one).

366. Christopher Lowenkamp et al., *Using 20 Minutes Wisely: Community Supervision Officers as Agents of Change*, in OFFENDER REENTRY: RETHINKING CRIMINOLOGY AND CRIMINAL JUSTICE (Matthew S. Crow & John Ortiz Smykla eds., 2014).

367. Trotter, *supra* note 316, at 44.

368. *Id.* at 43; Andrews & Dowden, *supra* note 252, at 88–100.

369. Laura Knollenberg & Valerie A. Martin, *Community Reentry Following Prison: A Process Evaluation of the Accelerated Community Entry Program*, 72 FED. PROB., Sept. 2008, at 54, 55.

370. Trotter, *supra* note 316, at 43; Andrews & Dowden, *supra* note 252, at 88–100.

371. Trotter, *supra* note 316, at 45.

372. *Id.*; see also Paul Raynor et al., *supra* note 365 (reporting prosocial modeling significantly related to low recidivism at one year and two years follow up, although it was only statistically significant at one year).

373. Lester et al., *supra* note 259, at 843.

374. Trotter, *supra* note 316, at 46.

375. *Id.*

respectfully.³⁷⁶ Thus, the incentives and sanctions are employed to shape behavior.³⁷⁷

2. Problem Solving

Problem solving is also a supervision best practice. Studies report that problem solving is significantly related to recidivism.³⁷⁸ Studies define problem solving differently, but most definitions involve identifying problems (such as family issues or drugs), goal setting to tackle problems, and developing strategies to accomplish goals.³⁷⁹

Problem solving is performed in several ways and involves addressing the criminogenic needs of the probationer.³⁸⁰ A critical feature of this practice is to allow the probationer to articulate the problem and possible solutions.³⁸¹ Working with the probationer's understanding of the problem is essential to effective problem solving.³⁸² One study suggests that the key is to address a probationer's criminogenic needs while simultaneously pursuing an interest of the probationer to motivate change.³⁸³

Best practices support the use of incremental steps to change behavior as opposed to the piling on of demands.³⁸⁴ A maximum of three issues should be addressed simultaneously.³⁸⁵ Placing too many demands and expectations on a probationer contributes to the probationer's feeling overwhelmed in attempting to manage conditions and often results in negative outcomes.³⁸⁶

376. *Id.*

377. Taxman, *supra* note 266, at 18.

378. See Raynor et al., *supra* note 365, at 242–43 (reporting that problem-solving was related to recidivism but only significantly related to compliance with conditions rather than re-offending).

379. Trotter, *supra* note 316, at 46.

380. *Id.* See generally Bonta et al., *supra* note 247, at 1127–48; Knollenberg & Martin, *supra* note 369, at 5 (citing P. Gendreau & D.A. Andrews, *Tertiary Prevention: What the Meta-Analysis of the Offender Treatment Literature Tells us About "What Works"*, CANADIAN J. CRIMINOLOGY 32, 173–84 (1990)) (discussing criminogenic needs as including a history of anti-social behavior, anti-social personality, anti-social attitudes and values, criminally deviant peers, substance abuse, and dysfunctional family relationships).

381. See Charles R. Robinson et al., *A Random (Almost) Study of Staff Training Aimed at Reducing Re-arrest (STARR): Reducing Recidivism Through International Design*, 75 FED. PROB., Sept. 2011, at 57; Christopher Trotter, *The Impact of Different Supervision Practices in Community Corrections: Cause for Optimism*, 29 AUSTL. & N.Z. J. CRIMINOLOGY 29, 32–33 (1996).

382. Trotter, *supra* note 381, at 32–33, 42.

383. Taxman, *supra* note 266, at 18.

384. *Id.* at 25.

385. *Id.* (“Stated simply, it is important to examine the main criminogenic factor (e.g., substance abuse, criminal peers, antisocial values, low self-control, criminal personality, and dysfunctional families), and help the offender develop a plan that is focused on two or three issues for this main factor. Piling on too many conditions, too many services, and too many expectations only contributes to the offender's perception that he/she is doomed to failure.”).

386. *Id.*

3. Use of Authority

The relationship between officer (or worker, as they are commonly called in the social work literature) and probationer is vital to success.³⁸⁷ Consilience refers to the amalgamation of knowledge from different disciplines and dictates that civility must exist to achieve compliance.³⁸⁸ In the context of probation, consilience refers to the importance of fair processes in achieving compliance.³⁸⁹ Compliance is the outcome of how individuals sense they are being regarded by the “system” and whether the “system” is treating them as it treats others.³⁹⁰

Principles of procedural justice require that probation officers treat probationers as citizens during the supervision process in order to facilitate a sense of ownership and accountability within the probationer.³⁹¹ When the probationer believes that her own behavior does not matter because the “system” is inequitable and fails to apply the rules fairly, the individual feels that she exists outside the bounds of legitimate society.³⁹² In many instances, an “outlaw” persona is adopted because the individual is not given the chance to be a citizen.³⁹³ In addition, studies show that a confrontational worker style has negative impacts on the individual’s attitude, behavior changes, and the overall relationship.³⁹⁴ With this, officer attitude is critical to the effectiveness of supervision and success of probationer reintegration.

Specific officer behaviors are associated with higher recidivism rates. For example, higher recidivism was linked to the frequency of discussing conditions of supervision.³⁹⁵ A preoccupation with probation conditions or the enforcement authority of the officer hinders the development of a cooperative rapport, “thereby creating an obstacle to more directive intervention.”³⁹⁶ Also, meta-analytical studies suggest that trust and a non-blaming relationship between officer and offender may be related to the rate of recidivism.³⁹⁷ One study reported that the perception of a trusting

387. Bonta et al., *supra* note at 247, at 1145. *See generally* Taxman, *supra* note 266, at 26.

388. Taxman, *supra* note 266, at 26.

389. *Id.* (“[Consilience] refers to the coming together of knowledge, from many different disciplines; in this case, it refers to the importance of procedural justice processes in facilitating compliance. In many different disciplines (e.g., medicine, law enforcement, education, etc) it has been found that fair processes and procedures are important in helping achieve better compliance.”).

390. *Id.*

391. *Id.*

392. Faye Taxman, James M. Byrne & April Pattavina, *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring Consequences of Deterrence*, 16 J. HEALTH CARE FOR POOR & UNDERSERVED 57 (2005); Taxman, *supra* note 266, at 26.

393. Taxman, *supra* note 266, at 26; Taxman et al., *supra* note 392, at 67.

394. Fortune et al., *supra* note 244, at 652.

395. Bonta et al., *supra* note at 247, at 1146.

396. *Id.* at 1146. *See generally* ANDREWS & BONTA, *supra* note 13.

397. Trotter, *supra* note 316, at 47.

relationship with the probation officer affected the likelihood of arrest for a new offense.³⁹⁸

Research shows that even in the case of negative outcomes, the way the authority figure addresses the situation influences the individual's level of acceptance of the situation and the sanctions.³⁹⁹ By simply acknowledging system inadequacies, officers may foster a sense of fairness within an individual.⁴⁰⁰ Officers should assume that the individual is reacting to the "system" as opposed to being defiant.⁴⁰¹ Moreover, specific skills were significantly related to lower recidivism, including the use of verbal and non-verbal communication,⁴⁰² "[a]ctive [l]istening, [r]ole [c]larification," and feedback.⁴⁰³ Programs that are structured, skills-based, and facilitated "with manuals by qualified staff, and which operate within supportive environments can result in between 10% and 30% reductions in offending."⁴⁰⁴

B. Bonus Best Practices

Additional research has identified additional empirically supported best practices.⁴⁰⁵ Community support and hope are two variables that are correlated with positive outcomes. Both are essential to achieve long-term desistance.

In 1950, Director Chandler emphasized the critical necessity of community and social supports.⁴⁰⁶ He encouraged officers to work with not only the individual but also their family and community.⁴⁰⁷ Today, the research shows that social environments, resources, and supportive

398. *Id.* at 47. See generally Paula Smith et al., *Improving Probation Officers' Supervision Skills: An Evaluation of the EPICS Model*, 35 J. CRIME & JUST. 189 (2012).

399. Taxman, *supra* note 266, at 26.

400. *Id.*

401. *Id.*

402. Trotter, *supra* note 316, at 47; Raynor et al., *supra* note 365, at 240.

403. Robinson et al., *supra* note 381, at 59.

404. Fortune et al., *supra* note 244, at 648 (discussing Lösel's findings). Ten general protective factors were identified from a desistance or resilience perspective:

(1) individuals maintaining at least one stable emotional relationship, (2) adequate acceptance and supervision in educational contexts, (3) receiving adequate social support, (4) access to social models that encourage adaptive coping, (5) exposure to appropriate levels of social responsibility, (6) having adequate cognitive capacities (e.g., an ability to plan a future), (7) "an easy temperament" and "ego resiliency", (8) some previous experience of self-efficacy and an adequate self concept, (9) active mechanisms for coping with stressors and strains and (10) previous experience of making sense, structure and meaning in one's life.

Id. (citing LÖSEL, *supra* note 322).

405. See *infra* Part IV.

406. Chandler, *supra* note 105, at 46.

407. *Id.*

relationships are crucial to desistance and are related to lower rates of recidivism.⁴⁰⁸ Informal social controls such as family, friends, and community are also more effective at motivating long-term desistance than supervision.⁴⁰⁹ Thus, supervision practices should employ a community-focused problem solving approach, which is shown to be effective in addressing the criminogenic needs of probationers.⁴¹⁰ In doing so, supervision systems should work to engage those communities that absorb a large portion of the re-entering population as this may provide a better way to leverage scarce resources.⁴¹¹

Hope is also a crucial player.⁴¹² In the psychology literature, hope is described as “the perception of successful *agency* related to goals” as well as “the perceived availability of successful pathways related to goals.”⁴¹³ A person who believes in a probationer can trigger desistance; a person who keeps hope alive when the probationer experiences despair is a critical component in the process of changing life patterns.⁴¹⁴ However, hope is a rare commodity in the lives of many probationers. The social environments in which many probationers live tend to stifle hope and in doing so hinder the process of change.⁴¹⁵ Because of their criminogenic circumstances, surroundings, and characteristics, the prognosis for many offenders is “dire.”⁴¹⁶

It is clear from the research that supervision *can* be effective when specific skills are employed.⁴¹⁷ These techniques are empirically linked to positive outcomes and lower recidivism. Overall, CBTs should be

408. Fortune et al., *supra* note 244, at 648; Taxman, *supra* note 266, at 18, 26; Dominic A.S. Pearson et al., *Reducing Criminal Recidivism: Evaluation of Citizenship, an Evidence-Based Probation Supervision Process*, 7 J. EXPERIMENTAL CRIMINOLOGY 73, 77–78 (2011).

409. Knollenberg & Martin, *supra* note 369, at 55.

410. Fortune et al., *supra* note 244, at 648, 650.

411. Knollenberg & Martin, *supra* note 369, at 55–56.

412. McNeill, *supra* note 183, at 27.

413. Burnett & Maruna, *supra* note 143, at 395 (emphasis added) (quoting C.R. Snyder et al., *The Will and the Ways: Development and Validation of Individual-Differences Measure of Hope*, 60 J. PERSONALITY & SOC. PSYCH. 570, 570 (1991)).

414. McNeill, *supra* note 183, at 27.

415. *Id.*

416. *Id.*

Perhaps because of their experience of adversity, we know from research and practice experience that persistent offenders are very often highly fatalistic; or . . . have ‘low self-efficacy’ and an ‘external locus of control’. They don’t feel that they determine the direction of their own lives. Rather, life happens to them. Yet Maruna (2001) discovered that, despite this background and previous outlook, desisters somehow manage to acquire a sense of ‘agency’—of control over their own lives.

Id. (citing SHADD MARUNA, AM. PSYCH. ASS’N, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001)).

417. See *infra* Section IV.A.

implemented in every case plan. Specific skills should be employed in officer-probationer contacts, including prosocial modeling and reinforcement, problem solving, appropriate use of authority, and a focus on establishing a positive rapport. In addition, officers should facilitate informal, and community supports to foster long-term stability and change. Finally, the importance of hope cannot be overstated. While probationers typically live in areas marred by hopelessness, they need someone to believe in them.

With this, decision-makers should consider that cooperative relationships, probationer goals, and a sense of meaning produce better outcomes than does a focus on risk reduction.⁴¹⁸ It begins with an understanding that the goal is secondary long-term reintegrative success and supervision can be a method to achieve it. From a practical standpoint, policy should include boots-on-the-ground factors that relate not only to theoretical considerations and the rules but also to recent data on effective supervision practices.

The RNR model still reigns supreme, and wartime attitudes remain pervasive in probation departments. If focus is shifted to what works, meaning what practices produce positive outcomes, desistance approaches quickly emerge as the methodology that yields the best results. With this, a very different system develops, with the role of a probation officer reimagined as a reentry procedural safeguard. It is a system of officers charged with assisting probationers to find personal fulfillment and inner peace by achieving stability and independence through a collaboratively developed plan outlining obligations, expectations, and goals. While ensuring compliance remains a desired outcome, such compliance will be accomplished by meeting individual goals and creating prosocial networks. GLM is one way to achieve this. A system's shift must begin with a close examination and modification of the current rules and policies governing supervision. With criminal justice reform in the spotlight and a plethora of literature outlining evidence-based best practices, we have a rare opportunity to shape supervision into a system that is well thought out, supported by data, and effective.

CONCLUSION

The rhetoric supporting supervised release promoted offender assistance and rehabilitation as priorities. Director Chandler specifically rebuffed post-imprisonment probation in 1950, finding that “[p]ersons put on probation following a term in prison almost always resent it,” and the courts

418. Fortune et al., *supra* note 244, at 648; Trotter, *supra* note 316, at 43.

often use it to police people recently release from prison.⁴¹⁹ He considered the practice “inconsistent with the nature of probation.”⁴²⁰

Though the national supervision population is declining, it remains exceptionally high. At the end of 2020, approximately 3,890,400 adults, or 1 in 66, remained on some type of community supervision, a reduction of 6.6% since January of 2020.⁴²¹ Moreover, the majority of those under supervision continue to be poor and overwhelmingly people of color, which further reinforces the narrative of the carceral state disproportionately impacting this demographic.⁴²² America’s supervision population is in need of not only a second chance in a general sense, but also of support in developing individual capacities necessary to desist and thus prevail.

Despite the historical rehabilitative origins of “probation” as an institution, supervision in 2022 operates like a law enforcement agency that is driven to protect the public from criminal risk. The social and humanitarian functions of the probation officer, championed by Director Chandler, are buried in the historical narrative and emerge occasionally in the form of caring and compassionate officers. If the political regime is truly interested in rectifying the harshness of the War on Drugs’ penal policy and its disproportionate impact on poor communities of color, the system of federal supervision must be part of the conversation, evaluation, and solution. This process requires not only investigating and reviewing the current best practices literature, but also taking a serious look at the current theoretical paradigm.

419. Chandler, *supra* note 105, at 44. To be clear, Director Chandler discussed a system where people sentenced to prison for one offense and then required to serve a term of probation for a different offense. *Id.*

420. *Id.*

421. Kaeble, *supra* note 2, at 1. There were to 4,167,100 people on January 1, 2020. *Id.*

422. SCHMITT & RUSSELL, *supra* note 213, at 6; MICHELLE ALEXANDER, *THE NEW JIM CROW* 96–97 (2010).