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Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons

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THE FEDERAL BUREAU OF PRISONS'(BOP) inmate population has grown substantially during the last few decades, and the increase is taking its toll on inmates, staff, and the very walls and floors of the prisons themselves. Studies demonstrate that the increase is driven primarily by the imposition of longer prison terms, fewer avenues for inmates to earn early release, higher conviction rates, and increased enforcement efforts. Persons revoked from community supervision and returned to prison constitute a small proportion of the inmate population, approximately six percent.² Yet, the number of people being revoked has been on the rise and that has garnered attention from those who want to both reduce the number of persons returned to prison and expand the role of supervision in getting current inmates out.

This article discusses the variety of complex factors that have influenced the slow but steady increase in supervisees being revoked.³ One factor is the large number of illegal aliens subject to supervision who are deported and then revoked after they illegally re-enter the United States. In those cases, there is very little the probation system can do to promote behavioral change, other than to initiate revocation proceedings for purposes of punishment and deterrence. Another factor influencing the rise in revocations has been the increase in the size of the supervisee population generally. There are now more people under supervision and in jeopardy of being revoked than ever before. A third factor is the worsening criminogenic risk profile of the supervision population, as measured by various empirical assessment tools. Finally, advancements in technology, policy guidance, and training have made officers more effective in detecting noncompliance. So while the raw number of supervisees returned to prison is increasing, when you take the above factors into account, the relative rate of revocations has actually been declining.

This article also provides detailed information about the factors that federal probation officers consider when responding to supervisee noncompliance, and it urges caution when interpreting statistical information concerning revocation rates. For instance, a revocation described as “technical” does not necessarily mean that there were no allegations of new criminal conduct. Furthermore, though not revealed by the data, in many cases that end in revocation, there have been numerous attempts to stop the noncompliance with lesser sanctions and intensified treatment.

The article also provides background on some of the key supervision strategies employed by the federal probation and pretrial services system to protect the public and reduce recidivism. Finally, this article explains how the federal probation and pretrial services system’s use of alternatives to incarceration produces considerable cost savings while offering the potential for supervisee rehabilitation and long-term community protection.

Although the probation system alone cannot solve the BOP’s overcrowding problem, it can play a role, whether by assuming responsibility for inmates released early pursuant to a new statute or serving as a more primary sentencing option in lieu of imprisonment. The challenge will be deciding which cases are most appropriate for direct referral to supervision versus supervision after a period of imprisonment adjusted for good behavior and reduction in criminogenic risk. There is also the economic reality that under sequestration and appropriation shortfalls, the probation and pretrial services system is losing staffing strength and has diminishing resources for supervisee monitoring and treatment. Expanding the responsibilities of the probation and pretrial services system when it has insufficient resources can compromise community safety and produce other undesired consequences, such as overburdening again the BOP.

One source for optimism, however, is that the savings from using supervision in lieu of incarceration in appropriate cases is substantial, amounting to tens of thousands of dollars per case. Those savings could be drawn upon by Congress and the agencies involved to experiment with greater use of and innovation in community supervision, ideally better protecting the public, reducing costs, and alleviating overcrowding at the BOP. Movement of funds in that manner has occurred successfully in state systems.

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A. FEDERAL BUREAU OF PRISONS OVERCROWDING

The BOP inmate population has been growing exponentially. The number of inmates doubled in the 1980s, doubled again in the 1990s and has increased 60 percent since the turn of the millennium.⁴ Not only are there more federal inmates, but they are serving longer periods in custody.⁵ As a result, the BOP now houses 220,000 inmates, more than the civilian population in 15 of the country’s largest 100 cities.⁶

The stress of the unrelenting growth on the BOP is taking its toll. Prison facilities are filled 38 percent beyond rated capacity, with overcrowding being particularly acute in higher-security institutions. Prison cells are double- and triple-bunked, making it more likely that some inmate misconduct will go undetected and jeopardizing the safety of inmates and staff alike. There are too many inmates for available rehabilitative programming, leading to waiting lists and lost opportunities for inmate rehabilitation. In addition, the overcrowding is causing excessive wear and tear on prison infrastructure and contributing to the \$6.8 billion cost of operating the BOP.⁷

The growth in the federal inmate population has been sparked and sustained by legislative changes and Department of Justice initiatives designed to promote sentencing uniformity, procedural transparency, and community safety.⁸ The Sentencing Reform Act of 1984 abolished parole, limited reductions for good behavior, and provided for more structured sentencing. A

series of statutes enacted in the midst of the crack-cocaine epidemic mandated lengthy custody terms for the types of cases that made up much of the federal criminal docket.² At the same time, the Department of Justice expanded prosecutions in drug crimes, firearm offenses, child pornography and illegal immigration.¹⁰ In analyzing the federal inmate boom, the Urban Institute concluded:

[The] increase in prisoners' expected time to be served was, by far, the leading determinant of the prison population growth, accounting for over one-half of the net population increase.... Higher conviction rates were responsible for one-quarter of the growth, while increased enforcement efforts and higher rates of sentencing to prison each contributed roughly one-tenth of the overall growth in the prison population.... The increase in time to be served by drug offenders alone accounted for nearly one-third of the total federal prison population growth.... Other offense-specific factors that contributed to growth included increased enforcement efforts against immigration and weapons violators, as well as a higher conviction rate for drug defendants.¹¹

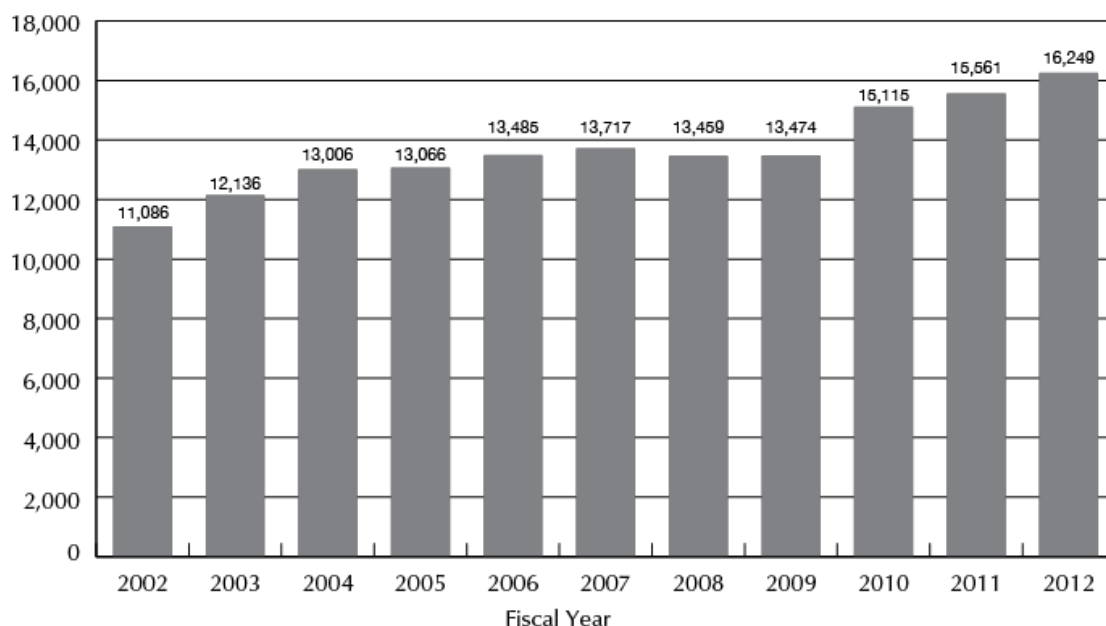
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B. SUPERVISION VIOLATORS' CONTRIBUTION TO THE OVERCROWDING

Relative to the other driving forces, persons revoked from community supervision and returned to prison constitute a small proportion of the federal inmate population. Somewhere between 8 and approximately 15 percent of the new admissions into the BOP each year are said to be supervision violators.¹² And since violators are subject to substantially shorter prison terms than those sentenced for new federal convictions, supervision violators occupy only 6 percent or so of the prison space on any given day.¹³ Nonetheless, the number of people being revoked has been increasing and that has generated concern among those studying prison overcrowding and looking to supervision as a possible means to alleviate it (see Figure 1).¹⁴

FIGURE 1.

Persons Revoked from Post-Conviction Supervision by Fiscal Year



Source: Administrative Office of the U.S. Courts, Decision Support System. Washington, DC.

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C. FACTORS INFLUENCING THE NUMBER OF SUPERVISEES REVOKED

A variety of factors have influenced the slow but steady rise in revocations in the federal system, including: (1) the increasing number of people unavailable for active supervision, specifically those deported after their imprisonment term, but who come back into the United States illegally and who are revoked as a result; (2) the increase in the size of the supervision population generally; (3) the escalation of the criminogenic profile of the supervisee population; and (4) improvement in the techniques to uncover supervisees' noncompliance. Adjustments to one or more of these factors could alter the number of people returned to prison in the future.

Between 2002 and 2012, the number of immigration-related prosecutions in federal court more than doubled.¹⁵ Immigration offenses now rival drug offenses as the type of crimes most frequently prosecuted in federal court.¹⁶ Some statutes and, up until recently, the Federal Sentencing Guidelines required supervised release terms to be imposed on deportable aliens following a period of incarceration. Since the aliens are deported shortly after their release from the BOP, the supervision term is put on "inactive" status and not "activated" unless the alien illegally re-enters the country or commits another offense in the United States, in which case revocation proceedings are initiated. So, in effect, these aliens are not actively supervised by probation officers and there is very little the probation system can do to promote behavioral change in them.

The probation system's data entry rules are being modified to better identify such cases going forward, but existing records indicate that 20 percent of the persons revoked in fiscal year 2012 were illegal or undocumented aliens. Similarly, illegal and undocumented aliens were responsible for 40 percent of the increase in revocations between 2002 and 2012.¹⁷

The impact of these cases on revocation rates and prison costs is all the more disconcerting when you take into account that there are currently 68,000 supervised release terms running inactively for individuals who either: (1) have been deported; (2) remain in administrative custody pending deportation; or (3) are being held in federal, state, or local custody on new criminal charges and for whom a violator's warrant has been lodged as a detainer.¹⁸

It is unclear if the number of immigration prosecutions will increase or decline. As this article is being written, Congress is debating immigration reform; any legislation passed will likely provide for enhanced enforcement, particularly along the southwest border with Mexico where the vast majority of federal immigration prosecutions already occur. In addition, the United States Sentencing Commission modified its policy statements in 2011 to state that "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment."¹⁹ The *Sentencing Guidelines Manual* further states:

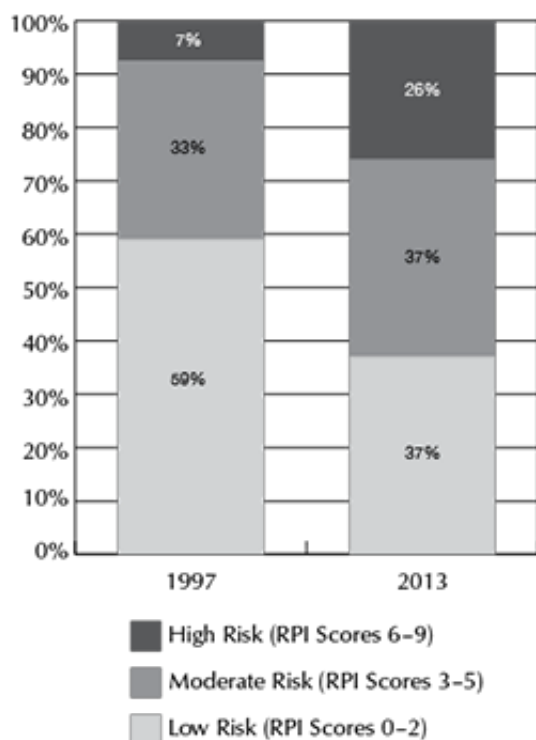
Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.²⁰

Consequently, it is possible that the number of illegal and undocumented aliens subject to supervised release terms could decrease, even if the number of immigration prosecutions continues to climb.

Another factor contributing to the growth in revocations is the increase in the supervision population generally. The daily supervision population has grown 45 percent in 15 years.²¹ The annual growth rate for the past decade has been 3 percent, and continued increases are expected, with the annual supervision population projected to exceed 194,000 by June 2015.²² Consequently, there has been and will continue to be a larger pool of people at risk of being revoked.

There has also been an escalation of the population's criminogenic profile. In an effort to better protect the community, the Department of Justice has focused on more persistent and violent supervisees, leaving the BOP and probation system with a higher-risk population.²³ Criminogenic risk can be measured in many ways. Since the 1990s, the federal probation and pretrial services system has used the Risk Prediction Index (RPI), an actuarial risk assessment tool developed by the Research Division of the Federal Judicial Center, to empirically measure the risk level of the supervisee population. The average RPI score of the supervisee population has been increasing year to year, and is now 50 percent higher than it was for supervisees in 1997 (Figure 2).²⁴ Similarly, the number of Career Offenders and Armed Career Criminals as defined by the United States Sentencing Guidelines has more than doubled, and the Commission's Criminal History Category system has detected increasingly more severe criminal histories and risk among defendants (Tables 1 and 2).²⁵

With fiscal reality precluding the probation and pretrial services system from providing the ideal level of supervision in all cases, and research suggesting that available resources are best focused on higher-risk supervisees, judiciary policy directs probation officers to dedicate their energies to those cases with elevated risk.²⁶ Officers are statutorily required to provide rehabilitative programming and make efforts to detect and report noncompliance.²⁷ In the case of high-risk supervisees, officers' monitoring efforts include: the use of GPS and other electronic devices; manual surveillance; development of third-party sources of information in the community; coordination with law enforcement agencies; and, if authorized by the court, warrantless searches and seizures.²⁸ Increased training, policy guidance, and supporting technology have made officers more effective and efficient in their monitoring role. For example, the judiciary's policy guidance on search and seizure was updated in 2010, and a national "train-the-trainer" program to develop officer expertise on search and seizure in the probation and pretrial services districts commenced shortly thereafter. In 2012, the probation and pretrial services system recorded its greatest number of search and seizure incidents, more than 1,000 (exclusive of computer monitoring of child-pornography supervisees). Three quarters of the search and seizure efforts resulted in contraband being removed from the streets, including everything from false identification to firearms and drugs.²⁹ Similarly, GPS-based location monitoring and drug-testing equipment has grown in sophistication, and communication has improved between probation and law enforcement agencies with the use of shared databases.³⁰ The net result is that supervisee noncompliance, when it does occur, is more likely than ever before to be detected, and that influences the number of persons revoked.

FIGURE 2.*Composition of Supervision Population by Risk Prediction Index Score*

Source: Eaglin, J., Gilbert, S., Hooper, L., Lombard, P. (1997). Descriptive Information About Offenders Grouped by Their RPI Scores, Washington, DC: Federal Judicial Center; Administrative Office of the U.S. Courts, Decision Support System. Washington, DC.

Table 1.*USSC Criminal History Points Assigned to Sentenced Defendants**

| Points | 1997 | 2012 | Change |
|--------|-------|-------|--------|
| 0 | 45.8% | 36.0% | -9.8% |
| 1 | 9.8% | 9.0% | -0.8% |
| 2 | 4.0% | 5.4% | 1.4% |
| 3 | 6.5% | 8.5% | 2.0% |
| 4 | 4.6% | 6.0% | 1.5% |
| 5 | 3.8% | 6.0% | 2.3% |
| 6 | 4.8% | 5.7% | 1.0% |
| 7 | 2.5% | 3.4% | 1.0% |
| 8 | 2.6% | 3.9% | 1.3% |
| 9 | 2.6% | 3.0% | 0.4% |
| 10 | 1.8% | 2.2% | 0.4% |
| 11 | 1.5% | 2.2% | 0.7% |

| | | | |
|-----|------|------|-------|
| 12 | 1.6% | 1.8% | 0.2% |
| 13+ | 8.3% | 6.8% | -1.5% |

Source: United States Sentencing Commission Sourcebook, Table 20, Fiscal Years 1997 and 2012.

*All percentages subject to rounding.

Table 2.

*USSC Criminal History Category Assigned to Sentenced Defendants**

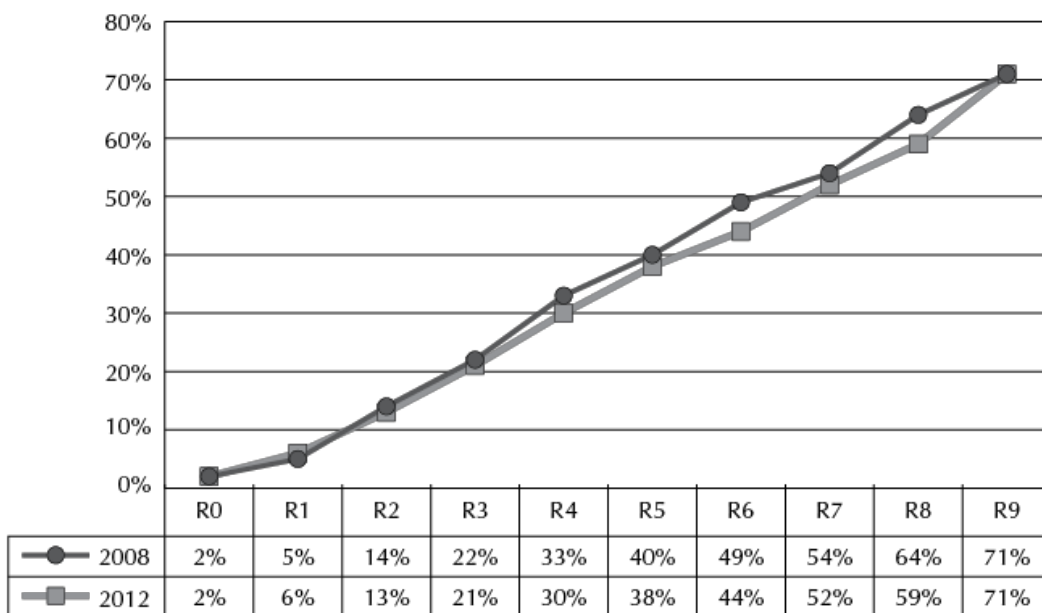
| Points | I | II | III | IV | V | VI |
|--------|--------|-------|-------|------|------|-------|
| 1997 | 55.9% | 10.6% | 13.0% | 7.2% | 4.2% | 9.2% |
| 2012 | 44.9% | 13.9% | 17.4% | 9.5% | 5.4% | 8.8% |
| Change | -11.0% | 3.3% | 4.4% | 2.3% | 1.2% | -0.4% |

Source: United States Sentencing Commission Sourcebook, Table 21, Fiscal Years 1997 and 2012.

*All percentages subject to rounding.

FIGURE 3.

Revocation Rate for U.S. Citizens Only, Displayed by FJC Risk Prediction Index Score
Source—National PACTS Reporting Database and Decision Support System



Source: Administrative Office of the U.S. Courts, Decision Support System. Washington, DC.

Taking into account all the various factors noted above, revocation rates have actually been stable, and have even declined among supervisees in some risk categories. Figure 3 reflects the revocation rate in 2008 and 2012 respectively for U.S. citizens only, based on their Risk Prediction Index scores as computed at the beginning of supervision.

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D. BASES FOR REVOCATION AND RECIDIVISM

In an effort to put revocation numbers into context, the probation and pretrial services system has

historically reported revocations as a percentage of total cases closed, excluding cases closed upon death and transfers. Like the raw number of revocations, the “revocation rate” has been increasing, although at a lower rate (Table 3). New crime revocations are described by the federal courts as either “major” or “minor,” labels meant to track the felony and misdemeanor distinction common in most penal codes. All other revocations are considered “technical” (Table 4 and Figure 4).³¹

It would appear that most revocations are on technical grounds, but that statistic should be viewed with caution because a substantial percentage of those cases actually involve allegations of criminal conduct (Figure 4). Noncompliant supervisees often commit both new crime and technical violations simultaneously, or in quick succession. For example, a supervisee who conspires and works with a former cellmate to distribute cocaine has committed both new crime and technical violations, specifically drug trafficking and association with a known felon. Indeed, a sampling of 768 cases from five judicial districts revealed that 93 percent of supervisees revoked for new crimes also had been cited for technical violations. Similarly, 39 percent of supervisees revoked for technical violations had incurred an arrest consistent with new criminal conduct during supervision.³²

For various reasons, such as minimizing the burden on witnesses and deferral to local prosecutions, the parties may settle on the supervisee pleading to a technical violation in lieu of going forward with a hearing on the criminal charge. The pressures and considerations that drive plea bargaining elsewhere in the criminal justice process are also present in the revocation context.³³ Also, in most instances, the applicable statutory penalties are the same for technical and new crime violations.

Further clouding an understanding of the bases of revocations at the macro level, probation and pretrial services’ case management system is not all-inclusive in terms of data related to revocations. Although there are plans to capture more data elements in the future, presently the case management system only requires users to enter one violation charge per revocation, even if the court found multiple violation charges proven. Data-entry rules suggest that the “most serious proven charge” be entered, but that still omits information on charges of equal or lesser severity for purposes of national reporting and analysis.

Recidivism in community corrections is measured in different ways. As noted above, the federal probation and pretrial services system has historically reported recidivism as the percentage of cases revoked in relation to total cases closed. That percentage now stands at 30 percent.³⁴ More recently, the system also began reporting supervisees’ felony rearrest rate for the three-year period following commencement of supervision (24 percent) and the three-year period after terminating supervision (18 percent).³⁵ The federal supervisee recidivism rate, using the broad definition of revocation on any charge or felony rearrest regardless if that arrest results in a conviction or reincarceration, has been independently computed at 30 percent.³⁶

Table 3.

*Federal Post-Conviction Revocation Rate**

| Fiscal Year | Revocation Rate | Change from Prior Year |
|-------------|-----------------|------------------------|
| 2000 | 23.8% | 1.2% |
| 2001 | 23.3% | -0.4% |
| 2002 | 25.7% | 2.4% |
| 2003 | 26.3% | 0.5% |

| | | |
|---------|-------|-------|
| 2004 | 23.4% | -2.9% |
| 2005 | 25.0% | 1.6% |
| 2006 | 26.9% | 2.0% |
| 2007 | 27.9% | 1.0% |
| 2008 | 27.4% | -0.5% |
| 2009 | 27.3% | -0.1% |
| 2010 | 29.3% | 2.1% |
| 2011 | 29.3% | 0.0% |
| 2012 | 29.7% | 0.3% |
| Average | 26.6% | 0.5% |

Source: Judicial Business of the U.S. Courts, Table E-7A, Administrative Office of the U.S. Courts, Decision Support System.

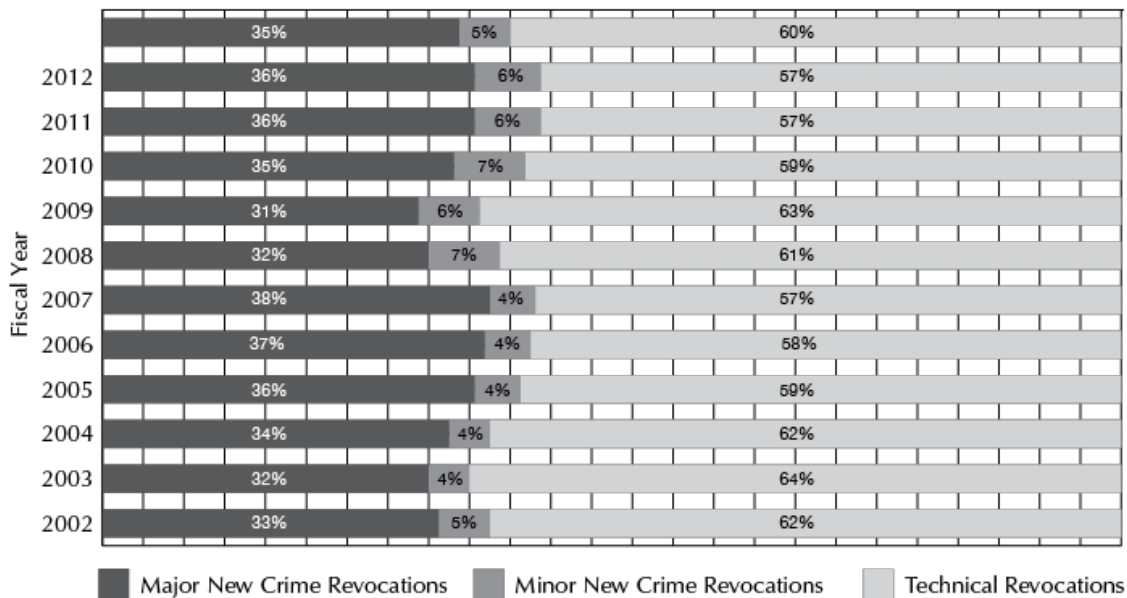
*All percentages subject to rounding.

Table 4.

Top 5 Violation Charges in Each Revocation Category During Fiscal Year 2012

| Rank | Major | Minor | Technical |
|------|----------------------------------|--|---|
| 1 | Drug Possession and Distribution | Traffic Violations (e.g., Driving without a License) | Violation of General Conditions |
| 2 | Immigration Offenses | Drunk and Disorderly | Use of Drugs |
| 3 | Assault | Simple Assault | Absconding |
| 4 | Firearm Offenses | Petty Theft | Willful Non-Payment of Court-Imposed Obligation |
| 5 | Larceny | Driving Under the Influence | — |

Source: Administrative Office of the U.S. Courts, Decision Support System, Washington, DC.

FIGURE 4.*Percentage of Major New Crime, Minor New Crime, and Technical Revocations*

Source: Judicial Business of the U.S. Courts, Table E-7A; Administrative Office of the U.S. Courts, Decision Support System. Washington, DC.

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E. FEDERAL SUPERVISION STRATEGIES AND PRACTICES

In the states, recidivism rates average between 43 and 67 percent, and supervision violators constitute a third of the persons admitted to state correctional facilities.³⁷ That leaves the federal recidivism rate somewhere between 13 and 37 percentage points below those of the states, and leaves violators as new prison admissions between 18 and 25 percentage points lower in the federal system.

Many things may explain the difference between the state and federal statistics, including factors outside the control of the agencies involved. The relatively positive outcomes produced by the federal system, however, are consistent with, and logically related to, the stated objectives of the federal judiciary's policies and procedures. The results also reflect the financial investment made in the probation and pretrial services system by Congress and the Judiciary, as well as rehabilitation work undertaken by the BOP, despite the BOP's overcrowding issues and pressures on staff.³⁸

Under judiciary policy, federal probation officers are responsible for promoting "the successful completion of the term of supervision, during which the offender commits no new crimes; is held accountable for victim, family, community, and other court-imposed responsibilities; and prepares for continued success through improvements in his or her conduct and condition."³⁹ Officers employ a variety of tools to promote the desired outcome, but all are based on the risk, need, and responsivity principles demonstrated by social science research to be effective in reducing recidivism.⁴⁰ According to the risk principle, the level of correctional intervention should match the client's risk of recidivism.⁴¹ Under the need principle, correctional interventions should target known and changeable predictors of recidivism (also referred to as "criminogenic needs").⁴² Finally, according to the responsivity principle, interventions should involve the treatment modality most capable of addressing the criminogenic need found in the case. To increase the likelihood of

positive effects on clients' behaviors, interventions must also be delivered in a style and mode specifically suited to the supervisee's learning styles and abilities. Responsivity factors may be relevant not because they predict criminal conduct, but because they affect how supervision and treatment services are delivered and received by the supervisee.

The most advanced risk and needs assessment instruments incorporate the principles of risk, need, and responsivity by addressing all three components: 1) whom to target for correctional intervention, 2) what needs to address, and 3) how to remove barriers to successful implementation of a supervision and treatment plan. To enhance officers' professional assessment of a case and supervision plan development, the federal probation system now has an additional actuarial tool, complementing the Risk Prediction Index. The new instrument is called the Post Conviction Risk Assessment (PCRA), and has been described in more detail in other peer-reviewed journals and in *Federal Probation*.⁴³

To further address need and responsivity issues, the system also has a formal training program for officers called Staff Training Aimed at Reducing Rearrest (STARR). Social science research has demonstrated that the most effective approach for changing behavior in the community supervision context is through cognitive-behavioral techniques, which involve exercises and instructions designed to alter the dysfunctional thinking patterns exhibited by many supervisees. Likewise, research suggests that the quality and nature of the relationship between the client and the supervision officer have an impact on outcomes.⁴⁴ STARR builds on officers' existing communication skills, use of authority, and ability to impart cognitive restructuring strategies to supervisees. STARR, and its demonstrated ability to reduce recidivism, has also been featured in other peer-reviewed journals and in *Federal Probation*.⁴⁵

The PCRA and STARR complement many district-based initiatives, such as re-entry courts, assorted cognitive behavioral programs, and specialized employment and vocational training for supervisees.⁴⁶ Although the amounts disbursed were reduced significantly with sequestration, each district continues to receive funds for traditional mental health and substance abuse services for supervisees whose condition requires it, but who are unable to pay on their own. Collectively, the federal judiciary dedicated more than a \$100 million in fiscal year 2012, above and beyond probation officer salaries and expenses, in an effort to reduce the criminogenic factors of persons under federal supervision.⁴⁷

Federal probation officers are also encouraged by judiciary policy to provide positive incentives for change.⁴⁸ As risk issues are addressed and supervisees meet their objectives, officers respond to such positive changes with graduated reductions in the level of supervision—up to and including early termination of supervision.⁴⁹ Under 18 U.S.C. §§ 3564(c) and 3583(e)(1), the court may terminate terms of probation in misdemeanor cases at any time and terms of supervised release or probation in felony cases after the expiration of one year of supervision if satisfied that such action is warranted by the conduct of a supervisee and is in the interest of justice. Policy directs officers to consider the suitability of early termination for supervisees as soon as they are statutorily eligible.⁵⁰ Recently, staff at the Administrative Office of the U.S. Courts completed a study examining the effectiveness of the judiciary's guidance to probation officers on recommending appropriate cases for early termination. The report confirmed that the policies allow officers to make responsible decisions about which supervisee to recommend for early termination (see Baber & Johnson, 2013, appearing in this issue of *Federal Probation*; full reference in Footnote 51).⁵¹

While the desired outcome is that persons under supervision change for the better, based on supervisees' risk profile, that may not always be possible. As noted earlier, the overall risk level of the supervisee population has been increasing steadily. A recent snapshot has shown that, on average, persons under supervision have five prior arrests; 16 percent violated a previous term of federal, state, or local community supervision, and 8 percent have a history of absconding.⁵²

Nearly 9 in 10 supervisees have been convicted of a felony-level offense, most involving drug trafficking, property crimes, firearms, or a crime of violence.⁵³ The majority of supervisees (83 percent) are not on probation but supervised release or another form of post-incarceration supervision.⁵⁴ The average prison term was 60 months for supervisees sentenced to supervised release terms between January 12, 2005, and fiscal year 2009.⁵⁵ While in custody, the supervisees were separated from family and any positive community ties they may have had, and were housed in the very same overcrowded institutions that are recognized now as a problem.

Close to half (43 percent) of supervisees have a history of alcohol abuse and more than a quarter have used opiates. Mental health issues plague 27 percent of the population, and 10 percent have a history of domestic violence.⁵⁶

Almost one in five supervisees are actively engaged in criminal thinking and manifest antisocial values, while 80 percent have a person in their life currently engaged in or promoting drug use or other criminal activity.⁵⁷ At the start of supervision, 34 percent of supervisees were unemployed, and at some point in their supervision terms 60 percent will have a problem with underemployment, employment stability, or the workplace not being conducive to a law-abiding lifestyle. Many supervisees are in debt, owing restitution and child support among other things, and 19 percent require basic housing and transportation services.⁵⁸

Overcoming such entrenched criminal involvement and criminogenic risk is a challenge for the federal probation and pretrial services system. Fortunately, nearly half of supervisees coming under supervision also have access to a prosocial support network, such as a well-adjusted family member, a socially responsible friend, or a caring mentor. An equal number of supervisees are said by their probation officer to be earnestly motivated to change.⁵⁹ Those positive traits, leveraged by probation staff with considerable skill and training,⁶⁰ may explain—in part—the relatively positive results in the federal system.

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F. THE FEDERAL APPROACH TO NONCOMPLIANCE

Probation officers' response to noncompliance, new crime and technical alike, is guided by the policies of the Judicial Conference of the United States, the U.S. Sentencing Commission, and the judge with jurisdiction over the case.⁶¹ Federal policy does not afford much discretion when it comes to felony-level new crime violations. Such violations "shall promptly" be reported by probation officers to the court.⁶² If the court finds the violations proven, the court "shall" revoke supervision and order the supervisee imprisoned between 4 and 63 months, depending on the nature of the violation and the supervisee's original offense and criminal history.⁶³ In instances where the proven violation relates to possession of a firearm, a controlled substance, refusal to participate in drug testing, or repeatedly testing positive for illicit drug use, revocation is mandatory.⁶⁴

In contrast, probation officers have more discretion when dealing with misdemeanor new crime and technical violations. The violations do not have to be reported to the court if the "[probation] officer determines (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to reporting violations."⁶⁵ However, even if such violations are not reported to the court, probation officers are still required to take timely and proportional action in response to the violations.⁶⁶ Officers can act within existing conditions of supervision conditions or seek to have the conditions modified by the court with the consent with the supervisee.⁶⁷ But the preferred response is community-based rather than prison-based sanctioning.⁶⁸

Probation offices and courts consider numerous complex and context-specific factors when deciding how to respond to noncompliance. Therefore, it is difficult to draw categorical conclusions about when revocation is appropriate. According to judiciary policy, each intervention in response to noncompliance should be individually tailored to relate to the nature and degree of the noncompliant behavior and to the context in which the behavior occurs. Contextual elements to be evaluated include the past history of the supervisee, his or her overall adjustment during this period of supervision, and the circumstances surrounding the current instance of noncompliance.⁶⁹ Another factor is the uneven availability of rehabilitative services and sanctioning facilities. For example, some districts have access to quality-intense treatment programs, halfway houses, and day-reporting centers, while other districts do not or not to the same degree.⁷⁰

Because of these factors, an intervention used for one supervisee may not be appropriate for another supervisee even if both engaged in the same conduct. While community-based interventions are preferred for technical violations, there are exceptions, such as when the possible intervention is not available,⁷¹ where a pattern in the supervisee's past has been associated with a significant and imminent public safety threat, or where there is repeated noncompliance after less-intrusive community-based interventions have failed.⁷²

The ultimate objective for officers is to apply the general principles of managing noncompliance to the individual case. Those supervising supervisees always need to individualize the response and to be prepared for exceptions to the rules.⁷³ All responses to noncompliance that involve substantive changes to the terms or conditions of supervision are subject to the Federal Rules of Criminal Procedure and require the supervisee's consent, or a court order after the supervisee is afforded a host of procedural protections.⁷⁴

The probation officers' response to minor and technical violations must be both "controlling" and "correctional."⁷⁵ According to judiciary policy, "controlling strategies" serve the dual purpose of: (1) maintaining awareness of a supervisee's activities and (2) encouraging compliance. "Correctional strategies" are designed to provide the supervisee with additional information, skills, resources, and treatment for the purpose of facilitating positive behavioral change during the period of supervision and beyond. This two-pronged approach simultaneously provides a punitive consequence designed to deter further noncompliance and offers the supervisee the means to change his or her behavior over the long term.⁷⁶

Examples of "controlling" community-based sanctions are home detention, imposition of a curfew, issuing a verbal or written reprimand, and intensifying reporting requirements. "Correctional" interventions include enhanced rehabilitative programming and treatment referrals. Two cases selected from the districts of Montana and the District of Columbia demonstrate the use of correctional and controlling interventions. Although the outcomes in the cases are different, they are representative of the use of interim sanctions across the country and the effort to avoid the use of costly incarceration (that would further burden the BOP).

***Defendant #1** was convicted of firearms violations and, with a history of substance abuse and mental health problems, repeatedly failed to follow probation officer instructions, missed treatment sessions and used alcohol despite an abstinence condition imposed by the court. Working together, the court and probation officer developed a response to the noncompliance that did not require imprisonment but rather 4 months home detention. The defendant was also required to read and report on books related to personal responsibility, and to maintain a written calendar with the times and dates of all treatment sessions clearly highlighted. Although there have been some minor setbacks, the defendant has been generally compliant and remains under supervision.*

Defendant #2 was convicted of crack cocaine and firearms offenses. He was resistant to the probation officer's efforts to secure him full-time employment. The defendant also interfered with efforts to test him for drug use, and eventually he was found to be using cocaine. Working with the court, the probation office developed a comprehensive, prison alternative, response. The response included 90 days of (electronic) location monitoring, overt surveillance, increased office reporting and drug testing, coupled with outpatient and in-house drug treatment and referrals to support groups. Unfortunately, the defendant persisted in his cocaine use and remained resistant to supervision, and his supervision term was revoked.

These cases are not atypical. An examination of a sample of cases, including all cases closed in five districts during 2012, indicated that 65 percent of supervisees had some degree of noncompliance during their supervision term. Only a third of those supervisees were ultimately revoked and returned to prison. The vast majority were brought back into compliance without resorting to incarceration. Consistent with the graduated nature of the sanction system in the federal courts, most supervisees—88 percent—were exposed to controlling and correctional strategies that operated within their initially imposed conditions.

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G. COST CONSIDERATIONS TO REVOCATIONS

Alternatives to incarceration are an effective part of the federal judiciary's response to supervisee noncompliance, and using them produces considerable cost savings and greater potential for supervisee long-term rehabilitation. The most recent figures indicate that incarceration is nine times more expensive than community supervision, and a term of supervision in lieu of prison saves \$25,600 a year per supervisee.⁷⁷ Community supervision also has the collateral benefit of allowing a supervisee to maintain employment and family connections and to participate in community-based treatment.

In addition, when supervisee rehabilitation does occur, the benefits to society go beyond avoiding the cost of new crimes and incarceration. Supervisees contribute to their communities through paying taxes, supporting dependents rather than relying on welfare, satisfying ordered financial penalties, and performing community service. Although computations are complicated when supervisees transfer across districts, available data indicate that the supervisees completing supervision in fiscal year 2012 paid in the vicinity of \$645 million in restitution, fines, and assessments. The supervisees also contributed \$4 million worth of community service, applying the current minimum wage to their more than 600,000 hours of service. And assuming conservatively that the persons who completed supervision successfully paid \$3,000 in taxes (income, sales, real estate), another \$115 million is added to the total.

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H. OPPORTUNITIES AND CHALLENGES

Clearly, the probation system cannot unilaterally solve the BOP's overcrowding problem.⁷⁸ The number of persons revoked from supervision and returned back to the BOP is relatively small when compared to other drivers of the prison population.⁷⁹ However, although it is not a major contributor to the overcrowding problem, the probation and pretrial services system can play a role in alleviating it. The Urban Institute stated in a recent study: "While some aspects of the federal system differ from the states, many lessons can be learned from the state experience. Chief among them is the need for the federal government to enhance its community corrections capabilities and resources as it develops strategies to contain its institutional population and accompanying costs."⁸⁰

The probation system could assume responsibility for inmates released early pursuant to a new statute or in response to policy changes in the Department of Justice allowing for greater community placement.⁸¹ Such an approach has been implemented recently to address budget crises at the state level. There are examples where states have strategically shifted correctional resources from prison to community corrections, reducing overall corrections costs and crime. The Department of Justice has expressed support for such measures.⁸² The probation system could also serve as a greater sentencing option, with more defendants being sentenced directly to supervision terms rather than to prison.⁸³ The fact is that supervision offers a lot of appeal: an opportunity for defendants to rehabilitate and redeem themselves, the ability to quickly detect and respond to changes in criminogenic risk, and enforcement of community-based punitive conditions (e.g., fines, community service, house arrest, employment restrictions), all at a relatively low cost.

There are risks and benefits to these suggestions. Most would agree that imprisonment carries a greater punitive and incapacitation punch than does supervision, but it is costly and may make some offenders worse in the long run.⁸⁴ On the other hand, supervision is relatively inexpensive and offers a degree of deterrence and incapacitation,⁸⁵ but the community is at greater immediate risk of harm from a wayward supervisee than it is from an inmate behind bars. The challenge is correctly determining which sentencing option or combination of options will produce the best result. That daunting task rests with U.S. district court judges. Even if judges were inclined to use supervision more often to alleviate prison overcrowding and further the goals of sentencing generally, their discretion is currently limited by statutes, advisory guidelines, and procedural rules that suggest and in some cases mandate lengthy custody terms and prohibit judges from revisiting a prison sentence once it is imposed.⁸⁶

Another complicating fact in relation to expanding the role of community supervision is that sequestration and other financial reductions are reducing the capacity of the probation and pretrial services system. Specifically, staffing and treatment resources have been on the decline.⁸⁷ The system's ability to promote positive behavioral change and to timely detect noncompliance will diminish over time, especially if programs like PCRA and STARR cannot be maintained and officers are saddled with large caseloads populated by higher-risk supervisees. The Vera Institute noted that "[w]ithout funds sufficient to ensure that people are receiving appropriate and individualized supervision, communities may see high failure rates, increased victimization, and delayed rather than avoided costs as understaffed agencies return [supervisees] to costly jail and prison beds on technical violations of probation or parole conditions or rules."⁸⁸ In addition, with less money to spend on alternative sanctions for violations, it is possible that courts may be forced to revoke more rather than fewer supervisees, even if the overall supervision population remains unchanged.

One source for optimism, however, is that the savings from using supervision in lieu of incarceration is substantial, amounting to tens of thousands of dollars per case.⁸⁹ Those savings could be drawn upon by Congress and the agencies involved to experiment with greater use and innovation in community supervision, ideally better protecting the public, reducing costs, and alleviating overcrowding at the BOP.

[References](#)

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