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## How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission

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# How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission

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The crescendo against overincarceration continues as the costs—financially but also societally—mount. In addition to the 2.3 million people who are incarcerated, another 4.7 million people are under supervision of the correctional system.<sup>1</sup> Most of them—almost 3.9 million—serve a probationary sentence. In the federal system, the number of probationers is very small,<sup>2</sup> especially compared to the number of those on supervised release.<sup>3</sup> The ratio is almost the opposite from the overall correctional population, where probationers make up about 80 percent of those under community supervision.<sup>4</sup> Despite years of neglect, the problem of what to do with the non-incarcerated correctional population is too big to ignore. This Issue looks at various dimensions of noncustodial supervision—including probation and post-confinement sanctions such as supervised release and parole—in the states and at the federal level.

Motivated, in part, by its breathtaking magnitude, this population has recently attracted renewed attention from academics and policy makers. The University of Minnesota's Robina Institute of Criminal Law and Criminal Justice shone a light here through its recent Data Brief, reprinted in this Issue. The Robina researchers found that it is not only the U.S. incarceration rate but also the number of offenders under supervision that is "exceptional" when compared with other countries. Whereas Council of Europe countries included in that study—36 of 47 member states—have twice the population of the United States, they have only 1.5 million offenders under supervision, which amounts to a U.S. supervision rate on average five times higher than for those European countries. The U.S. imprisonment rate, on the other hand, is "only" three times higher than that of all Council of Europe member states.<sup>5</sup>

Although in some states supervision has served as a net-widener and a virtual springboard into prisons,<sup>6</sup> in others probation supervision has fulfilled its traditional role as a diversionary tool.<sup>7</sup> Research indicates great diversity between states both in the use of supervision as a sentencing mechanism and in its implementation. Among the questions that have been raised recently: Should the number of individuals under supervision remain as high as it currently is, and how can it be decreased while respecting public safety concerns? What are the goals of supervision, and what should they be? How can supervision be made more effective, without needlessly leading to prison? Are the length and the terms of supervision overly onerous?

The contributions in this Issue of *FSR* indicate that research and evidence-based practices are providing new opportunities for more effective supervision that may increase community safety and successful reintegration. Initial exuberance about these innovative approaches, however, may lead to overly optimistic promises of decreased recidivism and increased community safety.

The focus on evidence-based approaches may conceal the absence of a well-defined mission of the probation service and of supervision, which are often tasked with achieving multiple, conflicting goals. Numerous goals without ranked priorities, as we have pursued in sentencing, have contributed to the

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development of our punitive criminal justice system. Going forward, it will be essential to set out a clear mission and goals with realistic targets to avoid disagreements over data and a potential backlash to what may be considered leniency.

In the federal system the crucial but often underappreciated role of the probation officer has been changing, as has the role of (some) federal judges who have set up alternative courts. Although many of these projects remain empirically untested and involve only a limited number of judges and probation officers, they seem to bring a new sense of purpose to these actors.

This Article will begin with the role of federal judges in supervision and their importance to the change process. Next it will turn to the use of evidence-based practices in the “new supervision,” with its promises and potential pitfalls. Finally, the Article will assess the measures of success, with a special focus on the reduction of recidivism as the apparent goal of the efforts to improve supervisory mechanisms.

### **I. The Role of the (Federal) Judge: Pivotal Collaborator and Driver of Change**

Probation has played a diminutive role in the federal system.<sup>8</sup> Judge John Gleeson, in one of his last opinions on the United States District Court for the Eastern District of New York before retiring in March 2016, urged the U.S. Sentencing Commission to support alternative-to-incarceration courts, as the states have done, by allowing for (generous) downward departures and a greater range of probationary sentences. He justified his recommendation on fiscal grounds, but also because of the proven success of the alternative courts in that District.<sup>9</sup>

On the other hand, federal judges commonly—almost reflexively—impose a term of supervised release (SR) upon discharge from prison, even if not statutorily required to do so.<sup>10</sup> In passing the Sentencing Reform Act, Congress mandated that SR be imposed not to achieve punitive but rather rehabilitative goals. For long-term prisoners, SR should facilitate reintegration, and for select prisoners with short-term prison sentences, it would provide for rehabilitation and supervision.<sup>11</sup> Matthew Rowland, head of the Probation and Pretrial Services Offices of the Administrative Office of U.S. Courts, describes SR as having been created “to assist offenders in their integration back into society and to provide the court with the means to quickly intervene if an offender is a risk to him- or herself, or to others.” Some commentators have argued that perhaps because its purpose has become murky, federal judges use SR substantially more than required.

Violations of SR frequently cause a return to prison, often with new supervisory terms attached. This has created the “threat of never-ending supervision,” another effect of the crime control model, as Benji McMurray, assistant federal public defender in Utah, indicates in his piece on Utah’s mental health court, which is a type of reentry court.<sup>12</sup>

The Sentencing Commission developed a list of conditions, some of which are mandatory, others are labeled “standard,” that is, “recommended,” and a third group is “special,” which means “recommended in the circumstances described and [] may otherwise be appropriate in particular cases. . . .”<sup>13</sup> Without regard to individual risk or needs, courts seem to impose at least all the standard discretionary conditions.<sup>14</sup> Some have questioned the value of such across-the-board requirements, especially at a time of greater striving for individualization in other areas, such as front-end sentencing and higher education.<sup>15</sup> The incipient move away from mandatory minimums because they deny substantial differences in culpability and circumstances serves as one example.<sup>16</sup> Federal judges may need to begin to focus on questions of whether to impose SR, for how long, and what discretionary conditions to attach. Decreases in length and conditions would likely result in a substantial decline in the number of revocations. In some foreign countries, such as Germany, that witness lower return rates to prison for violations of supervision conditions, judges impose supervision requirements only based on individual risks and needs.

The Sentencing Commission outlines some of the violations and their frequency that presumptively should lead to revocation, which may potentially restart the cycle of imprisonment with supervision following. McMurray questions orthodoxy—revocation for commission of a new offense—in his critique of revocations: why should federal courts revoke SR for a state offense? He argues that state entities, after all, can enforce their own laws. Should the federal system be a surrogate or a magnifier of state enforcement? What purpose does that approach serve? After all, revocations are costly, and in these cases may constitute a shift from state onto federal coffers. Because these revocations present interesting complications, they deserve an empirical and normative focus going forward.

At present federal judges do not seem engaged in large-scale questioning of SR or its conditions but instead some have begun to set up problem-solving courts. Currently there are about eighty of those, many reentry courts.<sup>17</sup> Their goal is to decrease future recidivism by assisting the reintegration of offenders and bringing about permanent change for them, all in accordance with evidence-based practices.

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Reentry courts in three different federal Districts are highlighted in this Issue—the Northern District of Florida, the District of Utah (in the form of a mental health court), and the District of New Jersey. These courts serve as examples of the variety of models that are currently being used in the federal system and highlight the underlying philosophies and goals that motivate federal reentry. In his article, Rodney Villazor, a former federal prosecutor now in private practice, details the common framework of federal reentry courts but also notes great variability.

Department of Justice recognition of the importance of reentry has played an important role in the acceptance of reentry, and the crucial figure in reentry courts is the judge.<sup>18</sup> Jeremy Travis, then at the Urban Institute, recognized this early on when he focused on the importance of reentry and proposed locating reentry management with the court. The judge ultimately has to support and champion the program. Judicial commitment is essential as the judge has to assure collaboration between the defender service and the U.S. attorney's office, her probation team, and other stakeholders. As Villazor indicates in New Jersey, the federal district court judge is even willing to staff an evening session of reentry court.

Interaction with the judge and the reentry team is a crucial ingredient of the reentry court and of special importance to the individual under supervision. Those regularly scheduled meetings often facilitate close relationships among the program participants and between the reentry committee and the participants. The judge's role is one of chief supporter but also of disciplinarian, if necessary, therefore judges need to develop meaningful systems of rewards and targeted sanctions. Though not all judges may be temperamentally suited for such a role, the ones who have set up these programs appear to have found them truly meaningful. To what extent reentry programs have influenced these judges' outlooks on the criminal justice system and sentencing overall remains an open question.<sup>19</sup>

Despite differences in the composition of the offender target population and the prerequisites for admission into the programs, Chief Judge M. Casey Rodgers of the Northern District of Florida describes the primary goal of reentry courts as improving the long-term protection of the public from recidivism. If successful, a substantial side benefit will be reduced costs for re-incarceration. She acknowledges that the traditional model of supervision cannot achieve this aim, as monitoring and punishing alone will never suffice. Instead the offender must change his or her behavior.

The most successful models require judges to harness community resources in support of reentry. Judge Rodgers has certainly done so in her district. After all she is fully aware of the need for offenders to "obtain steady jobs, learn critical thinking skills, and develop strong social bonds and positive community ties" to decrease their likelihood of reoffending. To assist with some of these crucial elements, she has recruited members of the local bar to establish mentoring relationships with those on supervised release and gotten the supervisees involved with the community garden to provide prosocial activity and influence. Other judges have pulled representatives of community service organizations into the reentry court team.

Meaningful rewards go hand-in-hand with the reentry court, as do clear expectations about them, McMurray indicates. The most substantial bonus for the no-longer-incarcerated offender remains the potential reduction—up to 12 months—off supervised release. This may be especially relevant if reentry courts expand as early termination of SR remains infrequent in the federal system.<sup>20</sup>

Federal judges have substantial control over both the imposition and the execution of probation and supervised release. Many of these decisions impact the number of violations and a supervisee's likelihood of returning to prison. First, judges could impose SR only in cases where warranted, which means when the offender needs supervision to assist with reintegration and to provide control. Second, they could limit the number of probation conditions by selecting only those discretionary conditions that are those most appropriate to the individual offender. Thirdly, they could terminate SR early. These three sets of decisions would decrease the potential for violations while allowing the court and the probation team to focus on higher-risk individuals. Those persons should have individualized requirements imposed and supervision provided to help prevent recidivism and assist rehabilitation. Although initially more work for a judge, in the long run such thoughtful decisions may decrease the need for judicial intervention and sanctions. They may also allow the judiciary and the probation service to focus more resources on reentry court and the higher-risk individuals who are going through it. Judges should carefully consider creating reentry courts in their districts, especially as the knowledge base of "what works?" will continue to grow as early results come in. Judge Rodgers's court, for example, will receive its first empirical report card later this summer.

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## II. Evidence-Based Practices or New Fads?

Much emphasis is being placed on so-called evidence-based practices. What role does and can data and data analytics play in supervision? Is our reliance on scientific evidence perhaps again overly optimistic, especially without a theoretical and values-based framework for supervision?

### A. How Are Parole Decisions Made?

Data analytics are taking on an ever larger role in many areas, including the sanctioning regime. Kathryn Young, Debbie Mukamal, & Thomas Favre-Bulle present their findings on the factors that go into parole decisions for lifers in California. Almost a quarter of inmates sentenced to life terms with a possibility of parole—close to 35,000—are incarcerated in California’s prisons. As the three researchers note, “strikingly little is known about states’ decision-making process for releasing lifers. . . .” Their study sheds some light on the thinking of California’s parole board, though one should keep in mind the governor’s right to overturn board decisions in murder cases, which may affect decision making in ways that do not apply in other states.

The research findings indicate that the Board grants release cautiously, with its decisions generally closely heeding suitability guidelines outlined in the California Code of Regulations. Positive factors—higher age at the time of the hearing, substance abuse programming, and a letter from an employer, for example—work in the petitioner’s favor. The Board also puts great stock into low risk scores based on psychological evaluations conducted before the hearings. The district attorney’s opposition to release carries a very strong negative value; perhaps more surprising, the district attorney’s support does not appear to make a difference. Also the presence of the victim or victim’s relatives does not seem to have an impact, in contrast to findings in other states.<sup>21</sup> It is possible, as the research team explains, that other factors account for that perhaps curious finding. Ultimately, the researchers conclude that the board is looking to release only those with a “near-pristine inmate profile.” Those turned down by the Board default into a fifteen-year reconsideration period, though the Board can shorten the time to as little as three years if the inmate displays no danger. The next part of the study will look into denial lengths, which appear comparatively long and not conducive to rehabilitation.

It is this type of data that can help evaluate an institution’s decision making, signal to the citizenry the care taken in the process and the focus on public safety, and assist the attorney in preparing the petitioner for the hearing. It may also indicate the heightened importance of certain factors, such as the offender’s risk assessment evaluation. Empirical research will be crucial in assisting with all aspects of sentencing and supervision.<sup>22</sup>

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### B. Evidence-Based Practices in Supervision

Risk assessments also play a role in federal courts as federal reentry courts target moderate- to high-risk offenders. Data indicate that low-risk offenders tend to be substantially less likely to run afoul of the law going forward, and therefore are less in need of supervision and control. Low risk may be encapsulated in the absence of a criminal record but also implies the presence of positive dynamic factors, such as employment and family support. The immutable fact of limited governmental resources militates in favor of focusing on those offenders who need support. Data analytics, however, do not end with the selection of offenders for federal reentry court.

Matthew Rowland, head of the federal Probation and Pretrial Services Office, has set his sights on “redesign[ing] the federal probation system into an outcome-driven organization with a strong emphasis on evidence-based practices, with long-term recidivism reduction as the ultimate goal.” In his article he discusses in part, what academic commentators have labeled, “‘the three most important theoretical orientations in contemporary offender management’: (i) the risk-needs-responsivity (RNR) model . . . ; (ii) the ‘Good Lives’ strengths-based model . . . ; and (iii) the ‘emerging’ desistance-based model. . . .”<sup>23</sup> The RNR model involves targeting higher-risk offenders, in part through risk assessment instruments that focus on dynamic (rather than static) risk factors. The supervision model employs a structured cognitive behavioral community supervision model, which addresses the individual’s specific risk factors.

Judge Rodgers outlines the types of training her probation team has received to respond to supervisees’ needs and to improve the interactions between probation officers and program participants. Much of the focus is now on changing the “offenders’ thinking patterns and value systems,” according to Rowland. This emphasis, however, does not come at the expense of adaptation to or changes in the social environment: “social networks, employment situation, and substance abuse” remain crucial factors in reoffending.

Some of these approaches reflect concepts that are being employed also in higher education where noncompletion rates create similar challenges for universities. Early identification of those at risk of not returning, keeping up with students, creating strong bonds and relationships that help with retention, and focusing efforts on the individual are as frequently used in that setting as in the supervision context. The struggle between individualization and equality remains a defining element in sentencing and back-end sanctions.

The reorientation of the federal probation staff may be one of the most exciting and promising developments in the criminal justice arena. After years of a law enforcement focus, which followed a long history of a social worker model, the newly emerging approach of support combined with supervision and limited sanctions may provide a more balanced approach.

Not unlike judges, chief probation officers' willingness to change paradigms and participate in reentry courts and their ability to motivate their staff will be decisive. After all, the role of the probation officer is critical to the success of reentry court participants. As Villazor notes, crucial ingredients in keeping participants from re-offending are "close supervision, access to social services, and intensive management to offenders released from prison"—all aspects that are part of the probation officer's daily work. Chief Judge Rodgers's praise for her probation team and especially her Chief Probation Officer, Anthony Castellano, is well placed.

Not all probation systems, however, are alike. In this Issue we are reprinting a heavily edited version of a 2013 article by Michelle Phelps. The article has been stripped of references and footnotes to make a data-heavy piece more easily accessible. Phelps's research indicates how variable probation services are in terms of structure, funding, and oversight. The way in which probation supervision and revocations are handled will determine whether probation will serve as diversion or rather serve the "probation-to-prison pipeline" Ron Corbett mentions. The reader should turn to the full version of the Phelps article for further references and access to her data.

Despite the changes in the federal probation service, the fatal killing of Michael Brown in Ferguson, Missouri, ultimately led to protests about not only the disproportionate use of police violence against African Americans but also the unsavory use of (traffic) fines and abusive probation practices to finance city operations by coercing payment of such fines from the most economically deprived.<sup>24</sup> In those cases probation supervision served entirely different goals than those now evidenced in federal court.

Increasingly municipalities have turned to private, for-profit entities to fulfill the probation function. The United States is not the only country that has opened probation to private, for-profit companies, as Philip Whitehead, professor of criminal and social justice in Great Britain and a former probation officer himself, indicates in his article. For reasons of efficiency and cost savings, England has provided private corporations with the opportunity to bid on supervising low-risk offenders, while high-risk offenders remain under the government probation services. As in the United States, there is substantial concern about the outsourcing of probation because of previously negative experiences with private prisons. It is disputed whether privatizing probation would provide cost-savings or more effective services to probationers than the government could. Continental European countries have also begun to experiment with private supervision. A successful model in Austria, however, employed a not-for-profit, values-based company.<sup>25</sup>

Going forward, it will be crucial to develop a clear mission and goals for a probation service so that it can provide the value the community expects. Also, the funding structure is of importance, as some private companies only appear cost-effective to municipalities because they are able to impose operating costs onto the—generally already poor—supervisees and the cost of imprisonment upon revocation either upon the municipality or a third party.

### C. Supervision Revocation

Even the most effective supervision system will ultimately have to address violations of conditions imposed on probationers and those released from imprisonment. Similar to the challenges for supervised release, Ron Corbett, project director for the Robina Institute's Community Sanctions and Revocations Project and a former acting commissioner of the Massachusetts Probation Department, calls "the sinister side of probation" the place "where the promise of redemption is subverted by a lurking punitiveness." In this view, the large number of revocations is due to "closer enforcement and increased requirements imposed on probationers." Sanctions imposed for probation violations, however, frequently lead to disproportionate sentences, with probation merely becoming "a staging area for eventual imprisonment."

Jonathan Wroblewski, Principal Deputy Assistant Attorney General who leads the Department of Justice's Office of Legal Policy and serves as the Attorney General's representative to a number of groups, including the U.S. Sentencing Commission, and Sean Douglass, Counsel at the Office of Legal Policy, also weigh in on back-end reforms. First they advocate for legislation that would allow for a second look at sentences imposed on juveniles who were punished as adults so that judges can revisit these sanctions after a prescribed—lengthy—period of time. Their second proposal recommends adoption of legislation favoring "Swift, Certain, and Fair" (SCF) sanctions for violations of probation or SR conditions. This would entail a "graduated sanctioning system" to provide probation officers with suitable responses to technical violations, comparable to Hawaii's HOPE program.

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Although such a program would provide for greater equality, one wonders how mandatory such a program would be, and whether it would in effect constitute a mini-guideline regime. Why could the Sentencing Commission not provide for a fuller set of such responses already, as it does with respect to a few technical violations? Alternatively, could the Office of Probation and Pretrial Services not be empowered to set up such a system for its officers, with ultimate power to adopt, modify, or reject vested in a federal judge? What empirical evidence, if any, supports the proposed sanctioning regime? What do we currently know about revocations and their effectiveness, or other sanctions and their impact?

Corbett would opt for administrative imposition of sanctions, short of full revocation. Wroblewski and Douglass and Corbett praise Hawaii's HOPE program, whose short detentions for rule violations are designed to "increas[e] compliance, reduc[e] drug use, and lower[] rates of reoffending." It is a model that avoids excessive sanctions and the "toxic effect" of incarceration, according to Corbett. In fact, he argues for a substantially more limited imposition of probation and fewer conditions in light of the financial expense and opportunity cost.

Despite positive reviews of the HOPE program, further data may be needed on the revocation side to develop an evidence-based model in different jurisdictions. One matter not addressed in this Issue is the proliferation of electronic supervision. Reviews have been positive, but ongoing empirical evaluations will be helpful in assessing who could benefit from such monitoring and for how long—a yet to be explored area. After all, extensive monitoring is likely to lead to the detection of minor or technical violations, which may result in penalties or even revocation.

As much remains to be explored with respect to supervision, solid empirical research, data analytics, and pilot projects provide a promising way forward.

### III. The New Yardstick of Success: Recidivism

The new measure of success is reduction of recidivism, which promises both cost savings and public safety. The focus on recidivism is intuitively appealing but also perplexing as there is no generally accepted definition of the parameters of recidivism. Does it refer to re-arrest, reconviction, or (re)incarceration? Should it be measured at three months, twelve months or three years? Ultimately it will be difficult to measure success if there is no commonly accepted yardstick.<sup>26</sup>

Many U.S. recidivism data sets are based on re-arrest rather than reconviction. Often re-arrest rates combine arrests for a violation of a condition of supervision and for a new offense. This focus appears to reflect limited faith in legal rules and the legal system, with arrests apparently being portrayed as more accurate reflections of re-offending than reconvictions. European recidivism rates, for example, measure only convictions for a new offense, though in some countries violations of conditions of supervision amount to a new offense.

The use of arrest data in the United States is yet more disturbing in light of increasing knowledge of the biases inherent in arrest data. Although a figure indicating that two-thirds of all offenders are being rearrested within three years and three-quarters within five years seems strikingly high for all offenders, the value of this figure may be questionable as it fails to indicate how many of these offenders were released without an adverse finding, how many got reconvicted and for what type(s) of offense, and how many were (re)incarcerated. Ultimately a re-arrest rate tells us little about the danger an individual presents to the community.

Reconviction rates on their own also carry insufficient value as the type and level of reoffense will be important. Some other countries count as recidivism only offenses that are of the same or greater seriousness than the crime for which the offender had been sentenced or imprisoned. If a murderer subsequently commits shop lifting, that makes him a recidivist here but not in some other jurisdictions. Which of these counts is more meaningful depends on the goals of the data collection. (Re-)imprisonment without distinguishing between situations where a new offense occurred as compared with those in which supervision was revoked also appears of questionable value. If 40 percent of federal offenders are returned to prison within three years, the number masks how many of them were returned for supervision violations versus the commission of new offenses.

Some recidivism studies focus on recidivism since release from imprisonment, which includes time under supervision, yet others look at recidivism after release from the entire criminal justice sanction. The latter time period may begin years after release from a criminal justice sanction. Which is the "right" way of collecting data will depend on the purpose of the data collection.

Interestingly, in Britain, as Philip Whitehead discusses, New Labor demanded in the late 1990s that the probation service focus on public protection, which resulted in the service becoming more punitive.<sup>27</sup> The "punitive controlism" tracks similar developments on this side of the Atlantic. Whitehead argues that

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the new approach to probation continues punishment—rather than rehabilitation—in the community, with the ostensible goal of preventing recidivism. The British government even proposed result-based payments to private probation services if offenders desisted from reoffending for twelve months.

Matthew Rowland looks at historical data to assess the likely recidivism of those federal drug offenders released early. He sees drug offenders as largely similar to other offenders under federal supervision, though their antisocial values and their cognitive shortcomings differ somewhat. Because of the presence of a substantial number of criminogenic factors—substance abuse, employment and housing challenges, financial distress, lack of a prosocial network—in addition to values and cognition challenges, he concludes that these offenders require supervision in the community, based on a pre-release risk assessment and release plan and on the employment of the RNR model and evidence-based practices.<sup>28</sup>

Past data indicate that most drug offenders remain arrest-free the first two years after release, allowing for positive predictions for the cohort to be released early. The commission of violent offenses by released drug offenders is strongly correlated to extensive criminal histories and a large number of criminogenic factors. In the end, Rowland appears cautiously optimistic that the new approach to supervision, combined with encouraging recidivism data from federal drug offenders released in the past, will allow for positive results for many of the early released drug offenders.

Despite the focus on recidivism as a marker of success, it is not the only one. Offenders are not defined solely through the absence of offending, but also through positive contributions they make to society in the form of work and the support of family members, both largely absent during imprisonment.

Finally, several pieces in this Issue focus on the fiscal wisdom of current supervision strategies. Fewer returns to prison will lead to savings, clearly a goal in the debate about sentencing reform. Not unlike recidivism, savings and expenses can be counted differently. Equally importantly, what should be the trade-off between recidivism and frugality? Unless we can articulate—and ideally agree on—what and how we measure and what the goals and values of these data points are supposed to be, it is unlikely that the criminal justice system will be meaningfully reformed. Rather, we may find ourselves in the fog of a data battle whose various sides come heavily armed with countervailing data sets and conflicting convictions about what should be more important.

Disagreements over data will not be the only challenge. New methods do not magically erase the enduring challenges of crime and punishment. Even some European countries that have small supervision populations and generally favorable conditions, have recidivism figures around 30 percent.<sup>29</sup> In the United States, the reintegration of offenders may be further hampered by criminal records that restrict their life choices and make them more likely to recidivate. In a number of recent expungement requests arising in the Eastern District of New York, two district court judges have detailed the impact a federal criminal record has had on the women who have applied for expungement. Although only one of the requests was granted, and is now on appeal, the decisions praise the women for leading a crime-free life despite the challenges they have encountered on the employment front, often caused or aggravated by their criminal record, even for relatively minor offenses.<sup>30</sup>

#### IV. Conclusion

Many of the contributors to this Issue imply that the developments described “will require a fundamental change in the American criminal justice system . . .,” as Judge Rodgers puts it. We should not underestimate the challenges inherent in re-making not only supervision but our entire sentencing system. As this Issue demonstrates, however, we are on the way—though much remains to be done. Most importantly, we cannot again forgo decisions on goals, measurements of success, and clear priorities.

#### Notes

- <sup>1</sup> Danielle Kaeble, Lauren Glaze, Anastasios Tsoutis, & Todd Minton, *Correctional Populations in the United States, 2014* (Dec. 2015, rev. Jan. 21, 2016), Bureau of Justice Statics, NCJ 249513 (based on data from yearend 2014). See also Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, Prison Policy Initiative, available at [www.prisonpolicy.org/reports/pie2016.html](http://www.prisonpolicy.org/reports/pie2016.html).
- <sup>2</sup> Of the about 135,000 persons under federal supervision as of September 30, 2015, about 15 percent—slightly over 19,000—were on probation. See *Caseload Statistics Data Tables*, Table E-2, available at [www.uscourts.gov/statistics-reports/caseload-statistics-data-tables](http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables). For a judicial critique of the restrictions on federal probation, see *U.S. v. Dokmeci*, 13-cr-00455 (Gleeson, J.), & *U.S. v. Jakab* 13-CR-00565 (Gleeson, J.), at 23–26 (E.D.N.Y. March 19, 2016).
- <sup>3</sup> On September 30, 2015, the federal probation service had almost 115,000 persons on supervised release. See *Caseload Statistics Data Tables*, Table E-2, *supra* note 2.
- <sup>4</sup> Kaeble et al., *supra* note 1, at 2, Tbl. 1. In 2014, of 4.7 million people under supervision, about 3.85 million—about 83%—were on probation, with 850,000 on parole.

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<sup>5</sup> The two data sets are not fully comparable as not all Council of Europe member states are included in the Robina Data brief.

<sup>6</sup> Concern about the increase in prison terms because of the violation of probation or parole conditions is not restricted to the United States. See, e.g., Nicola Padfield & Shadd Maruna, *The revolving door at the prison gate: Exploring the dramatic increase in recalls to prison*, 6(3) *Criminology & Crim. Just.* 329 (2006) (for a description of similar challenges in England and Wales).

<sup>7</sup> See Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35(1–2) *Law & Policy* 51 (2013), excerpted in this Issue.

<sup>8</sup> According to the U.S. Sentencing Commission, in fiscal year 2015 only 7.2% of all offenders sentenced received solely a probationary term. An additional 2.6% were sentenced to probation and confinement, and 2.9% received a prison/community split sentence. U.S. Sentencing Commission, *2015 Sourcebook of Federal Sentencing Statistics*, Fig. 3 (2015). Despite a limited expansion of Zone B in late 2010, which allows for a split sentence, the rate of probation sentences has decreased. According to the Commission, that is a function of judges continuing to sentence more serious offenders who fall within this category to prison. U.S. Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* 1–2 (May 2015). The Commission labels probation an “alternative” sanction, implying that imprisonment remains the default.

<sup>9</sup> See Dokmeci and Jakab, *supra* note 2, at 23–26.

<sup>10</sup> See Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 *Berkeley J. Crim. L.* 180, 207–17 (Fall 2013); U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release*, Table 1, at 55 (July 2010) (between 2005 and 2009 judges imposed supervised release in approximately 95% of all cases) [hereinafter U.S.S.C., *Supervised Release*].

<sup>11</sup> See also Scott-Hayward, *supra* note 10, at 190–91 (SR has its origin in rehabilitative, not punitive, goals).

<sup>12</sup> See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 *N.Y.U. L. Rev.* 958 (2013). McMurray draws heavily on Doherty’s work.

<sup>13</sup> U.S.S.C., *Guidelines Manual 2015*, § 5B1.3.

<sup>14</sup> Scott-Hayward, *supra* note 10, at 211–12.

<sup>15</sup> A combination of developments in neuroscience, developmental psychology, and technology allow delivery of content to enable self-paced learning in a manner never before possible. These systems can even diagnose academic problems before either the student or the instructor become aware of them. These developments are tied closely to the perceived need for a cheaper delivery of higher education and the desire to assess student competencies more effectively. See, e.g., John C. Cavanaugh, *Personalized College Degrees*, *Inside Higher Ed* (Sept. 11, 2013).

<sup>16</sup> See, e.g., 28(2) *Federal Sentencing Reporter* (Dec. 2015) (primary materials and commentary on the sentencing legislation pending in Congress).

<sup>17</sup> Twenty-two of these courts are presentence drug and problem-solving courts. See Dokmeci and Jakab, *supra* note 2, at 7 (providing statements of reasons for the acceptance of a deferred prosecution agreement and imposition of a non-incarcerative sentence, respectively, and detailing “(2) my policy disagreement with the Guidelines’ failure to encourage diversion programs” and “alternatives to incarceration,” respectively).

<sup>18</sup> See also Michael J. Newman, *A Federal Judge Reflects on Reentry Court*, *Fed. Lawyer* 40 (Dec. 2015).

<sup>19</sup> But see Judge Gleeson’s opinion in Dokmeci, *supra* note 2, at 23–26.

<sup>20</sup> U.S.S.C., *Supervised Release*, *supra* note 10, Fig. 2, at 62 (17.9% of cases were terminated early).

<sup>21</sup> See, e.g., Beth Schwartzapfel, *Parole Boards: Problem and Promise*, 28(2) *Fed. Sent’g Rep.* 81–82 (Dec. 2015). For further articles on parole, see 28(2) *Federal Sentencing Reporter* (Dec. 2015).

<sup>22</sup> Judge Gleeson suggests that the Commission collect and analyze data on alternative courts in the federal system. See Dokmeci, and Jakab *supra* note 2, at 7.

<sup>23</sup> Sue Hall, *Why Probation Matters*, 54(4) *Howard J. Crim. Just.* 321, 323 (Sept. 2015) (citing Fergus McNeill, Peter Raynor, & Chris Trotter, in *Offender Supervision: New Directions in Theory, Research and Practice* (McNeill, Raynor, & Trotter 2010)).

<sup>24</sup> See generally Human Rights Watch, *Profiting from Probation* (Feb. 5, 2014).

<sup>25</sup> See Hall, *supra* note 23, at 330.

<sup>26</sup> See also Steven Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16(1) *Fed. Sent’g Rep.* 1 (Sept. 2003).

<sup>27</sup> See also Gwen Robinson & Pamela Ugwudike, *Investing in “Toughness”: Probation, Enforcement and Legitimacy*, 51(3) *Howard J. Crim. Just.* 300 (July 2012) (these changes caused the probation service to lose legitimacy, led to a clash with traditional values within the service, and ultimately increased cost because of increased returns to prison).

<sup>28</sup> After re-alignment California adopted risk assessments to provide evidence-based services. See Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 *Harv. L. & Pol’y Rev.* 327 (2014).

<sup>29</sup> See, e.g., Jörg-Martin Jehle, Federal Ministry of Justice and Consumer Protection, *Criminal Justice in Germany* 59 (6th ed. 2015).

<sup>30</sup> See *Doe v. United States*, Memorandum & Order, No. 15-MC-1174 (Gleeson, J.) (E.D.N.Y. March 07, 2016); *Stephenson v. United States*, Memorandum & Order, No. 10-MC-712 (Dearie, J.) (E.D.N.Y. Oct. 7, 2015); *Doe v. United States*, Memorandum and Order, 14-MC-1412 (Gleeson, J.) (E.D.N.Y., May 21, 2015), on appeal to the U.S. Court of Appeals for the Second Circuit.