

## COMMENTS

# The Imposition of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law

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### INTRODUCTION

When a federal court sentences a defendant to prison, the judge may choose to impose a term of supervised release.<sup>1</sup> Supervised release is a “system of post-incarceration supervision”<sup>2</sup> designed to help reintegrate defendants into their communities and to protect public safety by requiring that defendants follow conditions advancing these two goals.<sup>3</sup> In making this choice, judges are required by 18 USC § 3553(a) to independently weigh the imposition of discretionary conditions<sup>4</sup> and by 18 USC § 3553(c) to provide reasons for imposing discretionary conditions to ensure that they are tailored to the defendant’s circumstances.<sup>5</sup> Nevertheless, the Seventh Circuit recently observed that sentencing judges regularly fail to fulfill this legal duty by forgoing independent assessments of the

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<sup>1</sup> See 18 USC § 3583(a) (“The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.”).

<sup>2</sup> Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 NYU L Rev 958, 960 (2013).

<sup>3</sup> See *United States v Gementera*, 379 F3d 596, 602 (9th Cir 2004) (explaining that supervised release conditions are designed to protect the public and rehabilitate the defendant). See also *United States v Jeanes*, 150 F3d 483, 485 (5th Cir 1998) (“The supervised release term serves a broader, societal purpose by reducing recidivism.”).

<sup>4</sup> 18 USC § 3553(a) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.”). These purposes include reflection on the seriousness of the offense, respect for law, just punishment, adequate deterrence, protection of the public, and provision of services and treatment to the defendant. See 18 USC § 3553(a).

<sup>5</sup> 18 USC § 3553(c) (“The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.”).

appropriateness of discretionary conditions for individual defendants.<sup>6</sup> In particular, judges appear to frequently impose thirteen discretionary conditions recommended by the United States Sentencing Commission—called “standard conditions”<sup>7</sup>—without considering whether they enhance public safety or rehabilitation in each case.<sup>8</sup>

This practice is troubling because Congress intended supervised release to be curative, not punitive.<sup>9</sup> Since courts already punish defendants with prison sentences, Congress instructed judges to consider only nonpunitive factors when imposing conditions of supervised release.<sup>10</sup> By imposing standard conditions without considering their applicability to particular defendants, courts expand defendants’ liability for violating conditions of supervised release, which can itself carry a new prison term.<sup>11</sup> More fundamentally, unjustified discretionary supervised release conditions unduly restrict defendants’ freedom of association and will probably go unchallenged by most defendants.<sup>12</sup> “[O]nce a defendant is serving supervised release,

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<sup>6</sup> See *United States v Siegel*, 753 F3d 705, 711, 717 (7th Cir 2014) (observing that judges often do not independently evaluate the § 3553(a) factors but instead accept the probation officer’s and counsel’s recommendations). See also Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J Crim L 180, 183 (2013) (“[T]he widespread imposition of supervised release occurs without any apparent consideration of either an individual’s risk to public safety or his or her rehabilitation needs.”).

<sup>7</sup> See United States Sentencing Commission, *Guidelines Manual* § 5D1.3(c) (2014) (“USSG”) (listing the standard conditions of supervised release).

<sup>8</sup> See Doherty, 88 NYU L Rev at 1013 (cited in note 2).

<sup>9</sup> See 18 USC § 3583(c) (outlining the factors that sentencing judges should consider when deciding whether to impose a term of supervised release and excluding from this list § 3553(a)(2)(A), which provides that a sentence should “provide just punishment for the offense”). See also *United States v Kappes*, 782 F3d 828, 836 (7th Cir 2015) (“Supervised release was not intended to be imposed for the purposes of punishment or incapacitation, since those purposes will have been served to the extent necessary by the term of imprisonment.”) (quotation marks omitted); *United States v Murray*, 692 F3d 273, 280 (3d Cir 2012) (noting that the omission of § 3553(a)(2)(A) “reinforces the idea that the primary purpose of supervised release is to facilitate the reentry of offenders into their communities, rather than to inflict punishment”).

<sup>10</sup> See 18 USC § 3583(c). See also note 9.

<sup>11</sup> See Scott-Hayward, 18 Berkeley J Crim L at 182 (cited in note 6) (“On average, one third of [ ] individuals [imprisoned and receiving a term of supervised release] will have their supervised release revoked, most as a result of technical violations, and receive, on average, a new prison sentence of 11 months.”).

<sup>12</sup> See USSG § 5D1.3(c)(8) (“[T]he defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.”); USSG § 5D1.3(c)(9) (“[T]he defendant . . . shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.”). See also *Siegel*, 753 F3d at

he typically finds himself without the right to counsel and may lack the legal sophistication to recognize the potential infirmities in the conditions he has been ordered to obey.”<sup>13</sup> Given these stakes, judicial inattention to discretionary supervised release conditions warrants further inquiry.<sup>14</sup>

This Comment advances the literature on this problem by providing the first examination of sentencing judges’ compliance with § 3553(c) when imposing discretionary conditions of supervised release.<sup>15</sup> In making this contribution, this Comment offers insight into the effectiveness of appellate guidance in mitigating this problem. It appears that appellate guidance has had little effect on sentencing judges’ regular noncompliance with their obligation to provide reasons for imposing discretionary conditions of supervised release and may be an ineffective remedy for this problem.<sup>16</sup> Based on both this observation and consideration of behavioral psychology literature, this Comment argues that the current format of the judgment-and-commitment form used by judges to impose supervised release hinders their ability to fulfill this legal obligation. By presenting standard conditions in boilerplate language on this form, federal courts have established a default format that creates recurring opportunities for judicial noncompliance. Ultimately, this Comment advocates two proposals. First, sentencing judges should eliminate the boilerplate language used to impose standard conditions. Second, sentencing judges should hold follow-up sentencing hearings when they lack adequate information to comply with their sentencing obligations.

This Comment proceeds in three parts. Part I explores the legislative purpose of supervised release and the legal

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711 (“Criminals who court long prison sentences tend to . . . give little weight to future costs and benefits.”).

<sup>13</sup> *Kappes*, 782 F3d at 853.

<sup>14</sup> Moreover, discretionary conditions of supervised release are often overly broad and vague. For a discussion of this problem and a proposed solution, see Part III.A.

<sup>15</sup> Professor Fiona Doherty has previously flagged the existence of this problem but did not examine it in depth. See Doherty, 88 NYU L Rev at 1002 (cited in note 2). Further, previous scholarship has raised general concerns about judges’ failure to explain their reasons for imposing terms of supervised release. See, for example, Scott-Hayward, 18 Berkeley J Crim L at 208–09 (cited in note 6) (finding, in a study of criminal cases in the Eastern District of New York between February and April 2012, that no judge ever “explain[ed] why he or she was imposing supervised release or justifi[ed] the length of the term imposed”). Finally, Judge Richard Posner underscored this problem in a recent judicial opinion. See *Stiegel*, 753 F3d at 707–11.

<sup>16</sup> See Part II.B.

requirements for imposing it. Part II first explains the practical importance of judicial compliance with § 3553(c). It then examines judges' compliance with § 3553(c) and finds that noncompliance is the norm. Part II concludes by explaining the principal factors contributing to judicial noncompliance with this sentencing obligation. After surveying relevant behavioral psychology research, Part III recommends feasible changes to courts' judgment-and-commitment-form and sentencing practices to help alleviate this problem.

#### I. THE PURPOSE AND IMPOSITION OF DISCRETIONARY SUPERVISED RELEASE CONDITIONS

In order to contextualize this Comment's argument, it is important to first consider the congressional intent underlying supervised release and the relevant legal standards and requirements for imposing supervised release. Congress identified the purpose of supervised release and provided the relevant legal standards and requirements in the Sentencing Reform Act of 1984<sup>17</sup> ("Sentencing Reform Act"). A close review of the legislative history reveals that judges' noncompliance with their sentencing obligations implicates the central issues that the Sentencing Reform Act was intended to address: namely, "fairness and certainty in sentencing" and a reduction in sentencing disparities based on defendants' demographic characteristics.<sup>18</sup> By imposing the same thirteen standard conditions on almost all defendants, judges may be creating undesirable sentencing uniformity.<sup>19</sup>

This Part begins by examining Congress's intent in creating supervised release and then describes discretionary conditions that sentencing judges can impose to effectuate Congress's intent. This Part concludes by explaining sentencing judges' statutory obligation to provide reasons for all discretionary conditions of supervised release imposed and by considering a relevant circuit split regarding this obligation.

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<sup>17</sup> Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

<sup>18</sup> *Comprehensive Crime Control Act of 1983*, S Rep No 98-225, 98th Cong, 1st Sess 38, 56-57 (1983), reprinted in 1984 USCCAN 3182, 3221, 3239-40.

<sup>19</sup> Sentencing uniformity can be undesirable if it results from sentencing judges' failure to consider the legal threshold for imposing particular standard conditions in each case. See Part I.B.

### A. The Legislative History of Supervised Release

Aiming to produce fairer sentences and reduce undesirable sentencing inequalities, the Sentencing Reform Act replaced the federal parole system with a supervised release system.<sup>20</sup> In passing the Sentencing Reform Act, Congress importantly altered the timing for when defendants begin postimprisonment supervision. Under the Sentencing Reform Act, defendants first complete their prison sentences and then begin supervised release.<sup>21</sup> This timing diverges from the former probation system because it substitutes portions of defendants' prison sentences with parole, thereby potentially shortening defendants' prison terms.<sup>22</sup> Due to uncertainty as to when defendants would be released from prison, the probation system "sometimes fooled the judges, sometimes disappointed the offender, and often misled the public," and thereby undermined sentencing fairness.<sup>23</sup> To make sentencing fairer, Congress designed supervised release to be nonpunitive and therefore intended that supervised release be imposed only when necessary, rather than as a universal practice.<sup>24</sup>

To this end, the Senate report accompanying the bill specifically explained the purpose of supervised release to assist sentencing judges with identifying defendants who should receive terms. Congress declared that 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

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<sup>20</sup> See S Rep No 98-225 at 37–39 (cited in note 18).

<sup>21</sup> See *United States v Siegel*, 753 F3d 705, 707 (7th Cir 2014).

<sup>22</sup> See USSG § 1A1.3 (describing how the parole system "empower[s] the parole commission to determine how much of the sentence an offender actually would serve in prison").

<sup>23</sup> Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L Rev 1, 4 (1988).

<sup>24</sup> See S Rep No 98-225 at 123 (cited in note 18) ("[T]he question whether the defendant will be supervised following his term of imprisonment is dependent on *whether the judge concludes that he needs supervision*, rather than on the question whether a particular amount of his term of imprisonment remains.") (emphasis added). See also *United States v Kappes*, 782 F3d 828, 836–37 (7th Cir 2015) ("Supervised release . . . giv[es] district courts the freedom to provide postrelease supervision for those, and only those, who need[ ] it. Congress aimed [ ] to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most.").

purposes but still needs supervision and training programs after release.<sup>25</sup>

Supervised release thus imposes high decision costs on sentencing judges because they confront two difficult choices. First, although some statutes dictate that convicted defendants must receive supervised release terms,<sup>26</sup> sentencing judges must otherwise determine whether supervised release should be imposed. This decision requires the sentencing judge to weigh the recommendations of the assigned probation officers and parties' counsel and to assess whether the defendant's public-safety threat and rehabilitation needs indicate that he requires the supervision of probation officers.<sup>27</sup> Second, if the judge decides that a supervised release term should be imposed, he must then consider only the discretionary conditions that can be imposed without making the sentence punitive. As detailed further in Part II.C.1, the fact that this decision is made during sentencing hearings compounds the difficulty of a judge's task because judges often have inadequate information about defendants' postincarceration needs at the time of sentencing. By passing the Sentencing Reform Act, Congress placed a major burden on sentencing judges that requires substantial consideration of defendants' likely postimprisonment situations for supervised release to adhere to congressional intent.

Before discussing discretionary conditions of supervised release, this Section concludes with a typical example of the process for imposing supervised release. In *United States v Glover*,<sup>28</sup> the defendant pleaded guilty to "[p]ossession with intent to distribute heroin" and "[p]ossession of a firearm in furtherance of a drug trafficking crime."<sup>29</sup> At sentencing, the court devoted its attention to determining the defendant's prison sentence and deemed supervised release necessary to protect public safety.<sup>30</sup> The probation officer then recommended that standard conditions of supervised release be imposed, which the sentencing judge agreed to do

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<sup>25</sup> S Rep No 98-225 at 124 (cited in note 18).

<sup>26</sup> See, for example, 21 USC §§ 841(b), 960(b) (detailing mandatory minimum terms for defendants convicted of various drug offenses).

<sup>27</sup> See note 24.

<sup>28</sup> Judgment in a Criminal Case, Criminal Action No 10-00981 (ND Ill filed June 19, 2013) ("*Glover* Judgment and Commitment Order").

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> See Transcript of Sentencing Proceedings, *United States v Glover*, Criminal Action No 10-00981, \*29–31 (ND Ill filed Aug 14, 2013) ("*Glover* Transcript").

without explanation.<sup>31</sup> One week later, the sentencing judge completed the case's judgment-and-commitment order and left untouched the thirteen standard conditions already written on the form.<sup>32</sup>

## B. Discretionary Conditions of Supervised Release

If a sentencing judge determines that a defendant should receive a term of supervised release, the defendant becomes bound upon release from prison both by mandatory conditions of supervised release and by any discretionary conditions that the judge decides to impose.<sup>33</sup> There are eight mandatory conditions: six that apply in all cases,<sup>34</sup> one that applies only to sex offenders,<sup>35</sup> and one that applies only to defendants convicted of domestic violence for the first time.<sup>36</sup> The six generally applicable mandatory conditions specify the following prohibitions and requirements: (1) "the defendant [shall] not commit another Federal, State, or local crime during the term of supervision";<sup>37</sup> (2) "the defendant [shall] not unlawfully possess a controlled substance";<sup>38</sup> (3) "the defendant [shall] cooperate in the collection of a DNA sample . . . if . . . authorized";<sup>39</sup> (4) "the defendant [shall] refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance";<sup>40</sup> (5) the defendant shall pay all fines imposed by the court;<sup>41</sup> and (6) the defendant shall pay restitution

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<sup>31</sup> Id at \*32–33 ("Ms. Fowlie: . . . The Probation Department would also like for him to be ordered to abide by the standard as well as additional conditions of supervised release. The Court: Yes. The defendant shall abide by the standard requirements of supervised release.").

<sup>32</sup> See *Glover* Judgment and Commitment Order at \*3 (cited in note 28).

<sup>33</sup> See USSG § 5D1.3(a); 18 USC § 3583(a), (d).

<sup>34</sup> See 18 USC § 3624(e) (requiring the defendant to pay all fines imposed by the court); 18 USC § 3583(d) (listing four of the six mandatory conditions that apply in all cases); 18 USC §§ 2248, 2259, 2264, 2327, 3013, 3663, 3663A, 3664 (requiring the defendant to pay restitution and an assessment).

<sup>35</sup> See 18 USC § 3583(d) (requiring registration as a sex offender if the relevant state law requires it).

<sup>36</sup> See 18 USC § 3583(d) (requiring attendance at a domestic violence rehabilitation program).

<sup>37</sup> 18 USC § 3583(d).

<sup>38</sup> 18 USC § 3583(d).

<sup>39</sup> 18 USC § 3583(d).

<sup>40</sup> 18 USC § 3583(d).

<sup>41</sup> See 18 USC § 3624(e).

and an assessment imposed by the court.<sup>42</sup> Since a defendant's circumstances might require further supervision beyond these mandatory conditions, sentencing judges have the authority to impose discretionary conditions that are tailored both to the risk a defendant poses to public safety and to his rehabilitative needs.<sup>43</sup>

To assist judges with exercising this authority, the Sentencing Commission recommends fifteen "standard conditions" and fifteen "special conditions" of supervised release.<sup>44</sup> Several of the fifteen standard conditions address the administration of supervised release or appear necessary to advance its purposes while others relate to individual defendants' underlying substantive offenses. The administrative category of standard conditions includes requirements that the defendant "report to the probation officer as directed by the court or probation officer,"<sup>45</sup> "answer truthfully all inquiries by the probation officer,"<sup>46</sup> and "notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer."<sup>47</sup> The second category encompasses requirements that the defendant "work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons"<sup>48</sup> and, "as directed by the probation officer, . . . notify third parties of risks that may be occasioned by the defendant's criminal record."<sup>49</sup> The final category includes requirements that the defendant "not associate with any persons engaged in criminal activity,"<sup>50</sup> "not associate with any person convicted of a felony unless granted permission to do so by the probation officer,"<sup>51</sup> and "not frequent places where controlled substances are illegally sold."<sup>52</sup>

According to the Sentencing Commission, "[s]everal of the [standard] conditions are expansions of the [mandatory] conditions required by statute"<sup>53</sup> and these fifteen standard conditions

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<sup>42</sup> See 18 USC §§ 2248, 2259, 2264, 2327, 3013, 3663, 3663A, 3664.

<sup>43</sup> See USSG § 5D1.3(b).

<sup>44</sup> See USSG § 5D1.3(c)–(e).

<sup>45</sup> USSG § 5D1.3(c)(2).

<sup>46</sup> USSG § 5D1.3(c)(3).

<sup>47</sup> USSG § 5D1.3(c)(11).

<sup>48</sup> USSG § 5D1.3(c)(5).

<sup>49</sup> USSG § 5D1.3(c)(13).

<sup>50</sup> USSG § 5D1.3(c)(9).

<sup>51</sup> USSG § 5D1.3(c)(9).

<sup>52</sup> USSG § 5D1.3(c)(8).

<sup>53</sup> USSG § 5D1.3(c).



“mostly track the [statutorily defined] discretionary conditions of probation.”<sup>54</sup> However, Professor Doherty contends that “[i]n actuality, none of the recommended ‘standard’ conditions are required by statute for supervised release; they are all expansions.”<sup>55</sup> A close reading of § 3583(d) indicates that the fifteen standard conditions are not mandatory under this statute, but that the standard conditions could meet the required criteria for discretionary supervised release conditions under this provision and for discretionary probation conditions under 18 USC § 3563(b). Section 3583(d) provides that “[t]he court may order . . . any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate”<sup>56</sup> so long as such condition:

- (1) is reasonably related to the [background of the offense, the offender, or one of the nonpunitive purposes of sentencing];
- (2) involves no greater deprivation of liberty than is reasonably necessary for the [relevant purposes of sentencing]; and
- (3) is consistent with any pertinent policy statements issued by the Sentencing Commission.<sup>57</sup>

The Sentencing Commission also recommends additional conditions called “special conditions” of supervised release.<sup>58</sup> These include restrictions on a defendant’s possession of weapons, lines of credit, and occupations; participation in substance abuse and mental health programs; and the provision of financial information to probation officers.<sup>59</sup> As intended by the Sentencing Commission, special conditions are less generally applicable because they are tailored to a defendant’s particular circumstances, such as criminal history, health, prison sentence, and danger to the public.<sup>60</sup> In addition to these fifteen special conditions, judges

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<sup>54</sup> United States Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* \*10 (July 2010), archived at <http://perma.cc/WW7Y-MMFC>.

<sup>55</sup> Doherty, 88 NYU L Rev at 1013 (cited in note 2).

<sup>56</sup> 18 USC § 3583(d).

<sup>57</sup> 18 USC § 3583(d). See also *Siegel*, 753 F3d at 707–08, quoting Doherty, 88 NYU L Rev at 1012 (cited in note 2) (paraphrasing the requirements of 18 USC § 3583(d)(1)–(3)).

<sup>58</sup> USSG § 5D1.3(d)–(e).

<sup>59</sup> USSG § 5D1.3(d)–(e).

<sup>60</sup> See USSG § 5D1.3(d)–(e).

have the discretion to “impose special conditions of their own devising, provided the conditions comply with overall federal sentencing policy as stated in 18 U.S.C. § 3553(a).”<sup>61</sup>

For a court to impose a standard or special condition, the sentencing judge must determine that the condition meets the three aforementioned criteria. Determining whether this standard is met for each defendant demands significant attention from sentencing judges—they must make individualized and very fact-intensive decisions for the vast majority of criminal defendants serving prison sentences who also receive terms of supervised release. According to the Sentencing Commission, “[o]ver 95 percent of offenders in each of the sentencing guidelines’ Criminal History Categories (CHCs) I through VI who were sentenced to prison received terms of supervised release [between 2005 and 2009].”<sup>62</sup> The Sentencing Commission’s recommendation of standard and special conditions thus helps reduce the decision costs judges face when deciding which discretionary conditions to impose.

### C. The Explanatory Requirement for Imposing Discretionary Supervised Release Conditions

Along with the statutory requirement that judges independently evaluate the discretionary conditions imposed, Congress created an additional sentencing requirement for judges. In § 3553(c), Congress established a requirement that sentencing judges explain the reasons for imposing discretionary conditions at the time of sentencing: “The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.”<sup>63</sup> This statute “requires the sentencing judge to explain how his sentence . . . comports with the sentencing factors listed in section 3553(a).”<sup>64</sup> Thus, “a district judge is

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<sup>61</sup> *United States v Bryant*, 754 F3d 443, 444 (7th Cir 2014).

<sup>62</sup> USSC, *Federal Offenders Sentenced to Supervised Release* at \*4 (cited in note 54). Excluding criminal convictions for aliens illegally reentering the United States, sentencing judges in the United States District Court for the Northern District of Illinois imposed terms of supervised release on 96.8 percent of the defendants sentenced to serve prison terms from June 19, 2013, to July 18, 2013, and from June 19, 2014, to July 18, 2014. For a discussion of why illegal reentry into the United States was excluded from this calculation, see *id.* at \*60 & n 256. For a critique that supervised release is excessively imposed, see generally Scott-Hayward, 18 Berkeley J Crim L 180 (cited in note 6).

<sup>63</sup> 18 USC § 3553(c). See also *United States v McMillian*, 777 F3d 444, 451 (7th Cir 2015) (explaining that a sentencing judge must give reasons for all of the discretionary conditions he imposes).

<sup>64</sup> *Siegel*, 753 F3d at 711.

required to give a reason, consistent with the sentencing factors in section 3553(a), for . . . any non-mandatory conditions of supervised release,”<sup>65</sup> but he “need not give a speech about each condition.”<sup>66</sup> Merely providing reasons for imposing a term of supervised release violates § 3553(c) when discretionary conditions are also imposed, because such an explanation fails to provide reasons for “the particular sentence” imposed.<sup>67</sup> By requiring that sentencing judges explain the discretionary conditions imposed, § 3553(c) helps ensure that sentencing judges independently evaluate the appropriateness of each condition for a particular defendant.<sup>68</sup>

Although no court has explicitly challenged this explanatory requirement, a circuit split has arisen over whether standard conditions, when not announced by the judge at sentencing, can be implicit in the imposition of supervised release. The First, Second, Sixth, and Ninth Circuits have answered this question in the affirmative,<sup>69</sup> while the Seventh Circuit has rejected this position.<sup>70</sup> While this split does not implicate the explanatory requirement for special conditions, it does create a division among the courts regarding the explanatory requirement for standard conditions. The majority rule effectively absolves judges from the explanatory requirement because sentencing judges probably cannot

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<sup>65</sup> *Bryant*, 754 F3d at 445. Discretionary conditions that are imposed but lack explanations are nonetheless authoritative. See id at 447. In cases in which a defendant appeals particular discretionary conditions that lack explanation, appellate courts appear to vacate defendants’ sentences and remand for resentencing. But judges can restore these conditions with adequate reasons. See *McMillian*, 777 F3d at 452; *Kappes*, 782 F3d at 867.

<sup>66</sup> *Kappes*, 782 F3d at 846.

<sup>67</sup> 18 USC § 3553(c).

<sup>68</sup> For an in-depth discussion of the purpose of § 3553(c), see Part II.A.

<sup>69</sup> See, for example, *United States v Sepúlveda-Contreras*, 466 F3d 166, 169 (1st Cir 2006) (“Defendants are deemed to be on constructive notice for . . . standard conditions announced for the first time in a written judgment, and therefore have no right-to-be-present claim with respect to any such condition.”); *United States v Thomas*, 299 F3d 150, 153 (2d Cir 2002) (“[W]e held that a written judgment does not conflict with an oral sentence where a district court fails to specify conditions of supervised release orally, but nevertheless includes in the written judgment conditions listed as mandatory or standard in U.S.S.G. § 5D1.3(a) or (c).”); *United States v Swanson*, 209 Fed Appx 522, 524 (6th Cir 2006) (“[W]e hold that unless the district court specifically says otherwise, the standard conditions of supervised release are deemed included in the oral sentence.”); *United States v Napier*, 463 F3d 1040, 1043 (9th Cir 2006) (“[I]mposition of . . . standard conditions is deemed to be implicit in an oral sentence imposing supervised release.”).

<sup>70</sup> See *United States v Johnson*, 765 F3d 702, 710–11 (7th Cir 2014) (declaring that conditions specified only in a written order, when other discretionary conditions were specified orally, lack legal authority).

provide reasons for the standard conditions imposed if these conditions are not announced at sentencing. This Comment therefore addresses this circuit split and shows how the judicially created majority rule complicates judges' statutory obligation to independently assess and explain the standard conditions imposed.

The First, Second, Sixth, and Ninth Circuits have offered three distinct justifications for their rule that standard conditions are implicit in the imposition of supervised release. The First Circuit has noted that "standard conditions either impose requirements essential to the basic administration of the supervised release system, or regulate other matters necessary to effect the purpose of supervised release," such that standard conditions necessarily follow from the imposition of supervised release.<sup>71</sup> The Second Circuit has reasoned similarly.<sup>72</sup> Second, the Ninth Circuit has stated that standard conditions "are sufficiently detailed [such] that many courts find it unnecessarily burdensome to recite them in full as part of the oral sentence. For [this] reason, . . . standard conditions [are] deemed to be implicit in an oral sentence imposing supervised release."<sup>73</sup> Third, the Sixth Circuit has interpreted 18 USC § 3583(f) to mean that the sentencing judge "will *not* read at sentencing each of the standard conditions imposed on a defendant, and will leave the administration of supervision to a duly authorized probation officer."<sup>74</sup> Thus, the First and Second Circuits effectively view standard conditions as implicit in the imposition of supervised release as a policy matter. The Ninth Circuit appears to justify this view based on judicial convenience; the Sixth Circuit does so as a matter of statutory interpretation.

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<sup>71</sup> *United States v Tulloch*, 380 F3d 8, 14 n 8 (1st Cir 2004).

<sup>72</sup> See *United States v Truscello*, 168 F3d 61, 63–64 (2d Cir 1999) ("[B]ecause . . . 'standard conditions' imposed . . . are basic administrative requirement[s] essential to the functioning of the supervised release system, . . . they are almost uniformly imposed by the district courts and have become boilerplate. . . . [T]he term 'discretionary' may be a misleading, if technically accurate, modifier for the standard conditions.") (quotation marks omitted).

<sup>73</sup> *Napier*, 463 F3d at 1043.

<sup>74</sup> *Swanson*, 209 Fed Appx at 524, quoting *United States v Crea*, 968 F Supp 826, 830 (EDNY 1997). Section 3583(f) reads as follows:

The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

18 USC § 3583(f).

The First and Second Circuits' arguments are persuasive with respect to the standard conditions that are administrative<sup>75</sup> or necessary to effectuate supervised release.<sup>76</sup> This is because it is likely harmless error for courts to fail to provide reasons for standard conditions.<sup>77</sup> In the context of supervised release, a sentencing judge's failure to provide a reason for a discretionary condition is harmless when the "consistency of [the] condition with the statutory sentencing factors is plain."<sup>78</sup> These statutory sentencing factors include (1) "protect[ing] the public from further crimes of the defendant"<sup>79</sup> and (2) "provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."<sup>80</sup> These two statutory sentencing factors appear consistent with the aforementioned conditions requiring the defendant to communicate with his probation officer, work or attend school, and notify relevant third parties of his public-safety risk. Thus, the First and Second Circuits are justified in treating these conditions as implicit in the imposition of supervised release.

But other standard conditions are neither administrative in nature nor necessarily required for supervised release. For example, § 5D1.3(c)(7)–(9) of the Sentencing Guidelines restricts the places a defendant can visit, the individuals with whom a defendant can interact, and a defendant's alcohol consumption.<sup>81</sup> Ultimately, the reasoning of these four circuit courts is troubling because § 3583(d) requires a case-by-case assessment of non-administrative standard conditions. For some defendants, these

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<sup>75</sup> See text accompanying notes 45–47.

<sup>76</sup> See text accompanying notes 48–49.

<sup>77</sup> The Seventh Circuit appears to have accepted this reasoning. In *Kappes*, the Seventh Circuit ruled that it constitutes harmless error for a sentencing judge to fail to justify standard conditions requiring defendants to (1) notify their probation officers if they have been arrested or questioned by police while on supervised release and (2) not act as informants for criminal investigations without receiving court permission. *Kappes*, 782 F3d at 850–51. Regarding the former condition, the court explained that "[c]learly, this condition assists the probation officer in monitoring the defendant's conduct and compliance with the other conditions of release, most notably, the mandatory condition that the defendant commit no other criminal offenses." *Id.* at 850. The court then reasoned that the latter condition advances the "the rehabilitative and re-integrative goals of supervision." *Id.* at 851 (quotation marks omitted). There remains a circuit split because the Seventh Circuit has not budged from its position that judges are statutorily required to provide reasons for all discretionary conditions imposed. See text accompanying notes 65–67.

<sup>78</sup> *Siegel*, 753 F3d at 713.

<sup>79</sup> 18 USC § 3553(a)(2)(C).

<sup>80</sup> 18 USC § 3553(a)(2)(D).

<sup>81</sup> USSG § 5D1.3(c)(7)–(9).

standard conditions may not be reasonably related to any of the applicable sentencing factors in § 3553(a) and could involve a greater deprivation of liberty than is permissible.<sup>82</sup> For a defendant whose crimes justify more-restrictive standard conditions, the harmless-error doctrine would effectively nullify § 3553(c)—a result that is impermissible as a matter of statutory interpretation.<sup>83</sup> Thus, the harmless-error doctrine should apply only to standard conditions that are administrative in nature or necessary to effectuate the goals of supervised release. Such standard conditions are applicable across all cases and do not demand individualized analyses.

These four circuit courts' reasoning also seems flawed in practice. By allowing standard conditions to be implicit in the imposition of supervised release, these courts have complicated sentencing judges' legal obligation under § 3553(c) to provide reasons for imposing standard conditions. If a sentencing judge implicitly imposes standard conditions after a sentencing hearing, it seems unlikely that he would have provided reasons for all of them at the sentencing hearing. It thus appears that these four circuits have created a rule that enables a sentencing judge to violate § 3553(c) by not providing reasons for standard conditions.

As compared to these circuits, the Seventh Circuit's approach diverges and adopts a more effective way for courts to impose non-administrative standard conditions. The Seventh Circuit has ruled that standard conditions imposed through written judgment-and-commitment orders but not announced orally at sentencing lack legal authority when the following two conditions are fulfilled: (1) other discretionary conditions are explicitly announced at sentencing, and (2) there is an "inconsistency" between the conditions orally announced and written on judgment-and-commitment orders.<sup>84</sup> The Seventh Circuit has used "inconsistency" to characterize additional discretionary conditions or provisions that substantively expand the scope of the defendant's

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<sup>82</sup> See, for example, *Kappes*, 782 F3d at 849 (finding error in the court's failure to provide a reason for the standard condition restricting the defendant's alcohol consumption, because the condition was not connected to the defendant's child pornography offenses).

<sup>83</sup> See *Montclair v Ramsdell*, 107 US (17 Otto) 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U Chi L Rev 800, 815 (1983) ("[L]egislators would rather not have the courts nullify their effort entirely unless the interpretation necessary to save it would pervert the goals of the legislature in enacting it.").

<sup>84</sup> *Johnson*, 765 F3d at 710–11. See also *Kappes*, 782 F3d at 862.

supervision.<sup>85</sup> Under this definition of “inconsistency,” sentencing judges within the Seventh Circuit cannot impose conditions via judgment-and-commitment orders that the judges do not explain at sentencing.

The Seventh Circuit’s approach is persuasive because Federal Rule of Criminal Procedure 35(c) unambiguously defines “sentencing” as “the oral announcement of the sentence.”<sup>86</sup> This means that “[a]ll components of a sentence must be stated in the oral sentence.”<sup>87</sup> Moreover, the Seventh Circuit’s approach sidesteps the pitfalls for noncompliance with § 3553(a) and (c) that are posed by the majority rule. The Seventh Circuit rule avoids creating opportunities for judges either to fail to provide reasons for nonadministrative standard conditions or, more importantly, to fail to independently weigh nonadministrative standard conditions. Ultimately, the disagreement among these circuits creates differences in how sentencing judges impose standard conditions but does not change the fundamental explanatory requirement of § 3553(c).

#### D. Form AO-245B

As noted by other commentators, there is reason to believe that some sentencing judges regularly fail to comply with the explanatory requirement when imposing standard conditions.<sup>88</sup> A significant reason for this noncompliance appears to be that the judgment-and-commitment form issued by the Judicial Conference of the United States to district courts lists the first thirteen standard conditions as preprinted boilerplate text.<sup>89</sup> According to

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<sup>85</sup> See *Johnson*, 765 F3d at 711 (“[T]he district court unambiguously announced several specific conditions of supervised release at Johnson’s sentencing hearing and did not include any statement as to whether other standard conditions would apply. . . . [A]ny new conditions imposed in the later written judgment are inconsistent with the court’s oral order and must be vacated.”); *Kappes*, 782 F3d at 863 (ruling that the addition of a discretionary-condition provision allowing the defendant’s probation officer to examine the defendant’s computer for child pornography was a “nullity” because the judge limited this condition to on-site examination and replication of digital files at sentencing).

<sup>86</sup> FRCrP 35(c). See also *McMillian*, 777 F3d at 451.

<sup>87</sup> *McMillian*, 777 F3d at 451.

<sup>88</sup> See note 15.

<sup>89</sup> See *Judgment in a Criminal Case* \*5 (Administrative Office of the United States Courts, Sept 2011), archived at <http://perma.cc/F2KG-MDX6> (“Form AO-245B”). See also E-mail from Charles W. Hall, Public Affairs Office, Administrative Office of the United States Courts, to Michael Kenstowicz (Oct 29, 2014) (on file with author) (stating that Charles Hall, a spokesperson for the Administrative Office, could not ascertain a reason why form AO-245B does not include standard conditions 14 and 15 within the “Standard

the Administrative Office of the United States Courts, this form, labeled “AO-245B,”<sup>90</sup> can be modified by a sentencing judge to remove the standard conditions as boilerplate language because such a decision falls within the judge’s sentencing discretion.<sup>91</sup> A sentencing judge can implement this change by directing his staff to retype sheet three of form AO-245B, following its current formatting but omitting the boilerplate standard conditions language at the bottom. Indeed, sentencing judges appear to already direct their staffs to make other changes to form AO-245B to meet judicial preferences.<sup>92</sup>

Nevertheless, according to Doherty, “[b]y way of the AO-245B, people on probation and supervised release are mechanically made subject to exactly the same thirteen standard conditions.”<sup>93</sup> In this respect, the Judicial Conference has formatted standard conditions the same way as mandatory supervised release conditions, which are also written on this form when sentencing judges receive it.<sup>94</sup> By contrast, the Judicial Conference has formatted sheet 3C of form AO-245B to require that judges write a list of all special conditions imposed on a case-by-case basis.<sup>95</sup> While the Judicial Conference has not explained its reasoning for this formatting decision, it may have chosen to use boilerplate language for the standard conditions because this default is undemanding of judges’ time and energy. This format enables the supervised release system to continue to function despite the high decision costs associated with justifying all discretionary conditions of supervised release. The mechanical nature of this process and the observations of Judge Posner and Professor Christine Scott-Hayward<sup>96</sup> raise

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Conditions of Supervision” but rather incorporates their language in other sections of the form).

<sup>90</sup> See Form AO-245B at \*1 (cited in note 89).

<sup>91</sup> See E-mail from Hall (cited in note 89) (“All other passages of AO-245B [besides the Statement of Reasons form] may be modified at the discretion of district courts and judges, although courts are strongly encouraged to use the AO form, to ensure uniformity of information and presentation.”). The Statement of Reasons form is an attachment to form AO-245B and is distinct from sheet three of form AO-245B, which contains the boilerplate standard conditions language. If sentencing judges removed the boilerplate standard conditions from their copies of form AO-245, they would still be using the referenced AO form and could still subscribe to its formatting by writing in the standard conditions imposed.

<sup>92</sup> See notes 126–27.

<sup>93</sup> Doherty, 88 NYU L Rev at 1013 (cited in note 2).

<sup>94</sup> See Figure 1. See also USSG § 5D1.3(a) (listing conditions of supervised release).

<sup>95</sup> See Form AO-245B at \*8 (cited in note 89).

<sup>96</sup> See note 15.



concerns that some sentencing judges are failing to comply with their statutory obligation to provide reasons for imposing terms of supervised release.

FIGURE 1. FORM AO-245B, SHEET THREE

| AO 245B (Rev. 09/11) Judgment in a Criminal Case<br>Sheet 3 — Supervised Release  |  | Judgment—Page _____ of _____ |  |
|---|--|------------------------------|--|
| DEFENDANT:  |  |                              |  |
| CASE NUMBER:  |  |                              |  |
| <b>SUPERVISED RELEASE</b>   |  |                              |  |
| Upon release from imprisonment, the defendant shall be on supervised release for a term of :  |  |                              |  |
| <p>The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.</p> <p>The defendant shall not commit another federal, state or local crime.</p> <p>The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.</p> <p><input type="checkbox"/> The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)</p> <p><input type="checkbox"/> The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)</p> <p><input type="checkbox"/> The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)</p> <p><input type="checkbox"/> The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)</p> <p><input type="checkbox"/> The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)</p> <p>If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.</p> <p>The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.</p>   |  |                              |  |
| <b>STANDARD CONDITIONS OF SUPERVISION</b>   |  |                              |  |
| <ol style="list-style-type: none"> <li>1) the defendant shall not leave the judicial district without the permission of the court or probation officer;</li> <li>2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;</li> <li>3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;</li> <li>4) the defendant shall support his or her dependents and meet other family responsibilities;</li> <li>5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;</li> <li>6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;</li> <li>7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;</li> <li>8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;</li> <li>9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;</li> <li>10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;</li> <li>11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;</li> <li>12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and</li> <li>13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.</li> </ol> |  |                              |  |

## II. JUDICIAL COMPLIANCE WITH 18 USC § 3553(c): AN EXAMINATION OF JUDGES' IMPOSITION OF DISCRETIONARY SUPERVISED RELEASE CONDITIONS

This Part evaluates whether judges are complying with their statutory obligation to provide reasons for imposing the first thirteen standard conditions. This issue recently captured the

attention of the Seventh Circuit in *United States v Siegel*.<sup>97</sup> In this case, Judge Posner issued an influential<sup>98</sup> exposé on the “serious problems with how some district judges are handling discretionary conditions of supervised release at sentencing.”<sup>99</sup> He raised the concern that “often judges seem not to look behind the recommendations” made by probation officers for imposing supervised release.<sup>100</sup> In response to this concern, he outlined the challenges that sentencing judges face in giving reasons for discretionary conditions of supervised release and recommended a series of best practices to help judges overcome these challenges.<sup>101</sup> Thus, *Siegel* importantly changed discretionary supervised release conditions from being “all too often an afterthought”<sup>102</sup> to restrictions that judges must provide reasons for imposing—a requirement that the panel explicitly stated three times.<sup>103</sup>

Given *Siegel*'s importance, this Part compares judicial compliance with § 3553(c) pre- and post-*Siegel*. After finding evidence that sentencing judges have failed to significantly improve compliance, this Part then explores why appellate guidance may be ineffective at inducing substantial compliance. This Part concludes by examining the problems mentioned by Judge Posner in *Siegel* that contribute to noncompliance. However, before beginning these tasks, it is important to first consider in greater depth the stakes of judicial noncompliance with § 3553(c).

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<sup>97</sup> 753 F3d 705 (7th Cir 2014).

<sup>98</sup> See William M. Landes, Lawrence Lessig, and Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J Legal Stud 271, 278 (1998). Based on the authors' numbers, the average number of courts of appeals citations per reported court of appeals opinion per year was 7.36 for judges sitting on the court of appeals in 1992 who had been on the bench for at least six years by December 31, 1995. According to Westlaw, *Siegel* was cited in eighteen reported court of appeals opinions in the year since it was issued.

<sup>99</sup> *Siegel*, 753 F3d at 708.

<sup>100</sup> *Id* at 711.

<sup>101</sup> *Id* at 716–17 (recommending that probation officers inform defense counsel of their proposed discretionary conditions two weeks before sentencing hearings, and further instructing sentencing judges to independently assess these conditions according to defendants' particular circumstances, to make the language of the conditions simple, and to hold second sentencing hearings immediately before defendants begin their terms of supervised release).

<sup>102</sup> Jonathan Koenig, *What the Seventh Circuit Did during Your Summer Vacation* (Marquette University Law School Faculty Blog), archived at <http://perma.cc/3DJC-TF7S>.

<sup>103</sup> See *Siegel*, 753 F3d at 707–08, 717.

A. The Stakes: Why Judicial Compliance with § 3553(c) Matters When Imposing Discretionary Conditions

A judge's failure to provide reasons for imposing discretionary conditions is problematic because it increases the likelihood that supervised release will be punitive. As explained in Part I.A, Congress mandated that supervised release not be punitive. However, supervised release becomes punitive when judges impose conditions that do not advance public-safety or rehabilitative goals. If defendants comply with such conditions, courts will have effectively restricted defendants' personal freedoms beyond the extent allowable by Congress. If defendants do not comply with such conditions, courts will have imposed on defendants a risk of possible future punishment for noncompliance. Thus, the explanatory requirement serves as a valuable check by ensuring that sentencing judges independently evaluate the appropriateness of the discretionary conditions imposed.<sup>104</sup>

The case of *United States v Caldwell*<sup>105</sup> illustrates the concern that supervised release may become punitive due to judicial non-compliance with § 3553(c). In this case, the sentencing judge imposed a term of supervised release on a defendant convicted of violating the Clean Water Act for illegally dumping septage into a sewage system and for making false statements to investigators to cover up this fraudulent scheme.<sup>106</sup> The sentencing judge imposed "all of the standard conditions" but did not provide any reasons for imposing them.<sup>107</sup> Since neither the sentencing judge, nor the probation officer, mentioned any substance abuse history,<sup>108</sup> it appears likely that the following standard conditions lacked rehabilitative value for Caldwell and would have failed to improve public safety: "the defendant shall refrain from excessive use of

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<sup>104</sup> See, for example, *United States v Goodwin*, 717 F3d 511, 524 (7th Cir 2013) (vacating a discretionary condition of supervised release "[b]ecause the district court [had] not provided any explanation of how this condition [was] reasonably related to Goodwin's offense and background or to the goals of punishment, involving no greater deprivation of liberty than [was] reasonably necessary to achieve these goals").

<sup>105</sup> Judgment in Criminal Case, Criminal Action No 13-05308 (WD Wash filed Apr 14, 2014) ("*Caldwell* Judgment and Commitment Order").

<sup>106</sup> *Id.* at \*1, 3.

<sup>107</sup> Transcript of Sentencing, *United States v Caldwell*, Criminal Action No 13-05308, \*53–57 (WD Wash filed June 18, 2014).

<sup>108</sup> See generally *id.*

alcohol”<sup>109</sup> and “shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.”<sup>110</sup> This case appears especially troubling because the sentencing judge handwrote changes to the typed special conditions language on this form but left the boilerplate standard conditions language untouched.<sup>111</sup> If the sentencing judge had given the standard conditions the statutorily required level of consideration, it seems unlikely that these two conditions would have been imposed.

Even if Caldwell had a history of substance abuse that justified these conditions, the sentencing judge’s failure to provide reasons for them may undercut defendants’ confidence in the justice of federal sentencing. The Sentencing Commission views supervised release as involving a relationship of trust between the defendant and the court.<sup>112</sup> According to this view, if a defendant violates a discretionary condition, he breaches the court’s trust.<sup>113</sup> By giving reasons for imposing supervised release, sentencing judges can help build this relationship of trust and can preserve the reasoning for their sentences for appellate review.<sup>114</sup> Additionally, the Seventh Circuit has explained that the explanatory requirement helpfully “promote[s] the perception of fair sentencing[ ] and [ ] is a vital element in [ensuring] . . . that the sentencing judge . . . consider[s] every convicted person as an individual.”<sup>115</sup> Thus, justice for individual defendants and the maintenance of public confidence in federal sentencing practices each demand that sentencing judges provide reasons for imposing discretionary conditions of supervised release.

## B. A Look at Judicial Compliance with § 3553(c)

In order to assess *Siegel*’s concern that some sentencing judges may regularly fail to comply with § 3553(c), this Comment compares judicial compliance with this explanatory requirement before and after the Seventh Circuit issued its opinion in *Siegel*.

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<sup>109</sup> USSG § 5D1.3(c)(7).

<sup>110</sup> USSG § 5D1.3(c)(8).

<sup>111</sup> See *Caldwell* Judgment and Commitment Order at \*3–4 (cited in note 105).

<sup>112</sup> See USSG § 7A.3(b).

<sup>113</sup> See USSG § 7A.3(b). See also Tonja Jacobi, Song Richardson, and Gregory Barr, *The Attrition of Rights under Parole*, 87 S Cal L Rev 887, 899–900 (2014).

<sup>114</sup> See *United States v Kappes*, 782 F3d 828, 845 (7th Cir 2015) (identifying one purpose of the explanatory requirement as “allow[ing] for meaningful appellate review”) (quotation marks omitted).

<sup>115</sup> *Id* (quotation marks omitted).

Because the Seventh Circuit decided *Siegel*, this Comment focuses on the judicial behavior of district judges within this circuit. Compared to district judges in other circuits, those within the Seventh Circuit are more likely to be aware of *Siegel* and, more importantly, are bound by it. It is reasonable to believe that this subset of district court judges would be most likely to comply with § 3553(c) post-*Siegel* when imposing discretionary conditions due to the Seventh Circuit's compulsory appellate guidance on supervised release and based on the court's signal that it would be willing to remand cases for noncompliance.<sup>116</sup>

This Comment focuses on the United States District Court for the Northern District of Illinois because it has the largest percentage of the Seventh Circuit's criminal docket of all district courts in that jurisdiction.<sup>117</sup> Because the Seventh Circuit issued *Siegel* on May 29, 2014, this Comment allots a three-week window for district judges in this circuit to become informed of *Siegel*'s dictates. Data was therefore collected on these district judges' impositions of supervised release during the period between June 19, 2014, and July 18, 2014 (hereinafter called "post-*Siegel*"). In order to create a point for comparison, the same data was gathered for the period beginning on June 19, 2013, continuing through July 18, 2013 (hereinafter called "pre-*Siegel*"). Since *Siegel* came "[s]eemingly out of the blue,"<sup>118</sup> there is no reason to believe that district courts anticipated it during the summer of 2013. Thus, this project was designed to create a relatively comparable sample of cases decided by the same group of district court judges during the same calendar period and thereby attempts to eliminate the influence of selection effects.<sup>119</sup>

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<sup>116</sup> See *Siegel*, 753 F3d at 717 ("[T]he cases must be remanded for reconsideration of the conditions of supervised release that we have determined to be . . . imposed without the sentencing judge's having justified them by reference to the sentencing factors in 18 U.S.C. § 3553(a).").

<sup>117</sup> See Administrative Office of the United States Courts, *Table 5.2—US District Courts—Criminal Judicial Facts and Figures* (Sept 30, 2012), archived at <http://perma.cc/QXB9-BX5C>.

<sup>118</sup> Koenig, *What the Seventh Circuit Did during Your Summer Vacation* (cited in note 102). See also Douglas A. Berman and Robert J. Watkins, *Terrific Posnerian Disquisition on Supervised Release Challenges and "Best Practices"* (Sentencing Law and Policy Blog, May 29, 2014), archived at <http://perma.cc/XJ3Q-ZKZF> (discussing the Seventh Circuit's *Siegel* opinion and calling it a "must-read for all who work" in federal criminal law).

<sup>119</sup> A one-month period was chosen for this project because the United States District Court for the Northern District of Illinois has a ninety-day redaction period for transcripts and this project commenced in the fall of 2014.

Due to the costs of obtaining publicly unavailable transcripts of these sentencing hearings,<sup>120</sup> sixteen transcripts were obtained for the pre-*Siegel* period and twenty-three were obtained for the post-*Siegel* period. Although a set of thirty-nine transcripts provides only limited statistical power to measure the effect of *Siegel*, criticism of this data set's size is diminished by this Comment's focus on the judges most likely to comply with § 3553(c) and by this project's review of all ninety-three judgment-and-commitment orders for this set of sentencing hearings. This Comment thus provides insight into judicial compliance with § 3553(c).

### 1. Transcript data.

Sentencing judges imposed standard conditions in thirty-eight of the thirty-nine supervised release terms in this data set.<sup>121</sup> Among these thirty-eight cases, the sentencing judges complied with § 3553(c) by giving reasons for all of the standard conditions imposed in only three cases.<sup>122</sup> In nine other cases, the sentencing judges provided reasons for some but not all of the

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<sup>120</sup> The United States District Court for the Northern District of Illinois charges a minimum of \$3.65 per page for sentencing hearings that have not been transcribed. See United States District Court for the Northern District of Illinois, *Maximum Transcript Rates - All Parties (per Page)* (Jan 26, 2012), archived at <http://perma.cc/CH4X-NULP>. In order to make this project financially feasible, only the sentencing excerpts from hearings were purchased. Court reporters have discretion to transcribe such hearings. They transcribed twenty-two of seventy-six requested sentencing hearing excerpts for this project, and Bloomberg Law provided seventeen publicly accessible full transcripts for sentencing hearings within this period.

<sup>121</sup> In the other term, the sentencing judge imposed special conditions, but the transcript excerpt indicates that he did not impose any standard conditions. Compare Judgment in a Criminal Case, *United States v Kirk*, Criminal Action No 08-00036, \*3 (ND Ill filed July 16, 2014), with Excerpt Transcript of Sentencing Proceedings, *United States v Kirk*, Criminal Action No 08-00036, \*4 (ND Ill July 16, 2014) ("*Kirk* Excerpt Transcript").

<sup>122</sup> See, for example, Transcript of Proceedings - Sentencing, *United States v Chatman*, Criminal Action No 12-00877, \*33 (ND Ill filed July 29, 2014) ("*Chatman* Transcript"):

You shall participate in an approved job training program at the discretion of the probation officer, because I have no record of documented work history in the [presentence report]. . . . I am going to require that you undergo a mental health evaluation and participate in treatment regarding domestic violence if necessary . . . because of the domestic violence conviction in the past and the escalation of behavior.

standard conditions imposed. But in twenty-six cases, the sentencing judges failed to provide reasons for any of the standard conditions imposed.<sup>123</sup>

In comparing compliance with § 3553(c) pre- and post-*Siegel*, sentencing judges gave reasons for imposing standard and special conditions in a higher percentage of terms post-*Siegel*, but these differences are not statistically significant. Compliance remained low post-*Siegel*. For standard conditions, sentencing judges increased their compliance with § 3553(c) from 0 percent to roughly 13 percent. Pre-*Siegel*, sentencing judges gave reasons for all of the special conditions imposed in approximately 14 percent of cases, and this number increased to 29 percent post-*Siegel*.<sup>124</sup> This data corroborates the Seventh Circuit's concern that sentencing judges still do not regularly comply with § 3553(c) when imposing discretionary conditions of supervised release and indicates that *Siegel* failed to induce substantial compliance.

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<sup>123</sup> The publication schedule for this Comment did not allow for harmless-error coding of the imposition of standard conditions. The Seventh Circuit first identified the failure to provide reasons for particular standard conditions as harmless error in *Kappes*, issued on April 8, 2015, but had not previously taken up this judicial task. See, for example, *United States v Bryant*, 754 F3d 443, 445 (7th Cir 2014) (omitting any discussion of harmless error when the sentencing judge failed to give reasons for imposing thirteen standard conditions). In addressing the failure to give a reason for a special condition, the Seventh Circuit has previously ruled that such a failure is harmless when the “consistency of [the] condition with the statutory sentencing factors is plain.” *Siegel*, 753 F3d at 713. Due to space constraints and the difficulty of empirically coding harmless error for special conditions, this Comment leaves for future researchers the task of addressing harmless error in relation to § 3553(c) for discretionary conditions.

<sup>124</sup> Sentencing judges imposed special conditions in thirty-five of the thirty-nine terms in this data set and gave reasons for imposing special conditions in eight of the thirty-five terms (22.9 percent). Two of these eight terms were pre-*Siegel* and the other six terms were post-*Siegel*. Thus, the compliance with § 3553(c) increased from 14.3 percent pre-*Siegel* (compliance in two of fourteen terms) to 28.6 percent post-*Siegel* (compliance in six of twenty-one terms), but this change is not statistically significant based on a Fisher's exact test with a 0.10 significance level (the *p*-value is 0.43, which is not significant at  $p < 0.10$ ).

TABLE 1. THE EFFECT OF *SIEGEL* ON JUDICIAL COMPLIANCE WITH § 3553(C) WHEN IMPOSING STANDARD CONDITIONS

| Transcript Data Set   | Pre- <i>Siegel</i> | Post- <i>Siegel</i>         |
|---|--------------------|-----------------------------|
| Number of Supervised Release Terms in Which Standard Conditions Were Imposed                                  | 15                 | 23                          |
| Number of Supervised Release Terms in Which the Judge Provided Reasons for All Standard Conditions Imposed    | 0<br>(0%)          | 3<br>(13.0%) <sup>125</sup> |
| Number of Supervised Release Terms in Which the Judge Provided Reasons for Some Standard Conditions Imposed   | 6<br>(40.0%)       | 3<br>(13.0%)                |
| Number of Supervised Release Terms in Which the Judge Provided No Reasons for the Standard Conditions Imposed | 9<br>(60.0%)       | 17<br>(73.9%)               |

An interesting correlation emerges from these results between the imposition of standard conditions and compliance with the requirement that judges provide reasons for imposing those conditions. There were only three cases in which the sentencing judges did not impose all thirteen boilerplate standard conditions from form AO-245B and instead imposed particular standard conditions tailored to the defendants' situations.<sup>126</sup> These three cases were also the only ones in which the sentencing judges gave reasons for all of the standard conditions imposed.<sup>127</sup> This observation is unsurprising for two reasons. First, if the sentencing judge

<sup>125</sup> A Fisher's exact test was performed with a 0.10 significance level for standard conditions. The *p*-value is 0.26, which is not significant at  $p < 0.10$ .

<sup>126</sup> See *Chatman* Transcript at \*31–34 (cited in note 122); Transcript of Proceedings - Sentencing, *United States v Charleston-Black*, Criminal Action No 12-00019, \*45–49 (ND Ill filed Aug 6, 2014) (“*Charleston-Black* Transcript”); Excerpt Transcript of Proceedings - Sentencing, *United States v Harris*, Criminal Action No 13-00275, \*11–13 (ND Ill July 10, 2014) (“*Harris* Excerpt Transcript”). The date that the court filed the transcript does not necessarily correlate with the date of the transcribed proceedings, as in *Charleston-Black*. In this case, the court filed the transcript on August 6, 2014, but the proceedings occurred on June 23, 2014.

<sup>127</sup> See *Chatman* Transcript at \*31–34 (cited in note 122); *Charleston-Black* Transcript at \*37–40, 42 (cited in note 126); *Harris* Excerpt Transcript at \*11–13 (cited in note 126).



took time to tailor the standard conditions imposed to the defendant's situation, then the judge would be more likely to exercise meticulous care in justifying the conditions imposed. Second, if the sentencing judge imposed fewer than all thirteen boilerplate conditions, then it would be easier for the judge to justify them because there would be fewer reasons to provide during the sentencing hearing.<sup>128</sup>

## 2. Data for judgment-and-commitment forms.

Although supervised release conditions announced at sentencing are authoritative,<sup>129</sup> the apparent correlation between the imposition of boilerplate standard conditions and noncompliance with § 3553(c) suggests that judgment-and-commitment forms warrant attention. A review of the forms included in this Comment's data set revealed that even for the three terms in which the sentencing judge did not impose all thirteen boilerplate standard conditions at sentencing, the forms for these three terms included all thirteen boilerplate standard conditions.<sup>130</sup> As explained in Part I.C, the additional standard conditions on these forms were not binding, because the sentencing judge declined to impose them orally at the sentencing hearing. Nevertheless, the fact that these three judgment-and-commitment forms contain unissued standard conditions signals the inertia of form AO-245B's format.

Among the ninety-three judgment-and-commitment orders in this data set, there exists only one variation: the language of the second standard condition on twelve judgment-and-commitment forms was changed from "the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer"<sup>131</sup> to "the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month."<sup>132</sup> The distribution of this variation in the language of the second standard condition

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<sup>128</sup> See Part III.A.2.

<sup>129</sup> See text accompanying note 84.

<sup>130</sup> See Judgment in a Criminal Case, *United States v Harris*, Criminal Action No 13-00275, \*3 (ND Ill filed July 17, 2014) ("*Harris* Judgment and Commitment Order"); Judgment in a Criminal Case, *United States v Chatman*, Criminal Action No 12-00877, \*3 (ND Ill filed June 30, 2014); Judgment in a Criminal Case, *United States v Charleston-Black*, Criminal Action No 12-00019, \*3 (ND Ill filed June 25, 2014).

<sup>131</sup> Form AO-245B at \*5 (cited in note 89).

<sup>132</sup> Judgment in a Criminal Case, *United States v Abate*, Criminal Action No 12-00568, \*3 (ND Ill filed June 23, 2014) ("*Abate* Judgment and Commitment Order").

pre- and post-*Siegel* was not statistically significant.<sup>133</sup> The statistical insignificance of this variation in the language of the second standard condition is reinforced by the fact that no sentencing judge in this sample issued orders containing the altered language of the second standard condition post-*Siegel* if he did not already use this altered language pre-*Siegel*. This fact is important because it indicates that no sentencing judge altered the boilerplate standard conditions language on form AO-245B in response to *Siegel*. Besides this variation, all ninety-three orders contain the verbatim language of standard conditions one and three through thirteen in the format of form AO-245B issued by the Judicial Conference. This uniformity indicates that, post-*Siegel*, sentencing judges did not perceive a connection between their statutory obligation to provide reasons for the standard conditions imposed and their formal imposition of these conditions via written judgment-and-commitment orders.

### 3. Qualitative evidence of noncompliance with § 3553(c).

Given this quantitative data, this Comment's qualitative findings signal that, even post-*Siegel*, some sentencing judges may not recognize when they fail to comply with § 3553(c) in imposing discretionary conditions of supervised release. For example, in *United States v Kirk*,<sup>134</sup> the sentencing judge did not provide reasons for imposing standard conditions of supervised release but instead said: "Well, the standard conditions—I know that there's been some law on this recently, but I think in this case, we don't have to worry about it. The standard conditions, remind me, do they require that the defendant stay in the Northern District?"<sup>135</sup> Another sentencing judge initially decided not to impose supervised release but then imposed a term without providing reasons for doing so after the probation officer erroneously instructed the judge that he "ha[d] to give him supervised

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<sup>133</sup> For this Comment's data set, sentencing judges increased their use of the altered language of the second standard condition from thirty-eight of forty-six cases (82.6 percent) pre-*Siegel* to forty-three of forty-seven cases (91.5 percent) post-*Siegel*. A Fisher's exact test was performed with a 0.10 significance level and a two-tailed hypothesis. For the second standard condition, the *p*-value is 0.23, which is not significant at *p* < 0.10.

<sup>134</sup> Excerpt Transcript of Sentencing Proceedings, Criminal Action No 08-00036 (ND Ill July 16, 2014).

<sup>135</sup> *Id.* at \*4.

release.”<sup>136</sup> If the sentencing judge knew of the requirement to provide reasons for imposing supervised release, he presumably would have explained why he changed his decision.

A third sentencing judge imposed “the standard written conditions” on a defendant convicted of illegally reentering the United States after being deported but did not explain why he imposed them.<sup>137</sup> This judge’s decision to impose standard conditions despite his expectation that the defendant would be deported may reflect unfamiliarity with § 3553(c).<sup>138</sup> If the judge had been familiar with § 3553(c), he probably would not have imposed several seemingly unjustifiable standard conditions. Because the defendant was an illegal alien, there would have been no way for him to “work regularly at a lawful occupation.”<sup>139</sup> Furthermore, given the strong likelihood that the defendant would be deported, the defendant seemingly could not comply with the requirement that he “not leave the judicial district without the permission of the court or probation officer.”<sup>140</sup> These qualitative findings suggest that some sentencing judges may not realize their noncompliance with § 3553(c) when imposing discretionary conditions of supervised release.

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<sup>136</sup> Transcript of Proceedings - Sentencing, *United States v West*, Criminal Action No 11-00061, \*23 (ND Ill filed July 31, 2014) (“*West* Transcript”) (initially deciding “not . . . to impose supervised release” but later imposing a term of supervised release when a probation officer told the sentencing judge that he “ha[d] to give him supervised release” after the defendant was convicted under 18 USC § 922(g)(1)). But see 18 USC § 924(e)(1) (stating that mandatory terms of supervised release are not required for felons convicted of possession of firearms under 18 USC § 922(g)).

<sup>137</sup> Excerpt of Proceedings, *United States v Campos-Guzman*, Criminal Action No 13-50052, \*2 (ND Ill June 23, 2014).

<sup>138</sup> See *id.*

<sup>139</sup> Form AO-245B at \*5 (cited in note 89).

<sup>140</sup> *Id.* Among the ninety-three defendants in this project’s data set, four received supervised release terms for illegally reentering the United States. The Sentencing Guidelines recommend 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.” USSG § 5D1.1(c). The judgment-and-commitment orders for these cases do not list convictions for crimes that require the imposition of supervised release. Even more puzzling, for three of these supervised release terms, the sentencing judges imposed a special condition requiring that the defendant remain outside the United States if deported and that he not reenter the United States without obtaining express permission from the Secretary of the Department of Homeland Security. See, for example, Judgment in a Criminal Case, *United States v Campos-Guzman*, Criminal Action No 13-50052, \*4 (ND Ill filed June 23, 2014). This special condition appears to be in significant tension with the Sentencing Guidelines’ recommendation because this condition takes effect only if the defendant is deported.

C. Why Would Sentencing Judges Fail to Comply with § 3553(c)?

As sentencing judges failed to provide reasons for all standard and special conditions in more than 77 percent of supervised release terms post-*Siegel*, this statistic suggests that the problem of judicial noncompliance with § 3553(c) for discretionary conditions is particularly sticky.<sup>141</sup> As discussed above, the format of form AO-245B likely contributes to this problem. By keeping the thirteen standard conditions as boilerplate language on judgment-and-commitment orders, some sentencing judges appear to be imposing the standard conditions without deciding which particular ones should be imposed.<sup>142</sup> This inference creates concern that sentencing judges are violating § 3553(a) and (c) by not actively choosing to impose all thirteen boilerplate standard conditions and are instead merely following the dictates of form AO-245B.

Several other issues also likely contribute to sentencing judges' failure to give reasons for imposing standard conditions: (1) the timing for imposing conditions of supervised release; (2) some judges' reflexive deference to the recommendations of probation officers; (3) the number of discretionary conditions that the Sentencing Commission recommends; and (4) the apparent ineffectiveness of appellate guidance to remedy judicial noncompliance with the explanatory requirement. Each of these four issues will be examined in turn.

1. Timing for imposing conditions of supervised release.

Since courts impose the terms of supervised release at sentencing, "the judge has to guess what conditions are likely to make sense when the defendant is released."<sup>143</sup> By making the thirteen standard conditions the default, judges lower their decision costs for imposing discretionary conditions. These decision costs are relatively high in some circumstances because judges must predict defendants' relative threats to public safety and

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<sup>141</sup> This conclusion is consistent with the findings of literature on default rules. See, for example, Omri Ben-Shahar and John A.E. Pottow, *On the Stickiness of Default Rules*, 33 Fla St U L Rev 651, 682 (2006) (concluding that "[d]efault rules and the standard boilerplate terms may stick more than we think, and more than they should").

<sup>142</sup> This practice occurred in twenty-four terms (63.2 percent) of this Comment's sample in which judges imposed standard conditions.

<sup>143</sup> *Siegel*, 753 F3d at 708.

future rehabilitation needs that are years away. It can be particularly challenging for a sentencing judge to evaluate the likelihood of recidivism for individual defendants. Although there is a significant body of literature on recidivism,<sup>144</sup> “statistical studies are unlikely to enable a confident prediction that a *particular* inmate will or will not commit crimes after he is released.”<sup>145</sup>

To address this issue, several commentators have suggested that judges reconsider supervised release conditions just before a prisoner is released from prison.<sup>146</sup> This suggestion is based on the statutory provision that supervised release conditions can be altered after being imposed.<sup>147</sup> Nonetheless, this proposal is burdensome to judges because of the costs associated with holding second sentencing hearings.<sup>148</sup> Additionally, it fails to remedy the fundamental problem: that supervised release requires judges to predict the appropriate discretionary conditions at sentencing. One sentencing judge described this situation as “being [a] more difficult [position] than that of King Solomon” and lamented the lack of a “crystal ball.”<sup>149</sup> It is thus understandable that some sentencing judges might fail to give reasons for such conditions: they might be choosing to avoid an unenviable task.<sup>150</sup>

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<sup>144</sup> See generally, for example, Francis T. Cullen, Cheryl Lero Jonson, and Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *Prison J Supp* 48S (2011); Cassia Spohn and David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 *Crimin* 329 (2002) (finding no evidence that imprisonment reduces the likelihood of recidivism).

<sup>145</sup> *Siegel*, 753 F3d at 709. Judge Posner further explained that “academic studies of recidivism are unfamiliar to most judges and often difficult for a judge who lacks a social-scientific background to evaluate.” *Id.* at 710.

<sup>146</sup> See, for example, Scott-Hayward, 18 *Berkeley J Crim L* at 222 (cited in note 6); *Siegel*, 753 F3d at 717.

<sup>147</sup> 18 USC § 3583(e)(2) (stating that the court “may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release”).

<sup>148</sup> See *Siegel*, 753 F3d at 708 (“[W]hile it’s true that conditions of supervised release can be modified at any time, 18 U.S.C. § 3583(e)(2), modification is a bother for the judge, especially when . . . modification becomes the responsibility of the sentencing judge’s successor because the sentencing judge has retired in the meantime.”).

<sup>149</sup> Excerpt Transcript of Sentencing Proceedings, *United States v Jackson*, Criminal Action No 11-00747, \*26–27 (ND Ill July 15, 2013) (“*Jackson* Excerpt Transcript”). The Seventh Circuit has expressed a similar exasperation regarding the difficulties in determining the proper discretionary conditions to impose at sentencing. See *Kappes*, 782 F3d at 838 (“A defendant may change substantially during a long prison sentence, and the world outside the prison walls may change even more. A judgeship does not come equipped with a crystal ball.”).

<sup>150</sup> See Transcript of Proceedings - Sentencing Hearing, *United States v Daniel*, Criminal Action No 11-00743, \*125 (ND Ill filed Aug 1, 2013) (“I think a term of supervised release . . . is appropriate in this case, and the reason is I do not know what Mr. Daniel’s

2. Reflexive deference to the recommendations of probation officers.

An additional concern is that judges accept recommended supervised release conditions from probation officers without scrutinizing the appropriateness of these conditions for particular defendants.<sup>151</sup> For example, in two cases from the transcript sample, judges accepted the probation officers' recommendations that standard conditions of supervised release be imposed without further questioning and without providing reasons for imposing them.<sup>152</sup> Generalist judges might defer to probation officers for two reasons. First, probation officers have expertise with supervised release. Second, they are likely to be more knowledgeable than judges of defendants' needs and circumstances after completing presentence reports.<sup>153</sup> Given the difficulty of imposing discretionary conditions, it is rational for judges to rely heavily on the advice of probation officers. This reliance becomes contrary to law only when it results in judges' failure to independently weigh these conditions or provide reasons for the discretionary conditions of supervised release recommended by probation officers.

Another situation presents an opportunity for sentencing judges to sidestep their judicial obligation under § 3553(a) and (c). When the parties agree on appropriate discretionary conditions, the sentencing judge leaves the customary adversarial setting and must assume an unfamiliar position: "imitating a Continental-style investigating magistrate."<sup>154</sup> This circumstance creates an opportunity for sentencing judges to accept the recommendation of particular discretionary conditions without further

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situation will be when he's released."). The judge in *Daniel* justified the imposition of supervised release by explaining that there would be a higher likelihood that the defendant would be able to pay restitution if he were under court supervision. At this sentencing hearing as well as at the hearing in *Jackson*, the sentencing judges failed to give reasons for all of the standard and special conditions imposed. See *id.* at \*121–28; *Jackson* Excerpt Transcript at \*26–35 (cited in note 149).

<sup>151</sup> See *Siegel*, 753 F3d at 709–10. See also *Freeman v United States*, 131 S Ct 2685, 2692 (2011) ("[Federal Rule of Criminal Procedure] 11(c)(1)(C) permits the defendant and the prosecutor to agree that a specific sentence is appropriate, but that agreement does not discharge the district court's independent obligation to exercise its discretion.").

<sup>152</sup> See *West* Transcript at \*23 (cited in note 136); *Glover* Transcript at \*32–33 (cited in note 30).

<sup>153</sup> See *Siegel*, 753 F3d at 710–11 (noting the propriety of giving weight to the recommendations of the probation officer, but also recognizing the limitations of these recommendations).

<sup>154</sup> *Creative Montessori Learning Centers v Ashford Gear LLC*, 662 F3d 913, 917 (7th Cir 2011) (characterizing a judge's position in the context of class action settlements).

inquiry. Nevertheless, this does not seem to be a significant problem, as no judges in this data set accepted negotiated conditions without inquiry, and the Seventh Circuit has characterized this situation as “aris[ing] rarely.”<sup>155</sup>

3. The number of supervised release conditions that the Sentencing Commission recommends.

A third obstacle to judicial compliance with § 3553(c) may be the number of discretionary conditions recommended by the Sentencing Commission. As discussed in Part I.B, the Sentencing Commission recommends fifteen generally applicable standard conditions and fifteen special conditions that apply in more limited circumstances. “The sheer number may induce haste in the judge’s evaluation of the probation service’s recommendations and is doubtless a factor in the frequent failure of judges to apply the sentencing factors in section 3553(a) to all the recommended conditions included in the sentence.”<sup>156</sup> The fact that thirteen of the fifteen standard conditions already appear on form AO-245B likely compounds this problem. Even though judgment-and-commitment orders are issued after sentencing hearings, form AO-245B’s boilerplate formatting of standard conditions may fail to signal to sentencing judges that they did not independently evaluate the recommended conditions.

4. The apparent ineffectiveness of appellate guidance to induce judicial compliance with § 3553(c).

A final reason for judicial noncompliance with § 3553(c) is that courts of appeals may be in a poor position to address this problem because defendants appeal noncompliance infrequently.<sup>157</sup> As part of their plea agreements, some defendants waive their rights to appeal their sentences such that there is no opportunity for appellate review—a result some sentencing judges have recognized.<sup>158</sup> Even if defendants possess the right to

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<sup>155</sup> *Siegel*, 753 F3d at 709.

<sup>156</sup> *Id.* at 708. See also, for example, *Harris* Judgment and Commitment Order at \*4 (cited in note 130) (leaving the word “and” as a stand-alone word by stating that “[t]he defendant shall participate in job skills training while in the Bureau of Prisons. and”).

<sup>157</sup> See text accompanying notes 12–13. See also, for example, *Bryant*, 754 F3d at 447 (noting that the defendant did not challenge discretionary conditions for which the sentencing judge failed to provide reasons).

<sup>158</sup> See, for example, Transcript of Proceedings - Sentencing, *United States v Grinberg*, Criminal Action No 10-00218, \*39, 58 (ND Ill July 10, 2014):

appeal their sentences, many are unlikely to challenge their terms of supervised release due to the “high discount rate”<sup>159</sup> they assign to supervised release. This is likely due to the fact that the terms of supervised release may not begin for many years for defendants who have long prison sentences. Furthermore, some defense attorneys do not contest the failure of the sentencing judge to provide reasons for the discretionary conditions imposed.<sup>160</sup> Given that courts of appeals have few opportunities to provide appellate guidance, some sentencing judges may not be clear on some standard condition provisions<sup>161</sup> or their discretionary nature.<sup>162</sup> In sum, the appeals process may not be an effective mechanism for addressing noncompliance with § 3553(c) due to various collective action problems involving the incentives and choices of sentencing judges, defendants, and counsel.

\* \* \*

Thus, a combination of factors appears to obstruct judicial compliance with § 3553(a) and (c) for discretionary conditions. In many cases, judges seem to lack sufficient information at sentencing to identify all of the discretionary conditions that should be imposed or to give reasons for imposing them. Given this problem, sentencing judges have strong incentives to accept recommendations from probation officers, counsel, and the Sentencing Commission without further consideration and to thereby impose the default standard conditions on judgment-and-commitment forms.

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So in terms of the conditions, I know that all the appeal rights are waived so this is not going to go to Judge Posner to find out whether I complied with this, but I still wanted to have you guys [counsel] take a look at them and tell me if you had any comments.

<sup>159</sup> *Siegel*, 753 F3d at 711 (quotation marks omitted). See also, for example, *West* Transcript at \*26 (cited in note 136) (transcribing a defendant’s statement that he cannot “think that far ahead” to his term of supervised release after being sentenced to a prison term of fifteen years).

<sup>160</sup> See, for example, *Bryant*, 754 F3d at 445–47.

<sup>161</sup> See, for example, Transcript of Proceedings - Sentencing, *United States v Davis*, Criminal Action No 12-00850, \*67–69 (ND Ill filed July 23, 2014) (imposing a term of supervised release and the “normal terms of probation,” which—according to the written judgment-and-commitment order—included the standard condition prohibiting the excessive use of alcohol, despite a finding that the defendant lacked an “alcohol problem”). Prohibitions on the excessive use of alcohol constitute standard conditions adopted by the United States District Court for the Northern District of Illinois. See, for example, *Abate* Judgment and Commitment Order at \*3 (cited in note 132).

<sup>162</sup> See *Kirk* Excerpt Transcript at \*4 (cited in note 134) (asking if a standard condition of supervised release can be waived in the judgment-and-commitment order and stating: “I’ll take a look at the J&C and see if we can just omit . . . a standard [condition]”).



Appellate review appears to be a poor mechanism for fixing this problem because hardly any defendants appeal their sentences on the grounds that the sentencing judges failed to independently evaluate or explain the discretionary conditions imposed. This result means that: (1) sentencing judges have significant incentives to avoid taking up this very challenging task; (2) courts of appeals have few opportunities to remind sentencing judges of this statutory obligation; and (3) some sentencing judges may not be aware of this obligation. Solutions beyond appellate review are therefore needed.

### III. NUDGING SENTENCING JUDGES TO COMPLY WITH 18 USC § 3553(C) FOR DISCRETIONARY SUPERVISED RELEASE CONDITIONS

Given the problems described in Part II.C, the judgment-and-commitment form presents an attractive target to reduce noncompliance with § 3553(c) for standard supervised release conditions. This Comment makes two proposals to nudge sentencing judges toward greater compliance.

First, standard conditions one through thirteen should no longer appear as boilerplate language on form AO-245B. This change would force sentencing judges or their law clerks to actively consider and rewrite the standard conditions imposed on particular defendants and would provide two benefits: (1) defendants would not be subject to standard supervised release conditions without the active choice of the sentencing judge, and (2) judges might hesitate to write standard conditions for which they did not provide reasons at sentencing.

Second, sentencing judges should determine whether to hold a second sentencing hearing by considering their ability to comply with § 3553(c) at a defendant's initial sentencing hearing. This approach would help judges evaluate whether they have sufficient information to give reasons for imposing discretionary conditions and could thereby make supervised release more effective at achieving its curative purposes. Additionally, this approach would likely induce greater judicial compliance with judges' statutory obligation to independently assess the discretionary conditions imposed and to give reasons for them. This Part describes each of these recommendations in greater detail.

A. Removing the Boilerplate Standard Conditions Language on Form AO-245B

This Comment recommends that sentencing judges eliminate the first thirteen standard conditions that appear in boilerplate language on sheet three of their judgment-and-commitment orders. Instead, sentencing judges should write any individually imposed standard conditions on the bottom of sheet three. As explained in Part I.D, judges have the discretion to make this change<sup>163</sup> and it would not constitute an extreme practice, as some sentencing judges have already made alterations to form AO-245B.<sup>164</sup> This recommendation could be implemented by judges authorizing their staffs to redesign sheet three so that the space below the heading “Standard Conditions of Supervision”<sup>165</sup> is blank, which would replicate form AO-245B’s design of the space for imposing special conditions.<sup>166</sup> Sentencing judges would then be encouraged to impose only warranted standard conditions by writing them in this space. This Section proceeds by first presenting the behavioral psychology research informing this recommendation. It then describes the recommendation in greater detail and concludes by considering counterarguments.

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<sup>163</sup> See note 91.

<sup>164</sup> See text accompanying note 132.

<sup>165</sup> Form AO-245B at \*5 (cited in note 89).

<sup>166</sup> See *id.* at \*8. See Figure 2 for the proposed new design of this form.

FIGURE 2. PROPOSED FORMAT OF FORM AO-245B, SHEET THREE

|  |                              |
|--|------------------------------|
| AO 245B (Rev. 09/11) Judgment in a Criminal Case<br>Sheet 3 — Supervised Release   | Judgment—Page _____ of _____ |
| DEFENDANT:<br>CASE NUMBER:   |                              |
| <b>SUPERVISED RELEASE</b>  |                              |
| Upon release from imprisonment, the defendant shall be on supervised release for a term of :   |                              |
| <p>The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.</p> <p>The defendant shall not commit another federal, state or local crime.</p> <p>The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.</p> <p><input type="checkbox"/> The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. <i>(Check, if applicable.)</i></p> <p><input type="checkbox"/> The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. <i>(Check, if applicable.)</i></p> <p><input type="checkbox"/> The defendant shall cooperate in the collection of DNA as directed by the probation officer. <i>(Check, if applicable.)</i></p> <p><input type="checkbox"/> The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. <i>(Check, if applicable.)</i></p> <p><input type="checkbox"/> The defendant shall participate in an approved program for domestic violence. <i>(Check, if applicable.)</i></p> <p>If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.</p> <p>The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.</p> |                              |
| <b>STANDARD CONDITIONS OF SUPERVISION</b>  |                              |

1. Changing routine behaviors to achieve desired outcomes: choice architecture and nudges.

Behavioral psychology literature recognizes that the framework in which an individual confronts a decision can significantly influence his decision.<sup>167</sup> To describe this phenomenon, Professors Richard Thaler and Cass Sunstein developed the idea of “choice architecture”—“the context in which people make decisions”—which can be manipulated to make particular decisions more likely.<sup>168</sup> Choice architectures can be

<sup>167</sup> See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* 36–37 (Yale 2008); Craig R.M. McKenzie and Jonathan D. Nelson, *What a Speaker's Choice of Frame Reveals: Reference Points, Frame Selection, and Framing Effects*, 10 *Psychonomic Bull & Rev* 596, 601–02 (2003).

<sup>168</sup> Thaler and Sunstein, *Nudge* at 3 (cited in note 167).

changed by adjusting “nudges,” influential factors that help shape human behavior.<sup>169</sup> For example, on Chicago’s scenic Lake Shore Drive, the city painted a sequence of lines along the curviest portion of the highway that become closer together as drivers approach the most dangerous part of the curve, which naturally induces drivers to slow down.<sup>170</sup> Thus, choice architects can establish favorable nudges that increase the probability that people will act in particular ways by identifying significant environmental factors that affect human behaviors and by aligning these factors to induce desired behaviors.

Choice architecture can help induce greater deliberation by actors and is especially important for changing routine behaviors.<sup>171</sup> Deliberation can facilitate critical thought that gives actors pause before engaging in habitual behaviors and can thereby alter actors’ perspectives on how particular tasks should be performed.<sup>172</sup> Such deliberation can be prompted by nudges that require actors to make choices instead of providing a familiar default option.<sup>173</sup> Creating nudges that force actors to make choices is particularly significant when an actor intends to deviate from routine behaviors but experiences significant time constraints.<sup>174</sup> In circumstances with high decision costs, possible choice fatigue, or a low probability of undesirable consequences, laboratory experiments suggest that decisionmakers have a high likelihood of choosing a default option that allows them to devote minimal energy to their decisions.<sup>175</sup>

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<sup>169</sup> Id at 8.

<sup>170</sup> See id at 37–39.

<sup>171</sup> See Tilmann Betsch, et al, *Oops, I Did It Again—Relapse Errors in Routinized Decision Making*, 93 *Org Behav & Hum Dec Processes* 62, 72 (2004).

<sup>172</sup> See Tilmann Betsch, Klaus Fiedler, and Julia Brinkmann, *Behavioral Routines in Decision Making: The Effects of Novelty in Task Presentation and Time Pressure on Routine Maintenance and Deviation*, 28 *Eur J Soc Psychology* 861, 875–76 (1998).

<sup>173</sup> See Thaler and Sunstein, *Nudge* at 86 (cited in note 167).

<sup>174</sup> See Betsch, et al, 93 *Org Behav & Hum Dec Processes* at 70–72 (cited in note 171) (discussing the effect of time constraints on decisionmaking).

<sup>175</sup> See Thaler and Sunstein, *Nudge* at 34–39, 83 (cited in note 167); Emir Kamenica, *Behavioral Economics and Psychology of Incentives*, 4 *Ann Rev Econ* 427, 437–38 (2012) (describing experiments showing “how choice fatigue increases the appeal of default options”); Paul M. Smeets, Simon Dymond, and Dermot Barnes-Holmes, *Instructions, Stimulus Equivalence, and Stimulus Sorting: Effects of Sequential Testing Arrangements and a Default Option*, 50 *Psychological Rec* 339, 350–52 (2000) (explaining that the introduction of a default option allowing test participants to skip problems that they found “impossible-to-solve” resulted in most participants skipping or answering incorrectly assigned matching problems).

The following study aptly illustrates the impact of opt-in and opt-out choice architectures on human behavior.<sup>176</sup> Researchers examined the effect of changing enrollment in 401(k) savings plans from opt-in to opt-out procedures at a large company in the health insurance industry.<sup>177</sup> Researchers found that 49 percent more employees participated in 401(k) savings plans when subjected to the opt-out procedure in comparison to employees of the same tenure cohort that were subjected to the opt-in procedure.<sup>178</sup> The researchers suggested that this drastic behavioral difference may result from individuals' preference for the default option when faced with a complicated decision and the significant effect of choice architecture on human decisionmaking.<sup>179</sup> Ultimately, the researchers interpreted this finding as a signal that "economically significant changes in savings behavior can be motivated simply by the 'power of suggestion.'"<sup>180</sup>

2. How sentencing judges can use choice architecture and nudge theory to achieve routine compliance with § 3553(a) and (c) for standard conditions.

Eliminating the standard conditions as boilerplate language on form AO-245B will likely nudge judges to be more deliberative in considering the value of particular standard conditions to an individual defendant's situation. If forced to write the standard conditions imposed on a case-by-case basis, it seems less likely that conditions lacking in public safety and rehabilitative value will be imposed, because judges will have to actively choose which conditions to impose. The current format of sheet three hinders judicial compliance with § 3553(c) because this format compounds incentives for judges not to provide reasons for imposing standard conditions. By the time that the sentencing judge reaches the discretionary-conditions portion of a defendant's sentence, the judge has reached one of his last sentencing decisions and confronts a difficult decision that likely entails a very low

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<sup>176</sup> See generally Brigitte C. Madrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q J Econ 1149 (2001).

<sup>177</sup> *Id.* at 1151–52.

<sup>178</sup> *Id.* at 1159–60.

<sup>179</sup> See *id.* at 1179–82 (positing that the "endowment effect," "procrastination," and "anchoring" of a decision reference point impacted the different 401(k) plan participation rates).

<sup>180</sup> Madrian and Shea, 116 Q J Econ at 1184 (cited in note 176).

probability of reversal.<sup>181</sup> Given these difficult circumstances, the boilerplate nature of the standard conditions language effectively creates an attractive “implicit endorsement”<sup>182</sup> from the Judicial Conference to impose the first thirteen standard conditions and move on.

This situation thus calls for a nudge that aligns the default of form AO-245B with § 3553(c) by making sentencing judges give reasons for the standard conditions that they impose. This Comment’s suggested formatting change would “force the choosers to make their own choice”<sup>183</sup> by preventing judges from imposing the first thirteen standard conditions without evaluating which ones are appropriate to impose. As a result of this change, judges would not be able to rely on the boilerplate language as a low-cost default. Instead, judges would be nudged to engage in deliberation over which standard conditions should be imposed and possibly to consider which conditions they lack sufficient information to justify.

Several possible critiques of this proposal come to mind. First, a critic might claim that removing the standard conditions in boilerplate language will not make a significant difference in sentencing judges’ explanations for or impositions of standard conditions and will therefore unnecessarily increase decision costs in sentencing. This critique is bolstered by this Comment’s finding that sentencing judges failed to comply with the explanatory requirement when imposing special conditions of supervised release in roughly 77 percent of cases.<sup>184</sup> Since the practice of writing special conditions has not resulted in significant compliance with § 3553(c), this Comment’s proposal that sentencing judges write out standard conditions may therefore seem unlikely to improve judges’ compliance with § 3553(c) for standard conditions.

In response to this critique, the increased decision costs constitute the burden of legally complying with § 3553(a) by making independent judgments of the appropriateness of recommended conditions. The increase in decision costs should not be overly burdensome, because judges can still easily consider the imposition of standard conditions by referring to the list in USSG § 5D1.3(c). More importantly, behavioral psychology research

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<sup>181</sup> See Part II.C.4.

<sup>182</sup> Thaler and Sunstein, *Nudge* at 35 (cited in note 167).

<sup>183</sup> *Id.* at 86.

<sup>184</sup> See Part II.C.

suggests that changing the boilerplate language on the form would facilitate judicial compliance with the statutory requirement to independently weigh the standard conditions imposed. Even if some judges develop a habit of writing “all standard conditions apply,” they will have engaged in some deliberation before initially establishing this routine and will have the opportunity to deviate when completing each new judgment-and-commitment order. Changing the boilerplate language might thus alter sentencing judges’ path dependence in imposing standard conditions.

At the very least, if this change were made, it would be unlikely that the thirteen boilerplate standard conditions would be imposed in almost all supervised release terms, as they are now. As described in Part II.B, the only terms of supervised release in which sentencing judges complied with § 3553(c) were those in which the sentencing judge did not impose all thirteen boilerplate standard conditions. While by no means a panacea, it seems likely that this change would improve compliance, which this Comment’s data support. Sentencing judges complied with § 3553(c) for special conditions in roughly 15 percent more terms than they did for standard conditions.<sup>185</sup> Given the severity of this problem and the low costs associated with this suggestion, this proposal constitutes a worthwhile change for sentencing judges to try.

A second critique of this proposal is that it would be more efficient to place “yes” and “no” boxes next to each standard condition on sheet three of form AO-245B instead of forcing sentencing judges to write standard conditions longhand. This task, however, is valuable because it gives judges greater opportunity to adjust the language of standard conditions to tailor it to defendants’ situations and make the language more precise than if boxes were merely checked.<sup>186</sup> There is a much larger choice set for a sentencing judge who imposes standard conditions by writing them out than by checking boxes. Furthermore, checking boxes sometimes fails to stimulate thoughtful decisionmaking. In one case reviewed when creating this Comment’s sample, a judge

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<sup>185</sup> Compare Table 1, with note 124.

<sup>186</sup> See, for example, *United States v Baker*, 755 F3d 515, 524 (7th Cir 2014) (acknowledging that the defendant should not have to abstain from all alcohol, but also noting that requiring the defendant to refrain from excessive use of alcohol was too vague a condition to impose). See also A.V. Muthukrishnan and Robin Chark, *Choice Set Induced Conflict, Deliberation, and Persistent Preference* \*10 (Springer Science+Business Media, Jan 7, 2014), archived at <http://perma.cc/G9HW-CEHJ> (“[W]hen people are asked to deliberate before making their decisions, the degree of persistence [for a particular preference] depends on the degree of conflict induced by the choice sets.”).

checked two boxes to impose a mandatory condition and a special condition of supervised release, despite ordering that the defendant not serve a term of supervised release.<sup>187</sup> In another case, the judge checked a box to impose a discretionary condition of supervised release, but then rewrote the condition almost verbatim in the “additional supervised release terms” section of the judgment-and-commitment form.<sup>188</sup> Checking boxes therefore does not appear to be an effective substitute for writing out standard conditions of supervised release.

The proposed change would also help mitigate a related problem: discretionary conditions whose language is overly broad or vague. The Seventh Circuit has explained that “conditions of supervised release must make clear what conduct is prohibited . . . as well as the scope of the provisions.”<sup>189</sup> Sentencing judges nevertheless impose overly broad<sup>190</sup> or vague<sup>191</sup> discretionary supervised release conditions in a nonnegligible number of cases. This issue is concerning because it creates more opportunities for probation officers to abuse their power in enforcing supervised release conditions: “The depth of probation officers’ discretion, exercised largely behind closed doors, [ ] raises all the old concerns about disparity in punishment among defendants. It also raises the possibility of the unequal treatment of minorities, the poor, and the politically powerless.”<sup>192</sup> It is plausible that the first recommendation proposed in this Comment can have the effect of reducing these concerns by nudging sentencing judges and their

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<sup>187</sup> See Judgment in a Criminal Case, *United States v Burnes*, Criminal Action No 12-00162, \*3 (ND Ill filed June 25, 2013).

<sup>188</sup> See *Harris* Judgment and Commitment Order at \*3–4 (cited in note 130).

<sup>189</sup> *Baker*, 755 F3d at 529.

<sup>190</sup> See, for example, *United States v Benhoff*, 755 F3d 504, 506 (7th Cir 2014) (vacating a supervised release condition that prohibited a convicted transporter of child pornography from possessing “sexually stimulating material” because this ban was not narrowly tailored to the defendant’s criminal conduct); *United States v Ramos*, 763 F3d 45, 60–63 (1st Cir 2014) (amending a supervised release condition prohibiting a sex offender from accessing the Internet without permission from a probation officer because of a lack of evidence that the sex offender used the Internet for criminal purposes).

<sup>191</sup> See, for example, *Baker*, 755 F3d at 524 (noting the ambiguity in supervised release conditions prohibiting a defendant from consuming an “excessive” amount of alcohol or purchasing “mood altering substances” and ruling that these conditions did “not pass muster”); *Siegel*, 753 F3d at 712, 715 (finding a supervised condition prohibiting a sex offender from possessing any material containing “nudity” to be a “muddle” and questioning whether a supervised condition prohibiting the consumption of “mood altering substances” applies to blueberries).

<sup>192</sup> Doherty, 88 NYU L Rev at 1014 (cited in note 2).



law clerks to more carefully weigh supervised release conditions and their language.

B. Holding a Brief Hearing Immediately Before the Defendant Begins Supervised Release

Given the challenging timing for imposing supervised release, commentators have proposed that sentencing judges hold brief hearings immediately before defendants begin supervised release to reconsider its imposition.<sup>193</sup> These commentators argue that, after defendants complete their prison sentences, sentencing judges will have significantly better information for determining the appropriate conditions of supervised release. However, as explained below, existing proposals capturing this idea are flawed because they are likely infeasible and inefficient.<sup>194</sup> This Comment advocates for a more measured approach that addresses these concerns as well as a fundamental problem underlying judges' noncompliance with § 3553(a) in many cases: the absence of helpful information at sentencing about defendants' relative risks to public safety and their rehabilitation needs upon leaving prison. When judges have access to such information, they confront lower decision costs in independently weighing discretionary conditions and are therefore more likely to comply with their statutory obligations.

This Comment recommends that when imposing terms of supervised release, sentencing judges should evaluate whether they have sufficient information to justify all of the discretionary conditions under consideration. If they lack this information, then sentencing judges should impose only the conditions for which they have sufficient information and then decide whether they should issue an order under § 3583(e)(2) to mandate that the defendants return to court immediately before beginning supervised release.<sup>195</sup> Sentencing judges should decline to hold these additional sentencing hearings if they believe that there will still be insufficient information to impose additional conditions that they are considering. In these situations, sentencing judges should not impose such conditions because Congress intended that supervised release be imposed at sentencing and not be punitive.<sup>196</sup> This recommendation works in

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<sup>193</sup> See notes 146–50 and accompanying text.

<sup>194</sup> See notes 199–202 and accompanying text.

<sup>195</sup> See notes 146–47 and accompanying text.

<sup>196</sup> See note 9. See also text accompanying note 86.

tandem with this Comment's first suggestion. If sentencing judges modify form AO-245B as previously suggested, they are more likely to become aware that they lack sufficient information to justify the imposition of certain discretionary conditions, which is critical to implementing this second recommendation.

If the sentencing judge were to determine that a second sentencing hearing was warranted, the judge would then have the opportunity to modify the discretionary conditions imposed based on the best available information about the defendant's public-safety risk and rehabilitative needs. This information would enable the judge to comply with § 3553(a) by independently and informedly assessing the other discretionary conditions considered at sentencing. This information would also enable the judge to comply with § 3553(c) because he would be able to decisively explain or reject any additional conditions considered at sentencing that he did not impose due to uncertainty about the defendant's postimprisonment state. This approach would simplify judges' sentencing decisions by "structur[ing] the complex choice"<sup>197</sup> that imposing and explaining discretionary conditions poses. If sentencing judges follow this procedure, they would have less reason to feel that tailoring supervised release to a defendant's individual circumstances constitutes a task requiring a crystal ball or one more difficult than that facing King Solomon.<sup>198</sup>

This suggestion improves on past proposals in two ways: (1) it remedies judicial noncompliance with § 3553(c), and (2) it is more efficient and practical than a blanket requirement that follow-up hearings occur for all terms of supervised release. A previous commentator has suggested that when sentencing judges impose terms of supervised release, they should impose the maximum term and then decide at a postimprisonment hearing whether to shorten or eliminate the term.<sup>199</sup> The Seventh Circuit has similarly proposed that judges hold second sentencing hearings immediately before defendants begin supervised release so that judges can reconsider the conditions imposed.<sup>200</sup> These proposals are incomplete because they fail to respond to the challenge for judges of providing reasons at sentencing for the supervised release conditions imposed. In addition, it may be

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<sup>197</sup> Thaler and Sunstein, *Nudge* at 94 (cited in note 167).

<sup>198</sup> See *Jackson* Excerpt Transcript at \*26–27.

<sup>199</sup> See Scott-Hayward, 18 *Berkeley J Crim L* at 222 (cited in note 6).

<sup>200</sup> See *Siegel*, 753 *F3d* at 717.

unrealistic to expect sentencing judges to hold second sentencing hearings on their own initiative for all cases in which supervised release is imposed. Given federal judges' incentives<sup>201</sup> and the frequency with which defendants receive terms of supervised release,<sup>202</sup> a more moderate approach to reconsidering supervised release terms is necessary.

This Comment's approach diverges from previous suggestions by grounding the sentencing judge's decision regarding a second sentencing hearing on whether he has adequate information in the initial hearing to give reasons for imposing discretionary conditions of supervised release. Thus, this framework can be conceptualized as an adaptation of the Hand Formula for supervised release:<sup>203</sup> the sentencing judge compares the cost ( $C$ ) of holding a second sentencing hearing to the product of the value ( $V$ ) of better information regarding the defendant's risk to public safety and rehabilitation needs and the probability that this information will exist ( $P$ ). This calculation tracks § 3553(c) by directing the sentencing judge to consider whether he has the necessary information to give reasons for imposing discretionary conditions of supervised release. If the judge believes that this information will likely be available at a second sentencing hearing, then this realization would signal to the judge that  $PV > C$ . In such a case, the judge would then order that the defendant appear at an additional sentencing hearing immediately before beginning his term of supervised release. Ultimately, this approach is advantageous because it efficiently allows sentencing judges to avoid second sentencing hearings when they conclude either that (1) they have sufficient information to give reasons for imposing all necessary discretionary conditions at sentencing, or that (2) a second sentencing hearing is unlikely to produce additional information that would justify additional discretionary conditions.

In response to this proposal, several counterarguments deserve consideration. First, it may be unrealistic to think that sentencing judges are capable of knowing  $P$  or  $V$  and, even if they

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<sup>201</sup> See Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 36, 48–50 (Harvard 2013) (“We expect leisure preference to play a greater role in judicial than in most other employments because of life tenure and the invariability of the judicial salary to performance.”).

<sup>202</sup> See note 62 and accompanying text.

<sup>203</sup> See *United States v Carroll Towing Co*, 159 F2d 169, 173 (2d Cir 1947) (detailing a similar approach that weighs the burden of preventing harm against the harm's probability and magnitude).

are, that they can adequately compare  $PV$  to  $C$ . Judge Learned Hand recognized the difficulty of estimating  $P$ ,<sup>204</sup> and scholars have recently recognized the inherent value judgment of appraising  $V$ , which in this case is the difference between the information available before and after a defendant serves prison time.<sup>205</sup>

In response to this counterargument, the values of  $P$ ,  $V$ , and  $C$  can be estimated and compared through sentencing judges' determinations of whether they have sufficient information to impose all of the discretionary conditions that they believe are necessary. Within this framework,  $P$  represents judges' relative confidence that there will be additional information at the second sentencing hearing for imposing a necessary discretionary condition, while  $C$  is the cost to the judge of holding the second sentencing hearing. Finally,  $V$  can be evaluated by the sentencing judge based on the length of the defendant's prison sentence and the defendant's background and circumstances. Although none of these variables can be precisely measured, sentencing judges can weigh them when determining the discretionary conditions that should be imposed, just as judges have used "the method [that the Hand Formula] capsulizes . . . to determine negligence ever since negligence was first used as a standard of liability in accident cases."<sup>206</sup> By adopting this perspective, judges can not only comply with § 3553(a) and (c) but also make the system of supervised release more effective and efficient.

A second counterargument is that this proposal presumes that sentencing judges would be willing to create more work for themselves by holding additional sentencing hearings, which may not be realistic. In response to this counterargument, there are two other important incentives that erode judicial hesitance to hold second sentencing hearings. First, judges generally exhibit reversal aversion because they dislike the probable increase in their workload from "rehearing a case or rebutting criticism that accompan[ies] a reversal."<sup>207</sup> Second, judges generally desire the

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<sup>204</sup> See *Moisan v Loftus*, 178 F2d 148, 149 (2d Cir 1949) ("[O]f these factors care is the only one ever susceptible of quantitative estimate, and often [it] is not. . . . [A]lthough probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries.").

<sup>205</sup> See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 Vand L Rev 813, 818–19 (2001) (stating that the Hand Formula requires value judgments and discussing some frameworks within which to make them).

<sup>206</sup> Richard A. Posner, *Economic Analysis of Law* § 6.1 at 194 (Aspen 9th ed 2014).

<sup>207</sup> Epstein, Landes, and Posner, *Behavior of Federal Judges* at 49 (cited in note 201).

“internal satisfaction of feeling that [they are] doing a good job.”<sup>208</sup> These countervailing incentives might motivate some judges to hold second sentencing hearings when there would be adequate information at the second hearing to independently assess and give reasons for discretionary conditions.<sup>209</sup> By tying the decision regarding second sentencing hearings to these two other incentives, judges will likely be much more willing to order such hearings and thereby improve their compliance with § 3553(a) and (c).

#### CONCLUSION

Although not legally deficient, form AO-245B contributes to a potential pitfall for judicial noncompliance with § 3553(a) and (c) by listing the first thirteen standard conditions in boilerplate language. This default formatting and the challenging timing for imposing supervised release together induce sentencing judges to routinely impose standard conditions without considering their appropriateness. This Comment found that in 73.9 percent of supervised release terms in which standard conditions were imposed, sentencing judges failed to give reasons for imposing them despite a trifecta of explicit reminders from the Seventh Circuit. This conclusion and data point “are a reminder that it is not enough for Congress to declare an action an obligation for the action to be undertaken. The obligations have to be designed in ways that speak to the incentives of the actors in the legal system who will undertake the desired action.”<sup>210</sup>

Behavioral psychology research suggests that removing the boilerplate standard conditions could help remedy this problem by forcing sentencing judges to more actively consider the conditions’ merit and by reminding judges that they need to give reasons for imposing such conditions. Moreover, federal judges’ incentives suggest that their decisions to hold follow-up sentencing hearings should be conceptually tied to their ability to comply with § 3553(a) and (c) at sentencing. This Comment’s contribution

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<sup>208</sup> Id at 48.

<sup>209</sup> This theory of judicial behavior is consistent with the previous discussion of judicial incentives because it posits that sentencing judges are willing to perform additional work when doing so will make it easier to make hard decisions and follow the law.

<sup>210</sup> M. Todd Henderson and William H.J. Hubbard, *Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior*, 44 J Legal Stud \*21 (forthcoming 2015), archived at <http://perma.cc/WB9A-QY7P>. The Seventh Circuit has underscored this point. See *United States v Kappes*, 782 F3d 828, 867 (7th Cir 2015) (“A sentencing judge might be tempted to conclude that the imposition of discretionary conditions of supervised release is more trouble than it is worth.”).

nonetheless rests on one final question: Why would sentencing judges follow these suggestions when they have failed to adhere to mandatory appellate guidance?

Although judges may not follow this Comment's recommendations, there are several reasons to be hopeful. First, sentencing judges might find this Comment's proposed approach for second sentencing hearings more feasible than that of the Seventh Circuit.<sup>211</sup> This Comment's approach results in the burden of such hearings not for every term of supervised release but rather only when doing so would be efficient. Second, moving into 2015, the Seventh Circuit has continued to admonish sentencing judges who ignore the requirement of providing reasons for imposing standard conditions and are unlucky enough to have their cases appealed.<sup>212</sup> Since "[j]udges do not like having their decisions reversed by higher courts,"<sup>213</sup> some sentencing judges may no longer be willing to take the chance that litigants may appeal their cases. Third, as the Seventh Circuit recently observed, "sentencing judge[s] might be frustrated with the task of navigating the maze"<sup>214</sup> associated with imposing supervised release. They may be looking for ways to make this task more manageable. For these reasons, sentencing judges may be receptive to this Comment's practical advice about how they can improve their compliance with § 3553(a) and (c).

These recommendations may be especially attractive to some sentencing judges who are unfamiliar with provisions of standard conditions, their discretionary nature, and the explanation requirement. These judges presumably have a greater desire to follow § 3553(c) than judges who have knowingly violated this statute. Ultimately, sentencing judges should write all standard conditions and focus on the sufficiency of information available at sentencing so that they are more likely to follow the law.

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<sup>211</sup> See Part III.B.

<sup>212</sup> See *United States v McMillian*, 777 F3d 444, 451 (7th Cir 2015); *Kappes*, 782 F3d at 867.

<sup>213</sup> Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 *SMU L Rev* 469, 477 (1998).

<sup>214</sup> *Kappes*, 782 F3d at 867.