Escaping from Release: Is Supervised Release Custodial under 18 USC § 751(a)?

Mica Moore†

INTRODUCTION

Supervised release is a relatively new form of postincarceration monitoring. After a defendant has completed a prison term, the sentencing court may provide for his release, contingent on the defendant's continued adherence to a series of conditions over a set period of time.[1] These conditions vary widely. They may include simple conditions, such as reporting requirements, or more complex conditions, such as a requirement that the defendant "make reasonable efforts to obtain a GED or high school diploma" while on release.[2] Congress created supervised release to replace federal parole, intending release to serve "rehabilitative ends, distinct from those served by incarceration,"[3] without perpetuating the sentencing disparities experienced under the parole system.[4] In 2010, a US Sentencing Commission report noted that almost one million individuals had received sentences that included a term of supervised release.[5]

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† BA 2014, Columbia University; JD Candidate 2017, The University of Chicago Law School.

1 See 18 USC § 3624(e):

> The term of supervised release commences on the day the person is released from imprisonment. . . . A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.

Additionally, "a probation officer [ ] shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court." 18 USC § 3624(e).

2 *United States v McKissic*, 428 F3d 719, 721, 724 (7th Cir 2005).

3 *United States v Johnson*, 529 US 53, 59 (2000).

4 See S Rep No 98-225, 98th Cong, 1st Sess 39–41 (1983), reprinted in 1984 USCCAN 3182, 3222–24 ("Comprehensive Crime Control Act Report").

5 *Federal Offenders Sentenced to Supervised Release* *3 (United States Sentencing Commission, July 2010), archived at http://perma.cc/9Y25-PEST.

It is quite common for releasees to miss scheduled meetings, disobey curfews, or otherwise violate their release conditions.[6] When this happens, sentencing judges may redress defendants' violations with a variety of sanctions. Judges may even revoke release and sentence the offender to a prison sentence lasting for the duration of the original release term.[7] In addition, some releasees have also been charged with the independent crime of escape.[8] Because escape is a felony punishable by up to five years in prison,[9] plus up to three years of supervised release,[10] an independent conviction for escape may significantly lengthen a defendant's time under criminal-justice supervision.

It is unclear, however, whether and in what circumstances violating release conditions constitutes an "escape" under the federal statute. Unlike certain state statutes, which narrowly proscribe escape from correctional institutions or from the custody of specific state officers,[11] the federal escape statute, 18 USC § 751(a), broadly prohibits escape from "any custody under or by virtue of any process issued under the laws of the United States."[12] The escape statute does not define "custody," and no Supreme Court case has provided direct guidance. Because supervised release may take many different forms, ranging from physical confinement to minimal reporting requirements, it is unclear when, if ever, defendants on release are in federal custody under § 751(a) and are thus capable of committing escape.

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6 Id at *63. A study conducted by the United States Sentencing Commission found that "technical violations accounted for the majority (51.6 percent) of all [supervised release] violations from 2005 to 2008." The study defined technical violations as "includ[ing] lesser infractions" such as failing to report to a supervising officer and nonpayment of fines. Id at *67–68.

7 See 18 USC § 3583(e)(3).

8 See *Federal Offenders* at *21 n 108, 68 (cited in note 5).

9 18 USC §§ 751(a), 3559(a)(4).

10 See 18 USC §§ 3559(a)(4), 3583(b)(2).

11 See, for example, Mass Ann Laws ch 268, § 16 (criminalizing escapes from "any jail or correctional institution," "any courthouse," "the custody of any officer [ ] while being conveyed to or from said institution," and other forms of custody). In other instances, the scope of "custody" for escape purposes is defined through a narrowing judicial construction. See, for example, *White v Commonwealth*, 591 SE2d 662, 667 (Va 2004) ("[I]t is clear that for purposes of prohibiting an escape under Code § 18.2–479, the General Assembly must have intended that the term 'custody' would include a degree of physical control or restraint under circumstances other than those also necessary to constitute an actual custodial arrest."); *Davis v Commonwealth*, 608 SE2d 482, 484 (Va App 2005) (applying the definition articulated in *White* and concluding that a defendant released on bond was not in custody within the meaning of the escape statute).

12 18 USC § 751(a).

The federal courts of appeals have traced the contours of this issue in a series of cases involving defendants required to reside in halfway houses as a condition of supervised release. The defendants leave the facility and are charged with escape. Circuits disagree as to whether such halfway house stays are custodial under § 751(a). In deciding these cases, many circuits define custody using expansive legal rules that are not tethered to the presence of physical or institutional restraints. These broad constructions of custody may have serious implications for other location-based forms of supervised release—for example, conditions requiring defendants to wear GPS devices, to adhere to curfews, or to remain within a judicial district unless granted permission to leave by their supervising officer.[13] One important concern is that this expansive understanding of escape will increase the length and punitiveness of prison sentences, turning supervised release from a tool to facilitate reentry into a powerful new driver of incarceration.

This Comment begins in Part I by discussing salient aspects of the Sentencing Reform Act of 1984[14] (SRA) and Congress's replacement of parole with supervised release. Part II.A explores the circuit split over whether defendants who are ordered to reside in halfway houses pursuant to supervised release conditions are in custody for purposes of § 751(a); Part II.B discusses key weaknesses inherent in the circuits' approaches. Finally, Part III draws on the history of the federal escape statute as well as the structure and function of supervised release to propose a rule that supervised release violations are categorically noncustodial under § 751(a).

I. THE SENTENCING REFORM ACT

Before exploring the special challenges that supervised release poses to the application of § 751(a), it is necessary first to provide some background on why Congress created supervised release in the first place. This Part places supervised release in its appropriate context as one part of a wider sentencing reform scheme. It also outlines some of the specific issues that supervised release was intended to resolve.

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13 The Sentencing Guidelines recommend that judges impose this last restriction as a standard condition of supervised release. United States Sentencing Commission, *Guidelines Manual* § 5D1.3(c)(1) (Nov 1, 2015) ("USSG").

14 Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

A. The Creation of Supervised Release

Congress passed the SRA in 1984 to enact widespread reforms to the criminal-justice system. Before the SRA, federal sentencing consisted of an indeterminate system in which power was principally divided among three authorities.[15] First, Congress possessed broad authority to set sentencing ranges for specific federal crimes, typically in the form of maximum sentences.[16] Second, sentencing judges had broad discretion to choose a sentence within the statutory range, based on their individualized assessments of the facts of the crime and the defendant's personal characteristics.[17] Third, the United States Parole Commission controlled sentences from the back end by selecting eligible prisoners for release, conditioned on their continued fulfillment of certain requirements.[18] Theoretically, the discretion vested in parole authorities to replace incarceration with conditional release acted as an administrative check on the discretion of sentencing judges to impose prison sentences.[19]

This indeterminate sentencing regime fell into disrepute throughout the 1960s and 1970s.[20] Commentators criticized the system for producing disparate sentences between similar defendants.[21] Importantly, desire for sentencing reform was driven by dissatisfaction with the perceived arbitrariness of both sentencing

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[15] See Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U Pa L Rev 297, 298–301 (1974) (defining indeterminate sentencing as a process in which actual time to be served is determined by both a judge and an administrative board against the background of a statutory mandate).

[16] See Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 225 & n 7 (1993).

[17] William W. Berry III, *Discretion without Guidance: The Need to Give Meaning to § 3553 after* Booker *and Its Progeny*, 40 Conn L Rev 631, 635–36 (2008).

[18] Parole Commission and Reorganization Act § 2, Pub L No 94-233, 90 Stat 219, 219 (1976), codified at 18 USC § 4201 et seq, repealed by the Comprehensive Crime Control Act of 1984 § 218, Pub L No 98-273, 98 Stat 1976, 2027.

[19] See, for example, *United States v Addonizio*, 442 US 178, 187–90 (1979) (discussing the relationship between sentencing judges and the Parole Commission).

[20] See, for example, Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv L Rev 904, 915–29 (1962). See also generally, for example, Stanley A. Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan L Rev 405 (1968); Marvin E. Frankel, *Criminal Sentences: Law without Order* (Hill & Wang 1973).

[21] See, for example, Weigel, 20 Stan L Rev at 406–10 (cited in note 20). But see Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 106–12 (Chicago 1998) (questioning the accuracy of pre-SRA studies demonstrating sentencing disparities).

judges and the Parole Commission.[22] Theoretically, parole promoted rehabilitation by allowing authorities to release prisoners who made sufficient progress while incarcerated, thus incentivizing prisoners to participate in vocational and educational programs.[23] By the 1980s, Congress believed that this model was a failure.[24] Parole merely perpetuated sentencing disparities by conditioning release upon rehabilitation—an amorphous concept.[25] The Parole Commission applied agency guidelines inconsistently, and it appeared to be unable to rationally determine when offenders were rehabilitated and therefore suited for release.[26]

In addition, rather than acting as a check on sentencing discretion, the availability of parole gave district court judges perverse incentives. To retain control over sentencing, judges would occasionally oversentence defendants, such that the earliest parole date would coincide with the sentence length the judge believed the defendant deserved.[27] For example, a judge who believed that a defendant deserved five years in prison could exert some level of control over his release date by sentencing the defendant to a fifteen-year term without early parole eligibility. Without early release, the prisoner would become parole eligible by statute after serving one-third of his sentence.[28] But this introduced a

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22 See *Comprehensive Crime Control Act Report* at 38–41 (cited in note 4) (criticizing the "unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence"); William W. Wilkins Jr, Phyllis J. Newton, and John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 Wake Forest L Rev 305, 308–10 (1993).

23 *Comprehensive Crime Control Act Report* at 40 (cited in note 4).

24 Id.

25 See id ("We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.").

26 See id at 38, 48. See also Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U Ill L Rev 231, 236 (noting that "[c]onservatives and law enforcement interests" supported determinate sentencing because "parole boards seemed often to release prisoners who continued to pose a danger to society," and judges seemed "reluctant to send 'marginal defendants' to prison"); William J. Genego, Peter D. Goldberger, and Vicki C. Jackson, Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L J 810, 826 & n 82 (1975) ("Extensive social science research strongly suggests that rehabilitation—defined as an increasing likelihood of successful adjustment upon release—cannot be observed, detected or measured.").

27 See *Comprehensive Crime Control Act Report* at 112–13 (cited in note 4). See also Stefan R. Underhill, *Did the Man I Sentenced to 18 Years Deserve It?* (NY Times, Jan 23, 2016), online at http://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html (visited Jan 31, 2016) (Perma archive unavailable) (offering a description of this phenomenon by a federal district judge).

28 See 18 USC § 4205(a), repealed by the Comprehensive Crime Control Act of 1984 § 218(a)(5), 98 Stat at 2027.

level of uncertainty to the system, as the defendant would receive the judge's intended sentence only if the Parole Commission's assessment of the prisoner, as well as the prisoner's conduct while incarcerated, perfectly aligned with the sentencing judge's prediction.

Congress passed the SRA to shift sentencing to a more rule-like and uniform regime, thus reducing perceived sentencing disparities and promoting transparency in sentencing.[29] Although the Sentencing Guidelines are the most studied manifestation of this new sentencing philosophy,[30] the abolition of federal parole was also a critical element of this shift. The SRA prospectively abolished parole for federal prisoners sentenced for offenses committed on or after November 1, 1987.[31] Only federal prisoners sentenced prior to this date remain eligible for parole.

Congress, however, did not entirely abandon the goal of postincarceration supervision. In fact, Congress observed an anomaly in the parole system: assuming that parole truly facilitated reentry, those most in need of monitoring would not receive it.[32] Specifically, better-behaved inmates would be granted parole, receiving supervision in lieu of their remaining prison time, even if they did not actually need assistance.[33] Conversely, inmates who behaved poorly would not be paroled. These inmates would serve longer prison terms but would not receive any postincarceration monitoring.[34]

Congress created supervised release to ameliorate these problems. Supervised release would "ease the defendant's transition into the community after the service of a long prison term" and "provide rehabilitation to a defendant who has spent a fairly short period in prison . . . but still needs supervision and training

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29 *Comprehensive Crime Control Act Report* at 65 (cited in note 4):

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system. . . .
>
> . . . The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain.

30 See generally, for example, Paul J. Hofer and Mark H. Allenbaugh, *The Reason behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am Crim L Rev 19 (2003); Charles J. Ogletree Jr, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv L Rev 1938 (1988).

31 See Sentencing Reform Act §§ 218(a), 235(a)(1), 98 Stat at 2031, as amended by Sentencing Reform Amendments Act of 1985 § 4, Pub L No 99-217, 99 Stat 1728, 1728.

32 See *Comprehensive Crime Control Act Report* at 122–23 (cited in note 4).

33 Id.

34 Id.

programs after release."[35] Unlike parole, supervised release would be entirely independent of the preceding prison term, helping defendants acclimate to life outside of prison without simultaneously facilitating arbitrariness in sentencing.[36]

B. The Structure of Supervised Release

Supervised release is a form of postconfinement monitoring. After a defendant is sentenced to a prison term, the sentencing court may, and under certain circumstances must,[37] require a term of supervised release that begins after the prison term is completed.[38] Similar to probationers, individuals on supervised release are monitored by the US Probation Office.[39] Releasees and probationers are subject to similar conditions.[40]

Supervised release differs structurally from other conditional release systems, such as parole (which is still common at the state level) and probation. Most importantly, supervised release is not an alternative to incarceration, but a separate and additional period of monitoring concerned with facilitating the reintegration of the defendant into the community. By contrast, a parolee agrees to abide by a set of conditions in exchange for release from prison. And similarly, a judge may sentence a defendant to either a probation term or a prison term, but not both.[41] Supervised release must *follow* imprisonment; it cannot be imposed on its own.[42] These differences reflect the rehabilitative character of release by fully disaggregating the punitive and transitional phases of a defendant's sentence.[43]

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35 Id at 124.

36 However, for an argument that supervised release restored indeterminate sentencing, see generally Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 NYU L Rev 958 (2013).

37 Supervised release is occasionally statutorily mandated. See, for example, 21 USC § 841(b) (setting out mandatory release terms for certain drug offenses).

38 18 USC § 3583(a).

39 18 USC § 3601.

40 See 18 USC § 3563(b) (listing permissible probation conditions); 18 USC § 3583(d) (incorporating § 3563(b) in listing valid supervised release conditions).

41 18 USC § 3561(a)(3).

42 18 USC § 3583(a) (authorizing courts to include a term of supervised release to commence "after imprisonment"). See also Doherty, 88 NYU L Rev at 998 (cited in note 36) (noting that supervised release is "a discretionary supplement to prison, not a sentence in its own right"); *United States v Johnson*, 529 US 53, 59 (2000) ("The objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release.").

43 See *Johnson*, 529 US at 59 ("Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.").

This distinction also has important legal consequences. For example, circuits uniformly hold that supervised release terms may extend a defendant's total time under criminal-justice supervision beyond the statutory maximum number of years permitted for imprisonment. Because release terms are independent monitoring periods rather than elements of the direct sentence, they are not subject to these statutory caps.[44]

These structural features may also be understood in part as rectifying procedural deficiencies that Congress identified in the parole system. Congress previously criticized the then-existing sentencing framework for permitting judges to play guessing games with parole officials, attempting to calibrate sentences to their predictions of when the prisoners would be granted parole.[45] By contrast, district court judges impose supervised release terms during the initial sentencing, thus consolidating sentencing authority in the district court judge and limiting the number of individuals with discretionary control over a defendant's sentence.

Further, supervised release is generally restricted to fixed terms not to exceed one, three, or five years, depending on the severity of the offense.[46] Under the parole system, defendants were supervised for whatever length of time they had remaining on the balance of their sentence. Supervised release was intended to create a more transparent system, with each defendant receiving a fixed term of supervision at the outset of his sentence rather than through later administrative hearings.[47]

Defendants are required to abide by a set of conditions while on release. Some of these conditions are statutorily mandated and

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[44] See *United States v Work*, 409 F3d 484, 489–90 (1st Cir 2005) (collecting cases from the Second, Fourth, Fifth, Eighth, Ninth, Tenth, and DC Circuits).

[45] *Comprehensive Crime Control Act Report* at 112–13 (cited in note 4).

[46] 18 USC § 3583(b) (setting supervised term limits, except as otherwise provided by statute). But see *United States v Moriarty*, 429 F3d 1012, 1023–25 (11th Cir 2005) (per curiam) (holding that a lifetime term of supervised release imposed for a sex offense did not violate the Eighth Amendment); *United States v Pettus*, 303 F3d 480, 487 (2d Cir 2002) ("There is no constitutionally imposed limit on how long a supervised release term can be."). Sex offenders have the highest rate of revocation for technical violations—perhaps due to the prevalence of lengthy release terms that increase the difficulty of perfect compliance. See *Federal Offenders* at *68 (cited in note 5).

[47] See *Comprehensive Crime Control Act Report* at 123 (cited in note 4) ("Unlike [under] current parole law, the 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.").

universal for all defendants.[48] For example, all individuals on supervised release must refrain from committing further crimes and must not unlawfully possess any controlled substances.[49] In addition, district courts have significant discretion to create individualized conditions, so long as they (1) are "reasonably related" to a list of sentencing factors; (2) "involve[ ] no greater deprivation of liberty than is reasonably necessary"; and (3) are "consistent with [ ] pertinent policy statements issued by the Sentencing Commission."[50] The district court may modify or eliminate release conditions throughout the term[51] and may terminate the term early for good behavior.[52]

Several developments have called the nonpunitive nature of supervised release into question. First, Congress expanded the list of factors that judges must look at when making these decisions. These factors are drawn from the wider list of considerations that judges must look at when choosing a prison sentence.[53] Originally, Congress excluded both punishment and incapacitation from the list, in line with the distinct aims of release.[54] In 1987, Congress added incapacitation to the list, directing judges to consider the need "to protect the public from further crimes of the defendant" in creating release terms.[55] This revision undermines the transitional aims of supervised release by permitting judges to focus on continued seclusion rather than defendants' reintroduction into the community. Today, judges may consider incapacitation not only in choosing the appropriate prison sentence length, but also in defining the terms of the defendant's release.

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48 18 USC § 3583(d) (listing standard release conditions).

49 18 USC § 3583(d).

50 18 USC § 3583(d).

51 18 USC § 3583(e)(2).

52 18 USC § 3583(e)(1) (authorizing a sentencing judge to terminate a release term after one year if "such action is warranted by the conduct of the defendant released and the interest of justice").

53 See 18 USC § 3553(a) (listing factors for consideration such as "the nature and circumstances of the offense and the history and characteristics of the defendant"; "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct . . . [and] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment . . ."; the Sentencing Guidelines; policy statements issued by the Sentencing Commission; "the need to avoid unwarranted sentence disparities"; and "the need to provide restitution to any victims of the offense").

54 See *Comprehensive Crime Control Act Report* at 125 (cited in note 4) ("The term of supervised release . . . may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment.").

55 Sentencing Act of 1987 § 9, Pub L No 100-182, 101 Stat 1266, 1267, codified at 18 USC § 3583(e)(1).

Second, Congress added specific procedures courts could use to revoke release.[56] Even without revocation, judges have a great deal of flexibility in dealing with violations of supervised release conditions. If a defendant violates a term of supervised release, the sentencing judge may continue the term without alteration, impose additional conditions, or extend the term of supervised release.[57] Initially, Congress did not believe that minor violations of release conditions should result in a resentencing of the defendant and thus declined to create a revocation process.[58] Congress envisioned that district courts would instead use contempt proceedings to redress repeated or serious violations.[59] If the defendant committed a new offense while on release, it was assumed that either a prosecution for that offense or a court order for contempt would sufficiently redress the violation.[60] For technical violations, the judge could make release conditions more severe, rather than returning the defendant to prison.[61]

Today, in addition to sustaining, extending, or adding conditions to the original release term, judges may also revoke release entirely and sentence the defendant to imprisonment for all or part of the originally authorized supervised release term without credit for time previously served on release.[62] Many commentators argue that the inclusion of revocation as a penalty reintroduced punishment into release's aims, turning supervised release from a rehabilitative measure to a punitive form of conditional release more akin to parole.[63] Many of these additional features appear to fly in the face of Congress's initial aim of creating a system in which "a prisoner has completed his prison term when

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56 See Anti-Drug Abuse Act of 1986 § 1006(a)(3)(D), Pub L No 99-570, 100 Stat 3207, 3207-6 to -7, codified as amended at 18 USC § 3583(e)(3).

57 See 18 USC § 3583(e)(2)–(3).

58 *Comprehensive Crime Control Act Report* at 125 (cited in note 4) ("Unlike a term of probation, however, the term of supervised release is not subject to revocation for a violation. Instead, for the usual violations, the term or condit[i]ons of supervised release may be amended pursuant to subsection (e).").

59 Id.

60 Id.

61 See id at 59 (suggesting that offering sentencing options aside from imprisonment may avoid unwarranted restrictions on liberty).

62 18 USC § 3583(e)(3).

63 See, for example, Doherty, 88 NYU L Rev at 1000–04 (cited in note 36) ("[T]he possibility of revocation made supervised release indisputably about punishment, oversight, and coercion."); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J Crim L 180, 201–04 (2013) (analyzing the effect of supervised release on defendants and concluding that release does not advance public safety or rehabilitative goals).

released even if he is released to serve a term of supervised release."[64] Instead of fixed prison terms followed by fixed periods of monitoring, revocation creates possibilities for further imprisonment at indeterminate points in the future. Although revocation may serve rehabilitative purposes by removing defendants from release who are likely to reoffend, revocation also allows defendants to be reimprisoned for violating conditions that proscribe otherwise-legal behaviors. Stated otherwise, revocation permits offenders to be imprisoned for failing to progress, eroding the barrier between the rehabilitative and punitive phases of a sentence.[65]

Importantly, while supervised release may constitute punishment as a descriptive matter, judges still consider supervised release to serve predominately rehabilitative goals.[66] It is for this reason that courts have held that sentencing defendants to lifetime terms of supervised release does not violate the Eighth Amendment.[67] The Second Circuit has gone a step further, observing in dicta that "[t]here is no constitutional limit on how long a supervised release term can be."[68] These decisions are premised on the idea that the stakes are lower for a defendant who is subject to rehabilitative monitoring, and that supervised release should therefore be subject to reduced constitutional scrutiny.[69] It is important to keep these decisions in mind when examining the

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64 *Comprehensive Crime Control Act Report* at 58 (cited in note 4).

65 See, for example, *United States v Nolan*, 109 F Supp 2d 350, 351–52 (ED Pa 2000) (imposing a revocation penalty of ten months' imprisonment on a defendant who failed to report to five scheduled meetings with his supervising officer and failed to enter a drug-treatment program, in violation of the terms of his supervised release); *United States v McCauley*, 102 F Supp 2d 271, 271–72 (ED Pa 2000) (revoking release for a defendant who tested positive for cocaine and alcohol).

66 See, for example, *Johnson*, 529 US at 60 ("In the instant case, the transition assistance ordered by the trial court required respondent, among other conditions, to avoid possessing or transporting firearms and to participate in a drug dependency treatment program. These conditions illustrate that supervised release, unlike incarceration, provides individuals with postconfinement assistance."); *Tapia v United States*, 131 S Ct 2382, 2390 (2011) ("[W]hen Congress wanted sentencing courts to take account of rehabilitative needs, it gave courts the authority to direct appropriate treatment for offenders. Thus, the SRA instructs courts, in deciding whether to impose probation or supervised release, to consider whether an offender could benefit from training and treatment programs.").

67 See *Moriarty*, 429 F3d at 1023–25 (holding that a lifetime term of supervised release imposed for a sex offense did not violate the Eighth Amendment, citing the transitional aims of release); *United States v Williams*, 636 F3d 1229, 1232–34 (9th Cir 2011) (same).

68 *Pettus*, 303 F3d at 487.

69 See, for example, *Williams*, 636 F3d at 1232 ("[A]lthough supervised release limits a criminal's liberty and privacy, it is a punishment far less severe than prison."); *Pettus*, 303 F3d at 486 (noting that while "supervised release is technically a punishment, . . . it is primarily intended to protect the public from further crimes by easing the re-entry of a convicted defendant into society").

penalties that defendants may permissibly incur for violating the terms of their release. If the penalties for condition violations are severe, then the stakes are in reality quite high for defendants on release, given that they may be subject to lifetime monitoring.

C. The Uncertain Custodial Status of Supervised Release

Given the quasi-rehabilitative, quasi-punitive, and occasionally quasi-incapacitative character of supervised release, should persons on release be considered to be in federal custody? This question is quite important. A defendant's custodial status may determine when his criminal sentence begins,[70] how long his sentence lasts,[71] whether various sentencing enhancements apply to him,[72] and whether he may seek habeas relief.[73]

Similarly, a defendant's custodial status determines whether he may be charged with escape. 18 USC § 751(a) codifies the common-law crime of escape for federal offenders. To convict a defendant, prosecutors must prove that the defendant absconded from (1) "the custody of the Attorney General or his authorized representative"; (2) "any institution or facility in which [the defendant] is confined by direction of the Attorney General"; (3) "any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge"; or (4) the custody of a federal officer pursuant to a lawful arrest.[74] Defendants on supervised release are prosecuted under category three. Strikingly, the statute defines neither "escape" nor "custody."

Both the structure and the function of supervised release make it difficult to determine whether persons on supervised release are in custody even if one puts these statutory ambiguities to one side and proceeds from a commonsense understanding of the term. By way of example, it is intuitively easy to accept that

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70 18 USC § 3585(a) ("A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.").

71 18 USC § 3585(b) (listing circumstances in which a defendant may be given credit for time served in prior custody).

72 See, for example, USSG § 3C1.1 (providing a sentencing enhancement for obstruction of justice in cases in which the defendant absconded from federal custody).

73 See 28 USC § 2241(c) (authorizing habeas petitions for individuals in enumerated forms of custody). See also Part II.B.

74 18 USC § 751(a).

all individuals who are currently incarcerated for committing federal crimes are in federal custody. These persons are subject to physical confinement, experience constraints on their activities, and have easily identifiable custodians. The overarching purpose of their confinement is punitive, which seems relevant as it suggests that these persons may not leave the boundaries of their confinement without facing further sanctions. Most importantly, 18 USC § 3621 clarifies that persons sentenced to prison terms are committed to the custody of the Bureau of Prisons until the expiration of that term.[75]

It is difficult to make the same leap for persons on supervised release, who are required to abide by a set of conditions but are not under the same extreme level of direct control. Furthermore, as discussed above, release terms are intended to form a rehabilitative phase that is separate and distinct from imprisonment. Persons on release have already completed a preceding prison term for an offense. The use of the term "release" ordinarily connotes some degree of freedom from restraint.[76] Finally, there is no statutory provision clarifying whether supervised release is custodial.

To further complicate matters, release terms may take a variety of different forms, some of which resemble direct incarceration more than others. Before discussing how courts have grappled with the question whether release conditions are custodial, it is useful to first briefly outline the different forms of release.

At one end of the spectrum are forms of supervised release that replicate physical confinement. It is important to note that these conditions have historically been subject to special statutory limitations.[77] For example, the SRA restricts judges' ability

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[75] 18 USC § 3621(a) ("A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed.").

[76] See *Johnson*, 529 US at 57 ("[T]he ordinary, commonsense meaning of release is to be freed from confinement. To say respondent was released while still imprisoned diminishes the concept the word intends to convey.").

[77] A judge may sentence a defendant to home confinement as a condition of supervised release, but if this is done, the term of the confinement functions similarly to parole in that it is treated as an alternative, rather than as a supplement, to incarceration. That is, home confinement as a condition to supervised release acts as "an alternative to incarceration" such that the total amount of time served, in prison and in home confinement, cannot exceed the statutory maximum for the crime committed by the defendant. See USSG § 5C1.1(c)(2)–(3) (recommending that judges use home confinement to reduce a direct prison sentence); 18 USC § 3583(e)(4) (providing that judges may impose home confinement "only as an alternative to incarceration"); *United States v Ferguson*, 369 F3d 847, 850 (5th Cir 2004) (per curiam) (holding that "incarceration and home [confinement] are

to prescribe intermittent confinement (sentences that allow defendants to remain at liberty but require them to return to the custody of the Bureau of Prisons during nights, weekends, or other intervals of time).[78] Intermittent confinement is not available as a general condition of supervised release; a judge may impose this sentence only to redress a condition violation.[79]

Other forms of release conditions approximate, but do not replicate, forms of physical confinement. These quasi-detentive conditions often restrict an individual's freedom of movement or association. For example, courts may impose conditions requiring the defendants to reside at transitional facilities[80] (colloquially known as halfway houses), to abide by curfews,[81] or to submit to GPS monitoring.[82] Many standard conditions of release fall into this category.[83]

Finally, some forms of supervised release do not approximate physical confinement at all. For example, district court judges have ordered defendants to use contraception,[84] to use only their "true legal name,"[85] or to refrain from driving for the duration of the release term.[86] Many release conditions target behaviors that are specifically related to an individual defendant's crimes, but there is no requirement that release conditions target only illegal behaviors. A judge may, for example, impose a condition requiring abstinence from alcohol for a defendant who used the proceeds

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alternative punishments that may not combine in excess of the maximum statutory term of incarceration").

78 18 USC § 3563(b)(10).

79 See 18 USC §§ 3563(b)(1), 3583(d).

80 See, for example, *United States v Griner*, 358 F3d 979, 982 (8th Cir 2004) (upholding a release condition requiring the defendant to reside at a community corrections facility).

81 See, for example, *United States v Rivera-López*, 736 F3d 633, 634, 636–37 (1st Cir 2013) (upholding conditions requiring the defendant to remain at his residence from 6:00 p.m. to 6:00 a.m. and to wear an electronic-monitoring device twenty-four hours a day).

82 See *United States v Porter*, 555 F Supp 2d 341, 343, 345 (EDNY 2008).

83 See, for example, USSG § 5D1.3(c)(1) (recommending a condition directing the defendant to stay within the judicial district except with permission from the probation officer). See also *United States v Truscello*, 168 F3d 61, 63 (2d Cir 1999) ("[T]he so-called 'standard conditions' [of USSG § 5D1.3(c)] . . . are basic administrative requirements. . . . [T]hey are almost uniformly imposed by the district courts and have become boilerplate.") (quotation marks and brackets omitted).

84 See, for example, *United States v Cason*, 25 F Supp 3d 1212, 1213 (WD Mo 2014) (imposing a supervised release condition requiring the defendant to "use contraceptives . . . unless such use would violate his religious scruples or is expressly rejected by his sexual partner"). See also *United States v Borski*, 2013 WL 4830238, *2–3 (SD Ind) (involving a defendant who was forbidden to possess "any pornography, erotica, or nude images" as a condition of supervised release).

85 *United States v Soltero*, 510 F3d 858, 865 (9th Cir 2007) (per curiam).

86 See, for example, *United States v Kingsley*, 241 F3d 828, 837–38 (6th Cir 2001).

from thefts to finance an alcohol addiction.[87] Other conditions are designed to increase social productivity; for example, judges may require releasees to pay child support or seek mental health treatment.[88]

These diverse forms of release underscore the difficulty of determining when supervised release is custodial under § 751(a). They suggest that supervised release may look very different for different defendants. Some states with programs similar to federal supervised release have dealt with this problem by amending their escape statutes to cover such conduct. The Maine escape statute, for example, explicitly provides that a person who "intentionally violates a curfew, residence, time or travel restriction" may be charged with "escape from supervised community confinement."[89] The federal escape statute, by contrast, has not been meaningfully amended since 1948—leaving it to the courts to determine whether and when release terms are custodial under § 751(a).

II. THE HALFWAY HOUSE CASES

A recent series of cases all share the same basic fact pattern: a defendant completes a prison term, begins a term of supervised release requiring residence at a halfway house, leaves the facility, and is charged with escape from federal custody. These halfway house cases are the first cases in which circuits have addressed whether one can escape from supervised release.

The halfway house cases are important in that they require courts to (1) determine whether a defendant who resides at a reentry facility as a condition of supervised release is in custody for purposes of § 751(a), and, in the process, (2) articulate a workable principle for determining whether other individuals on supervised release should be considered to be in custody. This issue is settled in the context of direct imprisonment. Courts uniformly hold that incarcerated persons who are transferred[90] from a penal institution to a halfway house to finish out the remainder of their

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87 See *United States v Thurlow*, 44 F3d 46, 47 (1st Cir 1995) (per curiam).

88 See *United States v Barajas*, 331 F3d 1141, 1143 (10th Cir 2003).

89 17–A Me Rev Stat Ann § 755(1–B).

90 See 18 USC § 3624(c)(1) (directing the Bureau of Prisons, "to the extent practicable," to ensure that prisoners spend a portion of their last year of imprisonment "under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community").

sentences are in custody.[91] But circuits disagree about whether the differences between supervised release and traditional incarceration militate in favor of a different rule.

Part II.A analyzes halfway house cases in the Second, Eighth, Ninth, and Tenth Circuits and traces the three rules created by the courts for determining whether an individual is in § 751(a) custody. Part II.B critiques the circuits' approaches.

A. Interpreting § 751(a): The Circuit Split

The Second, Eighth, and Tenth Circuits hold that a defendant who is released to a halfway house as a condition of supervised release is in custody for purposes of the escape statute. These courts rely on similarly expansive constructions of "custody" in reaching this holding. These broad constructions of § 751(a) may have interesting implications for other cases: If a defendant removes a GPS device, violates a nighttime curfew, or fails to comply with reporting requirements, has he absconded from custody within the meaning of § 751(a)?

In contrast to these circuits, the Ninth Circuit has advanced a narrower interpretation of the escape statute. The court suggests that custody is limited to those release conditions approximating traditional incarceration, but it gestures toward a rule that supervised release conditions are categorically noncustodial.

1. The Second and Eighth Circuits: Custody is established by restraints on activities.

The Second and Eighth Circuits endorse a "restraint on activities" rule for determining custody. Under this rule, an individual is within federal custody when he is subjected to limits on his activities. The Second Circuit advanced this rule in *United States v Edelman*.[92] Jody Edelman was convicted of a drug offense and sentenced to seven years of imprisonment followed by three years of supervised release.[93] After repeated violations, the sentencing

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[91] See, for example, *Nace v United States*, 334 F2d 235, 235–36 (8th Cir 1964) (per curiam) (holding that the defendant, who was allowed to serve his sentence at a halfway house, was in custody for purposes of the escape statute notwithstanding the freedom allowed to him at the institution); *McCullough v United States*, 369 F2d 548, 549–50 (8th Cir 1966); *Perez–Calo v United States*, 757 F Supp 1, 2 (D Puerto Rico 1991).

[92] 726 F3d 305 (2d Cir 2013).

[93] Id at 307.

judge modified Edelman's release to include residence in a halfway house for five months.[94] Edelman left the halfway house before the end of his term and committed a series of drug offenses.[95] He was arrested and charged with escape for his departure.[96] Edelman appealed, arguing that his halfway house stay did not constitute custody under § 751(a).[97]

The Second Circuit disagreed with Edelman's argument. The court observed that "[c]ustody may be minimal, and indeed, may be constructive."[98] The court found textual support for this reading, noting that § 751(a) refers broadly to "*any* custody under or by virtue of any process," supporting an expansive reading.[99] The court further observed that custody requires only "some restraint upon [an individual's] complete freedom."[100] Conceding that Edelman's residence at the halfway house differed substantially from traditional forms of incarceration, the court nonetheless noted that the release conditions still "subjected [the defendant] to a restraint on his activities and limited the amount of time he could spend out of the facility."[101] Residents at Edelman's halfway house were not permitted to leave without notifying staff beforehand, were required to sign out separately before each activity, and could leave the facility for only up to twelve hours at a time.[102] The Second Circuit concluded that these restraints established § 751(a) custody.[103]

In *United States v Goad*,[104] the Eighth Circuit, facing similar facts, arrived at the same conclusion. According to the court, it was sufficient to sustain an escape indictment that "(1) Goad was court-ordered to reside for 120 days at the Hinzman Center and obey its rules; (2) the Hinzman Center prohibited departures without authorization; and (3) Goad left early without obtaining authorization and failed to return."[105]

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94 Id.
95 Id at 307–08.
96 *Edelman*, 726 F3d at 308.
97 Id.
98 Id at 309.
99 Id at 309–10, quoting 18 USC § 751(a).
100 *Edelman*, 726 F3d at 309–10.
101 Id.
102 Id at 307.
103 Id at 309–10.
104 788 F3d 873 (8th Cir 2015).
105 Id at 876.

The defendant in *Goad* attempted to contrast the state of being in the attorney general's custody with the state of being released to the supervision of a federal probation officer.[106] This argument is premised on the idea that custody is relational—that custody cannot exist in a vacuum, but denotes a specific relationship between a custodian and the object of supervision. A relational understanding of custody undermines the restraints-on-activities approach by requiring courts to identify a custodian rather than simply asking about what types of activities the defendant may permissibly engage in. Various provisions of § 751(a) appear to identify a particular guardian that is the source of the custodial relationship, as they criminalize escape from the custody of the attorney general, his authorized representative, and federal officers conducting lawful arrests.[107] These clauses do not identify the agency that oversees defendants on probation and supervised release as a potential custodian, even though probation existed at the federal level when the escape statute was initially passed, and probation conditions may also include forms of confinement.[108] The omission of the US Probation Office is particularly surprising given that probation, unlike supervised release, is a criminal sentence in its own right that is imposed as a substitute for imprisonment.[109]

The *Goad* court quickly disposed of the relational argument, again pointing to the broad text of the relevant subsection of the escape statute.[110] The particular clause used to prosecute escapes from supervised release refers to "*any* custody under or by virtue of *any* process issued under the laws of the United States."[111] Because this subsection does not identify a particular custodian, the *Goad* court reasoned that the defendant's arguments were irrelevant.[112] The § 751(a) requirement was met when the district court sentenced Goad to serve out his release term at a halfway house.[113]

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106 Id at 875.

107 See 18 USC § 751(a).

108 See, for example, *United States v Dowling*, 962 F2d 390, 391 (5th Cir 1992) (involving a defendant ordered to reside at a halfway house as a condition of probation).

109 See 18 USC § 3561(a)(3).

110 See *Goad*, 788 F3d at 876.

111 18 USC § 751(a) (emphases added).

112 See *Goad*, 788 F3d at 876 (suggesting that the lack of reference to any particular custodian in this clause suggests that all custodians must be treated alike).

113 Id.

2. The Tenth Circuit: Custody is established by the right to control an individual.

The Tenth Circuit, in accord with the Second and Eighth Circuits, held in *United States v Foster*[114] that defendants ordered to reside in halfway houses pursuant to supervised release conditions are in custody under § 751(a).[115] Cheston Foster was sentenced to time served and thirty months of supervised release as a revocation penalty for violating the conditions of a previous release term.[116] During the sentencing phase of the trial, Foster's supervising officer asked the court to add a halfway house condition to the defendant's term of release, in light of the defendant's unstable residence and employment situations.[117] Foster left the halfway house and was charged with escape.[118] The district court dismissed the indictment, reasoning that the release condition was "a stop-gap measure used to prevent homelessness," not "a custodial sentence triggering criminal liability."[119]

The Tenth Circuit overruled the district court and upheld the indictment. Similar to the Second and Eighth Circuits, the *Foster* court looked first to the text of the statute. The court reasoned that the plain text of the statute does not distinguish between defendants in nonpunitive versus punitive forms of custody.[120] The *Foster* court agreed with the Government's interpretation that an individual is in custody if "another person has the legal right to control his actions or limit his freedom."[121] Because the relevant question under this analysis is whether the individual defendant is under "control sufficient to constitute custody,"[122] this rule is functionally similar to the restraints-on-activities approach. Under both rules, the existence of restrictions upon the defendant establishes § 751(a) custody.

The Tenth Circuit also adheres to an interpretation that custody "may be minimal or even constructive."[123] This rule was first articulated in *United States v Depew*,[124] a Tenth Circuit case dealing

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114 754 F3d 1186 (10th Cir 2014).
115 Id at 1189–91.**114**
116 Id at 1187.
117 Id.
118 *Foster*, 754 F3d at 1188.
119 Id.
120 Id at 1189.
121 Id.
122 *Foster*, 754 F3d at 1192–93.
123 Id at 1190.
124 977 F2d 1412 (10th Cir 1992).

with the issue of whether a defendant was in federal or state custody during a transfer on a writ of habeas corpus ad prosequendum.[125] The handcuffed defendant attempted to escape from the supervision of a county sheriff while being driven between facilities.[126] The court suggested that the defendant's status as "a federal prisoner who was due to be returned to serve time in a federal penitentiary," as well as his being "in the direct physical presence [of] and contact with a federal law enforcement officer," indicated that he was in federal § 751(a) custody.[127]

Although *Depew* is cited for the proposition that custody may be minimal or constructive,[128] these specific facts suggest that custody is still linked to physical restraint or the prospect of confinement. Further, the cases that the *Depew* court offered as examples of the "wide range of circumstances" in which § 751(a) applies outside of the narrower context of prison escapes involved direct physical restraints and institutional confinement.[129] The *Foster* court, however, denied that either was essential to the court's conclusion, as "real physical confinement" is not a prerequisite for custody.[130] The *Foster* court instead characterized *Depew*'s holding more broadly, reading the case as suggesting that a defendant is in custody when "the restrictions of life . . . are sufficiently limiting"—as when a defendant is required to live in a halfway house.[131]

The Tenth Circuit has also invoked *Depew* in circumstances bearing even more attenuated relationships to traditional incarceration. In *United States v Ko*,[132] the Tenth Circuit sustained an escape indictment for a defendant subject to electronic monitoring.[133] Michael Ko was permitted to leave his home for work, but he was required to return every evening. When he did not return

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125 Id at 1413–14. Habeas corpus ad prosequendum is a writ issued to remove a prisoner from one jurisdiction to another to face prosecution. See *United States v Londono*, 285 F3d 348, 356 (5th Cir 2002) (per curiam).

126 *Depew*, 977 F2d at 1413.

127 Id at 1414.

128 See, for example, *Foster*, 754 F3d at 1189–90.

129 *Depew*, 927 F2d at 1414. The *Depew* court noted that the federal escape statute had been applied to offenders "serving [ ] state prison sentence[s] at [ ] federal correctional institution[s]," offenders "serv[ing] [ ] federal prison sentence[s] in [ ] state penitentiar[ies]," and offenders in transit between federal and state or local facilities. Id.

130 *Foster*, 754 F3d at 1190.

131 Id, quoting *United States v Sack*, 379 F3d 1177, 1179 n 1 (10th Cir 2004).

132 739 F3d 558 (10th Cir 2014).

133 Id at 562.

one evening, he was charged with escape.[134] The Tenth Circuit rejected Ko's argument that the plain meaning of custody required physical confinement and could not encompass "leaving one's own home."[135] The Tenth Circuit cited *Depew* for the proposition that the defendant's "constant monitoring, [ ] monitoring bracelet, and spatial and temporal bounds" established custody.[136] Although *Ko* involved a defendant who was transferred to home confinement to finish out a direct prison sentence, the Tenth Circuit has thus far given no indication that the special nature of supervised release would prevent a similar prosecution.[137]

3. The Ninth Circuit: Custody is established by conditions equivalent to custodial incarceration.

In *United States v Burke*,[138] the Ninth Circuit adopted a very different test from the other circuits. Similar to *Foster*, *Burke* involved a defendant who was "essentially homeless" and was sentenced to a halfway house stay as a condition of supervised release.[139] Anthony Burke checked out of the center and did not return.[140] The Ninth Circuit affirmed the district court's dismissal of an ensuing escape indictment, holding that Burke was not in custody under § 751(a), as he was not confined "under conditions equivalent to custodial incarceration."[141]

Burke is amenable to two interpretations. The first reading suggests that the court created a rule necessitating case-by-case analysis of whether a defendant on supervised release is subject

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134 Id at 559–60.

135 Id at 560.

136 *Ko*, 739 F3d at 561–62.

137 The Tenth Circuit has suggested in dicta that a release condition requiring a defendant to reside with a family member may create § 751(a) custody. See *Sack*, 379 F3d at 1180 n 2:

> A defendant leaving the custody of the third party custodian . . . can menace the welfare of that custodian as easily as a defendant escaping from jail can menace corrections officers. The character of escape as "absenting oneself from custody without permission" is not altered by pre-existing relationships between the custodian and the detainee.

But see *United States v Miranda*, 749 F Supp 1062, 1064 (D Colo 1990) ("[A] bond condition that defendant live in a particular place is not tantamount to 'custody.' If the defendant had been required to live with his parents as a condition of bond, he would not have been charged with escape from custody if he decided to leave his parent[s'] residence.").

138 694 F3d 1062 (9th Cir 2012).

139 Id at 1063.

140 Id.

141 Id at 1064–65.

to conditions equivalent to custodial incarceration.[142] The *Burke* court did not define custodial incarceration, but instead appeared to enforce the rule by evaluating the extent of the defendant's restraints and comparing them to imprisonment. Under this interpretation, Burke could not be charged with escape because the specific conditions of his supervised release term were too lenient to constitute custody. The *Burke* court observed that residents at the halfway house were "free to be employed outside the center, and to come and go during the day with permission if they logged in and out."[143] The Second Circuit relied on very similar facts in *Edelman* to assert that the limits placed on the defendant's freedom indicated custody.[144] The Ninth Circuit instead emphasized the extent of the liberty enjoyed by the defendant while on release.[145]

It is unclear at what point release conditions become custodial under this rule. The Government argued in *Burke* that the halfway house placed numerous restrictions on the defendant, such as "a curfew, limited visitors, assigned beds, restricted telephone use," and requiring residents to notify staff before leaving.[146] The halfway house also put residents on an "escape or abscond status" if they failed to return to the center in a timely manner; the employees put Burke on escape status after he was still absent two hours after his estimated time of return.[147] In dismissing the indictment, the district court remarked that the halfway house rules were "standard" and reflected a "general understanding" that halfway houses are more lenient than custodial facilities.[148] The Ninth Circuit's application of the law to the facts of this case suggests that the equivalent-to-custodial-incarceration test may form a bright-line rule rather than a functional rule—nothing less than prison conditions may constitute custody.

As such, a second plausible reading of the opinion is that while *Burke* articulates an equivalent-to-custodial-incarceration

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[142] *Burke*, 694 F3d at 1064–65. See *Foster*, 754 F3d at 1191 ("In *Burke*, the Ninth Circuit focused only on whether Burke's freedom was sufficiently restricted to constitute custody, looking to the fact that the conditions of his release were much more analogous to probation than they were to imprisonment.") (quotation marks omitted).

[143] *Burke*, 694 F3d at 1064.

[144] See *Edelman*, 726 F3d at 307 (noting that residents at the halfway house "could not leave without notifying staff" and "could only leave the building for up to 12 hours at a time").

[145] See *Burke*, 694 F3d at 1064.

[146] Id.

[147] Id.

[148] Id.

test, *Burke* functionally creates a per se rule. Few forms of supervised release resemble traditional incarceration as closely as halfway house stays do,[149] yet *Burke* suggests that halfway house terms are outside the reach of § 751(a). Further, several elements of the *Burke* court's reasoning speak to the structure of supervised release more generally rather than to the specifics of the defendant's release term. The Ninth Circuit observed that the conditions of Burke's release "were much more analogous to probation than they were to imprisonment."[150] Importantly, the court highlighted the fact that condition violations may be sanctioned through revocation (as with probation) rather than an independent criminal charge of escape.[151] The *Burke* court also found it relevant that Burke, like all releasees, had completed a preceding prison term and was thus no longer in the custody of the Bureau of Prisons; the court distinguished past precedents on this basis.[152]

The *Burke* court did not go so far as to formally create a per se rule. It was not necessary for the Ninth Circuit to determine the custodial status of other forms of supervised release in order to decide *Burke*. Additionally, it is difficult to reconcile sections of the opinion contrasting the specific conditions of the defendant's confinement with direct imprisonment with a per se rule holding that supervised release is never custodial. The *Burke* court highlighted the similarities between supervised release and probation, but the opinion also appears to leave open the possibility that a defendant subject to a more-confining release condition (for example, a nonstandard halfway house) may be in § 751(a) custody.

At the same time, *Burke* nevertheless plants the seeds for a per se rule by establishing a high bar for custody at the outset. By taking a highly confining type of supervision relative to other forms of supervised release and declaring it to be insufficiently confining to generate § 751(a) custody, the *Burke* rule suggests that few, if any, release conditions are custodial.

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149 See Part I.C.

150 *Burke*, 694 F3d at 1064, quoting *United States v Baxley*, 982 F2d 1265, 1269 (9th Cir 1992).

151 See *Burke*, 694 F3d at 1065 ("Like an individual on probation, Burke was conditionally released from incarceration; his failure to return to [the halfway house] was a violation of his release conditions punishable by revocation of release, not an escape from 'custody' within the meaning of § 751(a)."); *Baxley*, 982 F2d at 1269–70 (stating that a probationer becomes an escapee only when, after having his probation revoked, "he *thereafter* fails to report for custodial incarceration").

152 See *Burke*, 694 F3d at 1065.

B. Critiquing the Circuits' Approaches

There are three weaknesses in the circuits' approaches that merit special attention. First, the reach of these holdings is unclear. Among the Second, Eighth, and Tenth Circuits, no circuit found the presence of physical or institutional confinement—in these cases, halfway houses—particularly relevant in determining whether the defendant was in custody. The Tenth Circuit directly denied the relevance of confinement, stating that "real physical confinement" is not a requirement for escape.[153] Instead, the circuits created rules focusing on the presence of legal rights to control behavior or restraints on the defendant's activities. These abstract rules suggest that many of the forms of supervised release detailed in Part I.C may be considered custodial under § 751(a), in the absence of some limitation.

Although the boundaries of these rules are unclear, there may be an implicit limiting factor within the escape statute itself. The statute requires prosecutors to prove that the defendant has "escape[d] or attempt[ed] to escape" as an element of the crime.[154] Not all condition violations may be characterized as escapes. A defendant who is banned from driving as a condition of supervised release may be in custody under the restraints-on-activities rule, but if she violated the terms of her release by driving, it would be difficult to construe that violation as an escape. This limiting principle becomes more complicated when the release conditions involve location-based restrictions on movement and association. As mentioned above, the Tenth Circuit suggested in *Ko* that failing to return to one's home at a specific time may still constitute an escape from federal custody. The escape element has thus far failed to provide a meaningful restriction on § 751(a) liability.

This lack of clear boundaries is problematic for three reasons. First, it makes it difficult to predict the consequences for violating release conditions. Second, it drastically expands the scope of criminal conduct by adding an overlapping criminal offense to a broad spectrum of release violations, even when those release conditions could not independently give rise to criminal liability. Even more importantly, absent a meaningful limiting factor, the circuits' rule verges on the absurd by encompassing a broad category of individuals. Well-settled principles of statutory interpretation generally counsel against such broad and unbounded

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153 *Foster*, 754 F3d at 1190.

154 18 USC § 751(a).

readings of criminal statutes.[155] The defendants in all four cases discussed above raised arguments that the rule of lenity obligated courts to resolve ambiguities over the construction of § 751(a) in their favor.[156]

Third, the Second, Eighth, and Tenth Circuits' opinions import reasoning from parallel, but inapplicable, Supreme Court jurisprudence. Although the Supreme Court has not defined § 751(a) custody, the Court has interpreted "custody" in the context of 28 USC § 2241(c)(3) habeas proceedings. Section 2241(c)(3) grants federal courts jurisdiction to hear habeas petitions from persons who are "in custody in violation of the Constitution or laws or treaties of the United States."[157] In *Jones v Cunningham*,[158] the Court addressed the question whether a state prisoner on parole was still in custody within the meaning of the statute, such that a district court could entertain a claim that his state sentence was unconstitutional.[159]

The Court unanimously concluded that the defendant was in custody.[160] The Court defined custody as the condition resulting from the imposition of "significant[ ] restrain[ts]" on individual liberty,[161] stretching beyond "actual, physical custody."[162] The Court further observed that the defendant was confined by parole order "to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life," and that even "a single deviation, however slight," could result in a return to prison.[163] It was not relevant to the Court's analysis that the conditions were part of a rehabilitative process; it mattered only that the parole order prevented the petitioner from participating in activities "which in this country free men are entitled to do."[164]

At first glance, *Jones* seems particularly instructive in that it involved a defendant on conditional release (parole) and issued an expansive reading of custody that could include forms of supervision falling short of direct imprisonment. Although the Second,

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155 See Part III.A.3.

156 See *Goad*, 788 F3d at 876 n 3; *Foster*, 754 F3d at 1193–94; *Edelman*, 726 F3d at 309–10; *Burke*, 694 F3d at 1065.

157 28 USC § 2241(c)(3).

158 371 US 236 (1963).

159 Id at 236.

160 Id at 243.

161 Id at 242–43.

162 *Jones*, 371 US at 239.

163 Id at 242.

164 Id at 242–43.

Eighth, and Tenth Circuits do not explicitly cite *Jones*, it seems far from coincidental that their respective opinions mirror the *Jones* Court's analysis. Specifically, just as *Jones* suggests that custody is created by restraints, regardless of whether those restraints are rehabilitative, and that custody does not require direct physical confinement for purposes of § 2241(c)(3), each circuit endorsed a similarly expansive reading of custody for purposes of § 751(a).

It is not clear that § 2241(c)(3) custody and § 751(a) custody must share the same meaning as a matter of statutory interpretation. The same word may have different meanings in different statutes.[165] Words often derive precise meaning from their statutory context. In *Wachovia Bank, National Association v Schmidt*,[166] for example, the Supreme Court declined to give the word "located" the same meaning in statutes pertaining to venue and to subject matter jurisdiction for national banks.[167] Although lower courts had interpreted "located" uniformly, the Court argued that this conflation overlooked the "discrete offices" of venue and jurisdiction.[168]

Similarly, the arguments advanced by the Supreme Court to support an expansive reading of habeas custody do not apply with equal force to escape custody, given the differing aims of § 2241(c)(3) and § 751(a). The Court has emphasized that habeas is not "a static, narrow, formalistic remedy,"[169] but a flexible device capable of "cut[ting] through barriers of form and procedural mazes."[170] A liberal interpretation of the custody requirement allows courts to hear a diverse range of claims and prevents states

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165 See, for example, *Yates v United States*, 135 S Ct 1074, 1082 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."); *Robinson v Shell Oil Co*, 519 US 337, 342–44 (1997) (noting that "employee" has different meanings in different sections of Title VII of the Civil Rights Act of 1964). But see *Yates*, 135 S Ct at 1096–97 (Kagan dissenting) ("[T]he normal rule of statutory construction assumes that identical words used in different parts of the same act, passed at the same time, are intended to have the same meaning. And that is especially true when the different provisions pertain to the same subject.") (quotation marks and citation omitted).

166 546 US 303 (2006).

167 Id at 315–17.

168 Id at 319. See also Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L J 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules . . . has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

169 *Jones*, 371 US at 243.

170 *Harris v Nelson*, 394 US 286, 291 (1969).

from evading the writ by declaring serious punishments noncustodial. In line with these aims, courts have read § 2241(c)(3) custody to include restrictions falling well short of confinement.[171]

The concerns that motivated the *Jones* Court's broad construction of § 2241(c)(3) custody are inapplicable in the context of supervised release. While "custody" is used in § 2241(c)(3) to define courts' habeas jurisdiction and, by extension, the availability of relief, "custody" is used in § 751(a) for a very different purpose—to define the scope of criminal liability for escape. The factors advanced in *Jones* in support of a flexible and vague definition of custody are not convincing as applied to statutes that define crimes. In this context, concerns regarding fair notice, due process, and the constraint of enforcement discretion are paramount.[172] It thus makes little sense to mechanically import § 2241(c)(3) reasoning into the § 751(a) context. Using parallel rules may also lead to absurd results. For example, a defendant ordered to complete community service is in custody for habeas purposes.[173] While a defendant who leaves a community service site is certainly disobedient, it seems incorrect to suggest that he has committed an escape, even though the legal rules defining § 2241(c)(3) and § 751(a) custody are virtually identical in some circuits.

Third, all four circuits rely on cases involving similar facts but different forms of conditional release that serve different purposes within the criminal-justice system. The Second and Eighth Circuits cited *United States v Rudinsky*[174] as persuasive authority.[175] In *Rudinsky*, the Sixth Circuit held that a defendant was in custody at a federal treatment center.[176] The Tenth Circuit, as discussed above, cited *Ko*, a case involving a defendant subject to electronic monitoring.[177] The defendants in both *Rudinsky* and *Ko* were completing direct prison sentences when they absconded. The defendant in *Rudinsky* was completing a criminal sentence for possessing stolen mail at a treatment center;[178] the defendant

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171 See, for example, *Hensley v Municipal Court, San Jose-Milpitas Judicial District, Santa Clara County*, 411 US 345, 345, 351 (1973) (holding that a person released "on his own recognizance" after conviction satisfies the habeas custody requirement).

172 See Part III.A.3.

173 See *Barry v Bergen County Probation Department*, 128 F3d 152, 161 (3d Cir 1997) (holding that community service satisfies the habeas custody requirement).

174 439 F2d 1074 (6th Cir 1971).

175 See *Edelman*, 726 F3d at 309; *Goad*, 788 F3d at 875.

176 *Rudinsky*, 439 F2d at 1076–77.

177 See *Foster*, 754 F3d at 1189–92. See also Part II.A.2.

178 *Rudinsky*, 439 F2d at 1075.

in *Ko* was transferred to home confinement by the Bureau of Prisons in order to complete the last four months of a prison sentence for conspiracy to distribute methamphetamines.[179] None of these opinions explains why supervised release terms should be treated as equivalent to these forms of supervision, even though there are salient differences between the two.

Further, all four circuits appear to read this legal question as revitalizing an earlier circuit split on whether halfway house stays as a condition of *pretrial* release could create § 751(a) custody. The three circuits holding that halfway house stays are custodial in the supervised release context all cite *United States v Sack*,[180] a Tenth Circuit decision holding that pretrial halfway house stays are custodial.[181] Conversely, the Ninth Circuit in *Burke* relied in part on *United States v Baxley*,[182] a case from that circuit holding that pretrial halfway house stays are noncustodial.[183]

Only the Tenth Circuit offered an explanation for why *Sack* and *Baxley* might be persuasive. The *Foster* court suggested that pretrial detention is an appropriate analogue for supervised release, as it "also serves a non-punitive function and does not serve as a substitute for part of a prison sentence."[184] Still, the purposes of pretrial release differ substantially from the reasons for imposing supervised release. Although pretrial release is nonpunitive, it is also nonrehabilitative.[185] By conflating supervised release with other forms of criminal-justice supervision, the circuits fail to sufficiently account for how the targeted aims of the SRA may bear on whether supervised release conditions are custodial.

* * *

In summary, the circuits have created unbounded rules for defining § 751(a) custody. Interestingly, none of the four circuits chose to resolve this textual ambiguity by looking at the escape statute itself and asking whether supervised release violations fall within the conduct historically proscribed by the statute. Instead, the circuits covertly imported reasoning from the Supreme

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179 *Ko*, 739 F3d at 559.

180 379 F3d 1177 (10th Cir 2004).

181 Id at 1182. See also *Edelman*, 726 F3d at 309; *Goad*, 788 F3d at 875–76; *Foster*, 754 F3d at 1190.

182 982 F2d 1265 (9th Cir 1992).

183 Id at 1269–70; *Burke*, 694 F3d at 1064–65.

184 *Foster*, 754 F3d at 1191 n 3 (quotation marks and emphasis omitted).

185 See 18 USC § 3142(c)(1)(B) (directing courts to create pretrial release conditions to "assure the appearance" of the defendant at trial).

Court's habeas jurisprudence and looked to precedents involving different forms of criminal-justice supervision—thus failing to take into account the importance of supervised release as a new form of criminal-justice supervision and a critical component of sentencing reform. Part III of this Comment clarifies this area of the law by filling the gaps the circuits have left and interpreting the applicability of escape to supervised release conditions in light of both the SRA and the history of § 751(a).

III. SUPERVISED RELEASE AND § 751(A) CUSTODY: THE CATEGORICAL RULE

This Part argues in favor of a rule that supervised release conditions are categorically noncustodial under the escape statute. Although it may seem uncontroversial to prosecute individuals who abscond from facilities or violate court-ordered conditions, both the SRA and the history of the escape statute strongly suggest that supervised release lies outside the ambit of § 751(a). In addition, the rule is normatively desirable, as it prevents condition violations from unduly extending criminal sentences and trapping releasees in a cycle of punishment. The rule is also administratively desirable, as it prevents the need for case-by-case inquiries into whether each defendant's form of release is custodial. Such inquiries are likely to lead to inconsistent application of the escape statute across jurisdictions. A categorical rule best gives effect to the SRA by emphasizing the barrier between retributive concerns, which must be addressed during the selection of an appropriate prison sentence, and rehabilitative concerns, which are addressed during the selection of the term of supervised release.

Part III.A traces the history of the federal escape statute. While there is no elegant definition of § 751(a) custody, several statutory developments suggest a narrow understanding of the term. Further, the statute has historically been used to rectify specific problems that do not implicate supervised release. Part III.B argues that escape prosecutions subvert the rehabilitative and discretion-centralization purposes of the SRA by adding a new layer to the penalty structure that Congress created to redress condition violations. If an individual violates a release condition, that violation can be sufficiently redressed through these preexisting mechanisms; there is no need to add additional criminal penalties in the absence of independently criminal conduct.

A. The Categorical Rule: The Federal Escape Statute

While the circuits purport to derive their rules from the text of § 751(a), it is virtually impossible to resolve this split on a plain-meaning approach alone. Dictionary entries for "custody" contain both broad definitions that would insufficiently delineate the bounds of criminal conduct and narrow definitions that do not settle the question. *Black's Law Dictionary* defines "custody" as "[t]he care and control of a thing or person for inspection, preservation, or security," or alternatively, "[t]he detention of a person by virtue of lawful process or authority."[186] The first definition contains six subentries with qualified versions of the term ("penal custody," "protective custody," etc.).[187] *Webster's Third* similarly defines "custody" as "the act or duty of guarding and preserving," or alternatively, "imprisonment or durance of persons or charge of things."[188] Neither source obviously compels any one of the circuits' rules.

Courts must look beyond plain language when meaning is ambiguous or a literal interpretation would lead to an absurd result.[189] Looking to the history and purposes of § 751(a) counsels against an expansive construction.

1. The legislative and enforcement histories of § 751(a) suggest a narrow construction of "custody."

The Second, Eighth, and Tenth Circuits quote the statutory language directly, emphasizing that § 751(a) criminalizes escape from "*any* custody under or by virtue of *any* process."[190] While the text suggests an expansive reading of "custody" at first glance, looking to the history of the statute demonstrates the extent to which broad constructions of the clause are a relatively novel phenomenon.

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186 *Black's Law Dictionary* 467 (West 10th ed 2014) ("Black's 2014"). The 1910 edition is the closest in time to the enactment of § 751(a). The entry for "custody" provides three definitions with increasing specificity: "care and keeping," "detainer," and "actual imprisonment." *Black's Law Dictionary* 309 (West 2d ed 1910). The entry also notes that a sheriff who enforces a custodial sentence by instead "allowing the defendant to go at large under his general watch and control" may be held criminally liable for the defendant's escape. Id.

187 *Black's 2014* at 467 (cited in note 186).

188 *Webster's Third New International Dictionary of the English Language Unabridged* 559 (Merriam 2002).

189 See *Haggar Co v Helvering*, 308 US 389, 394 (1940).

190 *Goad*, 788 F3d at 876, quoting 18 USC § 751(a). See also *Foster*, 754 F3d at 1189; *Edelman*, 726 F3d at 308.

Congress first codified the common-law crime of escape in 1930.[191] The statute was enacted as part of a program to improve the federal penal system.[192] The original statute criminalized only (1) escapes from the custody of the attorney general or his authorized representative and (2) escapes from penal or correctional institutions.[193] Five years later, Congress amended § 751(a) at the attorney general's request.[194] Concerned that the existing statute did not capture escapes by prisoners held prior to conviction, the attorney general sent letters to the chairmen of the House and Senate Committees on the Judiciary.[195] Each letter contained a draft proposal and a list of similar state statutes proscribing escapes by inmates held in jails (as opposed to penal institutions) while awaiting trial.[196]

The ensuing amendment adopted the attorney general's suggestions almost verbatim, creating two new custodial categories in addition to the two existing categories. The newly created category three relates to custody "by virtue of any process issued under the laws of the United States by any court, judge, or commissioner," and category four accounts for "custody of [federal] officer[s] . . . pursuant to lawful arrest[s]."[197] The facts that the language of the amendment mirrors that of the letter and that both of the relevant congressional reports insert the letter directly into the legislative history[198] suggest that the addition of the seemingly most expansive category was intended to capture a discrete group of individuals—federal prisoners awaiting trial.

One might argue that the broad language of the amendment vitiates the significance of the attorney general's intent. This argument would suggest that whatever his expressed intentions

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191 Act of May 14, 1930 § 9, 46 Stat 325, 327, codified as amended at 18 USC § 751.

192 *United States v Brown*, 333 US 18, 21 (1948), citing generally HR Rep No 71-106, 71st Cong, 2d Sess (1930).

193 Act of May 14, 1930 § 9, 46 Stat at 327, codified as amended at 18 USC § 751.

194 See *Administration of Federal Prisons*, S Rep No 74-1021, 74th Cong, 1st Sess 1 (1935). See also *Escape from Custody prior to Conviction*, HR Rep No 74-803, 74th Cong, 1st Sess 1 (1935) ("The purpose of H. R. 3430 is to make escape or attempted escape from custody under lawful arrest before conviction a criminal offense.").

195 See *Administration of Federal Prisons* at 1 (cited in note 194); *Escape from Custody prior to Conviction* at 2 (cited in note 194).

196 See *Administration of Federal Prisons* at 2 (cited in note 194) (including, for example, a Michigan statute providing that "any person lawfully imprisoned awaiting examination on trial, arraignment or sentence who shall escape shall be guilty of an offense"); *Escape from Custody prior to Conviction* at 1 (cited in note 194).

197 Act of Aug 3, 1935, 49 Stat 513, 513–14, codified as amended at 18 USC § 751.

198 See *Administration of Federal Prisons* at 1 (cited in note 194); *Escape from Custody prior to Conviction* at 2 (cited in note 194).

were, the language of the "by virtue of any process" clause (category three) sweeps broadly enough to encompass court-ordered release conditions. As the circuits have argued in the halfway house cases, the clause seems to potentially encompass many forms of criminal-justice supervision.

While the attorney general's narrow objective is not dispositive, the history behind the 1935 amendment sheds light on the meaning of "custody." The breadth of the "by virtue" clause is still entirely a function of the breadth of "custody," and if the term "custody" is read narrowly, the discontinuity between the attorney general's expressed aim (to expand § 751(a) to cover inmates who abscond from court-ordered confinement prior to trial) and the language of the "by virtue" clause disappears. Conversely, an expansive construction of category three renders category two (escapes from penal institutions) entirely superfluous. All escapes from penal institutions would be subsumed under a broad reading of three, running afoul of the interpretative canon against surplusage.[199]

Three developments further support a narrow construction. First, § 751(a) has never been used to prosecute violations of court-ordered parole conditions.[200] Parole, which existed at the time of the amendment, may include location-based conditions and would plausibly fall within the language of the "by virtue" clause under a broad construction of custody.

This lack of enforcement history may be motivated by more than prudential concerns—at least one court has suggested in dicta that parole violations simply do not fall under the statute, observing: "[I]t has never been held, and it is not now contended, that a parole violator has escaped from custody for purposes of an escape statute."[201] This absence of case law for parole violators is significant with respect to the circuit split at issue in the halfway house cases, as parole is the direct predecessor of supervised release.[202]

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[199] See *Ratzlaf v United States*, 510 US 135, 140–41 (1994) ("Judges should hesitate [ ] to treat statutory terms [as superfluous] in any setting, and resistance should be heightened when the words describe an element of a criminal offense.").

[200] I could not find any § 751(a) prosecutions for parole violators, even though federal parole existed when the act codifying escape was first passed and parole may include location-based conditions. Existing cases deal only with parole violators who are first arrested or recommitted and then subsequently abscond. See, for example, *United States v Franklin*, 313 F Supp 43, 44–47 (SD Ind 1970).

[201] See *United States v Person*, 223 F Supp 982, 984 (SD Cal 1963).

[202] See Part I.A.

Second, the circuits' reliance on the statute's reference to *any* custody as textual support is misguided. Although the language of category three was changed from custody "by virtue of any process" to its present form, "any custody under or by virtue of any process,"[203] this appears to have been a stylistic emendation rather than a substantive edit intended to signal an expansive understanding of the term.

The 1948 act that amended the language was part of an extensive recodification of the criminal statutes intended to clean up language and eliminate redundancies in the criminal code while avoiding dramatic changes to the underlying substantive content.[204] Courts have treated these edits carefully, noting that while the revisions do not require "slavish adherence to the predecessor statutes," courts "must not attribute to the 1948 [edits] any substantial disruption in prior congressional purpose or policy without first discerning clear evidence that such a departure was intended."[205] Indeed, the relevant legislative report disavows any major alteration to § 751, describing the revisions as changes in "phraseology and arrangement."[206]

Third, Congress's handling of situations involving prisoners on furlough and work release also demonstrates a limited understanding of custody for the purposes of escape.[207] If a prisoner is released to attend a funeral, but fails to return to prison for reincarceration, may he be prosecuted under the federal escape statute? If custody depends on either a restraints-on-activities or a right-to-control rule, failing to return may be prosecuted under § 751(a).

Yet in 1965, Congress passed a separate act to criminalize "[t]he willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General," noting that such acts should be "deemed an escape."[208] The statute

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[203] Act of June 25, 1948 § 751, 62 Stat 683, 734–35, codified as amended at 18 USC § 751.

[204] See *Report from the Committee on the Judiciary*, HR Rep No 80-304, 80th Cong, 1st Sess 2–9 (1947) (describing the mechanisms and goals of the 1948 revisions).

[205] *CNA Financial Corp v Donovan*, 830 F2d 1132, 1146 (DC Cir 1987).

[206] *Report from the Committee on the Judiciary* at A67 (cited in note 204).

[207] Furloughs are permitted under 18 USC § 3622 (authorizing the Bureau of Prisons to release prisoners for limited periods of time in order to visit dying relatives and obtain medical treatment, among other reasons).

[208] Act of Sept 10, 1965, Pub L No 89-176, 79 Stat 674, 675, codified at 18 USC § 4082(d). For a discussion of the two statutes, see *United States v Leonard*, 498 F2d 754, 757 (DC Cir 1974) (suggesting that Congress enacted the Act of September 10, 1965, in

does not provide for any enhanced penalties that might distinguish it from an ordinary § 751(a) violation, noting only that a violation is "punishable as provided in" the escape section of the US Code.[209] The fact that Congress enacted a separate statute to constructively deem such acts escapes may reflect a legislative endorsement of the view that § 751(a) custody is ordinarily linked to confinement and restraint, rather than an abstract legal right to enforce compliance. In line with this understanding, the failure-to-return statute explicitly applies to *prisoners*—excluding parolees and probationers from comparable liability.

2. The purposes of § 751(a) are not served by prosecutions for supervised release violations.

The above analysis demonstrates why the circuits' broad constructions of § 751(a) custody are inconsistent with a historical understanding of the statute, but it does not fully explain why release violations should be excluded from the statute. Given that § 751(a) predates the creation of supervised release by fifty-four years, it is important to examine the purposes underlying § 751(a) in assessing its applicability to release. Moreover, while the Supreme Court has not offered an interpretation of "custody" for purposes of § 751(a), the Court has defined the term in several other contexts with special reference to the broader purposes of the relevant provision, eschewing formal definitions for functional rules.[210]

In an early case, the Supreme Court observed that the escape statute is intended to reduce special risks posed to the public by a "violent" and "menacing" escape.[211] The Court adopted the Government's reasoning that escapes and attempted escapes present problems of "penal discipline," as they endanger "the lives of guards and custodians," and "carry in their wake other crimes attendant upon procuring money, weapons and transportation and

order to criminalize prisoners' failure to return from furloughs in response to a district court opinion declaring such acts to be outside the scope of § 751(a)).

[209] 18 USC § 4082(a).

[210] See *Jones*, 371 US at 241–43 (discussing the need to define § 2241 habeas custody broadly to protect individuals from wrongful restraint); *Howes v Fields*, 132 S Ct 1181, 1189 (2012) (defining custody for *Miranda* purposes as "a term of art [ ] specif[ying] circumstances that are thought generally to present a serious danger of coercion," focusing on "all of the circumstances surrounding the interrogation").

[211] *Brown*, 333 US at 21 n 5.

upon resisting recapture."[212] Under this interpretation, an escaped prisoner commits an independent wrong by creating a dangerous environment. This wrong is punishable as an independent criminal offense. This reading of § 751(a) has had lasting legal effect. More recently, the Supreme Court has used this same logic to hold that escape "is a continuing offense . . . [g]iven the continuing threat to society posed by an escaped prisoner."[213]

While these concerns are certainly relevant in the context of supervised release, the harms prevented are occasionally more speculative. The "menaces" posed by a defendant who walks away from a halfway house, fails to report for a meeting, or violates a curfew are not equivalent to those posed by an escaped prisoner who immediately becomes a fugitive and must act quickly to evade detection. *United States v Brown*[214] points to proximate custodians endangered by a prison break, but defendants on release do not have similarly close guards.[215] Release violators certainly have strong incentives to avoid detection and further penalties. But because they are not under direct surveillance, this evasion may not require the dangerous dash to obtain "money, weapons and transportation" that *Brown* envisions.[216]

But more importantly, unlike a prisoner or an arrestee, a defendant on release is essentially at liberty, having completed a preceding prison term. Sentencing judges may choose *only* between releasing the defendant to full liberty or adding a release term and requiring the defendant to adhere to a set of conditions. In short, the public already assumes a baseline degree of recidivism risk when an individual is released from prison. It is not clear that there is any increase in risk created by requiring that individual to undergo additional monitoring, let alone an increase sufficient to justify an independent offense for escape—particularly when there are preexisting mechanisms for redressing release violations.[217]

One counterargument is that Congress, in authorizing judges to consider incapacitation when imposing supervised release,

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[212] Id.

[213] *United States v Bailey*, 444 US 394, 413 (1980).

[214] 333 US 18 (1948).

[215] Releasees are supervised by probation officers. Many judges impose standard conditions requiring defendants to report to their officer on a regular basis, allow visits by their officer, and notify their officer if they are arrested or questioned by law enforcement officers. See USSG § 5D1.3(c)(2), (10)–(11).

[216] *Brown*, 333 US at 21 n 5.

[217] See Part I.B.

acknowledged potential risks posed by releasees.[218] This argument is not persuasive. Sentencing judges have a corresponding statutory duty to impose "no greater deprivation of liberty than is reasonably necessary."[219] Release conditions are ordinarily quasi-incapacitative at best;[220] detentive conditions such as halfway house stays still permit defendants to seek employment and leave with permission. Because the central aim of supervised release is to ease the defendant's transition to community life, courts may not protect the public by replicating incarceration.

The transitional nature of supervised release is thus fundamentally at odds with the rationale underlying escape prosecutions. Simply put, supervised release requires judges to integrate formerly incarcerated persons into the wider community; escape is designed to punish offenders for the risks that they present to the public when they abscond from seclusion or resist lawful proceedings.

3. The rule of lenity favors a narrow construction of § 751(a).

The rule of lenity suggests that textual ambiguities in criminal statutes should be construed narrowly.[221] Lenity is rarely applied, as it is operative only in "situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of [a] statute."[222] In theory, the rule operates as a background default to advance fair notice and cabin enforcement discretion.[223] Another rationale is that the rule implements the separation of powers, "strik[ing] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."[224] Under this view, lenity safeguards against interpretative slippage by requiring explicit legislative authorization for the expansion of criminal statutes. One commentator has gone further,

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[218] See text accompanying note 55.

[219] 18 USC § 3583(d)(2).

[220] Detentive release conditions are subject to special statutory limitations. See 18 USC § 3583(d)(2). See also notes 77–78 and accompanying text.

[221] See *Yates v United States*, 135 S Ct 1074, 1088–89 (2015) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

[222] *Moskal v United States*, 498 US 103, 108 (1990) (quotation marks and emphasis omitted).

[223] See *United States v Standard Oil Co*, 384 US 224, 234–37 (1966) (Harlan dissenting).

[224] *Liparota v United States*, 471 US 419, 427 (1985).

suggesting that the rule of lenity is designed to "provoke legislative correction" by having judges construe statutes in favor of traditionally disfavored interest groups, causing favored groups to override the decision but clarify latent ambiguities in the process.[225]

The interpretative-slippage justification has special relevance in this area, in which changed circumstances may drastically expand an ambiguous criminal statute to a broad class of ex-offenders without a clear legislative mandate. These slippage concerns are more than hypothetical. Prosecutors must enforce rules even in the absence of such a legislative mandate or other similarly final resolution. Thus, expansive court constructions have a direct influence on prosecutorial policy. For example, in the escape context, the entry for § 751(a) in the *U.S. Attorneys' Manual* currently provides that custody "need only be minimal."[226] The manual cites Eighth Circuit precedent in support of this rule,[227] even though there is disagreement among the circuits over how broadly to construe § 751(a) custody. Although there are other strong statutory construction arguments in favor of an unequivocal finding that supervised release conditions are categorically noncustodial, in the alternative, courts may arrive at the same outcome through the application of lenity.

B. The Categorical Rule: The Sentencing Reform Act

There are also several policy justifications for a categorical rule. Importantly, these justifications are not freestanding considerations, but are embodied within the SRA. While the circuits that have considered this issue have looked exclusively to § 751(a) in determining whether supervised release conditions are custodial, the SRA is a similarly relevant statute. As discussed in Parts I.A–B, the SRA created supervised release in order to facilitate offender rehabilitation and centralize sentencing discretion. Both of these purposes are inextricably linked with the specific penalty structure that Congress created to redress violations, a structure that is compromised by parallel prosecutions for escape.

One of the principal innovations of the SRA was to separate the punitive and rehabilitative aspects of a prison sentence. To

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[225] Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum L Rev 2162, 2166, 2192–96 (2002).

[226] See *U.S. Attorneys' Manual* § 1808 (Department of Justice, Offices of the United States Attorneys), archived at http://perma.cc/KDE8-22TF.

[227] See id, citing *United States v Cluck*, 542 F2d 728, 731 (8th Cir 1976).

enforce this divide, Congress has historically exerted careful control over the penalties that defendants may face for condition violations.[228] The SRA originally did not contain revocation proceedings; Congress instead envisioned that contempt could redress serious violations.[229] For less serious violations, releasees' rehabilitation was best served by intermediate sanctions, rather than returning them to prison.[230]

Even revocation places meaningful limitations on reincarceration.[231] First, revocation is not automatic. Sentencing judges have discretion in determining when to revoke, if at all.[232] Second, even when judges opt for prison time, they need not require incarceration for the entire length of the term. Congress made clear that the postrevocation sentence itself may include supervised release.[233] This feature was added to allow judges to carefully craft their responses to condition violations, rather than forcing judges to reimprison releasees for longer than necessary.[234] In short, revocation is structured to allow judges to ensure that a defendant remains at liberty whenever appropriate.

Because sentencing judges may carefully calibrate their response to a violation, supervised release's structure tolerates a degree of noncompliance as necessary for rehabilitation. Rather than requiring automatic sanctions for disfavored behaviors, the system allows releasees to make some errors before facing revocation. In line with this toleration, the Seventh Circuit in *United States v Smith*[235] criticized a sentencing judge for precommitting herself to a specific sanction for a violation,[236] thus "conflat[ing] criminality with disobedience."[237] Framing condition violations as

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228 See Part I.B.

229 See SRA, 98 Stat at 2000, codified at 18 USC § 3585(e)(3).

230 See notes 58–61 and accompanying text.

231 See 18 USC § 3583(e)(3) (setting the upper limits for revocation imprisonment for different classes of offenders); USSG § 7B1.1 (defining three grades of release violations); USSG § 7B1.3(a) (suggesting in a policy statement that judges should revoke release for Grade A or B violations, but may choose to revoke or otherwise modify release terms for Grade C violations).

232 See 18 USC § 3583(e).

233 See 18 USC § 3583(h).

234 See 137 Cong Rec 14823–24 (June 13, 1991) (describing how, without postrevocation supervision, judges "may be faced with a Hobson's choice" between "continuing a defendant on supervision who merits a more severe sanction" and "re-imprison[ing] [a defendant] for a longer period than otherwise necessary").

235 770 F3d 653 (7th Cir 2014).

236 Id at 655.

237 Id at 657.

independent crimes prevents rehabilitation by adding a new punitive layer to this system. Escape prosecutions blend disobedience and criminality by punishing releasees in instances in which a sentencing judge might choose a lesser sanction, or might even decline to sanction at all.[238] The results are conceptually odd. Under the dominant approach among the circuits, a sentencing judge's decision to excuse or to not excuse a condition violation has no bearing on whether the defendant may face criminal liability for that same action.

Escape prosecutions also thwart rehabilitation by drastically multiplying the consequences that a defendant faces for a location-based condition violation. For example, imagine that a defendant commits a crime and is ordered to serve the maximum term of supervised release authorized by statute for his offense (R_1) after serving his prison term (P_1). The defendant is ordered to reside at a halfway house, but he leaves the facility and fails to return. The defendant may face up to five years in prison if convicted of escape (P_2).[239] Further, because escape is a class D felony, the sentencing judge is authorized to impose up to three years of supervised release (R_2).[240]

One of the mandatory conditions of all release terms is that the releasee avoids committing a "Federal, State, or local crime" while under supervision.[241] Thus, the defendant is now eligible for revocation of R_1. The Sentencing Commission would classify an escape conviction as a Grade B violation.[242] The Commission recommends that sentencing judges revoke release for a violation of this grade.[243] If the judge revokes R_1, the offender will be sentenced to a new prison term (P_3) for up to the maximum term length that the judge could have imposed for the defendant's first term of supervised release (R_1), with no reduction for previous time spent on release.[244]

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238 The handbook for federal probation officers includes suggested responses for violations. These responses include formal reprimands, requests for modification of release conditions, and requests for revocations. Suggested responses to a first or second violation of home confinement include "[n]oncompliance meeting[s]," "[l]etter[s] of warning," "[i]ntensive supervision," and "[i]ntermittent confinement." See *Guide to Judiciary Policy: Probation and Pretrial Services; Supervision of Federal Offenders* § 620.40.20(b)(1) (Dec 10, 2010), archived at http://perma.cc/JX69-LG6F.

239 18 USC § 751(a).

240 18 USC § 3583(b)(2).

241 18 USC § 3583(d).

242 See USSG § 7B1.1(a)(2).

243 USSG § 7B1.3(a)(1).

244 18 USC § 3583(e)(3).

To further complicate matters, the postrevocation sentence P_3 may itself include a supervised release term (R_3), so long as the total revocation term (consisting of both imprisonment and the new release term) does not exceed the maximum term of supervised release authorized for the original offense ($P_3 + R_3 \leq R_1$).[245] In total, a defendant who escapes in the second year of a three-year term of supervised release ($R_1 = 3$) faces up to three years in prison as a revocation penalty (P_3), minus any extra release (R_3); up to five years in prison for escape (P_2); and up to three years of a new supervised release term (R_2). A single release violation may transform R_1 into at most two release terms and two prison sentences.[246] Even though the hypothetical defendant has already completed two years of his supervised release term, he may face a maximum of eight years of prison and a maximum of three years of supervised release.

This dual sentencing process also frustrates the discretion-centralization purposes of the SRA. A key innovation of the SRA was to consolidate sentencing authority in district court judges, rather than partitioning responsibility between judges and the United States Parole Commission.[247] Escape prosecutions thwart this reform by multiplying the number of individuals with discretionary control over the defendant's sentence from the moment that the prosecutor decides to bring an independent criminal charge of § 751 escape.

A lack of centralized control may have the effect of replicating some of the perverse incentives that Congress expressly sought to avoid by consolidating authority in district court judges. For example, both *Burke* and *Foster* involved district court judges who added halfway house conditions to give homeless releasees a place to stay at the end of their sentences.[248] Tying escape liability to violations may dissuade judges from acting similarly in the future, given that they do not have complete control over the consequences if the releasee absconds and is subsequently indicted for

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[245] This inequality must hold because, as previously defined, R_1 represents the maximum release term that a judge could statutorily authorize for the given offense. See 18 USC § 3583(h).

[246] Terms of supervised release do not run during any period in which the defendant is imprisoned in connection with a conviction for a crime, unless the imprisonment is for less than thirty days. The defendant in this hypothetical scenario likely cannot serve P_2 and R_1 concurrently. See 18 USC § 3624(e). Further, while supervised release terms run concurrently, judges may run prison terms consecutively upon revocation. See *United States v Deutsch*, 403 F3d 915, 917–18 (7th Cir 2005) (per curiam).

[247] See text accompanying note 45.

[248] See *Burke*, 694 F3d at 1063; *Foster*, 754 F3d at 1187–88.

escape. The same applies for judges who use supervised release as a vehicle for granting releasees access to mental health services or treatment programs.

These consequences suggest that courts should avoid construing release conditions as custodial conditions giving rise to § 751(a) escape liability. A categorical rule excluding supervised release conditions from § 751(a) custody best gives effect to the SRA by leaving the existing statutory penalty structure in place.

CONCLUSION

Commentators have criticized supervised release for failing to live up to its initial promise and perpetuating incarceration in instances in which "the utility of [ ] continued imprisonment is difficult to see."[249] Escape prosecutions exacerbate this effect by doubling the penalties that ex-offenders face for violating the terms of their release, trapping individuals who are not truly reoffending in a cycle of imprisonment.

States with similar supervision programs have confronted similar issues.[250] These issues will continue to arise over the coming years as federal parole is phased out and the proportion of ex-offenders serving release terms increases.[251] Although shielding supervised release violators from escape prosecutions may seem like a drastic step at first blush, the categorical rule is most consistent with the evolution of the federal crime of escape and best gives effect to the transitional and discretion-centralization aims of the SRA. The rule does not mean that disobedient releasees will get off scot-free—it merely requires courts to use appropriate preexisting mechanisms for sanctioning condition violations. Most importantly, the categorical rule will help clarify the divide between rehabilitation and punishment by carefully defining the consequences that may result from a condition violation.

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[249] *Smith*, 770 F3d at 657.

[250] See, for example, *Colorado Commission on Criminal and Juvenile Justice 2008 Annual Report* *164 (Colorado Department of Public Safety, Dec 2008), archived at http://perma.cc/3SVH-VRGN (noting that in fiscal year 2007, 1,249 individuals were charged with escape from various forms of criminal-justice supervision, including parole and community corrections programs).

[251] In cases in which defendants were sentenced to prison terms in excess of one year and supervised release was not statutorily mandated, sentencing courts still imposed release terms 99.1 percent of the time. See *Federal Offenders* at *52 (cited in note 5).