DEMYSTIFYING RISK ASSESSMENT: GIVING PRISONERS A SECOND CHANCE AT INDIVIDUALIZED COMMUNITY CONFINEMENT UNDER THE SECOND CHANCE ACT

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INTRODUCTION

Federal agencies use "backdoor rulemaking" to circumvent the requirements of the Administrative Procedure Act (APA) to the point of abuse[1]: they issue guidance documents, memoranda, bulletins, circulars, and other nonlegislative rules to avoid laborious[2] notice-and-comment procedures.[3] These rules sometimes take the form of "spurious" rules, which may appear to be general policy statements but which agencies misuse to bind agency staff and the public.[4] Scholars have called on the courts to rein in such backdoor rulemaking,[5] going so far as to advocate substantive review of guidance documents.[6] The Judiciary appears to have taken notice, as many courts are scrutinizing these rules to ensure adherence to separation of powers principles.[7] And while some

1. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1317 (1992) [hereinafter Anthony, *Interpretive Rules*] (noting agencies' tendency to avoid judicial and public scrutiny by issuing "nonlegislative" rules). This Comment occasionally will use Professor Anthony's term *spurious rule*—a rule that does not interpret law and was not subject to notice-and-comment procedures but which the agency nevertheless treats as binding upon affected parties. *See generally* Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 10 (1994) [hereinafter Anthony, *Lifting the Smog*].

2. *See* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 529–30 (1977) (noting that imposing a requirement of notice-and-comment rulemaking for guidance documents is generally rejected by agency staff members because of the delays and costs associated with such a requirement).

3. *See* Anthony, *Lifting the Smog*, *supra* note 1, at 3 n.8 (noting the tendency to avoid formal procedures).

4. *See* Anthony, *Interpretive Rules supra* note 1, at 1328–31 (explaining how agencies misuse such rules).

5. *See generally* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011) (reviewing various proposals to curb improper rulemaking).

6. *See generally id.*

7. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

> Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. . . . Law is made, without notice and comment, without public participation, and without publication . . . .

Id. *But see* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for*

commentators bemoan the "ossification,"[8] or stagnation, that supposedly results from heightened judicial skepticism of agency action,[9] others are willing to take the risk to rein in spurious rules and create better systems.[10] Some even question whether a "hard look" at agency action creates significant ossification at all.[11] Whichever side of this debate one takes, at bottom it is the courts that must ascertain agency compliance with the APA.

This Comment explores the trend toward backdoor rulemaking in the context of one agency within the Department of Justice (DOJ): the Federal Bureau of Prisons (BOP or the Bureau). The Bureau has promulgated a binding informal policy based on a regulation that did little more than "parrot" the language of its enabling statute.[12] While BOP enforcement actions premised on this rule should be invalidated as arbitrary and capricious,[13] the courts have upheld them.[14] Thus, Bureau staff continues to interpret the statute on an ad hoc basis, a result Congress never intended.[15]

The enabling statute in question, the Second Chance Act (SCA or the Act), funded a national prisoner re-entry initiative to be implemented by

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an Essential Element, 53 ADMIN. L. REV. 803, 807 (2001) (criticizing the D.C. Circuit for invalidating agency guidance).

8. *Ossification*, as used by some commentators, is "a tendency toward or state of being molded into a rigid, conventional, sterile, or unimaginative condition." *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 821 (10th ed. 2000).

9. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–88 (1992) (describing the relative difficulty of rulemaking).

10. *See* Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 682 (1996) (advocating hard-look review, a more searching form of judicial oversight of agency action).

11. *See* William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. Rev. 393, 396 (2000) (explaining that in the D.C. Circuit, most remanded agency action was able to "recover"), *cited in* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 535 n.266 (4th ed. 2006).

12. The regulation's language copied the language of the authorizing statute and should be afforded little deference under Supreme Court precedent. *See* Gonzales v. Oregon, 546 U.S. 243, 256–57 (2006) (remarking that interpretations of regulations that use "parroting" statutory language do not receive "*Auer* deference"); *cf.* Auer v. Robbins, 519 U.S. 452, 461 (1997) (showing that agency interpretations of its own regulations are normally entitled to substantial deference).

13. *See*, *e.g.*, Anthony & Codevilla, *supra* note 10, at 671 n.18 (citing U.S. Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994)); *see also infra* Part III.B (analyzing *U.S. Tel. Ass'n*).

14. *See infra* Part II.A (describing decisions that have upheld the Federal Bureau of Prisons (BOP or the Bureau) actions).

15. *See infra* Part I.C (explaining Congress's intent in passing the Second Chance Act (SCA or the Act)).

BOP and DOJ.[16] The Act ordered BOP's director to issue regulations that would maximize all inmates' chances of successful reintegration.[17] To help achieve this ambitious goal, the SCA increased the maximum time that BOP could place inmates in halfway houses from six months to one year.[18] Instead of interpreting the Act, however, the Bureau, without soliciting advance public comment, issued a regulation that simply copied the statutory language[19] and published binding guidance documents that substantially restrict inmates' access to community confinement.[20] The informal policy is primarily comprised of two Bureau memoranda, issued in April and November 2008.[21] Even though the memoranda are practically

16. The BOP is directed, at a minimum, to assess and track each prisoner's skill level, give priority to high-risk offenders, and track prisoner re-entry needs. *See* 42 U.S.C. § 17541(a)(1)(D) (Supp. II 2009); 18 U.S.C. § 4042(a) (Supp. IV 2011) (requiring the creation of a skills development plan); 18 U.S.C. § 3621(b)(1)–(5) (2006 & Supp. II 2009) (delineating factors the Bureau must consider in determining the length of a prisoner's Resident Reentry Center (RRC) placement).

17. Second Chance Act of 2007, Pub. L. No. 110-199, § 251, 122 Stat. 657, 692, 693 (2008) (to be codified at 42 U.S.C. § 17555(c)(6)(C) (2012)) ("[The Bureau Director shall issue regulations] which shall ensure that placement in a community correctional facility by the Bureau of Prisons is . . . of sufficient duration to provide the greatest likelihood of successful reintegration . . . .").

18. *Compare* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 2009 (1984) (codified as amended at 18 U.S.C. § 3624) (pre-2008 amendment) (enumerating that pre-release community confinement is not to exceed six months of the last 10% of the inmate's sentence), *with* 18 U.S.C. § 3624(c)(1) (Supp. II 2009) (highlighting that pre-release community confinement placements are "not to exceed 12 months").

19. 73 Fed. Reg. 62,440, 62,441 (Oct. 21, 2008), *invalidated by* Sacora v. Thomas, No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

20. *See* U.S. SENTENCING COMM'N, REGIONAL HEARING ON THE STATE OF FEDERAL SENTENCING 9–10 (2009) [hereinafter U.S.S.C. ALTERNATIVES TO INCARCERATION] (statement of Harley G. Lappin, Director, Federal Bureau of Prisons) (acknowledging that the Act gives BOP increased pre-release placement authority but declining to give most offenders more than three-to-four months' time). For a thorough discussion of the SCA's statutory language in the context of BOP's pre-release policy, see S. David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235, 320 (2011) (recommending twelve-month pre-release community confinement and an exception to the mootness doctrine so that courts can hear more prisoners' claims on the merits).

21. *See* Memorandum from Joyce K. Conley, Assistant Dir., Corr. Programs Div., Fed. Bureau of Prisons, and Kathleen M. Kenney, Assistant Dir./Gen. Counsel, Fed. Bureau of Prisons, to Chief Exec. Officers, Inmate Requests for Transfer to Residential Reentry Centers (Nov. 14, 2008) [hereinafter BOP November 2008 Mem.] (on file with author); Memorandum from Joyce K. Conley, Assistant Dir., Corr. Programs Div., Fed. Bureau of Prisons, and Kathleen M. Kenney, Assistant Dir./Gen. Counsel, Fed. Bureau of Prisons, to Chief Exec. Officers, Pre-Release Residential Re-Entry Center Placements Following The Second Chance Act of 2007 (Apr. 14, 2008) (on file with author) [hereinafter BOP April

binding on the public, neither has gone through notice-and-comment rulemaking.[22] This backdoor rule in effect has enabled the Bureau to block Congress's effort to reduce recidivism.[23] Indeed, by one account, only 2% of BOP inmates have been placed in community confinement for more than six months.[24] BOP has not taken the steps necessary to achieve Congress's goal, and yet few courts have stepped in to force the Bureau's adherence to legislative intent,[25] leading to congressional oversight and resignation of BOP's director.[26]

In a rare example of judicial intervention, on June 16, 2010, the U.S. District Court for the District of Oregon invalidated BOP's parroting regulation (but not its memoranda) because the Bureau did not establish good cause to forgo advance notice-and-comment.[27] While the court enjoined the regulation's enforcement until BOP re-issued it after having provided notice and an opportunity for public comment, it did not find the Bureau's informal policy to be contrary to the SCA or the APA.[28] The Ninth Circuit affirmed.[29] On September 20, 2011, the Bureau published a

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2008 Mem.].

22. Apparently realizing its misstep, the Bureau issued another memorandum that no longer required regional director approval and adopted an "approach" of targeting high-risk offenders, but lacked useful guidance for staff about how the "approach" would work in practice. *See* Memorandum from D. Scott Dodrill, Assistant Dir. Corr. Programs Div., Fed. Bureau of Prisons, to Chief Exec. Officers, Revised Guidance for Residential Reentry Center (RRC) Placements (June 24, 2010) [hereinafter BOP June 2010 Mem.]. Moreover, the newest memorandum does not rescind the requirement of "unusual or extraordinary" circumstances. *See id.*

23. Correctional researchers had the following to say about institutional impediments to reforms:

> The environment of corrections is primarily a command and control, punishment-oriented culture. In this environment, rehabilitation is often a periphery goal, if it is supported at all. . . . [R]esistance to implementation is an anticipated challenge due to the perceived misalignment of these practices. . . . Resistance to change, while sometimes limited to a few individuals, is most likely to arise from an organizational culture that prefers the traditional way of doing things.

Jennifer Lerch et al., *Organizational Readiness in Corrections*, FED. PROBATION, June 2011, at 6 (citations omitted).

24. *See* Mitchell, *supra* note 20, at 301 n.399.

25. *See infra* Part II.A (reviewing judicial responses to BOP's memoranda).

26. *See infra* Part IV (describing Congress's Government Accountability Office BOP audit and former Director Lappin's possibly "for cause" resignation).

27. Sacora v. Thomas, No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011); *see also* Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006).

28. *Sacora*, 628 F.3d at 1068–70.

29. *Id.* at 1070. BOP did not appeal the district court's order that it reissue the interim rule using notice-and-comment rulemaking. *Id.* at 1065 n.6.

notice of a "new" regulation that reads exactly the same as the first one.[30] The Bureau has not predicted the final rule's likely publication date.[31]

This Comment recommends that courts force BOP's 2008 memoranda through notice-and-comment rulemaking to give the public its rightful say on the pre-release rule.[32] Once the Bureau has provided the public with a meaningful opportunity to comment, the resulting regulation, enlightened by modern correctional research,[33] should incorporate an offender risk-assessment instrument to determine future Resident Reentry Center (RRC) placements. In the final analysis, requiring rulemaking will better align BOP's policy with congressional intent and empirical data on recidivism and re-entry—an improvement that should pay dividends for law-abiding taxpayers and ex-offenders alike.

Part I reviews the legal backdrop to the Act's passage and explains the SCA's intent and purpose. Part II analyzes judicial responses to BOP's "interpretation" of the Act and argues that the Bureau's implementation of the SCA violates the APA and the Act itself. Part II also asserts that, given their unique expertise in sentencing decisions, courts should not defer to BOP's pre-release rule. Part III examines two cases that repudiated actions of the Federal Communications Commission and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and urges courts to send BOP's memoranda back to the Bureau for notice-and-comment rulemaking. Lastly, Part IV discusses executive and legislative responses to the Bureau's broader failure to enforce the SCA and recommends that BOP incorporate a risk-assessment instrument into its new regulation.

I. BACKGROUND

A. The Federal Bureau of Prisons and the Second Chance Act

BOP, directly or through its contract facilities, manages over 218,000 prisoners, about 9,000 of whom are confined in halfway houses; 5,800

30. Pre-Release Community Confinement, 76 Fed. Reg. 58,197 (proposed Sept. 20, 2011) (to be codified at 28 C.F.R. pt. 570).

31. *See* e-mail from BOP to author, July 18, 2012 ("The final rule on pre-release confinement is still in development. We are unable to project a publication date at this time.") (on file with author).

32. *See* 5 U.S.C. § 706(2)(D) (2006) ("[T]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of [required] procedure . . . .").

33. Public participation is a foundation stone of agency action, even when agencies promulgate interpretive rules and guidance. *See* Asimow, *supra* note 2, at 575 (stating that the need for the public to provide agencies with relevant information on proposed informal rules, including guidance, is just as great as when agencies are issuing legislative rules).

inmates enter the federal correctional system annually.[34] Approximately 40% of inmates are serving sentences of ten years or more; about half for drug offenses; and 93% are male.[35] Despite longstanding criticism of prison overcrowding,[36] federal prisons are now over 35% above capacity.[37] And imprisonment comes at a price: in 2010 alone it cost taxpayers $28,284[38] to keep one federal inmate behind bars, while it cost 8.6% less[39] to confine the same prisoner in one of the Bureau's 175 RRCs,[40] also known as halfway houses or community correctional centers (CCCs).

According to BOP, "[RRCs] make it possible for ex-offenders to establish positive ties to the community gradually, while correctional staff supervises their activities during this important readjustment phase."[41] Indeed, community confinement can play an important role in reducing recidivism (or re-offending), as a shocking 60% of inmates re-offend within two years of release.[42] Yet today, only around 4% of inmates are housed in RRCs (during a transition period called pre-release community confinement)[43] before re-entering society.

In the face of this cycle of criminality,[44] all three branches of the Federal Government have sought to reduce recidivism by promoting programs centered on drug treatment, vocational training, and community

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34. *See Weekly Population Report*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp#contract (last updated Nov. 29, 2012).

35. *See Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/facts.jsp (last updated Oct. 27, 2012).

36. *See, e.g.*, Costello v. Wainwright, 397 F. Supp. 2d 20, 38 (M.D. Fla. 1975) (concluding that overcrowding "ultimately disserve[s] the rehabilitative goals of the correctional system").

37. U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20, at 1.

38. By comparison, social services workers earn a median salary of $28,740. *See* BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/current/oes211093.htm (last modified Mar. 27, 2012).

39. *See* Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081 (Sept. 15, 2011).

40. *See Directory of Active Contracts: March 2010*, FED. BUREAU OF PRISONS, *available at* http://www.bop.gov/locations/cc/RRcontracts_0310.pdf (listing current RRCs).

41. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2009 31, *available at* http://www.bop.gov/news/PDFs/sob09.pdf.

42. *See* Laura Knollenberg & Valerie A. Martin, *Community Reentry Following Prison: A Process Evaluation of the Accelerated Community Entry Program*, FED. PROBATION, Sept. 2008, at 54, 55 (stating how critical the period immediately following release is to offender outcomes).

43. *See Weekly Population Report*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp (last updated Nov. 29, 2012).

44. One out of every 99 Americans, and an astonishing 1 in 9 African-American men between the ages of 20 and 34 (approximately 11%), is imprisoned. *See* Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.: Inmate Population is Highest in the World*, N.Y. TIMES, Feb. 29, 2008, at A14.

confinement.[45] Judicial opinions,[46] legislative enactments,[47] and executive policy statements[48] indicate broad support for programs that will help offenders successfully reintegrate. Moreover, in an effort to create a smarter administrative state, in recent years the Executive Branch has urged agencies to justify their rules with current empirical research and to solicit public input.[49]

By the early 2000s, prison overcrowding coupled with little change in recidivism rates spurred Congress to pass the SCA.[50] Given the burgeoning

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45. *See* ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS 163–64 (2008) (noting that DOJ established the Federal Reentry Courts in an effort to track the nearly 650,000 prisoners released yearly from state and federal prisons in the 1990s).

46. *See* Tapia v. United States, 131 S. Ct. 2382, 2392–93 (2011) (approving lower courts' discussion of rehabilitative programs during sentencing and encouraging judges to recommend that the BOP place prisoners in treatment programs, but not permitting courts to impose longer sentences "to enable an offender to complete a treatment program"); *see also* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (2010) (indicating that 44% of respondents believed split sentencing between imprisonment and community confinement should be made more available for certain crimes).

47. Second Chance Act of 2007, Pub. L. 110-199, 122 Stat. 657 (2008) (to be codified as amended in 42 U.S.C. § 17501).

48. Keith B. Richburg, *States Seek Less Costly Substitutes for Prison: Treatment, Parole Are Gaining Favor*, WASH. POST, July 13, 2009, at A4 ("President Obama has asked Congress for more than $200 million for prisoner-reentry programs."). DOJ recently committed another $58 million to reentry programs following significant reductions in many states' recidivism rates. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Announces $58 Million to Improve Reentry Outcomes (Oct. 1, 2012), *available at* http://www.justice.gov/opa/pr/2012/October/12-ag-1185.html. And in an earlier example of executive action, in January 2011, Attorney General Eric Holder convened the first annual meeting of the Reentry Council, a cabinet-level group whose mission it is to reduce recidivism, save taxpayer dollars, and make communities safer. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Eric Holder Convenes Inaugural Cabinet-Level Reentry Council (Jan. 5, 2011) [hereinafter Press Release, Reentry Council], *available at* http://www.justice.gov/opa/pr/2011/January/11-ag-010.html.

49. *See* Cass Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Keynote Address at the Administrative Law Review Symposium: Interbranch Control of Regulation: Executive, Legislative, and Judicial Influence, and Agency Response (Feb. 17, 2012) (stating that OIRA's future goals are, among others, "interagency cooperation" and empirically informed agency decisions that will reduce costs and eliminate unjustified burdens).

50. *See* H.R. REP. NO. 110-140, at 2 (2007), *reprinted in* 2008 U.S.C.C.A.N. 24 ("The Federal prison population has increased more than seven-fold over the past 20 years. . . . According to the Bureau of Justice Statistics, expenditures on corrections alone increased from $9 billion in 1982 to more than $50 billion today."); *see also* Richburg, *supra* note 48, at A4 ("A powerful motivator for alternative sentencing is recidivism. For nearly 20 years, national recidivism rates have remained the same . . . ."); Liptak, *supra* note 44, at A14 (quoting Susan Urahn, Pew Center managing director, saying, "'We aren't really getting the

cost of the federal prison system and the United States' serious debt crisis,[51] it is no surprise that the House Report found a severe increase in federal imprisonment rates as one reason to support the Act's sweeping reforms[52] or that the bill passed with almost unanimous support.[53]

The House and Senate versions of the bill elected a recidivism-reduction approach to decrease the costs—economic and social—associated with America's federal correctional institutions.[54] The text of the bill emphasized its "focus[ ] on development and support of programs that provide alternatives to incarceration, expand the availability of substance abuse treatment, strengthen families, and expand comprehensive re-entry services."[55] Significantly, the SCA's pre-release provisions increased inmates' maximum allowable community confinement from six months of the last 10% of the sentence[56] to twelve months[57] and required that placements be made on an individual basis.[58] Accordingly, the Act read:

> ISSUANCE OF REGULATIONS.—The Director of the Bureau of Prisons shall issue regulations . . . which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—(A) conducted in a manner consistent with section 3621(b) of this title; (B) determined on an individual

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return in public safety from this level of incarceration. . . . Being tough on crime is an easy position to take, particularly if you have the money. And we did have [it] in the '80s and '90s.'").

51. *See* Liptak, *supra* note 44, at A14 (quoting a Pew Center official as stating that the "tough on crime" mentality has caused taxpayers to rethink whether lawmakers are spending public funds appropriately); *see also* Teresa Tritch, Editorial, *How the Deficit Got This Big*, N.Y. TIMES, July 24, 2011, at SR 11 (citing two wars and alterations in the tax code as causes of the debt crisis).

52. *See* H.R. REP. NO. 110-140, at 2.

53. *See* Erik Eckholm, *U.S. Shifting Prison Focus to Re-entry into Society*, N.Y. TIMES, Apr. 8, 2008, at A23 (noting the remarkably wide bipartisan support for the bill).

54. *See* H.R. REP. NO. 110-140, at 2 (noting that the staggering corrections expenditures do not include costs associated with prosecutions and arrests).

55. *See id.* at 5.

56. 18 U.S.C. § 3624(c) (2006).

57. 18 U.S.C. § 3624(c)(1) (Supp. IV 2011).

> The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

Id.

58. *Id.* § 3624(c)(6)(B); *see also* 18 U.S.C. § 3621(b) (2006 & Supp. IV 2011) (ordering the Bureau to designate placements considering "(1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence . . . and (5) any pertinent policy statement issued by the Sentencing Commission").

basis; and (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.[59]

The Act also included grants for rehabilitative programs[60] and forced BOP to set clear recidivism-reduction goals.[61]

Although Congress directed the Bureau to implement these sweeping changes,[62] BOP still has not realized many of the reforms, in part because it has not promulgated a regulation that actually interprets the Act.[63] BOP's initial attempt[64] to implement the law was rejected in *Sacora v. Thomas*[65] because it declined advance notice-and-comment rulemaking. In BOP's words, "Requiring formal notice-and-comment procedures would be contrary to the public interest in this case, particularly because the revision of these regulations will provide a greater benefit for inmates, through the possibility of a greater community confinement time frame . . . ."[66] Despite statutory language requiring individualized halfway house placements, and despite the Bureau's express acknowledgement of the benefits of RRCs,[67] BOP issued two guidance documents that have substantially undermined the Act's rehabilitative goals.[68]

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59. 18 U.S.C. § 3624(c)(6) (Supp. IV 2011).

60. *See* 42 U.S.C. § 3797w (2006 & Supp. IV 2011) (permitting grants of up to $1,000,000 to states, territories, and Indian tribes for the establishment of reentry projects). In 2010, DOJ awarded over $100 million in state and local reentry grants to support reentry. *See* Press Release, Reentry Council, *supra* note 48.

61. *See* 42 U.S.C. § 17541(d)(3)(C)(i) (Supp. IV 2011) (requiring the Director to establish an attainable goal for reductions in recidivism).

62. *See infra* Part I.C (explaining Congress's purpose and intent in passing the SCA).

63. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-854R, FEDERAL BUREAU OF PRISONS: BOP HAS MECHANISMS IN PLACE TO ADDRESS MOST SECOND CHANCE ACT REQUIREMENTS AND IS WORKING TO IMPLEMENT AN INITIATIVE DESIGNED TO REDUCE RECIDIVISM 1–2 (2010) [hereinafter GAO REP. ON BOP PROGRESS].

64. *See* 73 Fed. Reg. 62,440, 62,442 (Oct. 21, 2008) (codified at 28 C.F.R. pt. 570). The regulation pithily repeated the statutory requirements, followed by: "Section 570.22 reflects the three factors listed above." *Id.*

65. No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

66. 73 Fed. Reg. at 62,442. Of course, since claiming the exception, BOP has effectively extinguished the "possibility" of a "greater community confinement timeframe" through its memoranda. *Id.*; *cf.* Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 800 (D.C. Cir. 1983) (narrowly construing the good cause exemption), *cited in* LUBBERS, *supra* note 11, at 108.

67. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2009 31, *available at* http://www.bop.gov/news/PDFs/sob09.pdf (extolling the benefits of RRCs).

68. Indeed, studies show that individualized risk assessments are essential to successful community reintegration. *See* Knollenberg & Martin, *supra* note 42, at 54 (recommending the use of a risk assessment to identify individual offenders who would benefit from intensive programming).

The first, issued on April 14, 2008, referenced a fourteen-year-old program statement and stated that "Bureau experience reflects inmates' pre-release RRC needs can usually be accommodated by a placement of six months [just over 180 days] or less" and, "[s]hould staff determine an inmate's pre-release RRC placement may require greater than six months, the Warden must obtain the Regional Director's written concurrence . . . ."[69] The second, issued six months later, emphasized that departures from the six-month limit would be approved only under "unusual or extraordinary circumstances."[70] Issued just after passage of the SCA, these new pre-release requirements caught many inmates' case managers off guard.[71]

That the memoranda referenced a 1998 BOP program statement is quite significant. When the Bureau issued the 1998 guidance, the statute authorizing pre-release placements limited community confinement either to six months, or to the last 10% of the prisoner's sentence, whichever is less.[72] Accordingly, the 1998 policy stated: "(1) An inmate may be referred up to 180 days, [the maximum authorized,] with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval . . . ."[73] Plainly, the ten-year-old program statement permitted community confinement up to, and in excess of, the then-statutory limit,[74] making BOP's 2008 memoranda all the more inconsistent.

The 1998 program statement expressly encouraged RRC placements because such placements provided inmates with a smooth transition into their communities and enhanced public safety.[75] To this end, the policy, still in full effect by reference in the 2008 memoranda,[76] stated that:

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69. BOP April 2008 Mem., *supra* note 21, at 4.

70. BOP November 2008 Mem., *supra* note 21, at 3.

71. *See* Telephone Interview with U.S. Prob. Officer, Admin. Office of the U.S. Courts (Feb. 7, 2012) (anonymity requested) [hereinafter USPO Interview].

72. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 7310.04, COMMUNITY CORRECTIONS CENTER UTILIZATION AND TRANSFER PROCEDURE 6 (1998) [hereinafter PROGRAM STATEMENT], *available at* http://www.bop.gov/policy/progstat/7310_004.pdf.

73. *Id.* at 8.

74. *Id.* at 4 ("[BOP] may place an inmate in a CCC for more than the 'last ten per centum of the term,' or more than six months, if appropriate.").

75. *See id.* at 1 (stating that "whenever possible, eligible inmates are to be released to the community").

76. *See* BOP April 2008 Mem. *supra* note 21, at 2. The 1998 program statement remains in full force. *See* Arnett v. Washington-Adduci, No. CV 11-5898-JAK(E), 2012 WL 32386, at *3 n.4 (C.D. Cal. Jan. 3, 2012) ("The Statement remains in effect 'with minor adjustments' to comply with the [SCA].").

> [RRCs] provide an excellent transitional environment[,] . . . assure[] accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills[, and] . . . increase public protection by aiding the transition of the offender into the community. Participating in community-based transitional services may reduce the likelihood of an inmate with limited resources from recidivating, whereas an inmate who is released directly from the institution to the community may return to a criminal lifestyle. . . . [E]ligible inmates should generally be referred to CCCs to maximize the chances of successful reintegration into society.[77]

Thus, the 1998 program statement highlighted the benefits of RRC confinement while it simultaneously allowed case managers to choose the statutory maximum. Only a decade later, the Bureau issued its current pre-release rule, which comparatively limits staff discretion and, as demonstrated by BOP's public statements, downplays the benefits of community confinement.[78]

B. Modern Correctional Research and the Bureau's "Data"

Modern correctional research supports individualized and, in many cases, longer durations of community confinement, but the Bureau's six-month policy contradicts this empirical data, likely for institutional reasons.[79] Studies have shown that, in the context of drug treatment programs, "a *minimum* threshold of . . . 6–12 months [is required] to achieve lasting reductions in drug use and crime. Longer treatment duration appears to improve outcomes for individuals in . . . community corrections settings."[80] Other reports also point to the benefits of a more generous pre-

77. PROGRAM STATEMENT, *supra* note 72, at 1.

78. *See infra* Part I.B (discussing the Bureau's downplaying of the benefits of RRCs).

79. *See* CRIME & JUSTICE INST. & NAT'L INST. OF CORR., IMPLEMENTING EVIDENCE-BASED POLICY AND PRACTICE IN COMMUNITY CORRECTIONS ix (2d ed. 2009) (identifying agencies' inability to change their organization culture as a reason why, despite "a substantial body of literature" of practices "proven to reduce offender risk," necessary reforms are slow in coming); *see also Second Chance Act of 2007: Hearing on H.R. 1593 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 43 (2007) [hereinafter *SCA Hearing*] (prepared statement of Stefan LoBuglio, Chief, Pre-Release and Reentry Services, Montgomery County Department of Correction and Rehabilitation) (describing the fourth criterion for successful implementation of pre-release programs, "fidelity," or institutional support). LoBuglio states, "[C]orrectional institutions have few incentives to develop reentry programs given that the benefits of these programs accrue to society as a whole, while the institutions bear the full costs and liabilities of running them." *Id.*

80. *See SCA Hearing*, *supra* note 79, at 51 (prepared statement of Roger H. Peters, Chairman and Professor, Department of Mental Health Law and Policy, University of South Florida) (emphasis added).

release enforcement policy. For example, one study found that "[b]ehavior change is a long process that requires a minimum of 12 to 24 months. The period of incarceration and reintegration provides a sufficient period to bring about change."[81] Another study concluded that current RRC placements last on average only about five months and are ineffective, and it recommended that RRC placements be tailored to each offender's risk level, with higher-risk offenders receiving longer placements.[82] Additionally, a 2004 study conducted by the U.S. Sentencing Commission concluded that offenders who served a straight term of imprisonment recidivated at a rate of nearly 26%, while those who served a mixed sentence of prison and confinement alternatives recidivated at a much lower rate of 18%.[83]

Rather than support its pre-release rule with empirical findings, the Bureau has employed sweeping generalizations and, sometimes, inaccurate facts. For instance, after issuing the 2008 pre-release memoranda, BOP cited, at best, inconclusive research when at a 2008 U.S. Sentencing Commission symposium on alternatives to incarceration, former BOP Director Lappin asserted that halfway house placements actually cost more than imprisonment.[84] But published data on the costs of RRC versus prison incarceration are to the contrary: in its annual statistics and as recently as September 2011, the Bureau itself announced that RRC confinement costs 8.6% less than traditional imprisonment.[85]

During the symposium, Director Lappin said, "[O]ur research that we've done for many years reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better," and beyond six months, "tend to fail more often."[86] BOP has offered no reports to corroborate these statements.[87] Indeed, these claims contradict

81. *See* FAYE S. TAXMAN ET AL., FROM PRISON SAFETY TO PUBLIC SAFETY: INNOVATIONS IN OFFENDER REENTRY 15 (2002).

82. *See* FAYE S. TAXMAN ET AL., EXECUTIVE OVERVIEW: WHAT WORKS IN RESIDENTIAL REENTRY CENTERS 4 (2010).

83. *See* U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 13, 33 (2004).

84. *See* U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20, at 10.

85. *See* Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081 (Sept. 15, 2011). Inmates in halfway houses must also contribute one quarter of their income to defray the costs of their own confinement. *See Residential Reentry Management*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/locations/cc/index.jsp (last visited Nov. 30, 2012).

86. U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20, at 267.

87. *See* Brief for Appellant at 36, Sacora v. Thomas, 628 F.3d 1059 (9th Cir. 2010) (No. 10-35553), 2010 WL 5079251, at *36 ("[T]he BOP's own research department said, that there is not 'anything to confirm that the "6-months" was empirically based.'").

the Bureau's 1998 program statement, which touted the benefits of community confinement,[88] and should also raise concerns given the Bureau's criteria for inmates "doing worse" and "failing" at a halfway house.[89]

BOP's apparent decision to ignore a substantial body of research[90] and instead to propagate its own unsubstantiated findings raises grave doubts about its readiness to implement the Act.[91] The Bureau has shown its willingness to ignore highly relevant data that supports longer and individualized RRC placements.[92] Under these circumstances, notice-and-comment rulemaking of BOP's pre-release memoranda becomes a compelling alternative to induce necessary change.[93] Rulemaking would force BOP to publicly confront available research concerning community confinement and to offer a reasoned explanation for rejecting that research or accepting it and developing a better regulation.[94] While Congress retains ultimate authority over BOP's decisions,[95] the agency's decision not

88. *See* PROGRAM STATEMENT, *supra* note 72, at 1; *see also* Yana Dobkin, Note, *Cabining the Discretion of the Federal Bureau of Prisons and the Federal Courts: Interpretive Rules, Statutory Interpretation, and the Debate over Community Confinement Centers*, 91 CORNELL L. REV. 171, 183 (2005) (describing BOP's promotion of RRCs as suitable alternatives to prison).

89. Community confinement rules can severely curtail an inmate's access to transportation, cell phones, and family visitation. *See* FED. BUREAU OF PRISONS, *Community Corrections FAQs*, http://www.bop.gov/locations/cc/ccc_faqs.jsp#3 (last visited Nov. 30, 2012). As violation of any of these rules could potentially constitute a violation of community confinement, sooner or later most inmates in RRCs will have "failed" the conditions of pre-release placement. *See* USPO Interview, *supra* note 71. But the consensus among correctional experts is that rules violations are not necessarily sound predictors of recidivism. *See, e.g.*, Carol M. Miyashiro, *Research 2 Results (R2R)—The Pretrial Services Experience*, FED. PROBATION, June 2008, at 80, 82 (warning that technical violations may not be probative of safety risks).

90. *See also infra* Part IV.A (describing modern correctional research in greater detail).

91. *Cf.* Brae Corp. v. United States, 740 F.2d 1023, 1047–51 (D.C. Cir. 1984) (discussing the Interstate Commerce Commission's failure to consider relevant data would not have resulted in judgment of abuse of discretion but for specific legislative intent in enacting authorizing statute); *id.* ("Congress anticipated that the ICC would engage in a far broader and more thorough inquiry into the need for continued joint rate regulation before granting a total and unconditioned exemption of joint rates from any oversight or regulation."), *cited in* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 519 n.189 (1997).

92. *See supra* notes 79–81; *infra* Part IV.A (detailing a modern risk-assessment tool).

93. A petition for rulemaking could be brought under the APA. *See* 5 U.S.C. § 553(e) (2006) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); *see also* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 434, 440–43 (2007) (encouraging use of petitions for rulemaking as vehicles for challenging guidance).

94. *See generally* Mendelson, *supra* note 93.

95. *See* Seidenfeld, *supra* note 91, at 519.

to faithfully interpret the Act necessitates judicial intervention.

C. Congressional Intent in the Second Chance Act

Congressional intent as expressed in the SCA's legislative history supports a more generous pre-release policy.[96] The first enumerated purpose of the Act is "to break the cycle of criminal recidivism";[97] it was in the context of that purpose that Congress increased the maximum allowable placement in RRCs. The Act's overall thrust is rehabilitative: several provisions require the Bureau to improve offender outcomes.[98] Perhaps most important among them is the enabling provision that requires the Bureau Director to implement the Act so as to ensure inmates' "greatest likelihood of successful reintegration."[99]

In the months before the bill's passage, several members of Congress, including then-Senator Obama,[100] publicly expressed their support for the legislation.[101] Senator Obama lamented the fact that "most communities where prisoners go upon release already struggle with highly concentrated poverty, unemployment, fragile families, and a dearth of jobs. . . . In many cases, they will fail to become fully rehabilitated and go on to commit more crimes. We must end this revolving door of failure."[102]

> [T]he legitimacy of the bureaucratic state as a source of regulatory standards depends on a presumption of legislative supremacy. Thus, even if the legislature leaves resolution of the details of regulation to an agency, if the agency's authorizing statute prescribes that it look to certain factors to guide its decision, the agency has no legitimate power to give those factors short shrift.

Id. (footnote omitted).

96. *See* H.R. 1593, 110th Cong. (2007) (ensuring that offenders have a sufficient amount of time, up to one year, to transition into their communities); *see also* U.S.S.C. ALTERNATIVES TO INCARCERATION, *supra* note 20 (statement of Bobby Vassar, Chief Counsel, Subcomm. on Crime, Terrorism, and Homeland Sec.) ("What we were primarily trying to correct was the inability of the Bureau to be able to place a person in for a period of time that would be beneficial to the person and the program . . . .").

97. 42 U.S.C. § 17501(a) (Supp. IV 2011).

98. *See* 42 U.S.C. § 17533 (Supp. IV 2011) (requiring BOP's Director to ensure continued mentorship for offenders after their release from prison); *see also supra* notes 57–72, (describing the Act's other rehabilitative provisions and purposes).

99. 18 U.S.C. § 3624(c) (Supp. IV 2011).

100. 154 CONG. REC. 4614 (2008) (statement of Sen. Barack Obama).

101. *See* 153 CONG. REC. 31,028–31,030 (2007) ("[T]he number of Federal inmates has grown from just over 24,000 in 1980 to 173,739 in 2004. . . . [E]arly release is a commonsense option to raise capital.").

102. 154 CONG. REC. 4614 (2008).

II. JUDICIAL RESPONSES TO BOP'S "INTERPRETATION" OF THE SECOND CHANCE ACT

A. Cases Deferring to BOP's Discretion

While the SCA increased the Bureau's authority to release inmates to RRCs—for up to twelve months—BOP has refused to take the hint, limiting community confinement to six months or less[103] and potentially precluding individualized decisions.[104] Yet cases challenging BOP's six-month cap have, for the most part, proven unsuccessful.[105] Courts have concluded that the Bureau has wide discretion in incarceration, including RRC placements.[106] In particular, courts frequently refer to one provision that gives the Bureau Director broad placement authority.[107] They tend to assert that, by including the "no limitations" provision in the Act, Congress expressed its intent not to diminish the Director's authority.[108] In doing so, however, courts gloss over the context of the no-limitations provision, which was likely added in response to an order[109] from the DOJ's Office of Legal Counsel (OLC) that denied BOP the authority to confine inmates exclusively in RRCs instead of prisons.[110] Indeed, according to the American Bar Association, the no limitations provision simply "reaffirms BOP's independent authority . . . to make individualized front-end or direct placements to halfway houses," a possibility DOJ's order had foreclosed.[111]

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103. At least one organization has found that BOP places inmates in community confinement for an average of just over three months. *See FedCure Frequently Asked Questions*, FEDERAL CURE, http://www.fedcure.org/FAQ.shtml (last visited Nov. 30, 2012).

104. 18 U.S.C. § 3624(c).

105. *See, e.g.*, Steck v. Chester, 393 Fed. App'x 558, 560 (10th Cir. 2010) (prisoner did not exhaust administrative remedies); Sessel v. Outlaw, No. 2:08cv00212 JMM., 2009 WL 1850331, at *6 (E.D. Ark. June 25, 2009) (BOP did not abuse discretion).

106. *See, e.g.*, Guzman v. Daniels, No. 11-cv-00849-WYD, 2011 WL 3861582, at *2 (D. Colo. Aug. 31, 2011) ("In promulgating the SCA, Congress expressly made clear that it was not intending 'to limit or restrict the authority' of the BOP.").

107. *See* 18 U.S.C. § 3624(c)(4) ("Nothing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under [Section] 3621.").

108. *See Guzman*, 2011 WL 3861582, at *2 (emphasizing that the provision reposed considerable discretion in the Bureau).

109. *See* Bureau of Prisons Practice of Placing in Cmty. Confinement Certain Offenders Who Have Received Sentences of Imprisonment, 2002 WL 31940146, at *1 (O.L.C. Dec. 13, 2002) (concluding that BOP lacked the authority to place inmates directly into RRCs).

110. *See* Mitchell, *supra* note 20, at 247 n.51 and accompanying text (explaining that the Office of Legal Counsel's (OLC's) memorandum responded to the Bureau's then-policy to release some offenders directly into RRCs rather than prison, which the OLC found to be contrary to statute); *see also infra* note 159 (further explaining the OLC's memorandum and the ensuing response from federal courts).

111. *See* Letter from Thomas M. Susman, Director of the Am. Bar Ass'n Governmental

Yet this important history is overlooked in the courts.[112]

B. Sacora v. Thomas*: The Ninth Circuit Validates BOP's Pre-Release Rule*

The Ninth Circuit's opinion in *Sacora v. Thomas*[113] is instructive as one of the few reported United States Courts of Appeals cases to have fully considered BOP's pre-release memoranda under the APA.[114] In *Sacora*, the district court had required BOP to re-issue its interim rule as a notice-and-comment rule.[115] The Ninth Circuit affirmed, holding that BOP's policy was only entitled to *Skidmore* deference[116] but that the memoranda were nonetheless valid interpretations of the SCA.[117] The court recognized that

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Affairs Office, to the Bureau of Prisons, BOP Docket No. 1151-I Interim Rule Change (revised submission) (on file with author); *see also* Dobkin, *supra* note 88, at 213 (concluding that OLC's memorandum "severely" limited BOP's discretion).

112. One student author even argues that OLC's memorandum itself violates the APA, consisting of a binding substantive rule promulgated without notice-and-comment rulemaking. *See* Dobkin, *supra* note 88, at 197.

113. 628 F.3d 1059 (2010), *cert. denied*, 132 S.Ct. 152 (2011).

114. Other circuits to have considered BOP's policy include the Third, see Vasquez v. Strada, 684 F.3d 431, 434 (3d Cir. 2012), which concluded that the prisoner did not exhaust administrative remedies and BOP did not abuse discretion in recommending three-to-four month placement; the Sixth, see Demis v. Sniezek, 558 F.3d 508, 510 (6th Cir. 2009), which rejected the inmate's appeal as moot; the Eighth, see Miller v. Whitehead, 527 F.3d 752, 757–58 (8th Cir. 2008), which found that the BOP did not abuse discretion and memoranda were not contrary to the SCA; and the Tenth, see Garza v. Davis, 596 F.3d 1198, 1205 (10th Cir. 2010), which held that the prisoner did not exhaust administrative remedies.

115. Sacora v. Thomas, No. CV 08-578-MA (D. Or. June 16, 2010), *aff'd*, 628 F.3d 1059 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

116. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that challenged agency policies are "entitled to respect" depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

117. *Sacora*, 628 F.3d at 1070. Before *Sacora*, two district courts had held such memoranda to be invalid interpretations. *See* Krueger v. Martinez, 665 F. Supp. 2d 477, 483–84, 486 (M.D. Pa. 2009) (declining to defer to BOP's memoranda because placement pursuant to them was not "individualized" as required by the SCA); Strong v. Schultz, 599 F. Supp. 2d 556, 563 (D.N.J. 2009) (same). The courts also found the "discretion" reserved to staff to be hollow given the onerous requirements for recommending inmates for more than six months pre-release. *See Strong*, 599 F. Supp. 2d at 563; *Krueger*, 665 F. Supp. 2d at 483 ("[The April 2008 Memorandum] effectively chills staff discretion because staff are aware of the institutional preference for a RRC placement of six months or less, a preference that is contrary to the apparent purpose of the Second Chance Act."). In this sense, neither court believed the staff's freedom to exercise its discretion to be "genuine." *Cf.* Am. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980) (a policy statement "genuinely leaves the agency and its decision-makers free to exercise discretion"), *quoted in* LUBBERS, *supra* note 11, at 94.

the Bureau's memoranda were not legally binding on the court but stopped short of requiring the Bureau to promulgate the rule using notice-and-comment procedures because "the challenged policies [were] not substantive rules."[118]

1. Statutory Intent

In deriving congressional intent, the court emphasized the factor in § 3621(b)[119] that requires the Bureau to consider "the resources of the facility contemplated" when making placement decisions.[120] From this provision, the court divined an intention to balance inmates' placements with the ability of RRCs to house them, opining that "it is not unreasonable for the agency to conserve the resources of RRCs by applying an extra check on the *longest* placements in RRCs."[121] Of course, the Bureau's pre-release rule does not simply place an "extra check on the *longest* placements,"[122] but on all placements beyond the midline—even placements of six months and one day. A more persuasive reading of the SCA, then, in light of the Act's purpose and BOP's own program statements, would lead to the conclusion that the "resources of the facility contemplated" refers to the treatment options available to inmates—and not the facility's maximum occupancy.[123] This reading of the statute is underscored by the fact that BOP policy directs case managers to review the adequacy of proposed halfway houses prior to inmate placements.[124]

Support for this reading can also be found in the Bureau's November 2008 memorandum in which BOP instructs staff to "consider the resources of available RRCs . . . to assure accountability, provide program opportunities in employment counseling and placement, substance abuse, and aid inmates in acquiring daily life skills so as to successfully reintegrate into the community at large."[125] Nowhere does the November 2008 memorandum refer to the RRCs' bed space. Given that BOP's

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118. *Sacora*, 628 F.3d at 1070.

119. 18 U.S.C. § 3621(b) (2006).

120. 628 F.3d at 1067.

121. *Id.* (emphasis added).

122. *Id.* (emphasis added).

123. The appellants in *Sacora* argued along similar lines. *See* Brief for Appellant, *supra* note 87, at *52.

124. Indeed, the entire RRC transfer procedure supports this contention. *See* PROGRAM STATEMENT, *supra* note 72 ("Staff shall make recommendations for CCC placements based on assessments of *inmate needs for services*, public safety, and the necessity of the Bureau to manage its inmate population responsibly." (emphasis added)).

125. BOP November 2008 Mem., *supra* note 21.

interpretation was not entitled to *Chevron* deference,[126] the court was more than able to adopt this interpretation.

A necessary assumption of the court's deference is that the Bureau used its special expertise to choose its particular interpretation of the statute.[127] Indeed, in determining whether BOP considered available facts, the court in *Sacora* acquiesced in the Bureau's assertion of generalized "experience."[128] However, the presumption of agency expertise makes little sense here since, as the court stated, the Bureau had not quantified the results of its "experience," and was thus unable to offer the court any basis on which to decide the issue.[129] As the Bureau conceded,[130] its only RRC placement experience was with pre-release confinements of six months or less—before the Act even became law.[131] And the agency offered no data concerning inmates' success rate from the earlier period, either.[132]

And yet the respondents in *Sacora* were rebuffed on this front as well: the court found that, while empirical research "may have been preferable," it was nonetheless "reasonable for the BOP to rely on its experience, even without having quantified it in the form of a study."[133] In accepting that BOP's mere *claim* of experience was a "product of agency expertise"[134] without inquiring into its basis,[135] the court did what the Supreme Court

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126. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The marked departures between BOP's 1998 and 2008 guidance weaken the Bureau's position. *See supra* notes 76–82 and accompanying text.

127. *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (holding that "deference to an agency administering its own statute *has been understood to vary with circumstances*, and courts have looked to the . . . [agency's] *relative* expertness" in granting or denying it (emphases added)).

128. Sacora v. Thomas, 628 F.3d 1059, 1067 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011).

129. *Id.*

130. *Id.* at 1069 ("Although the BOP's experience with RRC placements of six months or less may not exactly parallel the issue here, its experience does provide some basis for understanding of how placements of varying lengths would affect most inmates.").

131. *Cf.* Sams v. Thomas, No. 11-333-AC, 2011 WL 2457407, at *4 (D. Or. May 12, 2011) (finding BOP's reliance on the 1998 program statement to deny an inmate's halfway house eligibility to be contrary to the statute).

132. *See Sacora*, 638 F.3d at 1069 n.9 (noting the absence of data collected by the BOP in the record); Brief for Appellant, *supra* note 87.

133. 628 F.3d at 1069.

134. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

135. In the same breath, the court wondered aloud about the Bureau's purported research and then overlooked its obvious absence. *See Sacora*, 628 F.3d at 1069 n.9 (noting the existence of BOP's reporting requirement under the Act, but conceding that "no such

explicitly has instructed courts not to do: "supply a reasoned basis for the agency's action that the agency itself has not given."[136]

2. Non-Binding Policy

The *Sacora* court also held that the requirement of "unusual or extraordinary" circumstances for placements beyond six months did not constitute a binding rule requiring notice-and-comment rulemaking, despite the fact that all of the class members had been denied placements exceeding six months.[137] In so deciding, however, the court did not address an important implication of its holding: that an agency's interpretation can be nonbinding and not subject to rulemaking as long as the agency does not apply it strictly in *all* cases.[138] Indeed, the court found that the memoranda were nonbinding in large part because a few dozen inmates outside the certified class were granted RRC placements in excess of six months.[139] Courts have decided otherwise under analogous circumstances,[140] and in so doing recognize that public participation in rulemaking is warranted when an agency's policy is effectively binding on most affected individuals.[141] Instead, the court in *Sacora* validated a practically binding rule that ignored scientific findings and public opinion. Thus, the Bureau's approach may

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reports are part of the record"); *cf. infra* note 192 and accompanying text (detailing the results of a Government Accountability Office audit that found BOP had failed to implement its reporting and other requirements under the SCA); *supra* Part III (examining a case much less forgiving of a similar omission).

136. *State Farm*, 463 U.S. at 43.

137. The court also found that requiring regional director approval for placements exceeding six months was not a new legal duty subject to notice and comment. 628 F.3d at 1069–70. Because BOP retracted the requirement in its June 2010 Memorandum, this Comment does not address that part of the court's opinion. *See supra* note 22. Nonetheless, it is worth noting that courts have held differently. *See, e.g.*, Natural Res. Def. Council v. EPA, 643 F.3d 311, 320–21 (D.C. Cir. 2011) (holding that an EPA guidance document binding regional directors required notice-and-comment rulemaking).

138. *See Sacora*, 628 F.3d at 1070 ("These regional differences [showing virtually no pre-release placements over six months in some regions, but not others] demonstrate that the BOP's rule allows staff to make individualized determinations and does not create a new binding rule of substantive law."). It could just as easily have been decided that these scant intraregional differences demonstrated not individualized placements but rather substantially similar ones within regions.

139. *Id.*; *see also* Brief for Appellant, *supra* note 87, at 18 (revealing that only one region had granted RRC placements in excess of six months and that the majority of granted requests came from Federal Prison Camp Duluth, a minimum-security facility).

140. *See, e.g.*, U.S. Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994); *infra* Part III.B.

141. *See U.S. Tel. Ass'n*, 28 F.3d at 1235–36; *see also supra* Part III.B; *cf.* Seidenfeld, *supra* note 5, at 514 (extolling hard look review as a way to force considered agency decisionmaking and to inhibit rash, interest-group-driven policy choices).

have invaded the province of the judiciary.[142]

III. HOW TO SUBJECT BOP'S PRE-RELEASE RULE TO RULEMAKING

A. *The Importance of Rulemaking and the Absence of "Ossification"*

The disparate outcomes between *Krueger* and *Strong*,[143] and *Sacora* and similar cases, may rest in the difficulty of distinguishing legislative rules from nonlegislative rules.[144] Under these circumstances, however, courts should hold that BOP's six-month limit is a legislative rule.[145] Otherwise, they risk improvidently allowing the Bureau to make "law" without the benefit of public input.[146] The advantages of requiring notice-and-comment rulemaking are well established.[147] Sifting BOP's "guidance" memoranda through rulemaking would force BOP to reconcile its current pre-release rule with a body of research that compels a contrary approach.[148] Judicial review would thus perform an important function: oversight of agency action to ensure against costly externalities.[149]

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142. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 57–58 (1990) ("[A] practice of routine acceptance for interpretations expressed in these formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force." (footnote omitted)).

143. *See supra* note 117 and accompanying text (explaining *Krueger* and *Strong*).

144. *See* LUBBERS, *supra* note 11, at 75 (noting that distinctions between legislative rules and non-legislative rules "tend to break down and become confused in practice").

145. *See* Joseph Scott Miller, *Substance, Procedure, and the Divided Patent Power*, 63 ADMIN. L. REV. 31, 66–68 (2011) ("The purpose of the substance–procedure distinction in the APA is to protect the general public's right to participate in an agency's formulation of the rules that regulate the public's primary conduct, and courts are thus a vital check on agencies." (footnote omitted)).

146. *See* Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 707 (2007) ("If the agency does not explain the basis for the interpretive rule or policy statement, but simply treats it as a binding rule, the agency has not articulated any explanation for its decision, and the decision (not the rule) should be invalidated as arbitrary and capricious.").

147. *See id.* at 734–35 (explaining that public participation in rulemaking enhances public perception of the resulting law as a fair and democratic one); *see also* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 550 (2000) (reviewing the principal advantages of official rulemaking, including enhancing rules' overall quality, fairness, and legitimacy); Asimow, *supra* note 2, at 574 (noting that the primary function of public participation is as a channel through which agencies receive much-needed information).

148. *See* Batterton v. Marshall, 648 F.2d 694, 703, 707–08 (D.C. Cir. 1980) (asserting that the "essential purpose" of notice-and-comment rulemaking is fairness and public participation in the decisions of unelected agency officials).

149. *See* Anthony & Codevilla, *supra* note 10, at 667 ("The courts' reviewing power is the citizen's bulwark against improper and abusive agency actions. . . . Citizens are bound by

"Ossification" should not be a concern. First, one of the usual complaints lodged against judges who scrutinize agency action is meritless; namely, that by adding to an agency's administrative calculus their own laundry list of a rule's possible unintended consequences, judges give the agency a Hobson's choice: either expend substantially more resources beforehand to account for every conceivable consequence and win, or conserve resources but risk failing to provide sufficient ad hoc justifications and losing on arbitrary or capricious grounds.[150] This criticism presumes consideration of at least *some* alternatives to the proposed action. BOP, however, should have already considered data that is germane to its pre-release rule, but it apparently has chosen not to acknowledge it.[151] The marked difference between what studies suggest should be done in pre-release confinement, and what the Bureau has actually done, reinforces this point.[152] Under these circumstances, accusations of judicial wrench-throwing are simply without merit.[153]

Second, while challenges to BOP's rule are, *a fortiori*, brought on behalf of prisoners, the alternatives to the current rule are both reliable and highly salient and deserve careful judicial consideration.[154] Publicly available research findings on risk assessments and offender re-entry needs exist only as a result of correctional experts' considerable efforts. It takes but a small step to presume that the same research before the court, even when presented by soon-to-be ex-offenders, merits serious consideration. Judges should welcome such evidence if it is offered in support of prisoners' assertions that the Bureau's rule is arbitrary.[155]

Nonetheless, most judges have not taken the reins on issues ostensibly committed to BOP's discretion, as revealed by *Sacora* and similar cases.

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such documents to the extent that courts will accept and apply them." (footnote omitted)); Cass Sunstein, *Smarter Regulation: Remarks from Cass Sunstein, Administrator, Office of Information and Regulatory Affairs*, 63 ADMIN. L. REV. (SPECIAL ISSUE) 7, 7–8 (2011) (emphasizing the importance of public input in agency decisions).

150. *See* Seidenfeld, *supra* note 91, at 515 (describing sua sponte judicial inquiry into unintended consequences of a proposed rule when the agency had not been notified of such an inquiry in advance, by either the court or the public).

151. *See supra* Part I.B (describing modern correctional research and BOP's response); *see also infra* Part IV.A (describing the advantages of the federal Post Conviction Risk Assessment (PCRA) over BOP's reliance on professional judgment and highlighting research showing that high-risk inmates require longer placements than they receive).

152. *Supra* Parts I.B, IV.A.

153. *See* Seidenfeld, *supra* note 91, at 515.

154. *Id.* at 515–16 (exploring issues that arise in challenges to agency action, such as the challengers' motives).

155. *Id.* (imploring courts, in carefully determining groups' motives in opposing agency action, to pick up on certain "signals," including investment of group resources into research supporting their arguments).

This Comment suggests that so-called generalist judges can—and should—intrude into agency discretion when it promulgates spurious rules,[156] especially when the judges are not generalists in the agency's field but quasi-experts.[157] Indeed, district courts have historically played the predominate role in sentencing,[158] and until recently[159] could recommend

156. *See* Anthony, *Lifting the Smog*, *supra* note 1, at 14 ("[I]f the agency treats the new propositions as binding, its attempt to go beyond existing legislation without observing legislative processes is invalid. In such a case, the agency has produced only spurious rules.").

157. *Cf.* Morrison v. Olson, 487 U.S. 654, 676 (1988) (holding that judicial officers could appoint independent counsel to investigate Executive Branch violations); *id.* at 676 n.13 ("Indeed, in light of judicial experience with prosecutors in criminal cases, . . . courts are especially well qualified to appoint prosecutors."); *see also* Joshua D. Wright & Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission 19–20 (Jan. 23, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=1990034 (finding, contrary to the oft-cited maxim that agencies possess greater expertise than "generalist" judges, that federal judges actually outperformed the Federal Trade Commission in adjudicating antitrust proceedings).

158. *See* Mistretta v. United States, 488 U.S. 361, 364–65 (1989) (emphasizing the considerable discretion Congress traditionally afforded judges in sentencing).

159. After the Department of Justice issued its legal memorandum directing the Bureau to no longer respect judicial sentencing recommendations, courts were further deprived of their ability to fashion sentences according to each offender's needs. This caused considerable consternation among some judges who despaired at the prospect of seeing non-violent offenders lose their positive community ties as a result of transfers from RRCs into prisons. *See, e.g.*, Culter v. United States, 241 F. Supp. 2d 19, 28–29 (D.D.C. 2003) (rejecting the government's request, after issuance of the DOJ's memorandum, to transfer defendant from a halfway house to a federal prison).

> [A]ll indications were that petitioner had begun the process of turning her life around. Recognizing and seeking to encourage these positive trends, the Court sought to fashion a sentence that would punish petitioner for her offense without interrupting the admirable strides she had made to rehabilitate herself. The Court believed that it was vital for petitioner to continue her participation in church activities, her therapy, and her paid employment. It was hoped that doing so would assist her reintegration into law-abiding society, her mental health recovery, and her ability to meet her restitution obligations. The Court decided that the best way to achieve these ends was for her to be committed to BOP for 12 months with the understanding that she would serve this sentence in a local halfway house. . . .
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> . . . .
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> . . . Given these unique circumstances, the Court concludes that BOP is estopped from relying on its new policy directive to remove petitioner from the halfway house. For the government to imprison petitioner merely because BOP was misguided about the scope of its authority and this misinterpretation was fostered and shared by both the Executive and Judicial branches for more than fifteen years is simply arbitrary and unfair.

Id. at 21, 28–29; *see also* Jennifer Borges, *The Bureau of Prisons' New Policy: A Misguided Attempt to Further Restrict a Federal Judge's Sentencing Discretion and to Get Tough on White-Collar Crime*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 141, 142 (2005) (recounting the judicial

that the Bureau place prisoners directly into RRCs instead of prisons.[160]

To their credit, more and more federal judges are informing their sentencing decisions with empirical data on offender outcomes.[161] Given judges' sentencing expertise and their increasing willingness to incorporate science into their decisions,[162] courts should heed modern correctional research when considering future challenges to the Bureau's pre-release rule.

B. Agencies' "General Policies" that in Application Result in Legally Binding Rules Are Subject to Notice-and-Comment Rulemaking

In *United States Telephone Ass'n v. FCC*,[163] the District of Columbia Circuit Court of Appeals considered a challenge to a Federal Communications Commission (FCC) "schedule" used to assess fines.[164] The challengers argued that the schedule was a legislative rule subject to notice-and-comment rulemaking; the FCC claimed that the schedule was a general statement of policy exempt under APA § 553(b)(3)(A).[165] The FCC labeled the policy "discretionary" and maintained that it retained the right to, and did, depart from it under certain circumstances, as indicated by the outcomes of several prior adjudications.[166]

The court scrutinized those prior adjudications and found otherwise: out of 300 proceedings, arguably only eight did not apply the prescribed schedule fine.[167] The court concluded that the FCC considered the policy to be a binding rule, even though the Commission deviated from the schedule on occasion—a fact that, "while probative, [did] not vitiate its adherence to the schedule of base amounts."[168] The court also found the form of the policy suspicious, since it was "rather hard to imagine an

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backlash in response to DOJ's sentencing directive).

160. *See* 18 U.S.C. § 3621(b) (Supp. IV 2011) (judicial recommendations of RRC placements are to be considered but are not binding in determining place of confinement).

161. *See, e.g.*, Michael A. Wolff, Brennan Lecture, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1402, 1416 (2008) (advocating evidence-based sentencing decisions using available empirical research).

162. *Id.*

163. 28 F.3d 1232 (D.C. Cir. 1994).

164. The statute at issue, the Communications Act, is similar to the SCA in several respects. *See* 47 U.S.C. § 503(b)(2)(D) (2006). Both statutes list mandatory factors the agency must consider and were amended to increase the relevant statutory maximum. *See* Brief for Petitioner at 8–9, U.S. Tel. Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) (Nos. 92-1321, 93-1526), 1994 WL 16777179 at *8–9.

165. *U.S. Tel. Ass'n*, 28 F.3d at 1234.

166. *Id.*

167. *Id.*

168. *Id.* at 1235.

agency wishing to publish such an exhaustive framework for sanctions if it did not intend to use that framework to cabin its discretion."[169] It ordered the FCC to issue the policy as a legislative rule with notice and an opportunity for comment.[170]

There are at least two insights to be gleaned from *U.S. Telephone Ass'n* that have immediate implications for BOP's pre-release rule. One is that an agency's boilerplate disclaimer of strict adherence to its policy will not prevent a reviewing court from scrutinizing the rule's previous applications. Another related implication is that a policy the court finds in application to have been strictly adhered to by the agency—even if the agency occasionally (but rarely) departed from it—can be invalidated as a legislative rule and shipped back for notice-and-comment rulemaking. Finally, and although less obvious on the face of the court's opinion, courts will view policies that prescribe numerical values with heightened skepticism.[171]

These factors support subjecting the Bureau's 2008 memoranda to notice-and-comment rulemaking. BOP, like the FCC, has repeatedly asserted that it reserves the right to depart from its policy in appropriate cases ("unusual or extraordinary" ones).[172] And both agencies have applied their policies nearly uniformly across enforcement proceedings.[173] Furthermore, both agencies' rules raise the question *why* the limitations would be promulgated at all if the agencies did not intend to apply them so as to "cabin" their discretion. Finally, both policies use numeric values as the basis for the rule's application. And yet, contrary to the D.C. Circuit's conclusion, in *Sacora* the court found the Bureau's reference to "extraordinary" circumstances, the Bureau's "discretion" to depart from its rule, as evidence that it was *adhering* to the statute. The court also found the fractional number of departures from the rule as evidence that BOP did *not* consider it to be binding.[174]

169. *Id.* at 1234.

170. *Id.* at 1236.

171. This insight originated in LUBBERS, *supra* note 11.

172. *Compare* BOP April 2008 Mem., *supra* note 21 (referring to the new requirement of individualized assessment of inmates no less than five times), *and* BOP November 2008 Mem., *supra* note 21 (referring to the new requirement at least five times), *with U.S. Tel. Ass'n*, 28 F.3d at 1234 (stating that the FCC's schedule referred to the Agency's discretion to depart from the policy no less than twelve times).

173. *See* Sacora v. Thomas, 628 F.3d 1059, 1070 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011) (showing that almost none of the inmate-class members had been granted an RRC placement exceeding six months); Mitchell, *supra* note 20, at 308 (estimating that only 2% of federal inmates have been granted pre-release in excess of six months); *U.S. Tel. Ass'n*, 28 F.3d at 1234 (showing that the FCC applied its schedule in all but 2.7% of proceedings).

174. *Cf. Sacora*, 628 F.3d at 1070.

More likely than not, the differences came down to the numbers: the court in *Sacora* apparently took notice that a number of inmates at one prison had been granted pre-release placements exceeding six months.[175] The D.C. Circuit, by contrast, only considered proceedings against the challenger's members and closely scrutinized each so-called deviation from the FCC's schedule. Thus, the outcome of future challenges to the Bureau's 2008 memoranda may depend on whether courts consider only the placement decision of the prison holding the inmates or a much broader sampling in determining how BOP applied its pre-release rule. Courts reviewing such challenges should conclude that, because the rule results in so few inmates receiving halfway house placements of six months or more, the memoranda are binding and must go through notice-and-comment rulemaking.

C. *Rejecting Agencies' Categorical Assertions of Expertise Without More:* Tripoli Rocketry Ass'n v. ATFE

Not all courts reviewing agency action have accepted vague assertions of general agency expertise like the court did in *Sacora*. Indeed, had *Sacora* been before the panel that decided *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms and Explosives*,[176] the result might have been different. There the court held that the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATFE) had not relied on sufficient data to support its classification of toy rocket propellant as "explosive" and remanded to ATFE for reconsideration.[177] The court rebuffed ATFE's appeals to judicial deference to its expertise because it failed to offer empirical proof supporting the product classification.[178]

In both *Sacora* and *Tripoli Rocketry* the agencies appealed to the judiciary's typical deference in matters of agency expertise. And while the posture of the cases differed in a significant respect—the *Tripoli Rocketry* court was merely deciding the commercial rights of a rocket manufacturer and not someone's post-conviction interests—this distinction would seem to counsel a more favorable outcome in *Sacora*. So would the fact that, while *Tripoli Rocketry* involved a highly technical area outside of the judges' expertise,[179]

175. *See id.* (finding that some prisoners were granted placements exceeding six months).

176. 437 F.3d 75, 81 (D.C. Cir. 2006) ("To survive review under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation marks omitted)); *see also* Motor Vehicles Mfr. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983).

177. *Tripoli Rocketry*, 437 F.3d at 84.

178. *Id.* at 82.

179. *See* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103

Sacora involved the comparatively less technical (and more familiar) field of imprisonment.[180]

Yet the cases reached nearly opposite results: unlike *Tripoli Rocketry*, *Sacora* upheld the agency action. These results appear irreconcilable, all the more so because the Bureau in *Sacora* made no attempt to provide empirical proof to corroborate its position that "most" inmates' needs are met with an RRC placement of six months or less.[181] The *Tripoli Rocketry* court gave short shrift to this level of generalization by ATFE.[182]

The disparate outcomes in *Sacora* and *Tripoli Rocketry* reveal that agencies can be perversely incentivized into not really interpreting their authorizing statutes and then not offering evidence during contested proceedings.[183] ATFE did the opposite and the court found against it; BOP, since it never interpreted the SCA beyond "parroting" the statute, successfully hid behind assertions of expertise. As the only authority that can require agency rules to be lawfully promulgated and enforced, the courts should be wary of such backdoor rulemaking.[184]

IV. NEXT STEPS: IMPLEMENTING THE SECOND CHANCE ACT

In December 2011, after public interest groups called for BOP

(1983); *see also* Indus. Union Dep't v. Hodgson, 499 F.2d 467, 474–75 (D.C. Cir. 1974) (suggesting deference for determinations at "frontiers of scientific knowledge").

180. *See supra* notes 173–177.

181. *See* Brief for Appellant, *supra* note 87 (showing that, not only did BOP not proffer such data, but the appellants sought and received admissions from Bureau researchers that the pre-release rule had no known foundation in empirical proof). Thus, BOP did worse than ATFE: whereas the latter at least made an effort to offer relevant data supporting its decision, BOP readily admitted it had none to offer.

182. *Tripoli Rocketry*, 437 F.3d at 81 (holding that "the fatal shortcoming" of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATFE's) position was that the agency "provided virtually nothing to allow the court to determine whether its judgment reflects reasoned decisionmaking").

183. It should be noted that, when contested pre-release decisions come before district courts, BOP will occasionally offer "proof" that it applied the statutory factors reasonably—or, more specifically, that the inmate's *case manager* applied them reasonably. As the Bureau has never really interpreted the SCA, courts that accept BOP's litigation strategy may in effect be handing over their interpretive functions to lower-level BOP staff. *See, e.g.*, Sessel v. T.C. Outlaw, No. 2:08cv00212 JMM, 2009 WL 1850331, at *5 (E.D. Ark. June 25, 2009) (holding that BOP did not abuse its discretion because there was no requirement of a detailed analysis of the specific statutory factors at each level of the administrative review process).

184. *See* Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 632–34 (1997) (praising aspects of active judicial review of agency decisionmaking).

leadership changes,[185] Attorney General Eric Holder announced the appointment of a new BOP Director, Charles E. Samuels Jr.[186] Director Samuels's appointment may hint at a new direction for Bureau policies;[187] executive staff changes have already begun.[188] According to the DOJ, Director Samuels "shares the attorney general's commitment to reduce recidivism by preparing incarcerated people to return to their communities and become productive members of society."[189] BOP's leadership changes make sense given the Bureau's lackluster track record, of which Congress appears to have taken notice. In the 2009 *State of the Bureau* introduction, then-Director Lappin acknowledged the external pressure for improved post-release results.[190] In the aftermath of unsuccessful litigation challenging the prerelease rule,[191] Congress exercised its oversight function and commissioned a 2012 report concerning the Bureau's re-entry initiative that confirmed BOP had not implemented several provisions of the SCA, including its reporting and individualized assessment requirements.[192] The Government Accountability Office's study found that BOP lacked a risk-

185. *See* James Ridgeway & Jean Casella, *Groups Urge Holder to Clean House at the Bureau of Prisons*, SOLITARY WATCH (May 19, 2011) (quoting the groups' letter to Eric Holder as saying, "Unfortunately, the agency has not adapted its management strategy to take full advantage of the diverse population reduction authorities and cost-savings measures given to it by Congress, such as: expanded half-way house placement . . . .").

186. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Holder Announces New Federal Bureau of Prisons Director (Dec. 21, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-ag-1693.html.

187. Harley Lappin resigned from BOP soon after he was arrested and charged with driving under the influence of alcohol in Annapolis, Maryland. *See* Matt Zapotosky, *Bureau of Prisons Director Faces DUI, Related Charges*, WASH. POST, Mar. 30, 2011, http://www.washingtonpost.com/local/bureau-of-prisons-director-faces-dui-related-charges/2011/03/30/AF0dTg5B_story.html. BOP's director is a member of the Senior Executive Service (SES) and is thus removable only "for cause." *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3179–80 (2010) (Breyer, J., dissenting) (listing SES agency heads who are removable only "for cause"). Mr. Lappin now represents private correctional industry interests. *See* Kevin Johnson, Proposal to Buy Prisons Raises Ethical Concerns, USA TODAY, Mar. 7, 2012, http://www.usatoday.com/news/nation/story/2012-03-07/prisons-ethical-concerns-executive/53405290/1.

188. *See* News & Information, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, www.bop.gov/news/ (last updated June 4, 2012).

189. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *supra* note 186.

190. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2009, at iii, *available at* http://www.bop.gov/news/PDFs/sob09.pdf (anticipating that success will require enlarging BOP's responsibilities) (2009).

191. *See supra* Part II (examining challenges to BOP's community confinement policy).

192. *See* GAO REP. ON BOP PROGRESS, *supra* note 63, at 15 (indicating that BOP has "mechanism[s] in place" to "[e]stablish a strategy that assesses inmates' skills, develops skills development plans, determines program assignments, [and] gives priority to high-risk inmate populations").

assessment program necessary for individualized, need-based placement decisions; instead, the Bureau relies primarily on its staff's professional judgment (i.e., experience).[193] By comparison, a report that reviewed the Administrative Office of the U.S. Courts' risk-assessment instrument, the Federal Post Conviction Risk Assessment (PCRA) found that "actuarial devices [such as PCRA] in combination with professional judgment are generally more accurate and consistent than professional judgment alone, which is based solely on . . . experience and individualized assessments . . . ."[194] In fact, subjective professional decisions are the most basic measurements of offender needs.[195] Yet BOP instructs its staff to use professional judgment combined with two Bureau instruments: the Inmate Skills Development (ISD) Plan, and the Custody Classification Form (BP-338).[196]

A. The Federal Post Conviction Risk Assessment

To give prisoners individualized placement decisions and "the greatest likelihood of successful reintegration into the community,"[197] BOP must incorporate a validated risk-assessment instrument into its pre-release rule.[198] By using such a tool, Bureau staff will be able to better prepare inmates for life outside prison, and BOP will be able to better defend placement decisions against future attacks.[199] The Bureau's "sister agency," the United States Probation Office (USPO), already uses PCRA.[200]

193. BOP June 2010 Mem., *supra* note 22.

194. *See* OFFICE OF PROB. & PRETRIAL SERVS., ADMIN. OFFICE OF THE U.S. COURTS, AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT 3 (2011).

195. *See id.* at 7 n.28 (calling professional judgment risk assessments' "first generation").

196. *See* BOP June 2010 Mem., *supra* note 22, at 4 (calling the Inmate Skills Development (ISD) Plan and the Custody Classification Form (BP-338) "helpful in establishing broad-based groupings"); *see also* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT P5100.8: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION (2006), *available at* http:///www.bop.gov/policy/progstat/5100_008.pdf (describing the custody classification system).

197. 18 U.S.C. § 3624(c)(6) (2006 & Supp. IV 2011).

198. *See* TAXMAN ET AL., *supra* note 82, at 5 (recommending BOP use a validated risk-assessment tool). Several states already use risk assessments or their principles, including Michigan, Mississippi, Ohio, Oregon, and Vermont. *See States Report Reductions in Recidivism*, JUSTICE CENTER, NATIONAL REENTRY RESOURCE CENTER, *available at* http://nationalreentryresourcecenter.org/documents/0000/1569/9.24.12_Recidivism_Reductions_9-24_lo_res.pdf.

199. *See, e.g.*, Sams v. Thomas, No. 11-333-AC, 2011 WL 2457407, at *4 (D. Or. May 12, 2011).

200. *See* FEDERAL POST CONVICTION RISK ASSESSMENT, *supra* note 194, at 1 (noting PCRA's efficiency goals, and that it has yet to be considered for use in other contexts, such as RRCs).

PCRA's measurement of offender needs will enable re-entry plans that can anticipate and mitigate inmates' situational triggers, thus reducing recidivism.[201] Indeed, PCRA can predict when an offender is more or less likely to reoffend—and correctional staff can detect these changes and calibrate the inmate's re-entry plan accordingly.[202]

By using the same assessment as the USPO, the Bureau could save time and money; since probation often runs concurrently with RRC confinement, the agencies could share offender data to coordinate re-entry plans.[203] But to pursue this goal, the Bureau must be willing to cooperate with its sister agency, and the USPO must be willing to share its new tool.[204] Achieving such interagency cooperation would fulfill a prime directive of the Obama Administration's OIRA future goals.[205] The Bureau is well aware of modern correctional methodology;[206] it simply has to use it. A pre-release rule that incorporates PCRA analysis to determine individual risks and needs would fulfill the letter and spirit of the SCA.

CONCLUSION

As long as BOP continues to ignore available empirical research and public opinion, it not only circumvents the requirements of the APA, but it does so at the expense of all Americans, offenders and their victims alike. Outdated rules and institutional customs should not be allowed to justify agency reticence to reform. Requiring notice-and-comment rulemaking for BOP's prerelease rule will give the Bureau another chance to adopt a validated risk-assessment tool, which in turn will give federal offenders a second chance at law-abiding lives.

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201. *See* TAXMAN ET AL., *supra* note 82, at 8 (concluding that correctional best practices should encourage redesigned offender re-entry plans).

202. *See* James L. Johnson et al., *The Construction and Validation of the Federal Post Conviction Risk Assessment (PCRA)*, FED. PROBATION, Sept. 2011, at 16 (2011).

203. Expert correctional researchers have recommended the same. *See* TAXMAN ET AL., *supra* note 82, at 5 (recommending that BOP use the same risk assessment tool as the United States Probation Office).

204. The Administrative Office of the United States Courts limits PCRA use to trained and certified probation officers. *See* FEDERAL POST CONVICTION RISK ASSESSMENT, *supra* note 194, at 14 ("The use of the PCRA without successfully completing the formal training . . . is strictly prohibited.").

205. *See* Exec. Order 13,563, 76 Fed. Reg. 3821 (2011); *see also* Sunstein, *supra* note 49.

206. *See* TAXMAN ET AL., *supra* note 82, at 1 (noting that the study was funded by a cooperative grant from DOJ, BOP, and the National Institute of Corrections).