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Jacob Schuman

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# Drug Supervision

Jacob Schuman\*

## ABSTRACT

*Critics of harsh drug sentencing laws in the United States typically focus on long prison sentences. But the American criminal justice system also inflicts a significant volume of drug-related punishment through community supervision (probation, parole, and supervised release). Over one million people are under supervision due to a drug conviction, and drug activity is among the most common reasons for violations. In an age of “mass supervision,” community supervision is a major form of drug sentencing and drug policy.*

*In this Article, I analyze the federal system of supervised release as a form of drug policy. Congress created supervised release as a program of transitional support for former prisoners, yet the system has instead evolved into a drug-control network focused on monitoring, restricting, and punishing drug activity. In particular, the mandatory revocation provision in 18 U.S.C. § 3583(g) was designed to protect the public by imprisoning people with drug addiction at the first sign of drug use. This targeting of drug activity is so punitive that it violates the jury right under the Supreme Court’s 2019 decision in *United States v. Haymond*.*

## INTRODUCTION

Critics of harsh drug sentencing laws in the United States typically focus on long prison sentences.<sup>1</sup> But the American criminal justice system also inflicts a significant volume of drug-related punishment through community supervision (probation, parole, and supervised release). Over one million people are under supervision due to a drug conviction, not including non-drug offenders sentenced to

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<sup>1</sup> See, e.g., Lucius T. Outlaw III, Commentary, *An Honest Drug Offender Sentencing Letter*, 17 OHIO ST. J. CRIM. L. 481, 483–91 (2020); Hon. Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 16 (2015); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1329–31 (2005); Marc Miller & Daniel J. Freed, *The Disproportionate Imprisonment of Low-Level Drug Offenders*, 7 FED. SENT’G REP. 1 (1994).

supervision based on a record of drug activity.<sup>2</sup> Conditions of supervision commonly prohibit drug use, require drug testing, and mandate addiction treatment, with drug activity among the most common reasons for violations. In an age of “mass supervision,” community supervision is a major form of drug sentencing and drug policy.<sup>3</sup>

In 2018, I wrote an essay criticizing the federal government for its harsh punishment of people with drug addiction on supervised release.<sup>4</sup> I argued that the federal supervision system had “collided with the national opioid epidemic” and was inflicting “more instability, stigma, and trauma.”<sup>5</sup> In response, three authors from the Administrative Office of United States Courts<sup>6</sup> published an article in the *Federal Probation* journal claiming my essay was part of an unfair “media” narrative that misrepresented federal community supervision as “geared toward monitoring for failure and recommending revocation,” while ignoring “officers’ efforts to help the person on supervision abate their substance use disorder, understand their actions ... [and] succeed.”<sup>7</sup> To correct the record, the authors performed a study of supervised-release revocations based on drug use where the defendant had one or fewer positive drug tests.<sup>8</sup> They discovered that these cases usually presented “additional factors” justifying a prison term.<sup>9</sup> Revocation for drug use, they conclude, is only a “final alternative” used “after other means of bringing about success have been tried.”<sup>10</sup>

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<sup>2</sup> THE PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 8 (2018), [https://www.pewtrusts.org/-/media/assets/2018/09/probation\\_and\\_parole\\_systems\\_marked\\_by\\_high\\_stakes\\_missed\\_opportunities\\_pew.pdf](https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf) [<https://perma.cc/SE7A-J4RS>].

<sup>3</sup> *Statement on the Future of Probation & Parole in the United States*, EXiT: EXEC. TRANSFORMING PROB. & PAROLE, <https://www.exitprobationparole.org/statement> [<https://perma.cc/N3HH-Q7DA>] (last visited Mar. 13, 2022); Phila. Dist. Att’y’s Off., *New Philadelphia D.A.O. Policies Announced March 21, 2019 to End Mass Supervision*, MEDIUM (Mar. 21, 2019), <https://medium.com/philadelphia-justice/philadelphia-daos-policies-to-end-mass-supervision-fd5988cfe1f1> [<https://perma.cc/R2YF-X4VZ>].

<sup>4</sup> Jacob Schuman, *America’s Shadow Criminal Justice System*, THE NEW REPUBLIC (May 30, 2018), <https://newrepublic.com/article/148592/americas-shadow-criminal-justice-system> [<https://perma.cc/P59R-GRMA>].

<sup>5</sup> *Id.*

<sup>6</sup> The AO is an agency within the judicial branch that provides “legal, financial, technology, management, administrative, and program support services to the federal courts,” including the Probation and Pretrial Services Office. *Judicial Administration*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration> [<https://perma.cc/M8HY-33F6>] (last visited Mar. 13, 2022).

<sup>7</sup> Janette Sheil et al., *Federal Supervised Release Revocation for Drug Use: The Rest of the Story*, 83 FED. PROB. 18, 18–19 (2019).

<sup>8</sup> *Id.* at 20.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 22.

In this Article, I respond to the *Federal Probation* study with an analysis of federal supervised release as a form of drug policy. While the *Federal Probation* study portrays drugs as marginal to federal supervision, focusing on the extreme individual scenario of a person sent to prison based on a single positive drug test, I show that the entire legal framework of supervised release is devoted to drug control. Congress created supervised release as a limited, rehabilitative program for former prisoners, yet the system has instead evolved into a vast public-safety network dedicated at monitoring, restricting, and punishing drug activity. In particular, the mandatory revocation provision in 18 U.S.C. § 3583(g) was designed to protect the public by immediately imprisoning people with drug addiction at the first sign of drug use. This targeting of drug violations is so punitive that it violates the jury right under the Supreme Court’s 2019 decision in *United States v. Haymond*.

Two notes on terminology: First, it is important not to stigmatize when discussing drug addiction, so I use the neutral terms “drug use,” “drug addiction,” “people with drug addiction,” and “substance-use disorder.”<sup>11</sup> Also, not everyone who uses drugs is necessarily addicted, and I have tried to avoid that implication.<sup>12</sup> Occasionally, I quote materials using different terms and making different assumptions, and keep their language intact to ensure a full understanding of the speakers’ perspectives.

Second, the federal criminal justice system uses two forms of community supervision: probation and supervised release. Probation is a term of supervision imposed *in lieu of* imprisonment, reserved for first-time offenders convicted of minor crimes.<sup>13</sup> Supervised release is a term of supervision imposed *to follow* imprisonment and is ordered in 75% of all cases, including virtually every case where the defendant is sentenced to more than one year in prison.<sup>14</sup> Both forms of supervision are administered by the Probation and Pretrial Services Office, an agency within the judicial branch. This Article focuses on supervised release, which

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<sup>11</sup> See, e.g., Lauren M. Broyles et al., *Confronting Inadvertent Stigma and Pejorative Language in Addiction Scholarship: A Recognition and Response*, 35 SUBST. ABUSE 217 (2014); Nat’l Inst. on Drug Abuse, *Words Matter - Terms to Use and Avoid When Talking About Addiction*, NAT’L INST. HEALTH, <https://www.drugabuse.gov/nidamed-medical-health-professionals/health-professionals-education/words-matter-terms-to-use-avoid-when-talking-about-addiction> [https://perma.cc/J8R9-UCEU] (last visited Mar. 13, 2022).

<sup>12</sup> See, e.g., Olga J. Santiago Rivera et al., *Risk of Heroin Dependence in Newly Incident Heroin Users*, 75 J. AM. MED. ASS’N PSYCHIATRY 863 (2018) (approximately 26% of people who use heroin become addicted).

<sup>13</sup> U.S. SENT’G GUIDELINES MANUAL § 5B1.1 (U.S. SENT’G COMM’N 2018); see also *Burns v. United States*, 287 U.S. 216, 220 (1932).

<sup>14</sup> See Christine S. Scott-Hayward, *Correctional Law Commentary: Recent Developments in Federal Supervised Release*, 56 CRIM. L. BULL. 150, 153 (2020); U.S. SENT’G COMM’N, *FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 3–4* (2010), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722\\_Supervised\\_Release.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf) [https://perma.cc/GAW5-MF3F]. Congress created supervised release in 1984 to replace parole. See generally Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587 (2020).

accounts for over 90% of the population under federal supervision.<sup>15</sup> Most of my argument, however, would also apply to probation.

The Article proceeds in four parts: Part I explains the relationship between community supervision and drug policy. Part II describes the *Federal Probation* study of drug-use revocations. Part III shows how federal supervised release is dedicated to monitoring, restricting, and punishing drug activity. Finally, Part IV argues that mandatory revocation for drug-related misconduct violates the jury right.

## I. DRUGS AND MASS SUPERVISION

Community supervision is a defining feature of American criminal law. The United States has 2.2 million people in jails and prisons, but more than double that number—4.5 million—on probation, parole, or supervised release.<sup>16</sup> Approximately 1.5% of the entire United States population is under some form of non-carceral criminal supervision,<sup>17</sup> which is “five to ten times the rates of European nations.”<sup>18</sup>

This “mass supervision” of criminal offenders is a “major driver of mass incarceration.”<sup>19</sup> Community supervision increases a person’s odds of arrest and imprisonment by subjecting them to “regular surveillance and monitoring” as well as “additional rules that do not apply to everyone else.”<sup>20</sup> If a person violates a condition of supervision, then they can have their supervision “revoked” and be sentenced to imprisonment without a jury trial or proof beyond a reasonable doubt.<sup>21</sup> Rates of revocation are high. About one-third of all people under supervision are

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<sup>15</sup> In 2019, there were 14,477 people on federal probation and 112,609 on supervised release. *Table E-2—Federal Probation System Statistical Tables For The Federal Judiciary (December 31, 2019): Federal Probation System—Persons Under Post-Conviction Supervision—As of December 31, 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2019/12/31> [<https://perma.cc/DUY9-EMCZ>] (last visited Mar. 13, 2022). That same year, 7,056 people began serving a term of probation, compared to 51,828 supervised release. *Table E-1—Federal Probation System Statistical Tables For The Federal Judiciary (December 31, 2019): Federal Probation System—Persons Received for and Removed From Post-Conviction Supervision For the 12-Month Period Ending December 31, 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/statistics/table/e-1/statistical-tables-federal-judiciary/2019/12/31> [<https://perma.cc/WE68-3P7L>] (last visited Mar. 13, 2022) [hereinafter *Table E-1*].

<sup>16</sup> HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 34 (2020), <https://www.aclu.org/report/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states> [<https://perma.cc/DY7U-SNT6>].

<sup>17</sup> THE PEW CHARITABLE TRS., *supra* note 2, at 6.

<sup>18</sup> HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *supra* note 16, at 34.

<sup>19</sup> Phila. Dist. Att’y’s Off., *supra* note 3; *see also* EXIT PROB. & PAROLE, *supra* note 3 (describing “mass supervision” as “overly burdensome, punitive and a driver of mass incarceration”).

<sup>20</sup> MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 119 (2012).

<sup>21</sup> Schuman, *supra* note 14, at 590–91.

eventually found in violation, sending 350,000 people to prison each year<sup>22</sup> and accounting for one-quarter to one-half of all prison admissions.<sup>23</sup>

Community supervision is also a central front in the War on Drugs. More than one million people are under supervision due to a drug conviction, comprising about one-quarter of the entire supervised population.<sup>24</sup> Even defendants convicted of non-drug crimes can be sentenced to supervision based on a record of drug offenses<sup>25</sup> or indications of substance-use disorder.<sup>26</sup> According to the Substance Abuse and Mental Health Services Administration, nearly half of the population under community supervision has a substance-use disorder,<sup>27</sup> with “rates of substance use disorder ... two to three times higher ... than in the general population.”<sup>28</sup> The criminal justice system is now the country’s “single largest referral source for public drug treatment”<sup>29</sup> with approximately one quarter of all people under supervision receive some form of treatment for drug addiction.<sup>30</sup>

Revocation of community supervision is a major form of drug punishment. Conditions of community supervision typically prohibit drug possession, use, or

<sup>22</sup> THE PEW CHARITABLE TRS., *supra* note 2, at 9.

<sup>23</sup> Andrea Fenster, *Technical Difficulties: D.C. Data Shows How Minor Supervision Violations Contribute to Excessive Jailing*, PRISON POL’Y INITIATIVE (Oct. 28, 2020), [https://www.prisonpolicy.org/blog/2020/10/28/dc\\_technical\\_violations/](https://www.prisonpolicy.org/blog/2020/10/28/dc_technical_violations/) [<https://perma.cc/59C8-589L>]; THE PEW CHARITABLE TRS., *supra* note 2, at 11. In some jurisdictions, the share of detentions based on violations is even higher, reaching almost 60% in Philadelphia. Fenster, *supra*.

<sup>24</sup> THE PEW CHARITABLE TRS., *supra* note 2, at 8.

<sup>25</sup> See HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *supra* note 16, at 42, 46.

<sup>26</sup> Substance-use disorder, also known as drug addiction, is a mental condition described in the DMSV as “a problematic pattern of [drug] use leading to clinically significant impairment or distress.” AM. PSYCHIATRIC ASS’N, *Substance-Related and Addictive Disorders*, in DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013). Diagnosis is based on “a pathological pattern of behaviors related to the substance,” such as “[i]mpaired control over substance use,” “multiple unsuccessful efforts to decrease or discontinue use,” and “continue[d] substance use despite ... persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.” *Id.* A “number of factors” put a person at risk for substance-use disorder, including “biology” and “social environment.” DEP’T OF VETERANS AFFS. & DEP’T OF DEF., CLINICAL PRACTICE GUIDELINE FOR THE MANAGEMENT OF SUBSTANCE USE DISORDERS 8 (Version 3.0 2015) [hereinafter CLINICAL PRACTICE GUIDELINE].

<sup>27</sup> *The NSDUH Report: Trends in Substance Use Disorders Among Males Aged 18 to 49 on Probation or Parole*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. (Mar. 6, 2014), <https://www.samhsa.gov/data/sites/default/files/sr084-males-probation-parole/sr084-males-probation-parole/sr084-males-probation-parole.htm> [<https://perma.cc/HWH4-YDGY>] [hereinafter *The NSDUH Report*].

<sup>28</sup> HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *supra* note 16, at 170.

<sup>29</sup> Liam Martin, *Reentry Within the Carceral: Foucault, Race and Prisoner Reentry*, 21 CRIT. CRIM. 493, 498 (2013).

<sup>30</sup> *The NSDUH Report*, *supra* note 27; see also THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CHARACTERISTICS OF ADULTS ON PROBATION, 1995 7 (1997) (“[m]ore than 2 of every 5 probationers were required to enroll in some form of substance abuse treatment”).

other drug-related activity,<sup>31</sup> and drug violations are among “the most common” reasons for revocations.<sup>32</sup> Personal drug use in particular is “a leading driver of incarceration for supervision violations.”<sup>33</sup> A 2020 report found that drug use or simple possession accounted for up to one-in-four violations in some states:

In Pennsylvania, 17 percent of all state parole rule violations from 2016 to 2019 resulted from drug possession. In Wisconsin, 20 percent of total violations during those years stemmed from drug use, and another 5 percent resulted from drug possession. Of people booked into jail in nine Georgia counties from June 1 to October 31, 2019 for alleged supervision violations and new charges, 15 percent of the charges were for drug possession.<sup>34</sup>

Even these numbers likely understate the connection between drugs and violations, as they do not include other forms of drug-related misconduct, like failing a drug test,<sup>35</sup> missing a treatment session, or losing a job due to drug use.<sup>36</sup> A study of Washington, D.C.’s supervision system found that of 96,500 technical violations recorded in a single year, over 90% were drug-related.<sup>37</sup>

Imposing supervision on defendants with drug addiction and then revoking their supervision for drug violations encourages a vicious cycle. The process of recovery from addiction “often includes relapses,”<sup>38</sup> even if the person is “amenable to treatment,” “receiving effective, evidence-based interventions,”<sup>39</sup> and “eventually abstain[s].”<sup>40</sup> Imprisonment is “anti-therapeutic,” as it separates the individual “from

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<sup>31</sup> See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 306 (2016) (describing standard conditions of probation); see also Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 435 (2011).

<sup>32</sup> HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *supra* note 16, at 42; see also Jeremy Luallen et al., *Supervision Violations: Patterns and Outcomes*, 52 J. OFFENDER REHAB. 565, 566 (2013) (“drug-related violations for a reentry population make up the vast majority of all violating behavior and ... these violations occur regularly”).

<sup>33</sup> HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *supra* note 16, at 78.

<sup>34</sup> *Id.* at 78–79.

<sup>35</sup> *Id.* at 46–47, 120.

<sup>36</sup> *Id.* at 171.

<sup>37</sup> Fenster, *supra* note 23.

<sup>38</sup> 8E ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY, PROBATION AND PRETRIAL SERVICES, SUPERVISION OF FEDERAL OFFENDERS §§ 110, 550.30.50(a) (2010) [hereinafter MONOGRAPH].

<sup>39</sup> CLINICAL PRACTICE GUIDELINE, *supra* note 26, at 9, 54; see also MONOGRAPH, *supra* note 38, §§ 110, 550.30.50(a).

<sup>40</sup> CLINICAL PRACTICE GUIDELINE, *supra* note 26, at 54; see also MONOGRAPH, *supra* note 38, §§ 110, 550.30.50(a) (describing relapses as “likely, unavoidable, and not necessarily indicative of long-term failure”). {is the §§ 110, 550.30(a) needed because it is the exact same as *supra* 38?}

tangible supports like drug treatment and counseling” and makes it “more likely [they] are going to get upset and want to use.”<sup>41</sup> Far from reducing drug use, incarceration exacerbates the psychological trauma and socio-economic disadvantage that foster addiction in the first place. Studies show that “many more people use drugs again” after being imprisoned and “are much more likely to overdose and die upon release.”<sup>42</sup>

Although drug treatment may be helpful in some cases, mandating treatment as a condition of supervision also increases the person’s likelihood of violation by exposing them to more intensive scrutiny and imposing more restrictions on their behavior. One study, for example, found that probationers “who received both treatment and drug testing, compared to only drug testing,” ultimately did “less well” in terms of completing their supervision without incident, which the authors attributed to the “higher level of visibility/surveillance that increased the chances that any violation . . . would be discovered and this discovery would be sooner rather than later.”<sup>43</sup> As Judge Jack Weinstein put it, community supervision can become “a trap” for people with drug addiction, leading them to “bounce between supervision and prison.”<sup>44</sup>

## II. STUDY OF DRUG-USE REVOCATIONS

Since the creation of supervised release in 1984, the population under federal post-release supervision had increased over 500%, from 18,300 to over 112,500 people, making the federal system one of the ten largest in the country.<sup>45</sup> One-third of the defendants on supervised release are eventually found in violation and sent back to prison, for an average eleven-month sentence.<sup>46</sup> In 2019, federal judges revoked supervised release in over 17,000 cases, accounting for approximately 20%

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<sup>41</sup> Fenster, *supra* note 23; *see also* Jay Whetzel et al., *All Hands on Deck! Toward a Reentry-Centered Vision of Federal Probation*, 84 FED. PROB. J. 3, 7 (2020) (describing prison as “iatrogenic, that is, it can make people worse, exacerbating the drivers of illegal behavior that lead to incarceration in the first place”); HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *supra* note 16, at 175.

<sup>42</sup> HUMAN RIGHTS WATCH & AM. CIV. LIBERTIES UNION, *supra* note 16, at 175–76; *see also* Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 998 (2002) (“Approximately 85% of drug-abusing offenders return to drug use within one year after release from prison and approximately 95% return to drug use within three years.”).

<sup>43</sup> Celesta A. Albonetti & John R. Hepburn, *Probation Revocation: A Proportional Hazards Model of the Conditioning Effects of Social Disadvantage*, 44 SOC. PROBS. 124, 135 (1997) (emphasis added).

<sup>44</sup> *United States v. Trotter*, 321 F. Supp. 3d 337, 363 (E.D.N.Y. 2018).

<sup>45</sup> *See id.*; *see also* Doherty, *supra* note 31, at 298–300; *Table E-1, supra* note 15; JAMES L. GALVIN ET AL., U.S. DEP’T OF JUST., L. ENF’T ASSISTANCE ADMIN., NAT’L CRIM. JUST. INFO. & STAT. SERV., *PAROLE IN THE UNITED STATES: 1976 AND 1977* 12 (1978), <https://babel.hathitrust.org/cgi/pt?id=osu.32437121645580&view=1up&seq=23> [<https://perma.cc/92YS-YAHL>]. Between 1995 and 2015, the average term of supervision also increased by more than 10%. *Trotter*, 321 F. Supp. 3d at 362.

<sup>46</sup> Schuman, *supra* note 4; U.S. SENT’G COMM’N, *supra* note 14, at 4.



of all federal sentencings.<sup>47</sup> More than half of supervised-release revocations are for non-criminal technical violations like failing a drug test or being terminated from drug treatment.<sup>48</sup> Based on these figures, I have argued that supervised release has become “a shadow criminal justice system” that funnels people with substance-use disorder into prison, rather than recovery.<sup>49</sup>

In response to my criticisms and the work of other scholars, three authors from the Administrative Office of United States Courts recently published an article in the *Federal Probation* journal titled “Federal Supervised Release Revocation for Drug Use: The Rest of the Story.”<sup>50</sup> In their article, the authors condemn the “media” narrative that “the correctional system” is “geared toward monitoring for failure and recommending revocation at the first sign of noncompliance,” especially “when former inmates are returned to prison based on a failed drug test.”<sup>51</sup> A “closer look at the data,” they claim, “tells a different story.”<sup>52</sup> Through “an exploratory review of case data,” they set out to study whether the “suggestions by the media ... that the number of technical violators significantly contributes to the prison population” are accurate, or, if instead, “there were factors or a combination of factors that contributed to the decision to recommend revocation.”<sup>53</sup>

For their study, the authors first searched the Probation and Pretrial Services Case Tracking System for cases where a defendant’s “term of supervised release” was “revoked for drug use” and there were “either zero or one positive urinalysis.”<sup>54</sup> Although they do not state the time period searched, their inquiry apparently located 205 cases.<sup>55</sup>

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<sup>47</sup> Table E-7A—*Federal Probation System Judicial Business (September 30, 2019): Federal Probation System—Post-Conviction Supervision Cases Terminated With and Without Revocation, by Type—During the 12-Month Periods Ending September 30, 2018 and 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/statistics/table/e-7a/judicial-business/2019/09/30> [<https://perma.cc/A2H7-VQ59>] (last visited Mar. 13, 2022) [hereinafter *Table E-7A*]; Table D-4—*U.S. District Courts—Criminal Statistical Tables For The Federal Judiciary (December 31, 2019): U.S. District Courts—Criminal Defendants Terminated, by Type of Disposition and Offense—During the 12-month Period Ending December 31, 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2019/12/31> [<https://perma.cc/536L-3RGU>] (last visited Mar. 13, 2022).

<sup>48</sup> Schuman, *supra* note 4; *Table E-7A*, *supra* note 48.

<sup>49</sup> Schuman, *supra* note 4.

<sup>50</sup> Sheil et al., *supra* note 7, at 18.

<sup>51</sup> *Id.* Skepticism of community supervision goes back a long time. In the early 19th century, penal reformers “worried that post-release police supervision would impede reintegration” and “make released prisoners second-class citizens.” Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 969, 974 (2013).

<sup>52</sup> Sheil et al., *supra* note 7, at 18.

<sup>53</sup> *Id.* at 19, 20–21.

<sup>54</sup> *Id.* at 19.

<sup>55</sup> *Id.*

Next, the authors asked “three PPSO staff and 16 U.S. probation or pretrial services officers from multiple districts” to review the electronic casefiles for these 205 revocations, including “the judicial revocation orders, the officer’s chronological case activity record, and other case documents.”<sup>56</sup> The reviewers “complete[d] a questionnaire” for each case, indicating whether the database entry was accurate and whether eight “additional factors” may have “contributed to why the person on supervised release was revoked for drug use.”<sup>57</sup> Those eight factors were:

1. Was the person in substance use disorder treatment during the current term of supervision?
2. Were other technical violations charged?
3. Were there positive urinalyses for more than one illegal drug type (e.g., opiates and amphetamines, or cannabinoids and amphetamines)?
4. Did the person test positive on three or more drug tests?
5. Was the person likely not amenable to supervision (failure to report, lying to the officer, absconding, unsuccessful termination from the reentry center, failure to participate in treatment)?
6. Did the officer report previous acts of noncompliance to the court on any federal supervised release term (Noncompliance report with no action requested or condition modification request)?
7. Did the person have a new arrest(s) while on another term of federal supervision?
8. Was the person previously revoked while on federal supervision?<sup>58</sup>

The authors then collected the answers to these questions and analyzed the data to “understand if many factors may affect the decision to petition for revocation.”<sup>59</sup>

The study’s first discovery was faulty record keeping. Of the 205 cases reviewed, “63, or 31 percent ... had the incorrect revocation reason” logged in the database.<sup>60</sup> The authors therefore “removed from the sample” 48 cases “that were listed as revoked for a new charge or arrest,” leaving “157 cases that were revoked for some type of technical violation.”<sup>61</sup> To avoid these mistakes in the future, they

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 19, 20.

<sup>58</sup> *Id.* at 20. The last three questions also included any incidents during “previous terms of federal supervision.” *Id.* The authors decided to count previous incidents because “they show[ed] a history of failure ... indicating that the current drug use is not the first time the person demonstrated noncompliance.” *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 19–20.

encouraged “agency leads to consider incorporating periodic data review of their outputs,” in order to ensure “trends producing errors are identified.”<sup>62</sup>

Then, the authors calculated the frequency with which the remaining 157 cases featured any of the eight “additional factors” influencing drug-use revocations.<sup>63</sup> They found that the four most common factors, each occurring in around 75% of revocations, were (1) enrolled in treatment at some time during the supervision, (2) charged with other technical violations, (3) previous reports for noncompliance, and (4) “likely not amenable to supervision.”<sup>64</sup> The fifth and sixth most common factors were a previous revocation (64%) and testing positive for drugs three-or-more times (50%).<sup>65</sup> The two least common factors were a new arrest while on another term of supervision (41%) and a positive drug test for multiple drug types (37%).<sup>66</sup>

Finally, the authors analyzed “the frequency of cases with multiple [additional] factors present.”<sup>67</sup> They found that 80% of cases had “at least 4 combinations of factors,” and 60% had at least five factors present.<sup>68</sup> By contrast, only 6% of cases had just one or two factors.<sup>69</sup>

Because so many drug-use revocations presented additional factors justifying imprisonment, the authors conclude that “supervision is more complicated than simply revoking someone for one or two instances of illegal substance use.”<sup>70</sup> “What is omitted” from this data, the authors add, “are [probation] officers’ efforts to help the person on supervision find employment, reconnect with family, abate their substance use disorder, understand their actions and cognitive process contributing to negative behavior, and other efforts to help offenders succeed.”<sup>71</sup> “[D]espite the assumptions of some,” they emphasize, “federal probation officers likely consider many different factors when recommending revocation; revocation, especially for technical violations, surfaces as a final alternative available to them after other means of bringing about success have been tried.”<sup>72</sup>

### III. FEDERAL DRUG SUPERVISION

The *Federal Probation* article is both methodologically and conceptually unsound. Methodologically, there are at least two significant problems with the

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<sup>62</sup> *Id.* at 21.

<sup>63</sup> *Id.* at 20.

<sup>64</sup> *Id.* at 20–21.

<sup>65</sup> *Id.* at 21.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 20.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 19.

<sup>72</sup> *Id.*

study. First, the authors do not state the time period they searched for drug-use revocations. They found 157 such cases, but we need to know the time period searched in order to determine how frequently the federal government is revoking supervision for drug use. Revoking 157 times a month is obviously much more significant than 157 a year. Second, the authors did not account for the 25% error rate they discovered in the database. Because there are 17,000 revocations of supervised release annually,<sup>73</sup> there may be hundreds if not thousands of drug-use revocations the authors overlooked due to miscoding. A 2002 study of the federal system, for instance, found that 17% of defendants “were revoked or removed from supervision ... due to technical violations involving drug use.”<sup>74</sup> If that percentage held true in 2019, it would account for nearly 3,000 drug-use revocations every year.

Beyond these methodological issues, there is also a deeper, conceptual problem with the *Federal Probation* article. The authors aim to disprove the “media” narrative that the federal government revokes supervised release “at the first sign” of drug use, focusing on 157 drug-use revocations based on zero or one positive drug tests.<sup>75</sup> Yet that undeniably unfair scenario is just one extreme fact pattern in a much larger system of supervision that governs the lives of over 100,000 criminal defendants and sends nearly 17,000 to prison each year. Viewed as a whole, the legal framework of supervised release reveals a system focused, even obsessed, with monitoring and punishing drug activity:

- Multiple layers of drug surveillance ensure that drug-related misconduct is quickly detected.
- Broad and deep drug conditions empower probation officers and prosecutors to define violations and induce concessions.
- Mandatory revocation for drug violations promotes public safety by immediately imprisoning defendants for drug use.

While Congress intended supervised release to be a program of transitional support for former prisoners, the system has instead evolved into a security network designed to incarcerate people with drug addiction who relapse.

#### A. *Multiple Layers of Drug Surveillance*

The federal criminal justice system has multiple, redundant layers of surveillance to monitor defendants on supervised release for drug violations. Drug-related misconduct, including lack of progress in addiction treatment, is grounds for even greater scrutiny. This drug panopticon places the defendant’s drug activity

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<sup>73</sup> Table E-7A, *supra* note 48.

<sup>74</sup> John D. Gurley, *Drug Use or Abstinence as a Function of Perceived Stressors Among Federally Supervised Offenders*, 67 FED. PROB. 49, 49 (2003).

<sup>75</sup> Sheil et al., *supra* note 7, at 18.

under “perpetual observation,” with any drug use certain to be immediately detected.<sup>76</sup>

Federal law targets defendants with a record of drug activity for supervised release. Judges may impose a term of supervised release on any defendant convicted of a felony or grade-A misdemeanor, which includes virtually all federal drug offenses (including simple possession).<sup>77</sup> When imposing supervised release, judges must consider deterrence, incapacitation, and rehabilitation, the last of which obviously includes drug treatment.<sup>78</sup> The Sentencing Guidelines also “highly recommend” that judges impose supervised release when the defendant is “an abuser of controlled substances or alcohol,”<sup>79</sup> as well as mandatory “substance abuse” treatment.<sup>80</sup>

Defendants convicted of drug crimes comprise the “largest portion” of the caseload under supervised release, accounting for about 45% of all people under federal supervision.<sup>81</sup> Even that figure does not include defendants convicted of non-drug offenses but sentenced to supervision based on a record of drug activity.<sup>82</sup> Some drug offenses also carry mandatory-minimum terms of supervised release, ranging from one to thirty years, with maximums up to lifetime supervision.<sup>83</sup> Between 2003 and 2008, almost 120,000 people convicted of drug offenses were sentenced to mandatory-minimum terms of supervised release, for an average of fifty-two months’ supervision.<sup>84</sup>

Once they are sentenced to supervised release, defendants with a history of drug use are targeted for more intrusive surveillance. The Probation and Pretrial Services Office’s Monograph on the *Supervision of Federal Offenders* lists “substance abuse” as one of the “big six criminogenic needs”<sup>85</sup> and instructs probation officers to screen

<sup>76</sup> MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 304 (Alan Sheridan trans. 1974).

<sup>77</sup> 18 U.S.C. § 3583(a); 21 U.S.C. § 844(a).

<sup>78</sup> 18 U.S.C. § 3583(c).

<sup>79</sup> U.S. SENT’G GUIDELINES MANUAL § 5D1.1 app. 3(c) (U.S. SENT’G COMM’N 2018).

<sup>80</sup> U.S. SENT’G GUIDELINES MANUAL § 5D1.3(d)(4) (U.S. SENT’G COMM’N 2018).

<sup>81</sup> U.S. SENT’G COMM’N, *supra* note 14, at 65.

<sup>82</sup> U.S. SENT’G GUIDELINES MANUAL § 5D1.1 app. 3(c) (U.S. SENT’G COMM’N 2018). *See, e.g.*, *United States v. Coston*, 964 F.3d 289, 291 (4th Cir. 2020) (“financially strapped” defendant with drug addiction spent fake money on Craigslist, was convicted of counterfeiting, and sentenced to imprisonment followed by five years of supervised release with mandatory drug treatment).

<sup>83</sup> 21 U.S.C. §§ 841(b), 859(b), 860(a)–(b), 960(b) (mandating supervised release for crimes of manufacturing, distributing, or possessing with intent to distribute drugs above certain quantities; distributing drugs to persons under twenty-one; and distributing or manufacturing drugs in or near schools and colleges).

<sup>84</sup> U.S. SENT’G COMM’N, *supra* note 14, at 49, 51.

<sup>85</sup> MONOGRAPH, *supra* note 38, §§ 110, 140. The other five needs are “low self-control,” “anti-social personality,” “anti-social values,” “criminal peers,” and “dysfunctional family.” *Id.* The Probation and Pretrial Services Office also lists combatting “substance abuse” as one of its six

defendants for “substance abuse problem[s]” through interviews, judicial records, prison reports, and treatment files.<sup>86</sup> The Monograph also recommends that defendants with a record of drug addiction receive more “intensive re-entry services” such as “treatment and monitoring.”<sup>87</sup> A seven-factor Risk Prediction Index (RPI), used to determine the appropriate level of supervision for each defendant, includes “whether the offender has a history of illegal drug use or alcohol abuse.”<sup>88</sup>

The government also employs multiple forms of surveillance to detect drug-related violations of supervised release. By statute, every term of supervised release must include a condition that the defendant “submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter,” unless the judge finds them “a low risk of future substance abuse.”<sup>89</sup> Three drug tests are just the minimum—judges may also choose to impose additional drug testing, including weekly<sup>90</sup> or even daily<sup>91</sup> testing.<sup>92</sup> While urine tests can identify drug use in the prior two days,<sup>93</sup> judges may also require defendants to wear a drug-detecting “sweat

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“principles of good supervision.” *Chapter 1: Authority (Probation and Supervised Release Conditions, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/services-forms/authority-probation-supervised-release-conditions> [<https://perma.cc/X2AC-U8BY>] (last visited Mar. 26, 2022).*

<sup>86</sup> MONOGRAPH, *supra* note 38, § 550.20.15(a).

<sup>87</sup> *Id.* § 330.10(b)(1).

<sup>88</sup> *Id.* § 350.10.10(b)(4). The other six factors are the number of arrests, use of a weapon in the commission of the instant offense, whether the offender was employed at the start of supervision, whether the offender ever absconded from a previous period of supervision, whether the offender has a college degree, and whether the offender was living with a spouse and/or children at the start of supervision. *Id.* § 350.10.10(b). In addition to the RPI score, probation officers also consider “the types of substances used” and “whether there is evidence of current use.” *Id.* § 350.10.20(c).

<sup>89</sup> 18 U.S.C. §§ 3563(a)(5), 3583(d). Judges do not frequently invoke this exception to mandatory drug testing for low-risk defendants. A 2011 study, for example, found “more than 57 percent of the some 130,000 federal offenders on supervised release were under a court-imposed duty to submit to post-conviction drug tests.” *Drug Testing Often a Part of Supervised Release*, THIRD BRANCH: NEWSLETTER FED. CTS. (Admin. Off. of the U.S. Cts., Washington, D.C.), Apr. 2011, at 7, <https://issuu.com/uscourts/docs/2011-04tb> [<https://perma.cc/UL6E-XYP5>] [hereinafter *Drug Testing Often*].

<sup>90</sup> *See, e.g.,* *United States v. Thornhill*, 759 F.3d 299, 302 (3d Cir. 2014); *United States v. Neal*, 662 F.3d 936, 937 (7th Cir. 2011) (authorizing up to 52 drug tests within a year).

<sup>91</sup> *See, e.g.,* *United States v. Lafley*, 656 F.3d 936, 937 n.2 (9th Cir. 2011) (authorizing daily drug tests). {no period needed}

<sup>92</sup> The Probation and Pretrial Services Office follows a “Three Phase Program, which requires a minimum of three random drug tests with less than 24 hours notice per month during Phase I; a minimum of two such tests monthly during Phase II; and a minimum of one such test monthly during Phase III.” MONOGRAPH, *supra* note 38, § 550.30.10(d).

<sup>93</sup> *United States v. Meyer*, 485 F. Supp. 2d 1001, 1012 (N.D. Iowa 2006).

patch”<sup>94</sup> that provides “a means of continuous detection.”<sup>95</sup> Positivity rates range between 2% and 14%,<sup>96</sup> and even tests that fall below the threshold for a positive test may be offered in court as evidence of drug use.<sup>97</sup> Positive tests, refused tests, and missed tests are all easy ways of detecting drug-related violations of supervised release.<sup>98</sup>

Mandatory drug treatment imposes another layer of drug surveillance.<sup>99</sup> More than half of all people under federal supervision are sentenced to substance abuse treatment conditions, and nearly a quarter of them—over 25,000 people—receive judiciary-funded substance abuse treatment (not including supervisees in insurance- or charity-funded treatment).<sup>100</sup> Treatment includes “detoxification; residential treatment; individual, family, or group counseling; and medication,”<sup>101</sup> and according to the Monograph should last at least 90 days and up to 18 months.<sup>102</sup> Inpatient or residential treatment ensures observation by facility staff who “report [the defendant’s] slip-ups back to the court,”<sup>103</sup> and may also require drug testing beyond that imposed by the judge.<sup>104</sup> It is not uncommon for the government to

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<sup>94</sup> United States v. Phillips, 791 F.3d 698, 702 (7th Cir. 2015) (Posner, J., concurring in part and dissenting in part).

<sup>95</sup> MONOGRAPH, *supra* note 38, § 550.30.25; *see also* Meyer, 485 F. Supp. 2d at 1005–07. If there is reason to believe defendants are attempting to disguise their drug use, probation officers may employ refractometers to examine their urine and “require [them] to wait and provide additional samples until a valid specimen is obtained.” *Drug Testing Often*, *supra* note 90, at 7.

<sup>96</sup> Christopher Mangione, *Overview of Substance Use Disorder Occurrence and Treatment in the Federal Judiciary*, 83 FED. PROB. 5, 5–6 (2019).

<sup>97</sup> United States v. Klimek, 411 F.3d 50, 51 (2d Cir. 2005).

<sup>98</sup> *See, e.g.*, United States v. Garner, 969 F.3d 550, 551 (5th Cir. 2020); United States v. Coston, 964 F.3d 289, 291–92 (4th Cir. 2020); United States v. Hathorn, 920 F.3d 982, 983 (5th Cir. 2019); United States v. Hammonds, 370 F.3d 1032, 1034 (10th Cir. 2004).

<sup>99</sup> Describing mandatory treatment as a form of drug surveillance does not mean that treatment programs are unhelpful for all defendants. A 1999 study in one district found that one-third of defendants under supervision “reverted to drug use following completion of treatment.” Gurley, *supra* note 75, at 49.

<sup>100</sup> Table S-13: *Federal Probation System—Offenders Receiving Judiciary-Funded Substance Abuse Treatment For the 12-Month Period Ending September 30, 2019*, ADMIN. OFF. OF THE U.S. CTS., [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_s13\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_s13_0930.2019.pdf) [https://perma.cc/U8K7-YNT5] (last visited Mar. 27, 2022); *see also* Mangione, *supra* note 97, at 5 (“For post-conviction supervision, federal probation offices supervised 186,509 cases during fiscal year 2018. Of that number, 120,217 had substance abuse treatment conditions”).

<sup>101</sup> Mangione, *supra* note 97, at 5. The Administrative Office of the U.S. Courts is authorized to “contract with any appropriate public or private agency or person for the detection of and care in the community of an offender who is an alcohol dependent person, an addict, or a drug-dependent person.” 18 U.S.C. § 3672; *see also* 18 U.S.C. § 3154. Currently, the judiciary uses “80 different services to address substance use disorder treatment.” Mangione, *supra* note 97, at 6.

<sup>102</sup> MONOGRAPH, *supra* note 38, § 550.20.45.

<sup>103</sup> HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 16, at 177.

<sup>104</sup> *See* U.S. SENT’G GUIDELINES MANUAL § 5D1.3(d)(4) (U.S. SENT’G COMM’N 2018); *see also* United States v. Bell, 197 F. Supp. 2d 192, 194 (E.D. Pa. 2002).

identify drug-related violations by virtue of the defendant's participation in drug treatment—for example, testing positive in program drug screens, getting caught with drugs in the facility, or missing a treatment session.<sup>105</sup>

Lack of progress in addiction treatment leads to even more intensive scrutiny. The Monograph describes “treatment interventions” as a “continuum of care,” ranging from group therapy, to individual treatment, to residential treatment, and finally full hospitalization.<sup>106</sup> The probation officer “move[s] the individual up or down th[is] continuum” as he “improves or struggles.”<sup>107</sup> Defendants who progress are rewarded with “reduced supervision incentives,” such as less frequent drug testing,<sup>108</sup> while those who do not face additional supervision.<sup>109</sup> Ultimately, if treatment is deemed unsuccessful, then the officer may petition the court to increase the intensity of the surveillance, shifting the defendant from outpatient to inpatient treatment, to in-home detention with electronic monitoring, or back into prison.<sup>110</sup>

In addition to testing and treatment, probation officers also personally monitor defendants for drug activity. Formally, the sentencing judge exercises “supervisory power over the defendant,”<sup>111</sup> but in practice, probation officers serve as the “investigative and supervisory ‘arm of the court,’” maintaining “contact with the defendant to ensure that the defendant complies with the terms and conditions.”<sup>112</sup> Officers also keep the judge informed about the defendant's status, “serv[ing] as a liaison between the sentencing court . . . and the defendant.”<sup>113</sup> If a defendant violates a condition of supervised release, then the officer may file a petition reporting the violation to the court and recommending modification or revocation.<sup>114</sup> The officer also sits as a “sworn witness” in the proceedings, which are prosecuted by the U.S. Attorney's Office.<sup>115</sup>

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<sup>105</sup> See, e.g., *United States v. Seighman*, 966 F.3d 237, 239 (3d Cir. 2020); *United States v. Schonewolf*, 905 F.3d 683, 685 (3d Cir. 2018); *United States v. Holt*, 890 F.3d 721, 724 (8th Cir. 2018); *United States v. Ilayayev*, 800 F. Supp. 2d 417, 427 (E.D.N.Y. 2011).

<sup>106</sup> MONOGRAPH, *supra* note 38, §§ 550.20.25(a), 550.20.40(c); see also Sam Torres, *A Continuum of Sanctions for Substance-Abusing Offenders*, 62 FED. PROB. 36, 38–44 (1998).

<sup>107</sup> MONOGRAPH, *supra* note 38, § 550.20.25(a).

<sup>108</sup> *Id.* §§ 550.20.60(f)(4), 550.20.65(e)(5).

<sup>109</sup> *Id.* §§ 620.40.10–620.40.30. Probation officers also will not recommend early termination of supervision for a defendant if there is “recent evidence of alcohol or drug abuse.” *Id.* § 380.10(b)(6).

<sup>110</sup> See, e.g., *Holt*, 890 F.3d at 724; *United States v. Hollins*, 847 F.3d 535, 538 (7th Cir. 2017); *United States v. Kindred*, 918 F.2d 485, 486 (5th Cir. 1990).

<sup>111</sup> *United States v. Davis*, 151 F.3d 1304, 1306 (10th Cir. 1998).

<sup>112</sup> *Id.* Probation officers are appointed by the district court and follow a number of statutory duties, including that they “keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a person on supervised release” and “‘report’ his conduct and condition to the sentencing court.” *United States v. Burnette*, 980 F. Supp. 1429, 1432–33 (M.D. Ala. 1997).

<sup>113</sup> *Davis*, 151 F.3d at 1306.

<sup>114</sup> *Id.*

<sup>115</sup> *Burnette*, 980 F. Supp. at 1434.



Every term of supervised release includes thirteen “standard” requirements intended to give federal probation officers the “tools needed ... to keep informed, report to the court about, and bring about improvements in [the defendant’s] conduct and condition.”<sup>116</sup> Seven of these conditions open a window into the defendant’s home, work, and personal life:

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment.
2. After initially reporting to the probation office ... you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district ... without first getting permission from ... the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements ... you must notify the probation officer ... .
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view ... .
7. If you plan to change where you work or anything about your work ... you must notify the probation officer.<sup>117</sup>

The Fourth Amendment does not apply to these conditions, meaning that officers may search a defendant’s home for evidence of drug activity without a warrant, probable cause, or even reason to suspect a violation.<sup>118</sup> The Fifth Amendment also does not apply, so probation officers may require defendants to answer questions about their drug use without warning them about self-incrimination<sup>119</sup> and then use their answers against them in revocation

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<sup>116</sup> These “standard” conditions are listed in the Federal Sentencing Guidelines and come pre-printed on the federal criminal judgment form. U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c) (U.S. SENT’G COMM’N 2018); National Federal Court Form: Judgment in a Federal Criminal Case AO-245B (Rev. 9/19), at 6 [hereinafter Judgment Form].

<sup>117</sup> Judgment Form, *supra* note 117, at 6; U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c) (U.S. SENT’G COMM’N 2018).

<sup>118</sup> *See* *Samson v. California*, 547 U.S. 843, 846 (2006); *see also* *United States v. Betts*, 511 F.3d 872, 876 (9th Cir. 2007); *United States v. Hanrahan*, 508 F.3d 962, 971 (10th Cir. 2007); MONOGRAPH, *supra* note 38, § 450.40.

<sup>119</sup> *United States v. Nieblas*, 115 F.3d 703, 705 (9th Cir. 1997).

proceedings.<sup>120</sup> Often, drug violations are discovered simply because the defendant admits them to their probation officer.<sup>121</sup>

Federal probation officers are trained to prioritize the detection of drug-related misconduct. “Given the established relationship between substance abuse and criminal activity,” the Monograph encourages them to make “ongoing efforts to detect substance abuse and to intervene promptly when a problem is identified.”<sup>122</sup> The Monograph even instructs officers to look for drug activity *preceding* actual drug use:

It is well established that individuals who relapse ... often begin by exhibiting predictable behaviors long before they return to using substances ... These behaviors ... need to be understood and recognized by officers. Armed with this knowledge, officers can intervene promptly and implement appropriate and timely interventions.<sup>123</sup>

So-called “[p]re-lapse behaviors” include “the sudden loss of a job, change in mood, choosing to associate with others who are abusing substances, and going back to places where drugs were purchased or used.”<sup>124</sup> Any change in life, mood, or movement under supervised release is scrutinized for signs of drug activity.

Probation officers are also taught to speak to defendant’s “collateral contacts,” such as “family members, friends, and other people who are important to [them].”<sup>125</sup> Officers interview these relations and then remain in communication to enlist them as “ongoing sources of information for officers on emerging risk issues.”<sup>126</sup> The defendant’s intimate contacts thus become yet another dimension of drug surveillance—for instance, the mother who called her son’s probation officer to report he was using methamphetamine.<sup>127</sup>

Beyond federal probation officers, state and local police also serve as agents of federal supervision. As a “standard” condition of supervised release, any defendant “arrested or questioned by a law enforcement officer” must “notify the[ir] probation officer within 72 hours.”<sup>128</sup> Because drug activity is heavily policed, contacts with law enforcement are another easy way for probation officers to discover drug-related

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<sup>120</sup> *United States v. Ka*, 982 F.3d 219, 220 (4th Cir. 2020).

<sup>121</sup> *See, e.g., United States v. Coston*, 964 F.3d 289, 292 (4th Cir. 2020); *United States v. Rodriguez*, 945 F.3d 1245, 1248 (10th Cir. 2019); *see also* MONOGRAPH, *supra* note 38, § 550.30.40.

<sup>122</sup> MONOGRAPH, *supra* note 38, § 460.30.

<sup>123</sup> *Id.* § 530.10(f).

<sup>124</sup> *Id.* § 550.30.50(b).

<sup>125</sup> *Id.* § 340.30.

<sup>126</sup> *Id.*

<sup>127</sup> *See United States v. Many White Horses*, 964 F.3d 825, 827 (9th Cir. 2020).

<sup>128</sup> Judgment Form, *supra* note 117, at 6; U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c) (U.S. SENT’G COMM’N 2018).

violations.<sup>129</sup> Of the federal defendants on supervision eventually re-arrested for new crimes, one-third are for drug offenses.<sup>130</sup>

The workplace offers a final mechanism for monitoring drug use. Every term of supervised release includes as a “standard” condition that the defendant must “work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so.”<sup>131</sup> To change their job or “anything about [their] work (such as the position or the job responsibilities),” the defendant must “notify the probation officer at least 10 days before[hand].”<sup>132</sup> As a result, even if a person on supervised release is able to conceal drug activity from their probation officer, they may still be discovered by their employer and fired, which in turn will be reported as a violation. One judge described this dynamic:

[The defendant] does not work and he is unable to maintain employment because of his marijuana smoking. His failure to maintain employment violates condition of supervised release # 5 which states that he ‘shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.’<sup>133</sup>

Supervised release involves multiple forms of drug surveillance, including regular testing, mandatory treatment, and routine contact with a probation officer. These overlapping layers of supervision target defendants with a record of drug activity and vary in intensity based on their progress in drug treatment. The all-drug-seeing eye of the federal criminal justice system ensures that any drug-related violations, and certainly any relapses, will be swiftly detected.

### B. *Broad and Deep Drug Conditions*

Professor Bill Stuntz famously described modern American criminal law as “broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over.”<sup>134</sup> The drug conditions of supervised release are especially broad and deep—they cover an extraordinary range of drug

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<sup>129</sup> See, e.g., *United States v. Napper*, 978 F.3d 118, 121–22 (5th Cir. 2020); *United States v. Doka*, 955 F.3d 290, 293 (2d Cir. 2020); *United States v. Burrage*, 951 F.3d 913, 915 (8th Cir. 2020); *United States v. Ilayayev*, 800 F. Supp. 2d 417, 426–27 (E.D.N.Y. 2011); *United States v. Bell*, 197 F. Supp. 2d 192, 194 (E.D. Pa. 2002).

<sup>130</sup> James L. Johnson, *Federal Post-Conviction Supervision Outcomes: Arrests and Revocations*, 78 FED. PROB. 3, 7 (2014); Laura Baber, *Results-Based Framework for Post-Conviction Supervision Recidivism Analysis*, 74 FED. PROB. 5, 8 (2010).

<sup>131</sup> U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c)(7) (U.S. SENT’G COMM’N 2018).

<sup>132</sup> *Id.*

<sup>133</sup> *United States v. Jefferson*, 175 F. Supp. 2d 1123, 1132 n.2 (N.D. Ind. 2001); see also *United States v. McCormick*, 54 F.3d 214, 217 (5th Cir. 1995).

<sup>134</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).

activity and prohibit it repeatedly. Because of this extreme breadth and depth, the drug conditions empower federal law enforcement to determine the scope of drug restrictions and pressure defendants to concede rather than contest drug-related violations.

According to Professor Stuntz, broad and deep criminal laws shift power away from legislatures and courts and towards police and prosecutors.<sup>135</sup> When “criminal law is broad,” he explained, “prosecutors cannot possibly enforce the law as written: there are too many violators.”<sup>136</sup> As a result, “the law as enforced will differ from the law on the books,” determined on the street “by law enforcers, by prosecutors’ decisions to prosecute and police decisions to arrest.”<sup>137</sup> “Deep” laws also give prosecutors leverage in the courtroom, allowing them to “[s]ubstitut[e] an easy-to-prove crime for one that is harder” and thereby increase the likelihood of conviction even though the odds that the defendant did something wrong remain the same.<sup>138</sup> Prosecutors can even “charge-stack” by alleging “several crimes for a single criminal episode” in order to raise the threatened sentence and induce guilty pleas.<sup>139</sup>

Professor Fiona Doherty applied Professor Stuntz’s theories to the standard conditions of probation, arguing that their breadth and depth are “even more intense” than the substantive criminal law.<sup>140</sup> Because the standard probation conditions require defendants to obey all the laws and follow all the instructions of their probation officers, she observed, the officer, “[e]ven more than the prosecutor,” becomes “a hidden and unaccountable lawmaker.”<sup>141</sup> Probation officers also wield significant adjudicative power, not only investigating violations and reporting them to the court, but also serving as a witness at revocation hearings and recommending punishments.<sup>142</sup>

Extending Stuntz and Doherty’s ideas a step further, the breadth and depth of the drug conditions of supervised release is yet again even more intense. By statute, every term of supervised release must include at least three conditions forbidding drug activity: that the defendant (1) “not commit another Federal, State, or local crime,” (2) “not unlawfully possess a controlled substance,” and (3) “refrain from any unlawful use of a controlled substance.”<sup>143</sup> The first of these conditions includes all drug crimes at every level of government, the second prohibits any unlawful drug possession, and the third forbids any unlawful drug use. Since even a single instance

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<sup>135</sup> *Id.* at 518–23.

<sup>136</sup> *Id.* at 519.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See* Doherty, *supra* note 31, at 346.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 347.

<sup>143</sup> 18 U.S.C. §§ 3563(a), 3583(d). Judges also may impose a condition banning the consumption of alcohol. *See* U.S. SENT’G GUIDELINES MANUAL § 5D1.3(d)(4) (U.S. SENT’G COMM’N 2018).

of drug use—including a positive drug test—is sufficient to prove drug possession,<sup>144</sup> and because drug possession is a federal crime,<sup>145</sup> just one positive drug test puts the defendant in violation of all three of these conditions simultaneously.

These three mandatory drug conditions are just the beginning. Two additional “standard” conditions of supervised release also forbid the defendant from “communicat[ing] or interact[ing] with someone the defendant knows is engaged in criminal activity,” or “knowingly communicat[ing] or interact[ing] with” someone he or she “knows ... has been convicted of a felony ... without first getting the permission of the probation officer.”<sup>146</sup> As a result, a defendant who uses drugs with another person under supervision violates both of these associational conditions, plus the three mandatory conditions mentioned previously, for a grand total of five violations arising from a single incident.<sup>147</sup>

Mandatory addiction treatment imposes yet another set of broad and deep drug restrictions. “Implicit in an order requiring an offender to participate in treatment” is the “obligation to follow the requirements of the treatment program—to attend when required and participate during sessions.”<sup>148</sup> In other words, defendants who break treatment rules also violate their supervised release. Those rules can be “wide-ranging and harsh,” including prohibitions on “‘coarse joking or gesturing;’ wearing torn clothing; and watching television outside of the specified ‘news hour.’”<sup>149</sup> Enforcement may “come down to subjective judgments about a person’s commitment and attitude, as well as the correctional facility’s rules.”<sup>150</sup> In one case, a defendant was discharged from drug treatment based on a seemingly arbitrary judgment by a single counselor:

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<sup>144</sup> Some circuits hold as a matter of law that proof of drug use necessarily establishes drug possession. *See* *United States v. Hammonds*, 370 F.3d 1032, 1033 (10th Cir. 2004); *United States v. Wirth*, 250 F.3d 165, 170 (2d Cir. 2001); *United States v. Hancox*, 49 F.3d 223, 225 (6th Cir. 1995); *United States v. Young*, 41 F.3d 1184, 1186 (7th Cir. 1994); *United States v. Clark*, 30 F.3d 23, 26 (4th Cir. 1994); *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992). Others hold that judges may infer possession from use but are not required to do so. *See* *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1997); *United States v. Almand*, 992 F.2d 316, 318 (11th Cir. 1993); *United States v. Dow*, 990 F.2d 22, 24 (1st Cir. 1993); *United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir. 1991); *United States v. Blackston*, 940 F.2d 877, 891 (3d Cir. 1991).

<sup>145</sup> 21 U.S.C. § 844(a).

<sup>146</sup> U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c)(8) (U.S. SENT’G COMM’N 2018).

<sup>147</sup> *See, e.g., United States v. Lamirand*, 669 F.3d 1091, 1092 (10th Cir. 2012) (“Shortly after his release from prison, Mr. Lamirand ... violated the terms of his supervised release by, inter alia, stealing gasoline, possessing controlled substances (i.e., illegal drugs) with the intent to distribute, and associating with felons.”).

<sup>148</sup> MONOGRAPH, *supra* note 38, § 550.10.20(c)(5); HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 16, at 177.

<sup>149</sup> HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 16, at 47.

<sup>150</sup> *Id.* at 120.

[The defendant] attained several treatment goals during his first eight days at the center, but on the eighth day a REAP counselor discharged him for poor attitude and rule infractions. The counselor who discharged [him] testified ... that the REAP staff believed [he] was not benefitting from the program and was disrupting the other patients. [He] also allegedly violated four REAP rules by smoking on a porch, listening to a radio in his room, talking in class, and falling asleep during free time. However, the counselor admitted ... that smoking on the porch and listening to the radio did not in fact violate REAP rules and that REAP guidelines concerning sleep during free time were inconsistently enforced and ambiguous.<sup>151</sup>

The defendant reported the discharge to his probation officer as well as his intent to appeal to the program's grievance committee, but the officer still filed a petition to revoke his supervised release.<sup>152</sup> The court sentenced him to two years imprisonment.<sup>153</sup>

Another layer of depth comes from the imposition of concurrent terms of supervised release. When a defendant is convicted of multiple crimes, the judge can choose to sentence them to multiple concurrent—in other words, simultaneous—terms of supervised release. These concurrent terms make no difference to the administration of the supervision, but if the defendant ever violates a condition, the judge can revoke all the terms and impose multiple *consecutive* prison sentences.<sup>154</sup> In one case, for example, a defendant was convicted of three counts of fraud and sentenced to 51 months of imprisonment followed by three concurrent 36-month terms of supervised release.<sup>155</sup> After completing his prison sentence and beginning his supervised release, he violated “technical and nontechnical conditions ... including cocaine and heroin use as well as unauthorized use of access devices and aggravated identity theft.”<sup>156</sup> The judge revoked all three terms of supervised release and sentenced him to the maximum “24 months in prison for violation of supervised release on each of the three ... charges,” with the sentences running consecutively, for a total punishment of 72 months' imprisonment.<sup>157</sup>

The final layer of depth in supervised release comes from the substantive drug law itself—drug crimes like possession, distribution, trafficking, etc. As noted earlier, every term of supervised release includes a condition that the defendant must

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<sup>151</sup> United States v. Kindred, 918 F.2d 485, 486 (5th Cir. 1990).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See United States v. Badgett, 957 F.3d 536, 538–39 (5th Cir. 2020); United States v. Dees, 467 F.3d 847, 850 (3d Cir. 2006).

<sup>155</sup> *Dees*, 467 F.3d at 850.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*; see also *Badgett*, 957 F.3d at 538–39 (revoking six concurrent terms of supervised release and imposing six consecutive sentences of eight months each, for a total sentence of 48 months' imprisonment).

“not commit another Federal, State, or local crime.”<sup>158</sup> Because of this condition, committing a drug crime is also a violation of supervised release.<sup>159</sup> And when a defendant on supervised release is convicted of a new crime, the Sentencing Guidelines recommend that the sentence for the violation run *consecutively* to the sentence for the conviction.<sup>160</sup> In other words, a defendant on supervised release who is convicted of a new crime may be sentenced to prison for that crime, and then sentenced to a consecutive prison term for the violation of supervised release, both based on the exact same conduct.<sup>161</sup>

The effect of this extreme breadth and depth is to give probation officers and prosecutors enormous discretion in enforcing the drug restrictions. Since the drug conditions cover such a broad range of conduct, the government cannot (and probably would not want to) enforce them to their fullest. Probation officers are only required to report “Grade A or B violations” (felonies) to the court, and need not report Grade C violations (misdemeanors and technical violations), so long as there is no “pattern of violations” or “undue risk to an individual or the public.”<sup>162</sup> While the Monograph instructs officers to “respond” to “all instances of noncompliance,” they are not required seek revocation for every violation.<sup>163</sup> The Monograph even provides a specific exception for the “Episodic Drug User” who “is actively participating in treatment, is making progress towards other objectives, and is not considered a danger to self or others should be given more consideration.”<sup>164</sup> For these offenders, “the exception to requesting revocation ... may be appropriate if consistent with circuit law.”<sup>165</sup> The vague language of this exception leaves much to the individual probation officer’s discretion.

The Department of Justice does not have an official policy on how federal prosecutors should handle drug-related violations of supervised release. The DOJ’s *Manual on Principles of Federal Prosecution* mentions revocation only once, stating that when a defendant “is on probation or parole as the result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by

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<sup>158</sup> 18 U.S.C. §§ 3563(a), 3583(d).

<sup>159</sup> Prosecutors may use a record of conviction as *per se* proof of a violation. *See* United States v. Goodon, 742 F.3d 373, 375–76 (8th Cir. 2014); United States v. Spraglin, 418 F.3d 479, 481 (5th Cir. 2005); United States v. Huusko, 275 F.3d 600, 602 (7th Cir. 2001).

<sup>160</sup> U.S. SENT’G GUIDELINES MANUAL § 7B1.3(f) (U.S. SENT’G COMM’N 2018).

<sup>161</sup> *See* Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 929–31 (2021) (collecting cases).

<sup>162</sup> U.S. SENT’G GUIDELINES MANUAL §§ 7B1.1(a), 7B1.2(a)–(b) (U.S. SENT’G COMM’N 2018); *see also* MONOGRAPH, *supra* note 38, § 620.30(b).

<sup>163</sup> MONOGRAPH, *supra* note 38, § 620.10(b). Rather than revocation, “community-based interventions are the preferred response to technical violations,” including verbal or written reprimands, additional meetings, travel restrictions, a curfew, etc. *Id.* at § 620.30(a).

<sup>164</sup> *Id.* at § 620.50.10(d).

<sup>165</sup> *Id.*

seeking revocation rather than “a new prosecution.”<sup>166</sup> Aside from this generic instruction, prosecutors are allowed to decide when and whether to revoke supervised release for drug violations. As a result, the drug conditions give law enforcement significant authority to decide which drug-related violations will be punished and which will be excused.

The depth of the drug conditions also gives probation officers and prosecutors more leverage over defendants in revocation hearings. Because any incident of drug use will likely violate multiple conditions of supervision,<sup>167</sup> probation officers and prosecutors can improve their odds of success by alleging the easiest violation to prove—for instance, that a defendant violated supervision by missing a treatment session rather than by actually using drugs. Officers and prosecutors can also choose how many violations to allege, which will affect how aggravated the defendant’s conduct appears to the judge. Finally, when the defendant is serving multiple concurrent terms of supervised release, prosecutors can “charge-stack” by seeking consecutive revocation sentences, which may dramatically increase the total prison term.<sup>168</sup> These structural advantages enable law enforcement to pressure defendants to concede drug-related allegations, for fear of harsher consequences if they choose to present a defense at an evidentiary hearing.

The most potent prosecutorial advantage in drug revocations is the “mandatory revocation” provision in 18 U.S.C. § 3583(g). As discussed below in Part III.C, § 3583(g) requires judges to revoke supervised release and impose a prison sentence whenever a defendant violates supervised release by possessing a drug, refusing a drug test, or testing positive for drugs more than three times in a year. Although a single positive drug test alone does not trigger mandatory revocation, it is considered enough evidence for the government to prove that the defendant possessed drugs, which does mandate revocation. In other words, whenever a defendant tests positive for drugs, probation officers and prosecutors can choose whether to invoke mandatory revocation by arguing either that the defendant *used* drugs and also *possessed* them. This power to decide if the defendant will face a mandatory prison

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<sup>166</sup> U.S. Dep’t of Just., Just. Manual §9-27.230 cmt. 9 (2020).

<sup>167</sup> A defendant who uses drugs with a friend arguably violates at least six conditions of supervised release: (1) Committing a crime, (2) possessing drugs, (3) using drugs, (4) interacting with someone engaged in criminal activity, (5) interacting with someone convicted of a felony, (6) being discharged from drug treatment. *See* 18 U.S.C. § 3583(d); U.S. SENT’G GUIDELINES MANUAL §§ 5D1.3(c)(8), 5D1.3(d)(4) (U.S. SENT’G COMM’N 2018).

<sup>168</sup> Professor Stuntz also observed that the breadth and depth of criminal law undermines its “expressive potential” by introducing “inconsistency” in enforcement, as “the definition of the law-on-the-street [will] necessarily differ, and may differ a lot, from the law-on-the-books.” Stuntz, *supra* note 134, at 520–21. In other words, discretionary enforcement by prosecutors and police “filters” the legislature’s message, with any hope of a single standard “swamped by local variation and hard-to-discern arrest patterns, by low-visibility guilty pleas and even lower-visibility decisions to decline prosecution.” *Id.* at 523. The same phenomenon occurs under the drug conditions of supervised release. Whatever message Congress intended to send by mandating drug conditions, the ultimate expression of those restrictions is controlled by probation officers and prosecutors who define the law through their enforcement decisions.



sentence gives law enforcement significant procedural leverage to induce concessions.<sup>169</sup> The extraordinary breadth and depth of the drug conditions allow federal law enforcement to both define the terms of supervision and pressure defendants not to contest drug-related violations.

### C. Mandatory Revocation for Drug Violations

The “mandatory revocation” provision at 18 U.S.C. § 3583(g) targets drug violations for mandatory imprisonment. This statute requires judges to revoke supervised release and impose a prison sentence whenever a defendant commits one of four violations, three of which involve drugs: (1) possessing drugs, (2) possessing a firearm, (3) refusing a drug test, or (4) testing positive more than three times in a year. The statute “afford[s] the district court no discretion ... revocation is automatic.”<sup>170</sup> The text and history of § 3583(g) show that mandatory revocation was designed to promote public safety by immediately imprisoning people with drug addiction at the first sign of relapse.

Compared to the rest of the supervised-release statute, § 3583(g) is uniquely punitive. In the entire history of supervised release, only one other provision has ever targeted specific violations for mandatory imprisonment. That was 18 U.S.C. § 3583(k), enacted in 2003, which imposed a five-year minimum sentence for registered sex offenders who violated their supervised release by committing another sex offense. As discussed below in Section IV, the Supreme Court recently held this provision violated the jury right.<sup>171</sup> As a result, §3583(g) is now the only provision left that mandates revocation of supervised release for particular violations.

Ironically, drugs were not a priority when Congress first created supervised release in the Sentencing Reform Act (SRA) of 1984. Supervised release replaced an older system of community supervision known as “parole,” dating back to the early 1900s, in which federal prisoners served one-third of their sentences before becoming eligible for early release.<sup>172</sup> If the U.S. Parole Commission determined that they had been rehabilitated, then it could grant them parole, which allowed them to serve the remainder of their sentences under supervision in the community.<sup>173</sup>

Lawmakers intended supervised release to rationalize post-release supervision by focusing resources on the defendants most in need of transitional support. Under the old parole system, one problem was that the term of supervision depended “on the almost sheer accident” of how much time was left on the defendant’s prison

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<sup>169</sup> Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 877 (2009) (explaining how mandatory-minimum sentences pressure criminal defendants to plead guilty).

<sup>170</sup> *United States v. Thornhill*, 759 F.3d 299, 308 (3d Cir. 2014).

<sup>171</sup> *United States v. Haymond*, 139 S. Ct. 2369 (2019).

<sup>172</sup> See Schuman, *supra* note 14, at 598–99.

<sup>173</sup> *Id.*

term.<sup>174</sup> A well-behaved prisoner would be paroled early and then serve a long term of supervision, while a poorly behaved prisoner would not be paroled and then have no supervision after release.

The SRA instead required defendants to serve their prison terms in full, followed by a separate term of “supervised release.”<sup>175</sup> Supervised release would be imposed by the judge at sentencing based on the unique facts of each case, using the judge’s “discretionary judgment” to “allocate supervision to those releasees who needed it most.”<sup>176</sup> Unlike parole, it was hoped, supervised release would only be imposed on “those releasees ... who actually need[ed] supervision.”<sup>177</sup>

Remarkably, the Senate Report on the SRA never mentions drugs or addiction when discussing supervised release. Instead, the Report emphasizes that the “primary goal” of supervised release was “to ease the defendant’s transition into the community” and “not ... for ... punishment.”<sup>178</sup> The closest the Report comes to referencing drug activity is when suggesting that a term of supervision would be appropriate for a defendant “who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.”<sup>179</sup>

In line with this rehabilitative intent, the SRA did not originally authorize judges to punish violations by revoking the defendant’s supervised release. This was a major change. Under parole, if a defendant violated a condition of supervision, then the Parole Commission could revoke their release and send them back to prison to serve out the rest of their original sentence. Parole revocations were not governed the same constitutional standards as criminal prosecutions and therefore did not require a jury or proof beyond a reasonable doubt.<sup>180</sup>

The SRA, by contrast, did not provide any mechanism for judges to revoke supervised release. Lawmakers did not believe that “a minor violation of a condition of supervised release should result in resentencing of the defendant,” and felt a “more serious violation” could simply be prosecuted as a new criminal offense.<sup>181</sup> Only if a defendant committed “repeated or serious violations of the conditions of supervised release” could the government charge them with “contempt of court,”

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<sup>174</sup> S. REP. NO. 98-225, at 124 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182 [hereinafter Senate Report].

<sup>175</sup> The abolition of parole also reflected Congress’s lost faith in the rehabilitative theory of imprisonment. Given the bipartisan consensus that the Parole Commission was not effective at identifying reformed prisoners, it no longer made sense to allow commissioners to grant early release. See Schuman, *supra* note 161, at 923–24.

<sup>176</sup> *Johnson v. United States*, 529 U.S. 694, 708–09 (2000).

<sup>177</sup> Senate Report, *supra* note 174, at 124–25.

<sup>178</sup> *Id.* at 125.

<sup>179</sup> Senate Report, *supra* note 174, at 124.

<sup>180</sup> See Schuman, *supra* note 14, at 607–08.

<sup>181</sup> Senate Report, *supra* note 174, at 125.

which would require a full criminal prosecution with all the accompanying constitutional protections.<sup>182</sup>

Yet this lenient vision for supervised release did not last. Just two years later, Congress passed the Anti-Drug Abuse Act of 1986, a major drug-control bill which included a provision at 18 U.S.C. § 3583(e)(3) authorizing judges to revoke supervised release and sentence defendants to imprisonment for violations. Unlike contempt prosecutions, proceedings to revoke supervised release would be governed by the same reduced constitutional standards as parole revocations, with no trial by jury and only a “preponderance of the evidence” standard of proof.<sup>183</sup>

The legislative history for § 3583(e)(3) suggests that the provision was aimed at imprisoning people with drug addiction who relapsed. Although there was no recorded congressional debate on the amendment,<sup>184</sup> the Chairman of the Parole Commission, Benjamin F. Baer, did submit a position paper discussing the topic in 1985.<sup>185</sup> Chairman Baer urged Congress to empower federal judges to “expeditiously return an offender to prison,” especially “in the case of offenders who have returned to the use of illegal drugs or the abuse of alcohol.”<sup>186</sup> He argued that supervised release was “seriously flawed” because it was “more difficult and time consuming to revoke supervision, particularly in the case of violations such as drug or alcohol abuse,” and there were “not ... adequate sanctions to permit supervision periods to serve as a deterrent to misconduct.”<sup>187</sup> The Parole Commission, by contrast, had protected the public by incarcerating “drug abusers” at “the earliest indications of drug abuse ... before the drug habit reaches the point that it can only be supported through criminal activity.”<sup>188</sup> Chairman Baer advocated giving judges the same authority under supervised release:

The Parole Commission can revoke parole and reincarcerate the offender at the earliest indications of drug abuse (e.g., submission of “dirty” urines or refusal to submit a urine sample) before he or she becomes heavily involved in new criminal conduct. The Commission so acts for between 800 and 850 individuals per year for technical violations of parole. These individuals have not been convicted of new crimes, but many have reverted to the use of drugs. By intervening early, however, the

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<sup>182</sup> Schuman, *supra* note 14, at 598–99.

<sup>183</sup> See 18 U.S.C. § 3583(e)(3); FED. R. CRIM. P. 32.1.

<sup>184</sup> Aside from Chairman Baer’s position paper, the only other legislative history explaining the decision to add a revocation mechanism is a reference to a request from the Administrative Office of United States Courts, which asked Congress to “streamline” the “procedure[s] for enforcing the conditions of supervised release.” 99 CONG. REC. S14177 (daily ed. June 4, 1985).

<sup>185</sup> BENJAMIN F. BAER, U.S. PAROLE COMM’N, POSITION PAPER ON POST-RELEASE SUPERVISION 67 (1985) [hereinafter POSITION PAPER].

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 65–66.

<sup>188</sup> *Id.* at 67–68.

Commission can remove drug abusers from the streets before the drug habit reaches the point that it can only be supported through criminal activity. This vital protection for the public is being seriously weakened in the [SRA].<sup>189</sup>

Ultimately, Chairman Baer made two suggestions: first, longer terms of supervised release, and second, a revocation mechanism to avoid “the protections afforded an ordinary criminal case, including the right to a trial by jury.”<sup>190</sup> The Anti-Drug Abuse Act included both of his proposals.

The next major development in supervised release came two years later in the similarly titled Anti-Drug Abuse Act of 1988, which increased the supervision and punishment of drug-related violations even further. First, the Act required judges to impose as a condition of supervised release in every case that the defendant not “possess illegal controlled substances.”<sup>191</sup> Second, the Act enacted a mandatory revocation provision at 18 U.S.C. § 3583(g), requiring that if a defendant violates supervised release by unlawfully possessing a controlled substance, the judge “shall” revoke their supervision and impose a prison sentence “not less than one-third of the term of supervised release.”<sup>192</sup>

Senator Jesse Helms, the Republican of North Carolina who sponsored § 3583(g), made clear that the provision was designed to ensure public safety by immediately imprisoning people with drug addiction at the first sign of drug use. His speech is excerpted below, offering a founding statement of the system’s anti-drug mission:

Mr. President, *ensuring a safe environment* is one of the basic functions of Government. Americans should not have to live in fear of being assaulted on our streets. They should not have to worry about their property being stolen or their children being tempted by *drug pushers*. The American public is especially, and understandably, incensed when they are victimized by an individual who should still be behind bars, but who is *out due to some program of probation, parole, or supervised release*. Unfortunately, this is too frequently the case.

Mr. President, numerous studies show that there is a *direct link between drug use and criminal behavior* ... [A National Institute of Justice] study states, “[t]here is an extensive body of information now available that documents that adult offenders who are identified by urinalysis to be *hard drug users are likely to be among the most active criminals* ... [A]ccording to the Department of Justice, criminals who use drugs commit the majority

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 66.

<sup>191</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4464.

<sup>192</sup> *Id.*

of what is called predatory or violent crime—that includes mugging, robbery, assault, theft, or murder ...

Mr. President, my point is that in light of the clear correlation between drug use and criminal behavior, one way to *cut down on the rate of recidivism* among criminals who have been conditionally released from prison is to *terminate that release immediately upon the first indication of illegal drug activity*. That is the reason for my amendment.

Mr. President, by requiring the termination of conditional release for individuals who possess illegal drugs, we will cut down on the number of repeat offenses and, I hope, also *cut down on the incidence of drug use among those who are released*.<sup>193</sup>

Senator Helms's argument for using supervision to punish drug use and prevent crime marked a significant change from Congress's original goal in designing supervised release. Lawmakers created supervised release in 1984 as a program of transitional support that would ease prisoners' return to the community. Yet the enactment of § 3583(g) just four years later transformed the system into a public-safety network focused on sending people back to prison for drug activity.

This punitive turn also reflected a broader shift in “the ideology of probation departments,” which abandoned “their early welfarist ambitions” and adopted a “growing emphasis on control and risk monitoring functions.”<sup>194</sup> Professors Malcolm M. Feeley and Jonathan Simon have described the emergence of a “new penology” during “the 1970s and 1980s,” in which “drug use and its detection and control” became “central concerns of the penal system.”<sup>195</sup> Rather than “the traditional emphasis on treatment and eradication,” they observed, these “practices track drug use as a kind of risk indicator.”<sup>196</sup> Similarly, Senator Helms cited “the clear correlation between drug use and criminal behavior” to justify the mandatory revocation provision at § 3583(g), arguing that “immediately” punishing “the first

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<sup>193</sup> 134 CONG. REC. S17321 (daily ed. Oct. 21, 1988) (emphases added).

<sup>194</sup> Doherty, *supra* note 31, at 333; see also Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1028–30 (2013) (describing a “shift in focus among post-release supervision agents” in “the 1980s and 1990s ... away from a casework model and toward a crime control model”); Scott-Hayward, *supra* note 31, at 438 (recounting a “shift in supervision styles” since the 1970s, from a “casework model that balanced treatment and reintegration” to “a surveillance or managerial model, dominated by a risk management philosophy”); Sam Torres, *Should Corrections Treat or Punish Substance-Abusing Criminals?*, 60 FED. PROB. 18, 18–19 (1996) (contrasting the “medical model, also known as the disease model” of criminal behavior, with the “rational choice model, [which] has become increasingly popular during the past 20 years”).

<sup>195</sup> Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 461 (1992).

<sup>196</sup> *Id.* at 462.

indication of drug activity” was necessary to “cut down on the rate of recidivism” and “ensur[e] a safe environment.”<sup>197</sup>

Despite this new justification for the supervision system, the federal courts continue to describe the “evident congressional purpose” of supervised release as “improv[ing] the odds of a successful transition from the prison to liberty,”<sup>198</sup> in service of “rehabilitative ends, distinct from those served by incarceration.”<sup>199</sup> Even scholars debate the philosophical justifications for supervised release, when the political answer is simple—drug control.<sup>200</sup>

Over the next fifteen years, Congress amended § 3583(g) twice more, each time focused on increasing the supervision and punishment of drug activity. First, in the Violent Crime Control and Law Enforcement Act of 1994,<sup>201</sup> Congress required as a condition of supervised release that defendants take at least three drug tests and expanded the trigger for mandatory revocation to include refusal to comply with drug testing.<sup>202</sup> The Act also repealed the minimum one-third sentence for mandatory revocations, simply requiring judges to revoke supervised release without specifying a minimum prison term. While this change had the effect of lowering the minimum sentence for drug violations,<sup>203</sup> it was not motivated by leniency. Instead, the legislative history states that “the Sentencing Commission can more rationally structure appropriate sanctions” for drug violations “than can a statutory minimum that arbitrarily varies with the length of the supervised release term.”<sup>204</sup>

Second, in the Drug Abuse Education, Prevention, and Treatment Act of 2002, Congress expanded the trigger for mandatory revocation once again to include testing positive for drugs more than three times in a single year.<sup>205</sup> This new trigger

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<sup>197</sup> 134 CONG. REC. S17321 (daily ed. Oct. 21, 1988)

<sup>198</sup> *Johnson v. United States*, 529 U.S. 694, 708–09 (2000).

<sup>199</sup> *United States v. Johnson*, 529 U.S. 53, 59 (2000).

<sup>200</sup> *See Schuman*, *supra* note 161, at 924–26 (retributive versus utilitarian theories of revocation); *see also Doherty*, *supra* note 31, at 327–43 (benevolent supervisor, privilege, and contract theories of supervision).

<sup>201</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

<sup>202</sup> *Id.* at 1831.

<sup>203</sup> *See United States v. Coston*, 964 F.3d 289, 296 (4th Cir. 2020); *United States v. Seighman*, 966 F.3d 237, 244 (3d Cir. 2020). The Act also added unlawful possession of a firearm as a trigger for mandatory revocation.

<sup>204</sup> 137 CONG. REC. S14823 (daily ed. June 13, 1991).

<sup>205</sup> 18 U.S.C. § 3583(d), (g). Application of this exception is left to the judge’s discretion, with no further instructions in the Sentencing Guidelines. *See* U.S. SENT’G GUIDELINES MANUAL § 7B1.4 cmt. 6 (U.S. SENT’G COMM’N 2018); *United States v. Williams*, 847 F.3d 251, 254 (5th Cir. 2017). Judges may choose not to apply the exception based on the defendant’s “lack of success with treatment programs, ... continued use of drugs and ... failure to admit ... drug use[.]” *United States v. Meyer*, 485 F. Supp. 2d 1001, 1013 (N.D. Iowa 2006); *see also United States v. Thornhill*, 759 F.3d 299, 306

also provides an exception if there are “appropriate substance abuse treatment programs” available, but that carve-out offers little protection, since even “a single positive urinalysis result” is enough to prove drug possession, to which the exception does not apply.<sup>206</sup> In other words, prosecutors can avoid the exception to mandatory revocation for multiple positive drug tests by arguing that the tests showed the defendant *possessed* drugs rather than simply *used* them. In fact, six circuits hold that as a matter of law, defendants who test positive for drugs also “possess” them for purposes of § 3583(g).<sup>207</sup>

Officially, mandatory revocation under § 3583(g) is *non-rehabilitative*. Under the SRA, judges are forbidden from considering rehabilitation when they sentence a defendant to imprisonment, including when they revoke supervised release.<sup>208</sup> In other words, judges revoking supervised release must consider all “the specified rationales of punishment except for rehabilitation,” which they must “acknowledge as an unsuitable justification for a prison term.”<sup>209</sup> According to the federal Sentencing Guidelines, moreover, judges should “primarily” revoke supervised release for retributive reasons, aiming to “sanction” the defendant for their “breach of trust inherent in the conditions of supervision.”<sup>210</sup>

In practice, the federal government takes a hard line on drug violations. Prosecutors have sought to revoke supervised release not only for use of serious drugs like cocaine, meth, and heroin, but also prescription opiates and marijuana,<sup>211</sup>

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(3d Cir. 2014) (declining to apply exception “in light of the unsuccessful efforts that had already been made to address [the defendant’s] substance abuse problems”). Judges need not refer to the exception when applying the mandatory-revocation provision, because “[i]mplicit consideration is all that is required.” *United States v. Brooker*, 858 F.3d 983, 987 (5th Cir. 2017); *see also* *United States v. Hammonds*, 370 F.3d 1032, 1038–39 (10th Cir. 2004).

<sup>206</sup> *Hammonds*, 370 F.3d at 1033.

<sup>207</sup> *Id.*; *United States v. Wirth*, 250 F.3d 165, 170 (2d Cir. 2001); *United States v. Hancox*, 49 F.3d 223, 225 (6th Cir. 1995); *United States v. Young*, 41 F.3d 1184, 1186 (7th Cir. 1994); *United States v. Clark*, 30 F.3d 23, 26 (4th Cir. 1994); *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992). Even courts that do not require judges to infer possession from use recognize their discretion to do so. *See* *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1997); *United States v. Almand*, 992 F.2d 316, 318 (11th Cir. 1993); *United States v. Dow*, 990 F.2d 22, 24 (1st Cir. 1993); *United States v. Baclaán*, 948 F.2d 628, 630 (9th Cir. 1991); *United States v. Blackston*, 940 F.2d 877, 891 (3d Cir. 1991).

<sup>208</sup> 18 U.S.C. § 3582(a); *Tapia v. United States*, 564 U.S. 319, 326–32 (2011).

<sup>209</sup> *Tapia*, 564 U.S. at 327.

<sup>210</sup> U.S. SENT’G GUIDELINES MANUAL, ch. 7, pt. A, intro. 3(b) (U.S. SENT’G COMM’N 2018); *see also* Schuman, *supra* note 161, at 898–903. The Sentencing Guidelines recommend that courts revoke supervised release for any felonious conduct, which includes nearly all drug crimes, including simple possession. U.S. SENT’G GUIDELINES MANUAL § 7B1.3(a) (U.S. SENT’G COMM’N 2018); 21 U.S.C. § 844(a). For technical violations, the Guidelines instruct that revocation is “generally . . . the appropriate disposition” if the defendant “having been continued on supervision after a finding of violation, again violates the conditions of his supervision.” U.S. SENT’G GUIDELINES MANUAL § 7B1.3 n.1 (U.S. SENT’G COMM’N 2018).

<sup>211</sup> *See, e.g., United States v. Newman*, 350 F. Supp. 3d 1218 (M.D. Ala. 2018).

and even medical marijuana consumed in accordance with state law.<sup>212</sup> A recent survey of federal district judges found they “overwhelmingly believe[d] that mandatory revocation for drug use is not desirable” and would prefer “more alternatives to incarceration for violations.”<sup>213</sup> Nevertheless, § 3583(g) requires that judges punish drug-related violations with imprisonment.

#### IV. MANDATORY DRUG REVOCATION VIOLATES THE JURY RIGHT

Supervised release is dedicating to surveilling, restricting, and punishing drug activity, in particular by people with drug addiction who relapse. The *Federal Probation* article focuses on the extreme individual scenario of a defendant sent to prison based on a single positive drug test, but that narrow perspective misses the broader legal framework. Identifying the aggressive drug-control policy embedded in the law of supervised release undermines the authors’ conclusions in three major respects.

First, the authors never consider how multiple layers of drug surveillance drive drug-use revocations. Their study counted 157 drug-use revocations based on zero or one positive drug tests, but in practice, a person who relapses is likely to test positive several times and trigger other forms of drug detection. None of these cases were included in their sample. Their identification of just 157 drug-use revocations is also difficult to reconcile with other available evidence. Chairman Baer claimed in 1985 that the Parole Commission revoked parole for drug use in about 800-850 cases each year.<sup>214</sup> As the population under post-release supervision is now 500% larger,<sup>215</sup> it is hard to believe that the number of drug-use revocations has dropped so precipitously. Evidence from other studies suggest there may be as many as 3,000 drug-use revocations annually.<sup>216</sup>

Second, the study’s selection of “additional factors” justifying drug-use revocations fails to account for the breadth and depth of the drug conditions. Because supervised release prohibits so much drug-related conduct so many times over, even one incident of drug use may result in multiple violations, and thereby qualify for several of the “additional factors” in the questionnaire. For example, a defendant who is in drug treatment, gets caught using drugs, and then is terminated from the treatment program will qualify for at least three of the study’s “additional factors”

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<sup>212</sup> See *United States v. Jackson*, 388 F. Supp. 3d 505 (E.D. Pa. 2019); *United States v. Bey*, 341 F. Supp. 3d 528 (E.D. Pa. 2018); *United States v. Tuyakbayev*, No. 15-cr-86, 2017 WL 3434089 (N.D. Cal. Aug. 10, 2017).

<sup>213</sup> *United States v. Trotter*, 321 F. Supp. 3d 337, 348 (E.D.N.Y. 2018) (citing U.S. Sent’g Comm’n, *Results of 2014 Survey of United States District Judges Modification and Revocation of Probation and Supervised Release* (2015)); see also George P. Kazen, *Mandatory Revocation for Drug Use: A Plea for Reconsideration*, 6 FED. SENT. REP. 202 (1994).

<sup>214</sup> POSITION PAPER, *supra* note 185, at 68.

<sup>215</sup> *Table E-1*, *supra* note 15; GALVIN ET AL., *supra* note 45, at 12.

<sup>216</sup> Gurley, *supra* note 74, at 49.



right off the bat.<sup>217</sup> If that defendant was previously revoked for a drug arrest, then he will satisfy five factors.<sup>218</sup> These cases may be as simple as a defendant in addiction treatment experiencing a relapse,<sup>219</sup> yet make up 60% of the study's sample.

Finally, the authors emphasize that probation officers “likely consider many different factors when recommending revocation,” while ignoring mandatory revocation for drug violations under 18 U.S.C. § 3583(g).<sup>220</sup> The truth is that regardless of officers’ good faith, the decision to revoke supervised release turns on only a single factor—whether the defendant possessed drugs, refused a drug test, or tested positive more than three times in a year.<sup>221</sup> The legislative history shows that this provision was enacted not for rehabilitative purposes but rather to ensure public safety by “immediately” imprisoning “drug abusers” at “the first indication” of drug use.<sup>222</sup> A study of how many drug-use revocations are treated as mandatory under § 3583(g) would be far more revealing as to the punishment of people with drug addiction under federal supervision.<sup>223</sup> Given the potential for arbitrariness or discrimination in the decision to invoke mandatory revocation, it is especially important to study whether there are race, gender, or geographic disparities in the application of § 3583(g).

Contrary to the benign description in the *Federal Probation* article, the targeting of drug activity under supervised release is so punitive that it violates the jury right under the Supreme Court’s 2019 decision in *United States v. Haymond*.<sup>224</sup> *Haymond* is the first time the Supreme Court has applied the jury right to revocation proceedings, striking down a five-year mandatory minimum sentence for sex offenders who violated their supervised release by committing another sex offense. Although the Court split 4-1-4 on the reasoning, a majority of justices agreed that the five-year mandatory-minimum sentence was unconstitutional. Under both the

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<sup>217</sup> (1) “in substance use disorder treatment,” (2) “other technical violations charged,” and (3) “not amenable to supervision.” Sheil et al., *supra* note 7, at 20.

<sup>218</sup> (1) “in substance use disorder treatment,” (2) “other technical violations charged,” (3) “not amenable to supervision,” (4) “previous acts of noncompliance,” (5) “arrest,” and (6) “previously revoked.” *Id.*

<sup>219</sup> *Id.* at 21.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 19.

<sup>222</sup> 134 CONG. REC. S17321 (daily ed. Oct. 21, 1988); POSITION PAPER, *supra* note 185, at 67–68.

<sup>223</sup> In 2020, the U.S. Sentencing Commission published its first report on federal supervision violations based on data collected between 2013 and 2017, but did not collect information on § 3583(g) violations, so this question remains unanswered. *Federal Probation and Supervised Release Violations*, *supra* note 47, at 1, 34.

<sup>224</sup> *United States v. Haymond*, 139 S. Ct. 2369 (2019). Before *Haymond*, the Supreme Court held that parole and probation revocations were subject to a minimal standard of due process, with no right to a jury trial. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

plurality and concurring opinions, § 3583(g) violates the jury right by imposing a one-day mandatory minimum sentence for drug-related misconduct.

A. *United States v. Haymond*

The defendant in *Haymond* was convicted of possessing child pornography and sentenced to 38 months in prison followed by 10 years of supervised release.<sup>225</sup> He served his prison sentence and began his supervised release, but a few months later, the government filed a revocation petition, claiming that officers had found 59 images of child pornography on his computer and cell phone. After an evidentiary hearing, the judge concluded that it was “more likely than not” that the defendant knowingly possessed 13 of the images, but that there was “insufficient evidence” that he knowingly possessed the remaining 46.<sup>226</sup> Because the defendant was a registered sex offender and the violation was a “criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [listing sex offenses],” 18 U.S.C. § 3583(k) required the judge to revoke supervised release and impose at least a five-year prison sentence. The judge imposed the minimum five-year sentence “with reservations,” calling it “repugnant” to the “traditional protections” of a “jury’s verdict, reached under the reasonable doubt standard.”<sup>227</sup>

On appeal, the defendant argued that § 3583(k) violated his Fifth and Sixth Amendment right to a jury trial under the Supreme Court’s prior decisions in *Apprendi v. New Jersey* and *United States v. Alleyne*. *Apprendi* and *Alleyne* hold that the government must prove any fact aggravating a sentencing range to a jury beyond a reasonable doubt.<sup>228</sup> In other words, facts triggering a mandatory-minimum sentence must be established before jury at trial, not found by a judge.<sup>229</sup> The defendant claimed that because § 3583(k) increased the minimum sentence for the revocation from zero to five years’ imprisonment based on a violation proved to a judge rather than a jury, the provision violated the jury right.

The Court ruled for the defendant in a fractured decision, with Justice Breyer as the key swing vote. Justice Gorsuch wrote a four-vote plurality opinion holding that § 3583(k) violated the jury right under *Apprendi* and *Alleyne*.<sup>230</sup> Because § 3583(k) allowed “judicial factfinding” to “trigger[] a new punishment in the form of a prison term of at least five years and up to life,” the statute “increase[ed] ‘the legally prescribed range of allowable sentences’ in violation of the Fifth and Sixth Amendments.”<sup>231</sup> He described this formal analysis as the most faithful to “the

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<sup>225</sup> *Haymond*, 139 S. Ct. at 2373.

<sup>226</sup> *Id.* at 2374.

<sup>227</sup> *Id.* at 2375.

<sup>228</sup> *Alleyne v. United States*, 570 U.S. 99 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>229</sup> *See generally Alleyne*, 570 U.S. 99.

<sup>230</sup> *Haymond*, 139 S. Ct. at 2378.

<sup>231</sup> *Id.*

original meaning of the jury trial right,” which sought “to safeguard the people’s control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt.”<sup>232</sup>

Justice Alito wrote a four-vote dissent arguing that applying *Apprendi* and *Alleyne* would undermine the entire system of supervised release. He disagreed with the plurality’s constitutional analysis and stressed the impracticality of using juries in revocation proceedings.<sup>233</sup> If “[a]ll supervised-release revocation proceedings” required “a jury trial,” he warned, “there is simply no way that the federal courts could empanel enough juries to adjudicate all those proceedings,” which would bring “the whole concept of supervised release . . . crashing down.”<sup>234</sup>

Finally, Justice Breyer authored a short but controlling concurrence “agree[ing] with the plurality that this specific provision of the supervised-release statute is unconstitutional.”<sup>235</sup> However, he also “agree[d] with much of the dissent,”<sup>236</sup> and emphasized that he “would not transplant the *Apprendi* line of cases to the supervised-release context,” due to “the potentially destabilizing consequences.”<sup>237</sup> As the narrowest opinion in the majority, his concurrence is controlling.<sup>238</sup>

Justice Breyer applied a three-factor analysis that was functional rather than formal. To begin, he observed that revocation “is typically understood as ‘part of the penalty for the initial offense,’” which is “first and foremost . . . sanction[] for the defendant’s ‘breach of trust’—his ‘failure to follow the court-imposed conditions’ that followed his initial conviction.”<sup>239</sup> Revocation is *not* punishment “‘for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct.’”<sup>240</sup> However, he found that § 3583(k) was “difficult to reconcile with this understanding” because of “three aspects” that made it “less like ordinary revocation and more like punishment for a new offense.”<sup>241</sup>

*First*, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute.

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<sup>232</sup> *Id.* at 2380.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 2388 (Alito, J., dissenting).

<sup>235</sup> *Id.* at 2386 (Breyer, J., concurring).

<sup>236</sup> *Id.* at 2385.

<sup>237</sup> *Id.*

<sup>238</sup> *See id.* at 2386 (Alito, J., dissenting) (noting that Justice Breyer’s opinion was controlling); *see also* *Marks v. United States*, 430 U.S. 188, 193–94 (1977) (holding that in fractured majority, narrowest opinion controls).

<sup>239</sup> *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

*Second*, § 3583(k) takes away the judge’s discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long.

*Third*, § 3583(k) limits the judge’s discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of ‘not less than 5 years’ upon a judge’s finding that a defendant has ‘commit[ted] any’ listed ‘criminal offense.’

“Taken together,” Justice Breyer concluded, these three features “more closely resemble the punishment of new criminal offenses,” but “without granting a defendant the rights ... that attend a new criminal prosecution.”<sup>242</sup> And because “in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term ... § 3583(k) is unconstitutional.”<sup>243</sup>

The result in *Haymond* puts the constitutionality of mandatory drug revocation into doubt. While Justice Gorsuch said he was “not express[ing] a view on the mandatory revocation provision” in § 3583(g) and Justice Breyer never mentioned it,<sup>244</sup> the provision is obviously similar to § 3583(k) in at least two respects. First, both target a specific type of violation (sex offenses or drug activity). Second, both impose a mandatory-minimum term of imprisonment (five years or one day).

So far, every circuit court to consider a *Haymond* challenge to § 3583(g) has rejected it.<sup>245</sup> But these courts have misinterpreted the decision and failed to appreciate the full scope of federal drug supervision. Properly understood, both Justice Gorsuch’s plurality opinion and Justice Breyer’s concurrence render mandatory revocation for drug-related misconduct unconstitutional.

#### B. Justice Gorsuch’s Plurality

Justice Gorsuch’s reasoning clearly invalidates § 3583(g). Justice Gorsuch found that § 3583(k) violated the jury right because it raised the defendant’s sentencing range from zero to five years based on allegations proved to a judge by a preponderance of the evidence, rather than to a jury beyond a reasonable doubt. In exactly the same way, § 3583(g) “increases ‘the legally prescribed range of allowable sentences’” for the defendant from zero to one day of imprisonment based on a “judicial factfinding” that the defendant possessed drugs, refused a test, or tested positive three times in a year.<sup>246</sup> While the one-day minimum in § 3583(g) is

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 2382 n.7.

<sup>245</sup> See *United States v. Garner*, 969 F.3d 550, 552 (5th Cir. 2020); *United States v. Coston*, 964 F.3d 289, 295 (4th Cir. 2020); *United States v. Seighman*, 966 F.3d 237, 243 (3d Cir. 2020); see also *United States v. Doka*, 955 F.3d 290, 295–96 (2d Cir. 2020).

<sup>246</sup> *Haymond*, 139 S. Ct. at 2378 (quoting *Alleyn v. United States*, 570 U.S. 99, 115 (2013)).

lower than the five-year mandatory minimum in § 3583(k), the *Apprendi/Alleyne* rule does not turn on the length of the minimum sentence. Instead, all that matters is that § 3583(g) aggravates the sentencing range based on violations found by a judge rather than a jury.

Despite this straightforward appeal, the plurality's analysis has won no support in the circuit courts that have rejected *Haymond* challenges to § 3583(g). These courts have (correctly) concluded that Justice Breyer's narrower concurrence is controlling, and because Justice Breyer declined to apply *Apprendi/Alleyne* to revocation of supervised release, so too have they.<sup>247</sup> Nevertheless, Justice Gorsuch's opinion offers the benefits of clarity and predictability, ensuring more certain protection against "the Framers' fears that the jury right could be lost not only by gross denial, but by erosion."<sup>248</sup>

### C. Justice Breyer's Concurrence

Applying Justice Breyer's three-factor test, the analysis of § 3583(g) is more difficult. His opinion is brief and at points cryptic, leaving room for competing interpretations. He also made clear his desire to avoid "potentially destabilizing consequences."<sup>249</sup> Nevertheless, a careful reading of his opinion casts significant doubt on the constitutionality of mandatory drug revocation. While there are differences from § 3583(k), the two provisions are identical in all the ways that matter. Just like § 3583(k), § 3583(g) violates the jury right by targeting particular violations of supervised release for mandatory imprisonment.

Under Justice Breyer's first factor, § 3583(g) is the same as § 3583(k) because it focuses on a "discrete set" of drug-related misconduct "specified in the statute."<sup>250</sup> Singling out specific violations makes the provision less like punishment for the defendant's "breach of trust" or "failure to follow the court-imposed conditions," and "more like punishment for a new offense ... to which the jury right would typically attach."<sup>251</sup> Not only the text, but also the legislative history of § 3583(g) shows that the provision was designed to "cut down on the incidence of drug use among those who are released" by "terminat[ing] ... release immediately upon the first indication of illegal drug activity."<sup>252</sup> As a result, § 3583(g) satisfies the first factor by targeting "particular conduct," not a "breach of trust."<sup>253</sup>

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<sup>247</sup> See *Garner*, 969 F.3d at 552; *Coston*, 964 F.3d at 295; *Seighman*, 966 F.3d at 243; see also *Doka*, 955 F.3d at 295–96.

<sup>248</sup> *Haymond*, 139 S. Ct. at 2381 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)).

<sup>249</sup> *Id.* at 2385 (Breyer, J., concurring).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 2386.

<sup>252</sup> See *supra* Section III.C, *supra* (quoting 134 CONG. REC. S17321 (daily ed. Oct. 21, 1988)).

<sup>253</sup> *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

Nevertheless, the circuit courts have distinguished § 3583(g) on this factor because unlike § 3583(k), it “does not cross-reference federal criminal statutes.”<sup>254</sup> That reading of Justice Breyer’s opinion, however, is far too literal. Justice Breyer never suggested that § 3583(k) was unconstitutional simply because it cross-referenced another federal statute. Rather, he found the provision unconstitutional because unlike revocation as “typical[ly]” understood, it singled out “a discrete set” of violations.<sup>255</sup> In the same way, § 3583(g) targets a discrete set of violations—drug possession, a refused drug test, and three positive drug tests. While Justice Breyer also mentioned that § 3583(k) applied to “federal criminal offenses specified in the statute,” he was not suggesting that that feature was what rendered the provision unconstitutional. Instead, he was simply describing the form of targeting used in that case.

A few circuit courts have also distinguished § 3583(g) from § 3583(k) on the first factor because unlike a sex offense, refusing a drug test is not a crime.<sup>256</sup> Yet these opinions do not explain *why* mandating imprisonment for non-criminal conduct cures violation of the jury right. If anything, sweeping in non-criminal conduct should *exacerbate* the constitutional problems with § 3583(g). In practice, moreover, drug testing serves to detect and deter illegal drug use, so punishing refusal to test is effectively a way to penalize drug activity.

Finally, to the extent courts find this distinction meaningful, it only saves one subsection of the provision, § 3583(g)(3), which makes refusing a drug test a trigger for mandatory revocation. By contrast, § 3583(g)(1) and (4) require revocation for possessing drugs or testing positive more than three times in a year, both of which are criminal offenses. Mandatory revocation for these violation is completely indistinguishable from § 3583(k)’s targeting of sex crimes.<sup>257</sup>

On Justice Breyer’s second and third factors, § 3583(g) is similar to § 3583(k) because it “takes away the judge’s discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long” and “limits the judge’s discretion in a particular manner: by imposing a mandatory minimum term of imprisonment.”<sup>258</sup> Of course, there is also a clear difference between the two provisions—§ 3583(k) imposed a minimum five-year prison sentence, while § 3583(g) allows the judge “broad discretion to craft a sentence of

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<sup>254</sup> *United States v. Coston*, 964 F.3d 289, 296 (4th Cir. 2020); *see also* *United States v. Garner*, 969 F.3d 550, 553 (5th Cir. 2020); *United States v. Seighman*, 966 F.3d 237, 243 (3d Cir. 2020).

<sup>255</sup> *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

<sup>256</sup> *Coston*, 964 F.3d at 296; *see also* *Garner*, 969 F.3d at 553; *Seighman*, 966 F.3d at 243.

<sup>257</sup> A contrary analysis would seriously weaken the jury right. If § 3583(g) is constitutional because it does not cross-reference other criminal statutes and includes non-criminal conduct, then the government could reenact § 3583(k) simply by describing the sexual misconduct rather than cross-referencing it, or by expanding the trigger to include non-criminal behavior. There is no reason to think Justice Breyer would uphold such a statute based on these superficial changes.

<sup>258</sup> *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

one day or more.”<sup>259</sup> The circuit courts have emphasized this distinction in upholding § 3583(g) against *Haymond* challenge.<sup>260</sup>

It is not clear, however, that the length of the mandatory sentence ultimately affected Justice Breyer’s decision.<sup>261</sup> When discussing the second and third factors, Justice Breyer did mention “how long” the minimum sentence was. Yet he never connected this observation to his constitutional analysis. Instead, in the final explanation of his three-factor test, he emphasized that the problem with § 3583(k) was that it looked more like punishment for a new crime, which meant that any facts triggering a mandatory minimum sentence had to be proved to a jury:

Taken together, these features of § 3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution. And in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term.<sup>262</sup>

This passage reflects the heart of Justice Breyer’s reasoning. While traditional revocation was justified as punishment for the defendant’s “failure to follow the court-imposed conditions,” § 3583(k) targeted “the particular conduct triggering the revocation,” making it more like a criminal prosecution.<sup>263</sup> And because criminal prosecution requires the government to prove any facts triggering a mandatory-minimum prison sentence to a jury, § 3583(k) violated the jury right.<sup>264</sup>

This interpretation also helps to clarify the relationship between Justice Breyer’s concurrence and Justice Gorsuch’s plurality opinion. While Justice Breyer declined to join the plurality in applying *Apprendi/Alleyne*, his analysis still ultimately rested on the same core principle—facts triggering a mandatory minimum must be proved to a jury, not a judge.<sup>265</sup> What separated Justice Breyer from the plurality is not whether the *Apprendi/Alleyne* rule should *ever* apply to revocation of supervised release, but whether it should apply in all cases (Gorsuch) or solely when the statute targets particular misconduct in a way that makes it look too much like a criminal prosecution, (Breyer).

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<sup>259</sup> *Coston*, 964 F.3d at 296; *see also Garner*, 969 F.3d at 553; *Seighman*, 966 F.3d at 244.

<sup>260</sup> *Coston*, 964 F.3d at 296.

<sup>261</sup> It is also worth noting that any period of incarceration “inflicts a ‘grievous loss,’” *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (citation omitted), that “may imperil the [person’s] job, interrupt his source of income, and impair his family relationships,” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Especially for defendants with substance-use disorder, even “a day or two behind bars” can do significant harm. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 16, at 175.

<sup>262</sup> *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Alleyne v. United States*, 570 U.S. 99 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Like § 3583(k), § 3583(g) targets particular drug-related misconduct for mandatory imprisonment, making it more like a criminal prosecution than traditional revocation and violating the jury right. As Chairman Baer and Senator Helms made clear, mandatory revocation for drug violations is not punishment for a “breach of trust,” but a sanction for drug activity intended to imprison people with drug addiction and protect the public. Even under Justice Breyer’s narrower opinion, § 3583(g) is unconstitutional because just like § 3583(k), it targets particular violations for a mandatory-minimum sentence.<sup>266</sup>

Finally, although Justice Breyer sought to avoid “potentially destabilizing consequences”<sup>267</sup> it would not be destabilizing to hold § 3583(g) unconstitutional. As the circuit courts have (correctly) concluded, ordinary revocation under § 3583(e)(3) is distinguishable from both § 3583(g) and § 3583(k), because it “applies generally” to all types of violations and allows the judge to decide whether or not to impose a prison sentence.<sup>268</sup> Because § 3583(e)(3) is more like “typical” revocation for the defendant’s “breach of trust,” and remains safe from *Haymond* challenge.<sup>269</sup> Invalidating § 3583(g) would not bring “the whole concept of supervised release ... crashing down.”<sup>270</sup>

## V. CONCLUSION

The authors of the *Federal Probation* article are right when they say that “supervision is more complicated than simply revoking someone for one or two instances of illegal substance use.”<sup>271</sup> The entire legal framework for supervised release—from the statute to the Guidelines to the Monograph—is devoted to monitoring, restricting, and punishing drug activity. Under *Haymond*, the targeting of drug-related misconduct for mandatory imprisonment via 18 U.S.C. § 3583(g) is so punitive that it violates the jury right.

Probation officers, prosecutors, and judges may work in earnest to help people with drug addiction, yet the law mandating revocation for drug violations is officially non-rehabilitative and empirically antitherapeutic. While the Probation and Pretrial Services Office describes the system as a “continuum of care,”<sup>272</sup>

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<sup>266</sup> One circuit court found § 3583(g) distinguishable because its maximum sentence “depends on the seriousness of his crime of conviction,” whereas § 3583(k) “empower[ed] the judge to impose a life sentence regardless of how serious (or minor) the defendant’s crime of conviction was.” *United States v. Seighman*, 966 F.3d 237, 244 (3d Cir. 2020). While this is a difference between the provisions, Justice Breyer never mentioned it as a relevant factor in his analysis. Rather than the statutory maximum, Justice Breyer focused solely on the increase in the mandatory *minimum* sentence. *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

<sup>267</sup> *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring).

<sup>268</sup> *Id.* at 2386.

<sup>269</sup> *United States v. Doka*, 955 F.3d 290, 296–97 (2d Cir. 2020).

<sup>270</sup> *Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting).

<sup>271</sup> Sheil et al., *supra* note 7, at 21.

<sup>272</sup> MONOGRAPH, *supra* note 38, § 550.20.25(a).



supervised release is also part of a “carceral continuum” that links drug treatment to mass incarceration.<sup>273</sup> Recognizing this reality is necessary to understanding the drug-control policy in federal community supervision.

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<sup>273</sup> FOUCAULT, *supra* note 76, at 303 (describing a “great carceral continuum, which provides a communication between the power of discipline and the power of the law, and extends without interruption from the smallest coercions to the longest penal detention”).