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Criminal Violations

Jacob Schuman

CRIMINAL VIOLATIONS

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Violations of community supervision are major drivers of incarceration. Nearly four million people in the United States are serving terms of probation, parole, or supervised release, and one-third of them are eventually found in violation of a condition of their supervision, sending 350,000 people to prison each year. To reduce incarceration rates, criminal justice reformers have called for lower sentences for non-criminal "technical violations," such as missed meetings, skipped curfews, etc.

In this Article, I offer the first comprehensive analysis of "criminal violations," the other half of cases where people violate their supervision by committing new crimes. Based on an original empirical study of U.S. Sentencing Commission data and an examination of federal case law, I make three novel observations. First, despite the popular focus on technical violations, criminal violations are the primary drivers of punishment via revocation of supervised release, accounting for at least two-thirds of the total prison time imposed. Second, while technical violations punish non-criminal behavior, criminal violations drive punishment by increasing sentences for criminal convictions and making punishing crimes easier. Third, the immigration crime of illegal reentry accounts for as many as one-third of all revocations for felony violations, revealing that supervised release is no longer just a program of surveillance or support but also has become a tool of immigration enforcement.

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Finally, after describing revocations for criminal violations in the federal criminal justice system, I argue that punishing criminal violations inflicts unfair double punishment and erodes constitutional rights. When defendants on supervised release commit new crimes, the better and fairer response is to prosecute them without revoking their supervision. The law of revocation opens an exception to the ordinary rules of criminal prosecution, which the federal government has generalized into a powerful engine of imprisonment.

INTRODUCTION

Violations of community supervision are major drivers of incarceration.[1] Almost four million people in the United States are on probation, parole, or supervised release.[2] One-third of them are eventually found in violation of their supervision, sending 350,000 people to prison each year and accounting for 45% of state prison admissions and 25% of the nation's prison population.[3] A coalition of probation and parole officials recently warned that "mass supervision" was contributing to "mass incarceration," because, "[f]ar from being an aid to community reintegration as originally designed, community supervision too often serves as a tripwire to imprisonment, creating a vicious cycle of reincarceration."[4]

To reduce incarceration rates, criminal justice reformers have called for lower sentences for non-criminal "technical violations" like missing meetings with the probation officer, skipping curfew, or filing late paperwork.[5] In 2019, Philadelphia District Attorney Larry Krasner

[1] Cf. Press Release, Phila. Dist. Att'y's Off., New Philadelphia D.A.O. Policies Announced Mar. 21, 2019 to End Mass Supervision (Mar. 21, 2019), https://medium.com/philadelphia-justice/philadelphia-daos-policies-to-end-mass-supervision-fd5988cfe1f1 [https://perma.cc/7M3F-2U24] ("Mass supervision is a major driver of mass incarceration.").

[2] Danielle Kaeble, U.S. Dep't of Just., Probation and Parole in the U.S., 2020, at 1 (2021), https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf [https://perma.cc/9RRN-7TVM].

[3] Adam Gelb, Juliene James, Amy Solomon & Brian Elderbroom, The PEW Charitable Trs., Probation and Parole Systems Marked by High Stakes, Missed Opportunities 9 (2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf [https://perma.cc/F4G4-AC2Z]; Council of State Gov't Just. Ctr., Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets (2019), https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf [https://perma.cc/QVS2-NN4L].

[4] See Statement on the Future of Probation & Parole in the United States, EXiT: Execs. Transforming Prob. & Parole (Nov. 13, 2020), https://www.exitprobationparole.org/statement [https://perma.cc/D2NF-5YJV].

[5] See Alex Roth, Sandhya Kajeepeta & Alex Boldin, Vera Inst. of Just., The Perils of Probation: How Supervision Contributes to Jail Populations 29 (2021), https://www.vera.org/downloads/publications/the-perils-of-probation.pdf [https://perma.cc/T9H8-YG5D] (advocating for "eliminating incarceration for technical violations"); Reagan Daly, Mackenzie Deary, Victoria Lawson & Pavithra Nagarajan, CUNY Inst. for State & Loc. Governance, Pathways to Success on Probation: Lessons Learned from the First Phase of the Reducing Revocations Challenge 30–31 (2021), https://static1.squarespace.com/static/5fcea962a1b4d771ad256fcc/t/61707b8a29d1471381fbcce8/1634761610960/10192021+Reducing+Revocations+v4.pdf [https://perma.cc/K9X3-QB8F] (recommending "limit[ing] the circumstances

announced an "effort to . . . bring balance back to sentencing" by limiting sentencing recommendations for technical violations to between thirty and sixty days' imprisonment.[6] The year after, lawmakers from three states joined with Professors Lara Bazelon and Shon Hopwood to propose legislation reorienting community supervision toward "rehabilitative, rather than surveillance, goals" by eliminating punishment "for asserted technical violations (i.e. violations that are non-criminal in nature)."[7] Even the staid U.S. Sentencing Commission recently announced a plan to reexamine how the federal sentencing guidelines "treat revocations . . . for conduct constituting a violation . . . that does not result in an arrest, criminal charge, or conviction,"[8] explaining that it had "received comment over the years regarding the impact of revocations, much of which focused on the impact of technical violations."[9]

The outcry over technical violations is understandable. Approximately half of all revocations are for technical violations, yet by definition this

under which formal technical violations can be filed"); Tonja Jacobi, Song Richardson & Gregory Barr, The Attrition of Rights Under Parole, 87 S. Cal. L. Rev. 887, 930 (2014) (arguing "prison even for technical violations . . . is problematic"); Cecelia Klingele, Rethinking the Use of Community Supervision, 103 J. Crim. L. & Criminology 1015, 1047 (2013) (supporting "barring revocation as a sanction for many noncriminal violations"); see also Vincent Schiraldi, Explainer: How 'Technical Violations' Drive Incarceration, The Appeal (Mar. 23, 2021), https://theappeal.org/the-lab/explainers/explainer-how-technical-violations-drive-incarceration/[https://perma.cc/8ZTH-WGYA]; 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://perma.cc/U5PX-N2Y5] (same); Stephen Handelman, Recidivism's Hidden Drivers: 'Technical Violations' of Probation or Parole, The Crime Rep. (Mar. 5, 2020), https://web.archive.org/web/20200927112600/https://thecrimereport.org/2020/03/05/the-hidden-driver-of-recidivism-technical-violations-of-probation-or-parole/ [https://perma.cc/G2AB-ZE7Z] (same); Eli Hager, At Least 61,000 Nationwide Are in Prison for Minor Parole Violations, The Marshall Project (Apr. 23, 2017, 10:00 PM), https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations [https://perma.cc/F6NB-RFX4] (same).

[6] Press Release, Phila. Dist. Att'y's Off., supra note 1.

[7] Lara Bazelon, Shon Hopwood, Jehan Gordon-Booth, Leslie Herod & Sydney Kamlager, The Just. Collaborative Sent'g Taskforce, Sample Legislation on Probation 7 (2020), https://30glxtj0jh81xn8rx26pr5af-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/20.10_Model-Policy-for-Probation-1.pdf [https://perma.cc/378H-XECN]; see also Klingele, supra note 5, at 1047–49 (describing legislative efforts to reduce punishments for technical violations).

[8] Final Priorities for Amendment Cycle, 83 Fed. Reg. 43956, 43956–57 (Aug. 28, 2018).

[9] Tracey Kyckelhahn & S. Alexander Maisel, U.S. Sent'g Comm'n, Revocations Among Federal Offenders 13 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf [https://perma.cc/5742-T3TQ].

behavior is not ordinarily considered worthy of incarceration.[10] By imprisoning people for non-criminal conduct, technical violations widen "the net of criminal social control."[11] In practice, moreover, perfect compliance with the conditions of supervision is difficult, if not impossible,[12] and penalizing minor infractions may encourage recidivism rather than reintegration.[13] Finally, defendants charged with technical violations seem the most sympathetic—and therefore the most likely to win popular support for reform.[14]

Concentrating on technical violations, however, misses a major piece of the story: the other half of revocations based on new criminal conduct,[15] which I refer to in this Article as "criminal violations." By state and federal law, every term of community supervision includes a condition requiring that the defendant not commit another crime,[16] which Professor Fiona Doherty has described as the "obey all laws" condition of supervision.[17] If a person on probation, parole, or supervised release engages in new criminal activity, then the government can revoke their

[10] Council of State Gov't Just. Ctr., supra note 3.

[11] Marcy R. Podkopacz & Barry C. Field, The Back-Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences, 91 J. Crim. L. & Criminology 997, 1070 (2001).

[12] See Daly et al., supra note 5, at 15; ACLU Hum. Rts. Watch, Revoked: How Probation and Parole Feed Mass Incarceration in the U.S. 3 (2020), https://www.aclu.org/report/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states [https://perma.cc/TY3L-YD8F].

[13] Carrie Pettus-Davis & Stephanie Kennedy, Inst. for Just. Rsch. and Dev., Going Back to Jail Without Committing a Crime: Early Findings from a Multi-State Trial 3 (2020), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Going_Back_to_Jail.pdf [https://perma.cc/Y2Z8-RVLZ].

[14] As Professor Cecelia Klingele observed, the distinction between criminal and technical violations does not always reflect "the severity of the conduct." Klingele, supra note 5, at 1049. Minor crimes like "[d]isorderly conduct" may not "signify a true threat to the community," while technical violations like a "pedophile who stalks the playground" can "involve dangerous behavior." Id.

[15] Cf. Council of State Gov't Just. Ctr., supra note 3 (reporting that technical violations account for approximately half of all state prison admissions for probation and parole revocations); Daly et al., supra note 5, at 20 (reporting that technical violations account for between 61% and 90% of all petitions to revoke probation in some jurisdictions).

[16] See, e.g., 18 U.S.C. § 3583(d) (federal supervised release); id. § 3563(a) (federal probation); id. § 4209(a) (1982) (federal parole); Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 Geo. L.J. 291, 301 (2016) (state probation); see also Neil P. Cohen, The Law of Probation and Parole § 8:1 (2021) ("Probation and parole orders routinely contain a condition which, written in general terms, prohibits offenders from violating the law. . . . This condition appears in both federal and state probation and parole requirements.").

[17] Doherty, supra note 16, at 301–02.

supervision and imprison them as punishment for their criminal violation.[18]

Until now, there has been little to no research on how criminal violations drive punishment. In 2021, researchers from the CUNY Institute for State and Local Government published a study on probation revocations in ten U.S. counties, reporting that "technical violations—those issued purely for noncompliance . . . that do not involve new criminal activity"—range from 61% to 90% of all violations filed in some jurisdictions.[19] By implication, of course, the remaining 10% to 39% of violations must have been for new criminal conduct. The study observed that these "new crime" violations were more likely to end in revocation than were technical violations, yet it was "not clear . . . what types of new crimes are tied to revocations."[20] The authors highlighted "new crime" violations as an "important question to be further explored in future research," emphasizing that their "prevalence" made "addressing them . . . critical for significantly reducing revocations overall."[21]

The popular focus on technical violations is akin to the well-meaning but limited calls for reducing punishment of "nonviolent drug offenders."[22] As Professor James Forman, Jr., has explained, "America's incarceration rates for nonviolent drug offenders are unprecedented and morally outrageous, but they are not 'the real reason our prison population is so high.'"[23] In reality, what drives mass incarceration are long sentences for violent crimes.[24] Even if the United States released every prisoner convicted of a non-violent drug offense, it still would have the largest prison population in the world.[25]

Just like emphasizing nonviolent drug offenders, focusing only on technical violations is understandable yet incomplete. Punishments for non-criminal technical violations may be excessive or even unfair, yet they account for only half of all revocations. Even if the government stopped punishing technical violations entirely, punishments for criminal violations would still drive up to half of all revocations in some

[18] See infra Section II.B.
[19] Daly et al., supra note 5, at 9, 20.
[20] Id. at 20, 32.
[21] Id. at 32.
[22] James Forman Jr., Locking Up Our Own: Crime and Punishment in Black America 220 (2017).
[23] Id. at 228.
[24] See John Pfaff, Decarceration's Blindspots, 16 Ohio St. J. Crim. L. 253, 265 (2019).
[25] Forman, supra note 22, at 228.

jurisdictions.[26] To understand the connection between community supervision and mass incarceration, therefore, we must study the role of criminal violations.

To be clear: I am not suggesting that technical violations are unimportant because they result in less prison time. Even a short prison sentence "inflicts a 'grievous loss'"[27] that may "imperil [a person's] job, interrupt his source of income, and impair his family relationships."[28] I also recognize that people under supervision who commit new crimes are not conventionally sympathetic.[29] Nevertheless, federal judges revoke supervised release and send people to prison for criminal violations in tens of thousands of cases every year and impose hundreds of thousands of months of imprisonment. Criminal violations are thus a critical issue in supervision law and policy that deserve our attention and respect.

In this Article, I offer the first comprehensive analysis of how criminal violations drive punishment, focusing on the federal system of supervised release.[30] The federal supervision system is a good example because it is one of the ten largest in the country[31] and "inevitably acts as a model, both positive and negative, for developments in the states."[32] Information on federal supervision violations is also publicly available. In July 2020, the U.S. Sentencing Commission published a report on federal supervision violations, which "[f]or the first time" made available "data collected from documents related to revocation hearings," including a database of 108,115 revocation hearings in federal district courts between 2013 and

[26] See Council of State Gov't Just. Ctr., supra note 3 (reporting that technical violations account for approximately half of all state prison admissions for probation and parole revocations); Daly et al., supra note 5, at 20 (reporting that technical violations account for between 61% and 90% of all petitions to revoke probation in some jurisdictions).

[27] Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

[28] Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

[29] Johnson v. United States, 529 U.S. 694, 709–10 (2000) (describing violators as "problem case[s] among problem cases").

[30] I do not address probation, which is community supervision in lieu of imprisonment. See 18 U.S.C. § 3561(a); U.S. Sent'g Guidelines Manual § 7A2(a) (U.S. Sent'g Comm'n 2018). Probation is reserved for less serious crimes and imposed in less than 10% of cases. See 18 U.S.C. § 3561(a); U.S. Sent'g Comm'n, 2019 Annual Report and Sourcebook of Federal Sentencing Statistics 61 fig.6 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf. [https://perma.cc/AJ5N-TU7A].

[31] See Doherty, supra note 16, at 298–300.

[32] See Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315, 1318, 1320 (2005).

2017.[33] Because federal courts ordinarily "do not use a standardized reporting system for sentences imposed following violations," the Commission's revocation database offers an extraordinary opportunity for understanding this subterranean layer of the federal criminal justice system.[34]

Through an original empirical study of the revocation database and examination of federal case law, I sought to answer three basic questions about how criminal violations drive punishment: (1) How much incarceration is attributable to criminal violations? (2) What is the function of criminal violations in the federal criminal justice system? And (3) What is the most commonly punished criminal violation? In answering these questions, I uncovered significant problems in the law of revocation, which led me to ask a fourth question: Is revoking supervised release for criminal violations justified or fair?

Part I of this Article reviews the law and history of supervised release. Part II describes my empirical and legal analysis of revocations for criminal violations in the federal system, which found they drive two-thirds of the total prison time imposed by increasing sentences for criminal convictions and making punishment easier for the government. Part III presents my analysis showing that the immigration crime of illegal reentry is one of the most commonly punished criminal violations and revealing that supervised release has become part of the "crimmigration" system. Part IV argues that revoking supervised release for criminal violations inflicts unfair double punishment and erodes constitutional rights, and therefore prosecution without revocation is a better and fairer way to punish crimes committed under community supervision. Finally, the Conclusion suggests that the law of revocation opens an exception to the ordinary rules of prosecution, which the U.S. Supreme Court, the Sentencing Commission, and the U.S. Department of Justice have generalized into a major engine of imprisonment.

[33] U.S. Sent'g Comm'n, Federal Probation and Supervised Release Violations 1, 12–13 (2020) [hereinafter Violations], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf. [https://perma.cc/J3VH-B9T2].

[34] Id. at 12. Unfortunately, the Commission only collected data on the five years between 2013 to 2017, so we remain in the dark on revocations outside this time frame.

I. LAW OF REVOCATION

Supervised release is a term of community supervision imposed by a judge at sentencing to follow a defendant's term of imprisonment. The supervision is subject to conditions, including that the defendant not commit any "Federal, State, or local crime during the term."[35] If a defendant on supervised release commits a new crime, then the judge can revoke their supervision and impose a new prison term as punishment. Federal law distinguishes between punishing crimes and punishing criminal violations using three doctrines: conditional liberty, punishment for the original offense, and the breach of trust.

A. Imposing Supervised Release

Congress created supervised release in 1984 to replace parole.[36] The key difference between supervised release and parole is their method of imposition. Under parole, a board of correctional officials released defendants early from prison to serve the rest of their sentences on community supervision. Under supervised release, by contrast, a judge sentences a defendant convicted of a felony or Grade A misdemeanor to a term of community supervision to follow imprisonment.[37] While this change was intended to limit and rationalize the imposition of supervision, virtually all eligible defendants today are sentenced to supervised release without discussion or consideration.

For most of the twentieth century, the federal government used a form of community supervision called "parole."[38] Judges sentenced convicted defendants to terms of imprisonment, and after serving one-third of their sentences defendants would become eligible to ask the Parole Commission for early release.[39] If the Commission found they had "observed the rules of the institution" and their release would not "depreciate the seriousness of [their] offense," "promote disrespect for the law," or "jeopardize the public welfare," then it could allow them to

[35] 18 U.S.C. § 3583(d).

[36] See United States v. Haymond, 139 S. Ct. 2369, 2381–82 (2019).

[37] See 18 U.S.C. § 3583(a).

[38] See generally Peter B. Hoffman, History of the Federal Parole System: Part 1 (1910–1972), 61 Fed. Prob. 23 (1997) (summarizing the history of the federal parole system in the twentieth century); Peter B. Hoffman, History of the Federal Parole System: Part 2 (1973–1997), 61 Fed. Prob. 49 (1997) (same).

[39] Tapia v. United States, 564 U.S. 319, 323 (2011); see 18 U.S.C. §§ 4205(a), 4208(e) (1982); 28 C.F.R. §§ 2.2(a), 2.11(a) (1982).

serve the rest of their sentence in the community under supervision by a parole officer.[40] The Commission could also impose conditions of parole to prohibit behavior "deemed dangerous to the restoration of the individual into normal society" and provide the officer with "information about the parolee and an opportunity to advise him."[41]

Parole was a system of "indeterminate sentencing" rooted in a rehabilitative theory of imprisonment.[42] Prison terms were referred to as "indeterminate" because the amount of time a defendant would ultimately spend in prison was not fixed at the time of sentencing but instead depended on the Parole Commission's assessment of their rehabilitation at a later parole hearing.[43] "A convict, the theory went, should generally remain in prison only until he was able to reenter society safely," at which point he "had become rehabilitated and should be released."[44] The "purpose" of post-release supervision was "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed."[45]

As crime rates rose in the 1960s and '70s, however, policymakers came to believe that the prison system's "attempt to 'achieve rehabilitation of offenders had failed.'"[46] Many questioned whether "prison programs could 'rehabilitate individuals on a routine basis'" or if the Parole Commission "could 'determine accurately whether or when a particular prisoner ha[d] been rehabilitated.'"[47] Parole also had two "unjustified" and "shameful" consequences.[48] First, studies revealed disparities in who won early release.[49] Second, "uncertainty as to the time the offender would spend in prison" distressed both defendants and victims.[50]

[40] 28 C.F.R. § 2.18 (1982); 18 U.S.C. § 4206(a) (1982).

[41] Morrissey v. Brewer, 408 U.S. 471, 478 (1972); see also 18 U.S.C. § 4209(a–b) (1982) (providing that the Commission "may impose or modify other conditions of parole" that are "reasonable to protect the public welfare," and which should be "sufficiently specific to serve as a guide to supervision and conduct").

[42] *Tapia*, 564 U.S. at 323–24.

[43] Id.

[44] Id. at 324 (quoting Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 18 (1998)).

[45] *Morrissey*, 408 U.S. at 477.

[46] *Tapia*, 564 U.S. at 324 (quoting Mistretta v. United States, 488 U.S. 361, 366 (1989)).

[47] Id. at 324–25 (quoting S. Rep. No. 98-225, at 40 (1983)).

[48] *Mistretta*, 488 U.S. at 366.

[49] *Tapia*, 564 U.S. at 324.

[50] *Mistretta*, 488 U.S. at 366.

In response to these failures, Congress passed the Sentencing Reform Act of 1984 ("SRA"), which officially rejected the rehabilitative theory of imprisonment and enacted a more "determinate" sentencing system.[51] The SRA describes four possible justifications for criminal punishment: (1) retribution, (2) deterrence, (3) incapacitation, and (4) rehabilitation.[52] It then instructs sentencing judges to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation."[53] In other words, Congress authorized judges to impose prison based on a defendant's need for retribution, deterrence, and incapacitation, but *not* for rehabilitation.[54]

The SRA also abolished parole, instead requiring defendants to serve their prison terms in full without the opportunity for early release. Because the federal government no longer considered rehabilitation as a purpose of imprisonment, there was no longer any justification for releasing prisoners before the end of their sentences.[55] Eliminating parole would also ensure "truth in sentencing" by making the length of the prison term known on the date of imposition.[56]

Even though they abolished parole, lawmakers did not wish to leave prisoners "without the community supervision inherent in the early

[51] *Tapia*, 564 U.S. at 325.

[52] Department of the Interior and Related Agencies Appropriations Act of 1985, Pub. L. No. 98-473, 98 Stat. 1938, 1989 (1984) (codified at 18 U.S.C. § 3553(a)).

[53] Id. at 1998 (codified at 18 U.S.C. § 3582(a)).

[54] See *Tapia*, 564 U.S. at 328; 18 U.S.C. § 3553(a)(2)(A–C).

[55] See *Mistretta*, 488 U.S. at 367; see also S. Rep. No. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 [hereinafter Senate Report] ("[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and . . . no one can really detect whether or when a prisoner is rehabilitated."); Marvin E. Frankel, Criminal Sentences: Law Without Order 90, 109 (1973) (arguing all legitimate considerations are "knowable on the day of sentencing" with "no occasion for an indeterminate sentence"). The Bureau of Prisons is still authorized to award a small amount of "good time" credit, equivalent to a 15% sentence reduction, to inmates who comply with prison rules. See 18 U.S.C. § 3624(b). The SRA also permitted judges to modify terms of imprisonment in "extraordinary and compelling" circumstances, like when a prisoner becomes gravely ill. See 18 U.S.C. § 3582(c); see also Shon Hopwood, Second Looks & Second Chances, 41 Cardozo L. Rev. 83, 101–03 (2019) (noting that Congress gave courts the power to decide if sentence reduction is justified on an individualized level, and "there is no indication that Congress limited the compassionate release safety valve to medical or elderly release").

[56] United States v. Haymond, 139 S. Ct. 2369, 2389 (2019) (Alito, J., dissenting); see also Barbara Meierhoffer Vincent, Supervised Release: Looking for a Place in a Determinate Sentencing System, 6 Fed. Sent. Rep. 187, 187 (1994) ("The emphasis of the reform was on openness and honesty in the sentencing process.").

release system."[57] To provide a term of post-release supervision, therefore, they created a new kind of sentence called "supervised release."[58] Supervised release is a term of supervision imposed by the judge at sentencing[59] based on the defendant's need for deterrence and rehabilitation (one year later, incapacitation was added as a factor).[60] The judge also has the ability to impose conditions of supervised release to provide the defendant with "post[-]confinement monitoring"[61] and "post[-]confinement assistance."[62]

When designing supervised release, the drafters of the SRA intended to make "a significant break with prior practice."[63] According to the Senate Report on the legislation, parole supervision was irrational because there was no logical relationship between the *duration* of the defendant's supervision and their *need* for supervision. Instead, the length of a parole term depended on the "almost sheer accident" of how much time was left on the defendant's original prison sentence when the Parole Commission granted release.[64] This led to the "anomalous situation" where "a defendant in great need of post-incarceration supervision would get little whereas a defendant who did not need such supervision would get a great deal."[65] A model prisoner, for example, would be released early to serve a long term of supervision, while a prisoner with a "poor disciplinary record" would serve their full prison sentence and receive no supervision after release.[66]

The drafters of the SRA intended to distribute supervisory resources more efficiently by assigning judges with the responsibility of imposing terms of supervised release. By making supervision "a separate part of the defendant's sentence," they allowed judges to vary the duration of the

[57] Vincent, supra note 56, at 187.

[58] Department of the Interior and Related Agencies Appropriations Act of 1985, Pub. L. No. 98-473, 98 Stat. 1938, 1999 (1984) (codified at 18 U.S.C. § 3583).

[59] The maximum term of supervision depends on the offense of conviction, and conditions must be "reasonably related" to the purposes of supervision and involve "no greater deprivation of liberty than is reasonably necessary." 18 U.S.C. § 3583(b), (d).

[60] Department of the Interior and Related Agencies Appropriations Act of 1985, 98 Stat. at 1999 (codified at 18 U.S.C. § 3583); Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266, 1272 (codified at 18 U.S.C. § 3583).

[61] Johnson v. United States, 529 U.S. 694, 696–97 (2000).

[62] United States v. Johnson, 529 U.S. 53, 60 (2000).

[63] Johnson v. United States, 529 U.S. at 724–25 (Scalia, J., dissenting).

[64] Senate Report, supra note 55, at 123–24.

[65] United States v. Montenegro-Rojo, 908 F.2d 425, 433 (9th Cir. 1990).

[66] Senate Report, supra note 55, at 123.

term based on the unique needs of each defendant.[67] The Senate Report explains that judges should impose supervised release only on "those releasees from prison who actually need supervision" so that "every releasee who does need supervision [would] receive it."[68] By giving "district courts the freedom to provide post[-]release supervision for those, and only those, who needed it," the law sought to use "the district courts' discretionary judgment to allocate supervision to those releasees who needed it most."[69]

The creation of supervised release also reflected an important yet subtle distinction in Congress's new philosophy of punishment. Although lawmakers rejected the rehabilitative theory of *imprisonment*, they still believed that *community supervision* could "fulfill[] rehabilitative ends, distinct from those served by incarceration."[70] The SRA specifically includes rehabilitation as a factor for judges to consider when imposing supervised release, but omits retribution.[71] Supervised release was intended to "protect the public" and "provide rehabilitation" but not "for purposes of punishment," which is "served to the extent necessary by the term of imprisonment."[72]

Legal developments over the next twenty years, however, undermined lawmakers' goal of limiting and rationalizing post-release supervision. Congress voted repeatedly to extend terms of supervised release, add mandatory conditions of supervision, and require mandatory minimum terms of supervision for drug-, sex-, and other serious crimes.[73] At the same time, the Sentencing Commission published sentencing guidelines instructing judges to impose supervised release whenever required by statute and whenever they sentenced a defendant to "imprisonment of more than one year."[74] Since the enactment of the SRA, the population under federal post-release supervision has more than quintupled—from

[67] Id. at 123.
[68] Id. at 125.
[69] Johnson v. United States, 529 U.S. 694, 709 (2000).
[70] United States v. Johnson, 529 U.S. 53, 59 (2000).
[71] 18 U.S.C. § 3583(c).
[72] Senate Report, supra note 55, at 124–25; see also Tapia v. United States, 564 U.S. 319, 326 (2011) ("[A] court may *not* take account of retribution . . . when imposing a term of supervised release." (citing 18 U.S.C. § 3583(c)).
[73] See Jacob Schuman, Supervised Release Is Not Parole, 53 Loy. L.A. L. Rev. 587, 604–05 (2020).
[74] U.S. Sent'g Guidelines Manual § 5D1.1(a) (U.S. Sent'g Comm'n 1990).

less than 20,000 parolees in 1983[75] to approximately 110,000 defendants on supervised release in 2019.[76]

Despite Congress's original intentions, supervised release is now practically a default punishment in federal criminal law. Every year, around 50,000 defendants begin serving new terms of supervised release,[77] with the average sentence lasting forty-seven months.[78] Judges impose supervised release in virtually all cases recommended by the guidelines, "irrespective of [the defendant's] need for re-integrative or rehabilitative services or their risk of additional criminal conduct."[79] Empirical studies show judges rarely explain their reasons for imposing supervised release, and that the parties themselves seldom mention it either.[80]

B. Revoking Supervised Release

When replacing parole with supervised release, Congress not only changed the process for imposing supervision but also the method of punishing violations. Under parole, the Parole Commission revoked early release and returned violators to prison to serve the rest of their original prison terms. Under supervised release, by contrast, the judge revokes supervision and sentences the violator to a new term of imprisonment. Congress has repeatedly voted to reaffirm this unique feature of supervised release,[81] making clear that revocation is meant to be a distinct punishment with no legal relationship to any prior sentencing decisions.

[75] Margaret Werner Cahalan, U.S. Dep't of Just., Historical Corrections Statistics in the United States, 1850–1984, at 183 (1986), https://bjs.ojp.gov/content/pub/pdf/hcsus5084.pdf [https://perma.cc/HAY6-YQU7].

[76] Table E-2—Federal Probation System Statistical Tables for the Federal Judiciary (December 31, 2019), U.S. Courts, https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2019/12/31 [https://perma.cc/AK5K-RLN8].

[77] Table E-1—Federal Probation System Statistical Tables for the Federal Judiciary (December 31, 2019), U.S. Courts, https://www.uscourts.gov/statistics/table/e-1/statistical-tables-federal-judiciary/2019/12/31 [https://perma.cc/ZK9P-MLHH].

[78] Number of Offenders on Federal Supervised Release Hits All-Time High, The PEW Charitable Trs. (Jan. 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high [https://perma.cc/JTE9-9AUE].

[79] Harold B. Wooten, Violation of Supervised Release: Erosion of a Promising Congressional Idea into Troubled Policy and Practice, 6 Fed. Sent'g Rep. 183, 183–85 (1994).

[80] United States v. Thompson, 777 F.3d 368, 374 (7th Cir. 2015); United States v. Siegel, 753 F.3d 705, 711 (7th Cir. 2014); Christine S. Scott-Hayward, Shadow Sentencing: The Imposition of Federal Supervised Release, 18 Berkeley J. Crim. L. 180, 208–10 (2013).

[81] See infra notes 109–12 and accompanying text.

When a parolee was accused of violating a condition of their supervision, the Commission would convene an administrative hearing to decide whether the allegation was true.[82] As discussed in more detail below, this hearing was not considered a criminal prosecution and therefore was not subject to the "full panoply" of constitutional rights, including a jury or proof beyond a reasonable doubt.[83] If the Commission found them in violation, it could return them to prison for the remainder of their sentence.[84] Punishment for a parole violation, in other words, was restoration of the defendant's original prison term. As Justice Scalia explained: "When parole was 'revoked' . . . there was no need to impose a new term of imprisonment; the term currently being served (on parole) was still in place."[85]

This feature of parole revocation had two important sentencing consequences. First, because revocation restored the defendant's original prison term, the maximum punishment for a parole violation depended on the time remaining on that term.[86] A defendant originally sentenced to nine years' imprisonment and paroled after three, for example, would face a maximum six-year punishment for violating a condition of supervision. By contrast, a defendant originally sentenced to nine years' imprisonment and paroled after eight would face a maximum one-year revocation sentence for a violation.[87]

Second, parole revocation was a form of indeterminate sentencing. When the Parole Commission revoked a parolee's early release, they were sent back to prison to serve the rest of their original sentence but would eventually again become eligible to ask for "reparole" and a second chance at early release.[88] The length of the sentence for a parole violation, therefore, was not fixed at the time of revocation but depended on the Commission's future decision at the reparole hearing.[89]

According to the Senate Report on the SRA, these aspects of parole revocation were arbitrary. When the Commission revoked parole, the defendant's sentence was not based on the conduct that led to the violation

[82] See 18 U.S.C. § 4214(c) (1982); 28 C.F.R. § 2.50 (1977).
[83] Morrissey v. Brewer, 408 U.S. 471, 480 (1972); see infra Subsection I.C.1.
[84] See 18 U.S.C. § 4214(d) (1982); 28 C.F.R. § 2.52(a) (1977).
[85] Johnson v. United States, 529 U.S. 694, 725 (2000).
[86] 28 C.F.R. § 2.21(b) (1977).
[87] Parolees received credit for time served under supervision unless they absconded or committed a new crime. See 18 U.S.C. § 4214(d) (1982); 28 C.F.R. § 2.52(c) (1977).
[88] 28 C.F.R. § 2.21 (1977).
[89] See id. § 2.21(b).

but "on the length of the original term of imprisonment," whatever that happened to be.[90] Revocation "ha[d] the effect of requiring the parolee to serve the remainder of [their] original term of imprisonment,"[91] regardless of their actual conduct.

In designing supervised release, lawmakers intended to create a more rational and determinate process for punishing violations. Instead of authorizing judges to revoke supervised release, the original SRA instructed them to punish violations as "contempt of court."[92] Treating violations as criminal contempt had two important consequences. First, criminal contempt would require a criminal prosecution, which meant that the government would have to prove violations of supervised release to a jury beyond a reasonable doubt.[93] Second, punishment of criminal contempt would result in a new prison sentence, which meant that the punishment for supervised release violations would depend on the defendant's conduct rather than whatever time remained on their original sentence.[94]

The criminal contempt approach to punishing violations also reflected a more lenient attitude toward post-release supervision. The Senate Report explains that the SRA "did not provide for revocation proceedings for violation of a condition of supervised release" because lawmakers did "not believe that a minor violation . . . should result in resentencing of the defendant."[95] Instead, the drafters "intended that contempt of court proceedings" would be used only "after repeated or serious violations of the conditions of supervised release."[96] They also did not believe that a

[90] Senate Report, supra note 55, at 122–23.

[91] Id. at 123.

[92] 18 U.S.C. § 3583(e)(3) (1984).

[93] See 18 U.S.C. § 3691 (statutory jury right for criminal contempt); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (constitutional jury right for criminal contempt where sentence exceeds six months); see also Benjamin F. Baer, U.S. Parole Comm'n, Position Paper on Post-Release Supervision, *in* Dep'ts of Com., Just., and State, the Judiciary, and Related Agencies Appropriations for 1986: Hearings Before a Subcomm. of the Comm. on Appropriations, 99th Cong. 65–68 (1985) [hereinafter Parole Position Paper] ("[A]n offender charged with contempt of court is entitled to the protections afforded an ordinary criminal case, including the right to a trial by jury.").

[94] See 42 U.S.C. § 1995 (six-month maximum sentence for criminal contempt); see also Vincent, supra note 56, at 188 ("The notion was that imprisoned offenders had already done their time for the original offense and that subsequent criminal behavior should be adjudicated separately . . . .").

[95] Senate Report, supra note 55, at 125.

[96] Id.

"new offense" should be punished as a violation of supervised release, since it could simply "be prosecuted."[97]

Once again, however, Congress's original plan for limiting supervised release did not last long. Before the new system even came into effect in 1987, the Parole Commission and the Administrative Office of U.S. Courts lobbied Congress to replace the burdensome contempt process for punishing with the old revocation approach, which would ensure "a streamlined procedure for enforcing the conditions of supervised release"[98] and "expeditiously return an offender to prison."[99] Lawmakers responded to their request in the Anti-Drug Abuse Act of 1986 ("ADAA"), which replaced the criminal contempt provision with one authorizing judges to punish violations of supervised release in "revocation" proceedings.[100] Like parole revocation, revocation of supervised release would be governed by informal procedures, with no right to a jury or proof beyond a reasonable doubt.[101] Judges decide by "a preponderance of the evidence" whether "the defendant violated a condition of supervised release" and, if so, whether to "revoke [the] term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense [of conviction]."[102] As Professor Doherty put it, the ADAA "grafted" the old concept of parole revocation onto the new system of supervised release.[103]

Yet even as the ADAA returned to the revocation model for punishing violations, the law still maintained a key innovation in the design of supervised release. Under parole, the Commission had punished violations by restoring the defendant's *original* prison term. By contrast, when judges revoke supervised release, they impose a *new* prison sentence, which is "authorized by a statute and Guidelines scheme . . . separate from the regime that governs incarceration for the original offense."[104] Parole revocation reinstated the defendant's original

[97] Id.

[98] 131 Cong. Rec. 12703, 14177 (1985); Parole Position Paper, supra note 93, at 67.

[99] Id.

[100] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207, 3207-7 (codified at 18 U.S.C. § 3583(e)).

[101] Vincent, supra note 56, at 188.

[102] 18 U.S.C. § 3583(e)(3).

[103] Fiona Doherty, Indeterminate Sentencing Returns: The Invention of Supervised Release, 88 N.Y.U. L. Rev. 958, 1002 (2013).

[104] United States v. McNeil, 415 F.3d 273, 277 (2d Cir. 2005).

prison sentence, whereas revocation of supervised release results in "a fresh term of imprisonment."[105]

This difference in revocation follows logically from the difference in imposition. Parole was a grant of early release from imprisonment, so the government could punish violations by restoring the defendant's original prison sentence. Supervised release, by contrast, follows full service of the defendant's prison term, so there is nothing left for the government to "revoke" as punishment. By definition, the penalty for violating supervised release must be a new prison term because the defendant's original prison sentence has already been completed.

At a deeper level, however, this difference also reflects Congress's attempt to create a more rational and determinate sentencing system. Lawmakers viewed parole revocation as arbitrary because the length of the prison term was tied to the defendant's original sentence, regardless of the seriousness of their violation.[106] By making revocation of supervised release "a separate punishment," they gave judges the discretion to "tailor[]" revocation sentences "to the needs of individual defendants."[107]

The importance of this distinction between parole and supervised release revocation is evident from the fact that Congress subsequently voted three times to reaffirm the difference between a defendant's original sentence and their punishment for violating supervised release. First, in 1987, lawmakers voted to set statutory maximum sentences for supervised release violations based on the offense of conviction: five years for a Class A felony, three years for a Class B felony, two years for a Class C or D felony, and one year for any other case.[108] This amendment made clear that the maximum punishment for a violation was not "limited by the original sentence" imposed on the defendant but rather by special "statutory caps" based on the offense of conviction.[109]

Next, in 1994, Congress amended the statute to clarify that the maximum sentence for a violation was not "limited by the amount of supervised release the original sentencing court imposed" and could even

[105] United States v. Thompson, 777 F.3d 368, 372 (7th Cir. 2015).

[106] See Senate Report, supra note 55, at 122–23.

[107] United States v. Reese, 71 F.3d 582, 588 (6th Cir. 1995) (quoting United States v. Dillard, 910 F.2d 461, 466 (7th Cir. 1990)).

[108] Sentencing Act of 1987, Pub. L. No. 100-182, § 25, 101 Stat. 1266, 1272 (codified at 18 U.S.C. § 3583(e)(3)).

[109] United States v. Cunningham, 800 F.3d 1290, 1292 (11th Cir. 2015).

be "longer than the term of the revoked supervised release."[110] In other words, a defendant sentenced to six months of supervised release could be sentenced for a violation to one-year imprisonment.[111]

Finally, in 2003, Congress amended the statute yet again to make clear that the maximum sentence for a violation of supervised release was not limited by any prior sentences imposed for violations.[112] For example, if a judge revoked a defendant's supervised release multiple times, they would have to determine the maximum penalty for each violation anew at each revocation hearing. Together, these amendments ensured that punishments for violating supervised release were based on the facts of each case and not limited by any prior sentencing decisions.

C. Not a Criminal Prosecution

When a defendant on supervised release commits a new crime, the judge can revoke their supervision and impose a new prison sentence as punishment for the violation. Federal law distinguishes between prosecuting crimes and revoking supervised release for criminal violations based on three doctrines. First, criminal prosecution is said to deprive a defendant of absolute liberty, whereas revocation takes away their "conditional liberty." Second, prosecution is punishment for the defendant's new conduct, while revocation is punishment for their "original offense." Finally, criminal prosecution is justified as a penalty for the defendant's actual behavior, while revocation is a penalty for their "breach of trust."

1. Conditional Liberty

The most important distinction between prosecuting crimes and revoking supervised release for criminal violations is that revocation deprives a defendant of "conditional liberty," not absolute liberty. This

[110] United States v. Hampton, 633 F.3d 334, 339, 341 (5th Cir. 2011) (quoting United States v. Jackson, 329 F.3d 406, 408 n.4 (5th Cir. 2003)); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505(2)(B), 108 Stat. 1796, 2016–17 (amending 18 U.S.C. § 3583(e)(3) to limit the maximum sentence for violating supervised release according to the class of felony).

[111] E.g., United States v. Lamirand, 669 F.3d 1091, 1092 (10th Cir. 2012).

[112] See United States v. Knight, 580 F.3d 933, 937–38 (9th Cir. 2009); United States v. Hernandez, 655 F.3d 1193, 1196 (10th Cir. 2011) (Gorsuch, J.); see also Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. 108-21, § 101, 117 Stat. 650, 651 (codified as amended at 18 U.S.C. § 3583(e)(3)) (inserting "on any such revocation" into 18 U.S.C. § 3583(e)(3)).

principle traces back to the Supreme Court's 1972 decision in *Morrisey v. Brewer*, which held that parole revocation "arises after the end of the criminal prosecution, including imposition of sentence" and therefore "deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."[113] Because "revocation of parole is not part of a criminal prosecution," the Court concluded that the "full panoply of rights due a defendant in such a proceeding does not apply."[114] Under *Morrissey*, parole revocation only required "general" due process protections like notice and an opportunity to be heard, not a jury trial or proof beyond a reasonable doubt.[115]

After Congress replaced parole with supervised release in the SRA, the federal circuit courts unanimously held that "[l]ike parole . . . fewer constitutional safeguards are needed to protect the conditional liberty interest during supervised release."[116] Because "parole . . . and supervised release revocation hearings are constitutionally indistinguishable," they are governed by the same relaxed legal procedural standards.[117] As a result, the courts concluded, "most of the fundamental constitutional procedural protections that are normally applicable to a criminal prosecution are not required for supervised-release proceedings."[118]

The Supreme Court did not address the relationship between liberty under parole and supervised release until its 2019 decision in *United States v. Haymond*. There, the defendant challenged the constitutionality of 18 U.S.C. § 3583(k), a provision of the supervised release statute enacted in 2003 to impose a five-year mandatory minimum sentence on sex offenders who violated their supervision by committing a new sex crime.[119] In a 4-1-4 vote, the Court struck down § 3583(k) as violating the jury right but split on the reasoning. A majority of Justices agreed that revocation of supervised release deprived defendants of conditional

[113] 408 U.S. 471, 480 (1972). Revocation is not a criminal prosecution even when the alleged violation is a new crime. See Carchman v. Nash, 473 U.S. 716, 725 (1985) ("A probation-violation charge . . . does not accuse an individual with having committed a criminal offense in the sense of initiating a prosecution . . . . Although the probation-violation charge might be based on the commission of a criminal offense, it does not result in the probationer's being 'prosecuted' or 'brought to trial' for that offense.").

[114] *Morrissey*, 408 U.S. at 480.

[115] Id. at 488–89.

[116] See, e.g., United States v. Gomez-Gonzalez, 277 F.3d 1108, 1111 (9th Cir. 2002).

[117] United States v. Hall, 419 F.3d 980, 985 n.4 (9th Cir. 2005).

[118] United States v. Meeks, 25 F.3d 1117, 1123 (2d Cir. 1994).

[119] United States v. Haymond, 139 S. Ct. 2369, 2374 (2019).

liberty yet disagreed about its relationship to parole revocation and criminal prosecution.

Justice Gorsuch wrote a plurality opinion joined by three other Justices acknowledging that revocation of supervised release deprived a defendant of conditional liberty, not absolute liberty, but still finding § 3583(k) unconstitutional based on differences in how parole and supervised release were imposed and revoked.[120] When parole was imposed, he explained, the government "suspend[ed] part . . . of a defendant's prescribed prison term and afford[ed] him a period of conditional liberty."[121] Supervised release, by contrast, is not imposed "to replace a portion of the defendant's prison term" but rather "to encourage rehabilitation *after* the completion of his prison term."[122] This "structural difference bears constitutional consequences," he argued, because parole revocation restored the "*remaining* prison term . . . as found by a unanimous jury under the reasonable doubt standard," whereas revocation of supervised release results in "additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict."[123] While parole revocation without a jury was constitutional, he concluded that § 3583(k) violated the jury right under *Apprendi v. New Jersey* and *United States v. Alleyne* because it triggered "a substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts under a preponderance standard."[124]

Justice Alito wrote a dissent joined by three other Justices claiming that the jury right did not apply to revocation of parole or supervised release because both were equivalent deprivations of conditional liberty rather than absolute liberty.[125] He started with "the proposition that the old federal parole system did not implicate the . . . jury trial right" because revoking a parolee's "conditional liberty" was "not a 'criminal prosecution'" and "did not result in a new sentence."[126] "Supervised release," he contended, "is not fundamentally different and therefore should not be treated any differently."[127] Before "a person is indicted and

[120] Id. at 2373–74.
[121] Id. at 2377.
[122] Id. at 2382.
[123] Id.
[124] Id.; see Apprendi v. New Jersey, 530 U.S. 466 (2000); Alleyne v. United States, 570 U.S. 99 (2013).
[125] *Haymond*, 139 S. Ct. at 2391 (Alito, J., dissenting).
[126] Id.
[127] Id.

faces the threat of prison . . . , his unconditional liberty hangs in the balance," but "convictions have consequences," including a term of "[s]upervised release . . . that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison."[128] He concluded that defendants facing revocation of supervised release were entitled to "only . . . general due process rights, not other constitutional protections that unaccused and unconvicted individuals enjoy."[129]

Finally, Justice Breyer wrote a solo concurrence making clear that he "agree[d] with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is consistent with traditional parole."[130] He also said that he would not apply *Apprendi* or *Alleyne* to revocation of supervised release due to the "potentially destabilizing consequences."[131] Nevertheless, he joined the plurality in striking down § 3583(k) based on his own analysis. He observed that revocation as "typically understood" was supposed to be punishment for the defendant's "failure to follow the court-imposed conditions," not "the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct."[132] Section 3583(k), by contrast, singled out "a discrete set of federal criminal offenses" for a five-year mandatory minimum sentence.[133] He concluded that this targeted five-year mandatory minimum was unconstitutional because it "more closely resemble[d] the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution."[134]

Justice Breyer ultimately joined Justice Gorsuch in voting to strike down § 3583(k) on the ground that the provision targeted specific criminal violations for a mandatory minimum sentence. Because this minimum punishment was triggered by a judicial finding that the defendant engaged in "particular conduct" rather than a more general conclusion that the defendant refused to obey the conditions of

[128] Id. at 2399 (alteration in original) (internal quotation marks omitted) (quoting Mont v. United States, 139 S. Ct. 1826, 1833 (2019)).

[129] Id.

[130] Id. at 2385 (Breyer, J., concurring).

[131] Id.

[132] Id. at 2386 (internal quotation marks omitted) (quoting U.S. Sent'g Guidelines Manual § 7A1.3(b) (U.S. Sent'g Comm'n 2018)).

[133] Id.

[134] Id.

supervision, he concluded that § 3583(k) was more like a criminal prosecution and therefore unconstitutional.[135] Yet while the defendant in *Haymond* prevailed, all the Justices still agreed that revocation of supervised release was a deprivation of conditional liberty, not a criminal prosecution subject to full constitutional protection. Justice Alito's opinion was labeled a dissent, yet his vision of supervised release still won a majority of five votes—one circuit court even described it as the "Alito plurality."[136]

2. Original Offense

The second key distinction between prosecuting crimes and revoking supervised release for criminal violations is that revocation punishes the defendant's "original offense," not the new conduct that resulted in the violation. This rule dates back to the Court's 2000 decision in *Johnson v. United States*,[137] which addressed an Ex Post Facto Clause challenge based on the following timeline:

> *March 1994:* Defendant convicted of a crime and sentenced to imprisonment followed by supervised release,
>
> *September 1994:* Congress passes law authorizing judges to impose additional supervised release to follow imprisonment when revoking supervised release,[138] and
>
> *March 1996:* Defendant violates supervised release and is sentenced to imprisonment followed by additional supervised release.[139]

On appeal, the defendant argued that the additional term of supervised release was unconstitutional retroactive punishment because Congress had passed the statute authorizing that supervision in September 1994, *after* he was convicted and sentenced for his original offense.[140] The U.S. Court of Appeals for the Sixth Circuit disagreed, finding that the additional supervised release was not retroactive punishment because

[135] Id. (internal quotation marks omitted) (quoting U.S. Sent'g Guidelines Manual § 7A1.3(b) (U.S. Sent'g Comm'n 2018)).
[136] United States v. Doka, 955 F.3d 290, 295–96 (2d Cir. 2020).
[137] 529 U.S. 694 (2000).
[138] See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505(2)(B), 108 Stat. 1796, 2016–17.
[139] *Johnson*, 529 U.S. at 697–98.
[140] Id. at 698–99.

"revocation . . . 'imposes punishment for defendants' *new offenses* for violating the conditions of their supervised release,'" not their original convictions.[141]

The Supreme Court affirmed but explicitly rejected this reasoning, applying a circuitous chain of logic intended to forestall a range of constitutional objections to punishing criminal violations. First, the Court made clear that the Sixth Circuit was wrong to view revocation of supervised release as a penalty for the defendant's new conduct. That view had "some intuitive appeal," the Court noted, but would also raise "serious constitutional questions" because violations were not proved to a jury beyond a reasonable doubt, and when "criminal in their own right . . . may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense."[142] To "avoid[] these difficulties," the Court explained, "post[-]revocation sanctions" should be treated as "part of the penalty for the initial offense" that was the basis for imposing the term of supervised release.[143]

Adopting the original offense doctrine avoided one set of constitutional problems but ran headfirst into others. If revocation of supervised release was punishment for the defendant's original offense, then punishing violations based on legislation enacted after their original conviction "would be to apply th[at] section retroactively," in violation of the Ex Post Facto Clause.[144] The Court analogized the dilemma to a case it had decided under the parole system, which "forbade on *ex post facto* grounds the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment."[145] Yet again, however, the Court evaded this constitutional obstacle by holding that the original 1986 revocation statute had authorized the sentencing judge to impose the additional supervised release challenged by the defendant.[146] Because that statute predated the

[141] Id. at 699–700 (emphasis added) (quoting United States v. Page, 131 F.3d 1173, 1176 (6th Cir. 1997)).
[142] Id. at 700.
[143] Id.
[144] Id. at 701.
[145] Id. (citing Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967), *summarily aff'd*, 390 U.S. 713 (1968)).
[146] Id. at 713.

defendant's 1993 conviction by several years, imposing the additional supervision was not retroactive.[147]

Arguably, this resolution rendered the Court's endorsement of the "original offense" doctrine mere dicta. If the 1986 statute authorized the additional supervised release, then the Court did not need to decide whether it *would have* been retroactive to apply the September 1994 statute to the defendant. Nevertheless, *Johnson*'s original offense principle has become a cornerstone of revocation law.[148]

Indeed, nearly two decades later, all the Justices in *Haymond* invoked the original offense doctrine, although they disagreed on its implications. Justice Gorsuch said revocation must comply with the *Apprendi*/*Alleyne* rule because punishing violations is "part of the final sentence for [the] crime."[149] Justice Alito, by contrast, argued that a defendant facing revocation was not an "accused" within the meaning of the Sixth Amendment because he was "charged not with a crime, but with violating the terms of a jury-authorized sentence that flowed from his original conviction."[150] Finally, Justice Breyer agreed with Justice Alito that "[r]evocation of supervised release is typically understood as 'part of the penalty for the initial offense'" but joined the plurality in striking down § 3583(k) because the provision's focus on sex crimes made it "more like punishment for a new offense."[151]

3. Breach of Trust

The final distinction between prosecuting crimes and revoking supervised release for criminal violations is that revocation of community supervision sanctions the defendant's "breach of trust," not their actual violation conduct.[152] This theory originates in the Sentencing Commission's first sentencing guidelines on supervision violations, published in 1990.[153] In the introduction to the sentencing guidelines for violations of probation and supervised release, the Commission described

[147] Id. at 696.

[148] See, e.g., United States v. Collins, 859 F.3d 1207, 1216 (10th Cir. 2017); United States v. Jackson, 559 F.3d 368, 372 (5th Cir. 2009); United States v. Pettus, 303 F.3d 480, 487 (2d Cir. 2002).

[149] United States v. Haymond, 139 S. Ct. 2369, 2379–81 (2019).

[150] Id. at 2393 (Alito, J., dissenting).

[151] Id. at 2386 (Breyer, J., concurring) (quoting Johnson v. United States, 529 U.S. 694, 700 (2000)).

[152] U.S. Sent'g Guidelines Manual § 7A1.3(b) (U.S. Sent'g Comm'n 2021).

[153] U.S. Sent'g Guidelines Manual § 7A (U.S. Sent'g Comm'n 1990).

"two different approaches to sanctioning violations."[154] First, judges could treat violations as a "breach of trust inherent in the conditions of supervision."[155] Second, they could view them as "new federal criminal conduct."[156] The Commission endorsed the first approach, saying judges "should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator."[157]

In part, the Commission chose the "breach of trust" approach for practical reasons. "Given the relatively narrow ranges of incarceration available in many cases" and "the potential difficulty in obtaining information necessary to determine specific offense characteristics," it was "undesirable" to "develop guidelines that attempt to distinguish, in detail, the wide variety of behavior that can lead to revocation."[158]

More importantly, the Sentencing Commission adopted the breach of trust doctrine to provide theoretical support for its new, tougher policy on punishing criminal violations. Before 1984, the Parole Commission had punished parolees for criminal violations by revoking their release but also would "count[] as time in custody" any "[t]ime served on a new state or federal sentence,"[159] which "grant[ed], retroactively, the equivalent of *concurrent* sentences."[160] The Senate Report for the SRA similarly makes clear that lawmakers in supervised release did not want judges to punish

[154] Id. § 7.1.
[155] Id. § 7.3.
[156] Id. § 7.2.
[157] Id. § 7.3.
[158] Id.
[159] 28 C.F.R. § 2.21(b)(3) (1982); see also id. § 2.47(d)(1) ("A parole violator whose parole is revoked shall be given credit for all time in federal, state, or local confinement on a new offense . . . .").
[160] Moody v. Daggett, 429 U.S. 78, 87 (1976) (emphasis added). Although the Commission's general policy was to impose the equivalent of concurrent sentences, this practice was not followed in every case. See 18 U.S.C. § 4210(b)(2) (1982) (authorizing the Commission to run revocation sentence concurrently or consecutively with sentence imposed for new offense); Cohen, supra note 16, § 27:23 ("When the probationer or parolee has committed a new crime in violation of a condition of release, consecutive sentences for the original sentence and the new sentence provide punishment for both offenses."). The Supreme Court recognized the Commission's authority to impose consecutive sentences for criminal violations if it chose to do so. See Zerbst v. Kidwell, 304 U.S. 359, 363 (1938) ("Unless a parole violator can be required to serve some time in prison in addition to that imposed for an offence committed while on parole, he not only escapes punishment for the unexpired portion of his original sentence, but the disciplinary power of the Board will be practically nullified."); see also Wilkerson v. U.S. Bd. of Parole, 606 F.2d 750, 751 (7th Cir. 1979) (upholding the Commission's decision to run revocation sentence consecutively to sentence for new offense).

criminal violations with new prison sentences, since these cases should simply "be prosecuted."[161] When writing the new sentencing guidelines, however, the Sentencing Commission recommended for the first time in § 7B1.3(f) that judges revoking supervised release for criminal violations should impose sentences "*consecutive*[] to any sentence of imprisonment that the defendant is serving" even if it was for the same conduct.[162]

This novel recommendation of consecutive sentencing for criminal violations also created a conceptual problem—if revocation penalized the defendant's actual violation, then the sentence for the violation would "substantially duplicate" the sentence for the conviction.[163] The only way to avoid double punishment, therefore, would be to have the sentence for the violation "run *concurrently* with, and thus generally be subsumed in, any sentence imposed for th[e] new criminal conduct."[164] To ensure an independent legal justification for punishing criminal violations through consecutive sentencing, the Commission declared that punishing "new criminal conduct would not be the primary goal of a revocation sentence."[165] "Instead," revocation would primarily be considered punishment for the defendant's "breach of trust" in "failing to abide by the conditions of the court-ordered supervision," which would "leav[e] the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense."[166] The Commission expressly stated that it rejected the "new criminal conduct" approach to punishing violations as "inconsistent with its views" that the sentence for a criminal violation "should be in addition, or consecutive, to any sentence imposed for the new conduct."[167]

Courts describe the "'breach of trust' theory of punishment" as the "unique purpose of revocation sentences."[168] Revocation is considered a penalty for the defendant's failure to follow the conditions of supervision, not the actual behavior that resulted in the violation. In other words, when a defendant violates their supervised release by committing a new crime, the judge revoking their supervised release "may appropriately sanction . . . [their] 'breach of trust,' but may not punish [them] for the

[161] Senate Report, supra note 55, at 3182.
[162] U.S. Sent'g Guidelines Manual § 7B1.3(f) & cmt. n.5 (U.S. Sent'g Comm'n 1990).
[163] Id. at ch. 7, pt. A, 3(b).
[164] Id. (emphasis added).
[165] Id.
[166] Id.
[167] Id.
[168] United States v. Dawson, 980 F.3d 1156, 1162 (7th Cir. 2020).

criminal conduct."[169] "Drawing a (very) fine line," the judge must "differentiat[e] between *punishment* for the offense constituting the supervised release violation, and *sanctioning* the violation itself."[170]

Intriguingly, Justice Gorsuch never mentioned the breach of trust theory in his *Haymond* plurality opinion, while Justices Alito and Breyer both referred to it repeatedly. Justice Alito argued that the Sixth Amendment did not apply to revocation of supervised release because it is "not primarily a punishment for new criminal conduct" but "rather . . . that the violative act is a breach of trust."[171] Justice Breyer stressed that "[t]he consequences that flow from violation of the conditions of supervised release are first and foremost considered sanctions for the defendant's 'breach of trust' . . . not 'for the particular conduct triggering the revocation,'" but ultimately concluded that § 3583(k) broke from this principal by targeting specific criminal conduct for mandatory punishment.[172]

II. REVOCATION FOR CRIMINAL VIOLATIONS

Criminal violations are major drivers of punishment in the federal supervision system. Empirical analysis of the Commission's revocation database reveals that criminal violations account for at least half of all revocations of supervised release and a substantial majority of the total prison time imposed. Examination of federal case law shows that criminal violations drive punishment in two ways: first, by giving the government an additional justification for punishing criminal conduct, and second, by providing an easier alternative to criminal prosecution.

A. Primary Driver of Imprisonment

Based on my analysis of the Sentencing Commission's database, I estimate that criminal violations account for at least half of all revocations of supervised release and two-thirds of the total prison time imposed. These numbers reflect federal supervision policy, which prioritizes the detection and punishment of criminal violations. Despite the popular

[169] United States v. Miqbel, 444 F.3d 1173, 1182 (9th Cir. 2006).

[170] United States v. Rivera, 797 F.3d 307, 308–09 (5th Cir. 2015) (first citing United States v. Miqbel, 444 F.3d 1173, 1182 (9th Cir. 2006); and then citing United States v. Johnson, 640 F.3d 195, 203 (6th Cir. 2011)).

[171] United States v. Haymond, 139 S. Ct. 2369, 2393 (2019) (Alito, J., dissenting) (citing U.S. Sent'g Guidelines Manual ch. 7, pt. A, 3(b) (U.S. Sent'g Comm'n 2021)).

[172] Id. at 2386 (Breyer, J., concurring).

focus on technical violations, criminal violations are the true drivers of revocation punishment under supervised release.

1. Grade A/B v. Grade C Violations

Federal law mandates in 18 U.S.C. § 3583(d) that every term of supervised release include as a condition "that the defendant not commit another Federal, State, or local crime during the term of supervision." The same condition also comes pre-printed on the standard federal criminal judgment form.[173] This is the federal "obey all laws" condition,[174] which empowers the government to revoke supervised release for criminal violations.

To understand the role of criminal violations in the federal system, I analyzed all 77,568 revocations of supervised release in the Commission's database that indicated the defendant's highest "grade" of violation.[175] Unfortunately, I could not directly compare all criminal violations against all non-criminal violations because the Commission only collected information on the *highest grade of violation* for each revocation, not the defendant's *actual conduct* in committing that violation. The federal sentencing guidelines divide violations into three grades: Grade A violations are felonies involving violence, drugs, or guns, or punishable by more than 20 years' imprisonment; Grade B are all other felonies; and Grade C are all misdemeanors and all non-criminal violations of supervision.[176] Because Grade C violations include both misdemeanors (which are crimes) and technical violations (which are not crimes), I could not determine whether a defendant's conduct in revocations based on Grade C violations was criminal or non-criminal.

The closest I could come to comparing revocations for criminal violations to technical violations was to compare all revocations for Grade A and B violations to all revocations of Grade C violations. This analysis is the equivalent of comparing all felony violations to all misdemeanor

[173] U.S. Cts., AO-245B, Judgment in a Criminal Case (2019) ("You must not commit another federal, state or local crime.").

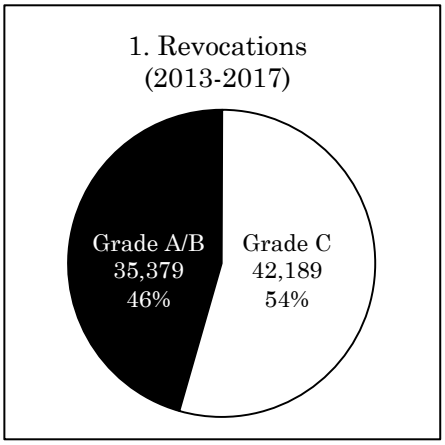
[174] Doherty, supra note 16, at 300–01.

[175] To arrive at this figure, I counted the number of revocations in the database that (1) were coded as supervised release violations (PV_VIOLTYP 2) and (2) indicated the defendant's highest grade of violation (PV_GRADVIOL 1, 2, or 3). I excluded any entries that either did not record whether they were a violation of probation or supervised release or did not indicate the defendant's highest grade of violation. This dataset is the starting point for all calculations below.

[176] See U.S. Sent'g Guidelines Manual § 7B1.1(a)(1)–(3) (U.S. Sent'g Comm'n 2021).

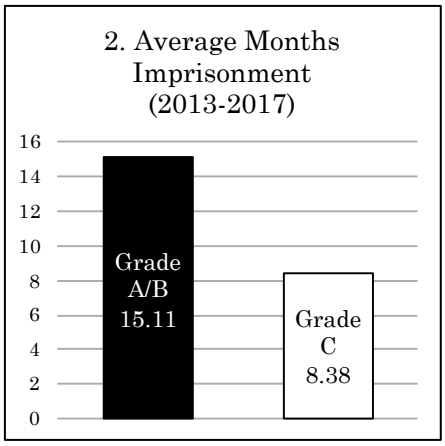
and technical violations. Because Grade C violations include both misdemeanors and technical violations, my analysis necessarily *under*estimates the total impact of criminal violations on incarceration. Nevertheless, I found that felony violations drove a substantial majority of the prison time imposed through revocation of supervised release.

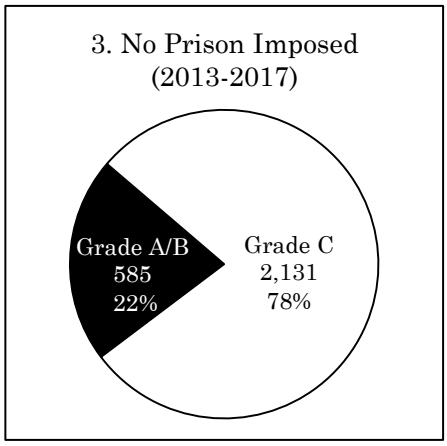
Figure 1 shows that 46% of revocations of supervised release were based on Grade A or B violations.[177] In other words, approximately half of all revocations were for new felony conduct. Because this figure also does not include revocations for misdemeanors, which are categorized as Grade C violations, the actual proportion of revocations for all criminal conduct is almost certainly higher.



[177] To arrive at this figure, I compared the number of revocations where the defendant's highest grade of violation was A or B (PV_GRADVIOL 1 or 2), to the number where the defendant's highest grade of violation was C (PV_GRADVIOL 3). The 46% Grade A and B violations is roughly consistent with a previous report by the Sentencing Commission, which found that between 2005 and 2008, criminal violations were responsible for approximately half of all revocations. See U.S. Sent'g Comm'n, Federal Offenders Sentenced to Supervised Release 68 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf. [https://perma.cc/82YZ-X6GM]. By contrast, analyses by the U.S. Courts suggest that criminal violations account for only one-third of revocations of supervised release. See U.S. Cts., Table E-7A—Federal Probation System Statistical Tables for the Federal Judiciary (December 31, 2019), https://www.uscourts.gov/statistics/table/e-7a/statistical-tables-federal-judiciary/2019/12/31 [https://perma.cc/WW93-2DES]. This discrepancy may be due to differences in categorizing violations for a failed drug test or admitted drug use, which could be viewed either as technical violations or criminal violations. See Kyckelhahn & Maisel, supra note 9, at 11–12.

Next, Figures 2 and 3 show that judges punished Grade A and B violations twice as harshly as Grade C violations (15.11- versus 8.38-month average sentence).[178] Judges almost never declined to impose a prison sentence (only 2,716 cases total),[179] but when they did, they were far more likely to be lenient with a Grade C violation (78%) than a Grade A or B violation (22%).[180] This result is also consistent with research on state-level revocations, which shows that "new crimes were more likely to lead to revocation than technical violations."[181]





Finally, Figure 4 demonstrates that Grade A and B violations were responsible for 63% of the total prison time imposed via revocation of supervised release.[182] Overall, felony violations accounted for approximately 490,000 months of imprisonment between 2013 and 2017,

[178] To arrive at this figure, I compared the average sentence imposed (PV_SENTOT) where the highest grade of violation was A or B (PV_GRADVIOL 1 or 2) to the average sentence imposed (PV_SENTOT) where the highest grade of violation was C (PV_GRADVIOL 3).

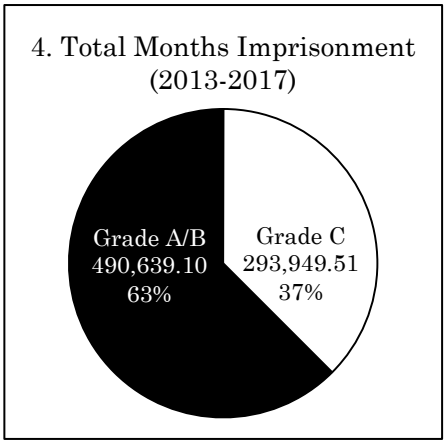
[179] To arrive at this figure, I counted the number of revocations where the type of sentence imposed did not include imprisonment (PV_SENTIMP 3, 4, 5, 6, 7, or 8).

[180] To arrive at this figure, I compared the number of revocations where (1) the highest grade of violation was A or B (PV_GRADVIOL 1 or 2) and (2) the type of sentence imposed did not include any imprisonment (PV_SENTIMP 3, 4, 5, 6, 7, or 8) to the number of revocations where (1) the highest grade of violation was C (PV_GRADVIOL 3) and (2) the type of sentence imposed did not include any imprisonment (PV_SENTIMP 3, 4, 5, 6, 7, or 8).

[181] Daly, supra note 5, at 24.

[182] To arrive at this figure, I compared the total prison time imposed (PV_SENTTOT) where the highest grade of violation was A or B (PV_GRADVIOL 1 or 2) to the total prison time imposed (PV_SENTTOT) where the highest grade of violation was C (PV_GRADVIOL 3).

equivalent to roughly 8,200 years of imprisonment imposed every year for felony violations of supervised release. Once again, by leaving out misdemeanor violations, this number *under*states the punitive impact of revocations for criminal conduct.



To some extent, these results are unsurprising. Grade A and B violations are more serious, so judges punished them more severely than Grade C violations. However, this analysis also illustrates an important and unappreciated aspect of the federal supervision system. While technical violations attract the most attention, criminal violations are the primary drivers of imprisonment via revocation of supervised release.

2. Federal Supervision Policy

The results of my empirical analysis reflect federal supervision policy, which prioritizes the detection and punishment of new criminal conduct. In addition to the "standard . . . tools" of supervision like reporting requirements and search conditions,[183] the federal government also uses additional legal tools to identify and sanction criminal activity by defendants on supervised release.

The federal supervision system includes multiple, overlapping layers of surveillance aimed at identifying new criminal activity. At the

[183] U.S. Cts., AO-245B, Judgment in a Federal Criminal Case (2019); see also U.S. Sent'g Guidelines Manual § 5D1.3(c)(1)–(2), (6) (U.S. Sent'g Comm'n 2021) (listing the " 'standard' conditions . . . recommended for supervised release").

beginning of every term of supervised release, the probation officer broadcasts a "Federal Bureau of Investigation flash notice highlighting the [defendant's] supervision sentence and requesting notification of new criminal conduct," which "serve[s] as notification to law enforcement officers of the offender's status and [the probation office's] interest in the case."[184] Officers also conduct periodic "criminal record checks," including searches for "national and local arrests in any area where the offender resides, works, travels, or otherwise spends time."[185] As an additional "source[] of information about an offender's pattern of criminal activities and associates," officers "make frequent contact with law enforcement agencies that may have information about the activities of the offender."[186] Finally, anyone on supervised release must notify their probation officer within 72 hours if they are "arrested or questioned by a law enforcement officer."[187]

When a probation officer believes that a defendant has violated a condition of supervision, they must inform the district judge and local U.S. Attorney, who will then decide whether to initiate revocation proceedings.[188] According to the federal sentencing guidelines, officers are required to report all Grade A and B violations to the government, meaning all felony conduct.[189] Officers also must report all Grade C violations unless they are "minor, . . . not part of a continuing pattern of violations," and "will not present an undue risk to an individual or the public."[190]

Once revocation proceedings begin, the process is streamlined and virtually certain to result in imprisonment. The prosecution may prove a criminal violation based solely on the record of a new conviction,

[184] 8E Admin. Off. of U.S. Cts., Guide to Judiciary Policy § 430.40 (2003) (as amended 2010).

[185] Id.

[186] Id. § 450.10.

[187] U.S. Sent'g Guidelines Manual § 5D1.3(c)(9) (U.S. Sent'g Comm'n 2021).

[188] See 18 U.S.C. § 3603(8)(B); United States v. Mejia-Sanchez, 172 F.3d 1172, 1174–75 (9th Cir. 1999).

[189] U.S. Sent'g Guidelines Manual § 7B1.2(a) (U.S. Sent'g Comm'n 2021).

[190] Id. § 7B1.2(b). One survey of federal probation officers found "the vast majority . . . supported judicial interventions with offenders who picked up new charges." Mark Jones & John J. Kerbs, Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations, 71 Fed. Prob. 9, 12 (2007); see also Daly, supra note 5, at 25 ("[P]robation officers and judges . . . reported that a violation or revocation was the appropriate response to a new crime.").

obviating the burden to establish the violation by other evidence.[191] The sentencing guidelines also instruct that judges "shall" revoke supervised release for all Grade A and B violations and "may" revoke or extend/modify the conditions of supervision for Grade C violations.[192] Under the "mandatory revocation" provision enacted at 18 U.S.C. § 3583(g), moreover, judges *must* revoke supervised release and impose a prison sentence if a defendant violates supervised release by possessing drugs, possessing guns, testing positive for drugs more than three times in one year, or refusing a drug test.[193] From start to finish, the federal supervision system aims to identify and punish criminal violations.

B. Additional Justification for Punishment

Federal case law shows that revocation for criminal violations drives punishment by giving the government an additional justification for punishing criminal activity, which allows it to increase sentences for criminal convictions. Below, I explain how the government uses criminal violations to increase punishment as a recidivist enhancement and second opinion mechanism. Later, in Section IV.B, I argue that this practice is unjustified and unfair.

1. Increase Punishment

When a defendant on supervised release is convicted of a new crime, revoking their supervised release and imposing a consecutive sentence allows the government to increase the amount of time they will spend in prison for their criminal conduct.[194] Imagine, for example, a defendant on supervised release is arrested for selling drugs, charged with distribution

[191] See Carchman v. Nash, 473 U.S. 716, 731–32 (1985) ("[T]he convictions conclusively establish the probation violation" and the defendant "may not relitigate the factual issue of guilt of the probation-violation charge when it is established by a conviction . . . ."); see also United States v. Trung Dang, 907 F.3d 561, 565 (8th Cir. 2018) (holding that state conviction sufficed to show the nature of defendant's conduct warranting revocation); United States v. Spraglin, 418 F.3d 479, 481 (5th Cir. 2005) (holding that state conviction established that the defendant's supervised release terms had been violated).

[192] U.S. Sent'g Guidelines Manual § 7B1.3(a)(1)–(2) (U.S. Sent'g Comm'n 2021). The guidelines also recommend punishments based on the violation grade and the defendant's criminal history, ranging from 3–9 to 51–63 months' imprisonment. Id. § 7B1.4(a).

[193] 18 U.S.C. § 3583(g).

[194] Cf. Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) ("In most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him.").

of a controlled substance, convicted, and sentenced to five years in prison. The government can then revoke their supervised release for having committed the crime of drug distribution and impose a consecutive two-year sentence, extending their total amount of prison time to seven years. By providing an additional justification for punishing criminal conduct, criminal violations allow the federal government to increase the penalty for crimes committed on supervised release.

The Sentencing Commission officially endorses the use of criminal violations to increase punishment. As noted earlier, § 7B1.3(f) of the sentencing guidelines recommends that when a defendant violates their supervised release by committing a new crime, the sentencing judge should revoke their supervision and impose a prison term to "run consecutively" to whatever sentence they receive for the new conviction.[195] In other words, the guidelines instruct that the judge should require the defendant to serve their sentence for the criminal violation after they complete their sentence for the criminal offense, thereby increasing their total time in prison.

Consecutive sentencing of criminal violations can dramatically increase a defendant's total punishment. In *United States v. Schonewolf*, for example, a defendant on supervised release who was "addicted to opiates" was convicted in state court of selling heroin out of her house and sentenced to two to four years of imprisonment.[196] The district court revoked her supervised release based on the criminal violation and sentenced her to a consecutive forty-month term of imprisonment, effectively doubling her total punishment for the drug conviction solely because she was on supervised release at the time of the criminal conduct.[197] In the margin, I cite multiple other cases imposing consecutive revocation sentences for criminal violations that doubled or even tripled the defendant's total prison time.[198]

[195] U.S. Sent'g Guidelines Manual § 7B1.3(f) & cmt. n.4 (U.S. Sent'g Comm'n 2021); see also supra Section I.B & Subsection I.C.3 (discussing revocation process and consecutive revocation sentencing). Even a concurrent revocation sentence can increase a defendant's punishment for future crimes by aggravating their criminal history. Kyckelhahn & Maisel, supra note 9, at 5.

[196] United States v. Schonewolf, 905 F.3d 683, 685 (3d Cir. 2018).

[197] Id. at 686.

[198] See, e.g., United States v. Duckett, 935 F.3d 594, 596 (D.C. Cir. 2019) (offense sentence thirteen months, revocation sentence twenty-four months); United States v. Kenny, 846 F.3d 373, 375 (D.C. Cir. 2017) (offense sentence forty-eight months, revocation sentence thirty months); United States v. Valure, 835 F.3d 789, 790 (8th Cir. 2016) (offense sentence sixty-three months, revocation sentence thirty-six months); United States v. Banks, 743 F.3d 56, 58

Even when a defendant on supervised release receives a long prison term for a new conviction, the federal government may increase their penalty even further by imposing a consecutive revocation sentence for the criminal violation. In *United States v. Huusko*, for instance, a defendant on supervised release was convicted of armed robbery in state court and sentenced to 15 years' imprisonment.[199] The district court then revoked his supervised release for the criminal violation and imposed a consecutive 24-month sentence, which the Seventh Circuit affirmed, explaining that "at revocation . . . it is primarily th[e] breach of trust that is sanctioned" and "it is not unreasonable for this sanction to be consecutive to any sentence imposed for the underlying conduct."[200] The margin provides many more examples of revocations for criminal violations added to already lengthy punishments for convictions.[201]

Courts justify consecutive sentencing for criminal violations based on the special doctrines of revocation law. As the Supreme Court admitted in *Johnson v. United States*, without the "original offense" principle, revocation based on a new criminal conviction would violate the Double Jeopardy Clause by penalizing the defendant twice for the same conduct.[202] Similarly, the Sentencing Commission acknowledged in its introduction to the revocation guidelines that it was adopting the "breach of trust" doctrine because otherwise imposing a consecutive revocation sentence for a criminal violation would be unnecessary.[203] To provide an independent justification for imposing consecutive sentences on criminal

(3d Cir. 2014) (offense sentence eighteen months, revocation sentence thirty-three months); United States v. Carter, 730 F.3d 187, 189–90 (3d Cir. 2013) (offense sentence nine to twenty-three months, revocation sentence thirty-seven months); United States v. Kreitinger, 576 F.3d 500, 503 (8th Cir. 2009) (offense sentence forty-eight months, revocation sentence fifty-eight months).

[199] United States v. Huusko, 275 F.3d 600, 602 (7th Cir. 2001).

[200] Id. at 602–03.

[201] See United States v. Napper, 978 F.3d 118, 122 (5th Cir. 2020) (offense sentence 240 months, revocation sentence thirty-seven months); United States v. Trung Dang, 907 F.3d 561, 563 (8th Cir. 2018) (offense sentence 240 months, revocation sentence sixty months); United States v. Adams, 820 F.3d 317, 325 (8th Cir. 2016) (offense sentence 240 months, revocation sentence eighteen months); United States v. Rivera, 784 F.3d 1012, 1014 (5th Cir. 2015) (offense sentence 336 months, revocation sentence sixty months); United States v. Woodrup, 86 F.3d 359, 360 (4th Cir. 1996) (offense sentence 240 months, revocation sentence twenty-four months).

[202] Johnson v. United States, 529 U.S. 694, 700 (2000).

[203] U.S. Sent'g Guidelines Manual ch. 7, pt. A, 3(b) (U.S. Sent'g Comm'n 1990).

violations, revocation has to be "a modification of the terms of the defendant's original sentence"[204] based on their "breach of trust."[205]

The breach of trust theory of revocation does not just authorize consecutive punishment for criminal violations but practically demands it. In one opinion for the Seventh Circuit, Judge Posner invoked the principle, "unmistakable though implicit, and so obviously sound that it would take extraordinary circumstances to justify a departure from it," "that every separate violation of law deserves a separate sanction, so that no violation shall go unsanctioned."[206] Violating supervised release "is not a crime as such," he explained, but rather "a 'breach of trust,'" and "it would be an abuse of discretion for the district judge to impose a concurrent sentence for the violation of supervised release, because it would mean that he had failed to impose any sanction for committing the violation."[207]

2. Recidivist Enhancement

Increasing punishment for criminal convictions through consecutive revocation sentencing is a form of a recidivist sentence enhancement. The judge imposes a consecutive revocation sentence to extend the defendant's total time in prison on the ground that their criminal conduct was more culpable because they engaged in it while under supervised release. Although defendants have argued that the sentence imposed for the conviction will already include a recidivist penalty, courts use the law of revocation to justify additional recidivist punishment for criminal violations.

Committing a crime while under community supervision is considered particularly serious and worthy of additional punishment. A person "who, after committing an offense and being placed on supervised release for that offense, again commits" a crime "is not only more likely to continue on that path, but also has demonstrated to the court that the violator has little respect for its command."[208] As one district judge put it when revoking the supervised release of a defendant who sexually abused a

[204] United States v. Wyatt, 102 F.3d 241, 245 (7th Cir. 1996).

[205] See United States v. Contreras-Martinez, 409 F.3d 1236, 1241 (10th Cir. 2005).

[206] United States v. Hill, 48 F.3d 228, 232 (7th Cir. 1995) (Posner, J.).

[207] Id. at 232–33; see also United States v. Coombs, 857 F.3d 439, 451 (1st Cir. 2017) (claiming that a defendant would escape meaningful punishment if they were not punished for both committing the criminal offense and violating the conditions of supervised release).

[208] United States v. Simtob, 485 F.3d 1058, 1063 (9th Cir. 2007).

minor: "Considering [the defendant] was willing to commit this egregious act while under federal supervision indicates pervasive criminal thinking and sexual deviancy."[209] Judges impose consecutive sentences for criminal violations to reflect the greater blameworthiness of recidivism on supervised release.

But even if crimes committed under supervision deserve greater punishment, consecutive revocation sentencing still seems to duplicate the enhancement already contained in the sentence for the defendant's new criminal conviction. For example, imagine that a defendant on supervised release is accused of shooting a rival, charged with aggravated assault, and convicted at trial. Prosecutors will undoubtedly inform the sentencing judge that the defendant's assault was committed while he was on supervised release. The judge will obviously view that fact as an aggravating circumstance and impose a longer prison sentence as a result. In fact, the federal guidelines specifically recommend a sentence enhancement in this scenario, adding two points to the defendant's criminal history score if they committed their offense "while under any criminal justice sentence, including probation, parole, [or] supervised release."[210] Because the sentence for the conviction will already include an enhancement for committing the assault while under supervision, revoking supervised release and imposing a consecutive sentence seems to punish the defendant twice on the exact same basis.

Nevertheless, courts cite the special doctrines of revocation law to reject claims that consecutive sentencing as a recidivist enhancement inflicts unfair double punishment. In *United States v. Roe*, for example, a defendant on supervised release was convicted of possessing a firearm as a felon.[211] The sentencing judge enhanced his criminal history score for committing the crime while under supervision and sentenced him to 120 months' imprisonment for the conviction. The judge also revoked his supervised release based on the criminal violation he committed by possessing the weapon and imposed a consecutive thirty-six-month prison

[209] United States v. Trung Dang, 907 F.3d 561, 563 (8th Cir. 2018).

[210] U.S. Sent'g Guidelines Manual § 4A1.1(d) (U.S. Sent'g Comm'n 2021); see also United States v. Franco-Flores, 558 F.3d 978, 981 (9th Cir. 2009) (referring to the sentencing guidelines in determining whether a defendant should receive additional criminal history points).

[211] United States v. Roe, 9 F.4th 754, 754 (8th Cir. 2021).

sentence, for a total prison term of 156 months.[212] On appeal, the Eighth Circuit held these two sentences did not amount to double punishment:

> The firearm sentence and the supervised-release sentence "penalize distinct aspects of [the defendant's] conduct and distinct harms." The firearm sentence penalizes [the defendant] for being a felon in possession of a firearm. The supervised-release sentence penalizes him for violating his supervised release.[213]

Because punishment for crimes versus criminal violations rely on different justifications, the court permitted the government to use consecutive sentences for criminal violations as a recidivist enhancement.

3. Second Opinion

Increasing punishment for criminal convictions through consecutive revocation sentencing is also a kind of "second-opinion mechanism." Professor Adrian Vermeule has defined a "second-opinion mechanism" as an institutional arrangement for decision making based on "two successive opinions on some issue of fact, causation, policy, or law from some decision-making body or bodies."[214] He argued that second opinions can improve outcomes by encouraging a "sober second thought," "epistemic diversity," and "certainty" that the initial decision is correct.[215] Examples of second-opinion mechanisms in American constitutional law include bicameralism (two legislative bodies enacting law), separation of powers (multiple branches of government taking significant actions), judicial review of agency action (judges reviewing decisions by administrative agencies), and collateral review (criminal defendants seeking relief from multiple courts).[216]

Revocation for criminal violations is a second-opinion mechanism embedded in federal criminal law. When a defendant on supervised release commits a new crime, the judge can revoke their supervision and impose a consecutive sentence as a way of giving a successive opinion on

[212] Id. at 755–56.

[213] Id. at 756 (quoting United States v. Waldner, 580 F.3d 699, 707 (8th Cir. 2009)); see also United States v. Abreu-Garcia, 933 F.3d 1, 5 n.1 (1st Cir. 2019) (dismissing defendant's argument that raising his criminal history score for committing a new criminal offense, in addition to receiving a consecutive revocation sentence, was "double counting").

[214] Adrian Vermeule, Second Opinions and Institutional Design, 97 Va. L. Rev. 1435, 1448 (2011).

[215] Id. at 1449, 1452, 1456.

[216] Id. at 1436–37, 1440–41.

the appropriate punishment for their new criminal conduct. If the judge determines that the sentence imposed for the conviction was too short, then they can increase the total penalty by imposing a consecutive revocation sentence. If they conclude the sentence was appropriate, then they can impose a concurrent sentence or simply decline to revoke supervision at all. One judge explained the logic in a case where a defendant on supervised release had been charged with aggravated assault in state court:

> Whether state incarceration is especially lenient or especially harsh should inform this Court's view of how to structure its revocation sentence . . . If [the defendant] were to receive the state statutory maximum [of thirty years' imprisonment], a revocation sentence wholly consecutive to the state sentence would appear less than parsimonious. By contrast, if he receives a two-year state sentence, a federal sentence made wholly concurrent would appear insufficient.[217]

District courts may even "defer the revocation hearing" until after the prosecution in order "to consider . . . the sentence imposed for the underlying crime that caused the revocation."[218]

The courts of appeal encourage sentencing judges to use consecutive sentences for criminal violations as a second-opinion mechanism. In *United States v. Hill*, for example, the defendant violated supervised release by using drugs, stealing, driving without insurance on a suspended license, and giving a false name to a police officer, for which he was convicted in state court and sentenced to three years in prison.[219] The district judge then revoked his supervised release based on the new convictions and imposed a consecutive twenty-one-month sentence.[220] On appeal, the Seventh Circuit reversed the sentence on procedural grounds but emphasized that a consecutive penalty was appropriate given the light punishment the defendant had received for his conduct in state court:

> We are not impressed by the length of his state sentence. So hardened has the nation become to murder, lucrative drug deals, and gigantic swindles that a "mere" thief is likely to seem undeserving of substantial

[217] United States v. Reeks, 441 F. Supp. 2d 123, 128 & n.13 (D. Me. 2006).
[218] United States v. Reyes-Solosa, 761 F.3d 972, 975–76 (9th Cir. 2014).
[219] United States v. Hill, 48 F.3d 228, 230 (7th Cir. 1995).
[220] Id. at 230.

> punishment; but we do not think that so insouciant an attitude toward theft can be justified.[221]

By providing an additional justification for punishment, revocation for criminal violations allows the government to increase sentences for crimes committed on supervised release.

C. Easier Alternative to Prosecution

The second way federal case law shows that revocation for criminal violations drives punishment is by giving the government an easier alternative to criminal prosecution without a full criminal trial. Below, I explain how prosecutors use criminal violations to ease punishment by avoiding procedural rights and expanding the power to punish. Later, in Section IV.B, I argue that revoking supervised release in these cases may be justified in rare circumstances but also is constitutionally corrosive.

1. Ease Punishment

Revoking supervised release for criminal violations is easier for the government than criminal prosecution. Criminal prosecution requires the government to prove its allegations to a jury at trial beyond a reasonable doubt.[222] Revocation of supervised release, by contrast, only requires that allegations be proved to a judge by a preponderance of the evidence.[223]

The Department of Justice officially endorses the use of criminal violations to ease punishment. Section 9.27 of the Department's *Justice Manual* recommends as one of the "Principles of Federal Prosecution" that when federal prosecutors assess whether to prosecute a defendant who committed a crime while under community supervision, they "consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by

[221] Id. at 233; see also United States v. Rivera, 784 F.3d 1012, 1015–16 (5th Cir. 2015) (noting that the district court judge justified revocation of supervised release and imposition of the maximum five-year sentence for the defendant's criminal violations in part because she thought that the defendant's prior punishments for murder and burglary were insufficiently severe).

[222] In re Winship, 397 U.S. 358, 361 (1970).

[223] See 18 U.S.C. § 3583(e)(3); see also Fed. R. Crim. P. 32.1 (setting rules for revocation proceedings).

commencing a new prosecution."[224] In other words, prosecutors should revoke supervision for criminal violations rather than prosecute that conduct as a criminal offense if doing so better serves the "public interest."[225]

Unsurprisingly, prosecutors often prefer this easier method of punishing crime. In *Morrissey v. Brewer*, the Supreme Court observed that when a "parolee is accused of another crime," revocation was "often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."[226] As Professor Bill Stuntz explained, "[s]ubstituting an easy-to-prove crime for one that is harder to establish . . . makes criminal litigation cheaper for the government," and "[l]ike most of us, line prosecutors are likely to seek to make their jobs easier, to reduce or limit their workload where possible."[227] Federal prosecutors therefore have "every incentive" to revoke supervised release rather than prosecute,[228] which requires "substantially less effort."[229]

Nevertheless, the federal government did not always encourage the use of revocation as an easier alternative to trial. Before the 1970s, the Parole Commission's policy was to wait for criminal violations to be resolved through prosecution, not revocation, based on its view that "an alleged violator should be given every opportunity to have new charges fully adjudicated by local courts," including "an opportunity to face his accuser and produce witnesses."[230] Even if a parolee was accused of "a serious

[224] U.S. Dep't of Just., Justice Manual § 9-27.230 (2020) [hereinafter Justice Manual], https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution [https://perma.cc/H8GE-B7G5].

[225] Id.

[226] Morrissey v. Brewer, 408 U.S. 471, 479 (1972); see also Jones v. Cunningham, 371 U.S. 236, 242 n.19 (1963) (observing that the obey-all-laws condition, "at first blush innocuous, is a significant restraint [on the defendant's liberty] because it is the Parole Board members or the parole officer who will determine whether such a violation has occurred").

[227] William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 520, 535 (2001).

[228] Stephen A. Simon, Re-Imprisonment Without a Jury Trial: Supervised Release and the Problem of Second-Class Status, 69 Clev. St. L. Rev. 569, 595 (2021).

[229] Brett M. Shockley, Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders, 67 Wash. & Lee L. Rev. 353, 387 (2010).

[230] See District of Columbia Appropriations for Fiscal Year 1968: Hearing on H.R. 8569 Before the Subcomm. of the S. Comm. on Appropriations, 90th Cong. 2975 (1967) [hereinafter Hearings on H.R. 8569] (statement of Walter Dunbar, U.S. Parole Bd.). The United States Board of Parole was the original name of the United States Parole Commission,

crime," the Commission's "policy [was] to have a conviction first" due to "a concern . . . under our Constitution."[231] By 1968, legislators persuaded the parole commissioners to change their policy and pursue revocation of parole without delay in cases where "the person is a threat to others" or "there is an immediate issue of public protection."[232] Even this standard, however, was narrower than the Department of Justice's public interest policy.

Recently, Justices and judges have questioned the fairness of using revocation as an alternative to prosecution. In *Haymond*, Justice Gorsuch warned that the "displacement of the jury's traditional supervisory role, under cover of a welter of new labels, exemplifie[d] the 'Framers' fears that the jury right could be lost not only by gross denial, but by erosion.'"[233] He asked, with a hint of sarcasm, "[W]hy bother with an old-fashioned jury trial for a new crime" when there is the option of "a quick-and-easy 'supervised release revocation hearing' before a judge?"[234]

which became known as such in 1976. Organization, Mission and Functions Manual: United States Parole Commission, Dep't of Just. (Sept. 2022), https://www.justice.gov/doj/organization-mission-and-functions-manual-united-states-parole-commission [https://perma.cc/THZ7-R4T3].

[231] Hearings on H.R. 8569, supra note 230, at 2976–77 (1967) (statements of Sen. Robert C. Byrd, Chairman, Subcomm. of the S. Comm. on Appropriations, and Walter Dunbar, U.S. Parole Bd.).

[232] Id. at 2975 (statement of Walter Dunbar, U.S. Parole Bd.); see also Note, Parole Revocation in the Federal System, 56 Geo. L.J. 705, 712 (1968) (observing that the Board changed its policy from waiting to execute a warrant against a parolee until after a court disposed of the indictment to executing a warrant immediately where there is an issue of public protection).

[233] United States v. Haymond, 139 S. Ct. 2369, 2381 (2019) (quoting Apprendi v. New Jersey, 530 U.S. 466, 483 (2000)).

[234] Id. (citation omitted). When a defendant on supervised release is accused of a new crime, the government's only incentive to prosecute rather than revoke supervision for criminal violations is that the maximum sentence for a conviction may be higher than the maximum sentence for a violation. Justice Manual, supra note 224, § 9-27.300 ("[T]he attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence . . . ."). By statute, the maximum sentence for a supervised release violation is five years' imprisonment. 18 U.S.C. § 3583(e)(3). If prosecutors want to secure a longer prison sentence, then they may prefer prosecution over (or in addition to) revocation. Yet these situations are rare, as the average sentence for a state or federal conviction is less than five years' imprisonment. See U.S. Sent'g Comm'n, Overview of Federal Criminal Cases: Fiscal Year 2019, at 9 (2020) [hereinafter Overview], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/F9CK-AW8R]; Danielle Kaeble, U.S. Dep't of Just., Time Served in State Prison, 2016, at 1 (2018), https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf [https://perma.cc/8VNN-TG26].

Judge Underhill, sitting by designation on the Second Circuit, authored a dissent calling for more procedural rights in proceedings to revoke supervised release, arguing that the "system was intended to serve a rehabilitative purpose; it should be used to do so, not to provide an expedient means of returning people to prison."[235] Even the dissenting judge in the Eighth Circuit decision below *Morrissey* decried the "abuse of revocation" when "paroles have been revoked . . . because of the parolee's *alleged* involvement in a new crime[, r]ather than tak[ing] the time, the expense and the possibility that the parolee may be found innocent" at trial.[236]

The "original offense" and "breach of trust" doctrines of revocation provide the legal justification for applying a lower constitutional standard at revocation proceedings.[237] Both *Johnson* and *Haymond* recognized these doctrines as necessary to avoid serious constitutional problems with using criminal violations to ease punishment. If revoking supervised release penalized the defendant's "violative conduct," the Court explained, then it would amount to unconstitutional criminal punishment without a jury trial.[238] To ensure that revocation proceedings complied with the Fifth and Sixth Amendments, revocation could not be punishment for the defendant's violative conduct, but rather for their "violati[on of] the terms of a jury-authorized sentence that flowed from [their] original conviction."[239]

2. Avoid Rights

Easing punishment of criminal conduct through revocation proceedings allows the government to avoid procedural rights that would apply in a criminal prosecution. Not only are revocation hearings exempt from the jury right, but also from the Fourth Amendment, the privilege against self-incrimination, the right to a speedy trial, the right to confront adverse witnesses, the right to effective assistance of counsel, and the Federal Rules of Evidence.[240] If a defendant on supervised release successfully invokes a constitutional protection to stymie a criminal

[235] United States v. Peguero, 34 F.4th 143, 179 (2d Cir. 2022) (Underhill, J., dissenting).
[236] Morrissey v. Brewer, 443 F.2d 942, 954 n.5 (8th Cir. 1971) (Lay, J., dissenting).
[237] United States v. Henderson, 998 F.3d 1071, 1077 (9th Cir. 2021).
[238] See Johnson v. United States, 529 U.S. 694, 700 (2000).
[239] United States v. Haymond, 139 S. Ct. 2369, 2393 (2019) (Alito, J., dissenting).
[240] See Schuman, supra note 73, at 590–91.

prosecution, prosecutors can avoid that right by revoking the defendant's supervised release instead.

Justice Souter warned about this use of criminal violations in his dissenting opinion in *Pennsylvania Board of Probation & Parole v. Scott*.[241] There, a majority of the Supreme Court held that the Fourth Amendment's exclusionary rule did not apply to parole revocation, which "deprives the parolee . . . 'only of . . . conditional liberty,'" not "the absolute liberty to which every citizen is entitled."[242] In dissent, Justice Souter argued that without the exclusionary rule, the government could invoke revocation proceedings as a "consolation prize" whenever evidence was suppressed at trial.[243] He highlighted "the obvious popularity of revocation in place of new prosecution," given that "the odds of revocation are very high" and "the sentence to be served . . . may well be long enough" to be "the practical equivalent of a new sentence for a separate crime."[244] If the exclusionary rule did not apply, he argued, there would be "no influence capable of deterring Fourth Amendment violations when parole revocation is a possible response to new crime."[245]

As Justice Souter envisioned, federal prosecutors can now use revocation as an alternative to criminal prosecution whenever the Fourth Amendment prevents them from admitting illegally obtained evidence at trial. In *United States v. Armstrong*, for example, a defendant on supervised release was stopped and searched by the police, who found him in possession of a gun and 3.1 grams of cocaine base.[246] Federal prosecutors indicted him in the U.S. District Court for the District of Columbia and also sought to revoke his supervised release in the District Court for the Eastern District of Virginia.[247] In the D.C. prosecution, the defendant "successfully moved to suppress the evidence retrieved during the stop" based on "inconsistencies in the police officers' testimony."[248] The prosecutors then dropped the criminal charges and used the same evidence across the river in Virginia to prove he violated his supervised release.[249] The district judge at the revocation hearing admitted the

[241] See Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 378 (1998) (Souter, J., dissenting).
[242] Id. at 365 & n.5 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
[243] Id. at 378.
[244] Id. at 379.
[245] Id.
[246] United States v. Armstrong, 30 F. Supp. 2d 901, 902 (E.D. Va. 1998).
[247] Id. at 901–02.
[248] Id. at 902 & n.2.
[249] Id. at 902, 907.

evidence, found him in violation, and sentenced him to twenty-seven months in prison.[250] The U.S. Court of Appeals for the Fourth Circuit affirmed on the ground that "the exclusionary rule does not apply in federal supervised release revocation proceedings," as the defendant enjoys only "a limited degree of freedom . . . in return for the . . . assurance that he . . . compl[ies] with the terms."[251] The margin cites many more examples of prosecutors using revocation to avoid Fourth Amendment rights in this manner.[252]

Federal prosecutors can also use revocation after losing at trial to evade the prohibition on successive prosecutions under the Fifth Amendment's Double Jeopardy Clause. One extraordinary example is *United States v. Frederickson*.[253] There, a defendant on supervised release was accused of attacking an intern at the probation office and charged with assaulting a federal employee.[254] He claimed self-defense, and, following a three-day trial, the jury returned a verdict of not guilty.[255] Immediately following his acquittal, prosecutors "insisted on pursuing the supervised release violation, given the lower burden of proof . . . applicable at revocation proceedings."[256] The district court ordered him detained, found him in violation, and "imposed the maximum allowable sentence—twenty-four months in prison followed by eight months of supervised release."[257]

On appeal, the First Circuit rejected the defendant's argument that revoking his supervised release based on conduct for which he had just been acquitted violated the Double Jeopardy Clause.[258] The court explained that "collateral estoppel . . . does not bar the government's use of acquitted conduct" to revoke supervised release because revocation proceedings "deprive[] an individual 'only of [] conditional liberty'" and

[250] Id.

[251] United States v. Armstrong, 187 F.3d 392, 393–94 (4th Cir. 1999).

[252] United States v. Hebert, 201 F.3d 1103, 1104 (9th Cir. 2000); United States v. Alexander, No. CR-3-90-96, CR-3-90-99(1), 1996 WL 1671233, at *3 (S.D. Ohio Nov. 12, 1996). The government used parole revocation similarly. See Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 378 (1998) (Souter, J., dissenting) (collecting cases); Cohen, supra note 16, § 17:16 ("[T]he revocation proceeding, often based on the items discovered in the [illegal] search, is used in lieu of a criminal trial.").

[253] 988 F.3d 76 (1st Cir. 2021).

[254] Id. at 80–82.

[255] Id. at 82.

[256] Id.

[257] Id. at 82–84.

[258] Id. at 84–85.

are subject to a lower standard of proof.[259] The court also held that it was not fundamentally unfair to give prosecutors a "second bite at the apple" because "new criminal conduct committed . . . on supervised release" has a "dual effect."[260] "In addition to running afoul of a criminal statute," the court concluded, "the offending conduct simultaneously and independently violates the terms of release for the initial offense," which entitled prosecutors "to pursue both a new criminal conviction and revocation as 'part of the penalty for the initial offense.'"[261] Additional instances of the government revoking supervised release based on acquitted conduct are cited in the margin.[262]

Finally, federal prosecutors can use revocation proceedings to avoid the Sixth Amendment's Confrontation Clause, which restricts introduction of testimonial hearsay evidence in criminal prosecutions.[263] In domestic violence cases, the criminal defendant's right to confront adverse witnesses often proves to be an obstacle because the victim recants or refuses to testify, leaving as the only evidence their hearsay statement to police, which is inadmissible at trial.[264] Although prosecutors cannot use these hearsay statements in a criminal prosecution, they can still introduce them at a revocation hearing. Because "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only . . . conditional liberty," courts hold that "the full protection provided . . . under the Sixth Amendment right to confrontation does not apply."[265]

United States v. Robinson offers a vivid example of prosecutors using revocation to evade the confrontation right in a domestic violence case.[266] In that case, a defendant on supervised release was arrested and charged in state court with assaulting his wife.[267] She gave a statement to police at

[259] Id. at 84–86 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
[260] Id. at 87.
[261] Id. (quoting United States v. McInnis, 429 F.3d 1, 5 (1st Cir. 2005)).
[262] See United States v. Brown, No. 21-3766, 2022 WL 2709431, at *1–2 (8th Cir. July 11, 2022); United States v. McCall, No. 21-50201, 2021 WL 4933416, at *1 (5th Cir. Oct. 21, 2021); see also United States v. Rentas-Felix, 235 F. Supp. 3d 366, 369–70 (D.P.R. 2017) (revoking supervised release after a judge dismissed indictment for lack of probable cause).
[263] Crawford v. Washington, 541 U.S. 36, 53–54 (2004).
[264] See Tom Lininger, Prosecuting Batterers After *Crawford*, 91 Va. L. Rev. 747, 748, 750 (2005).
[265] United States v. Dunlap, No. 8:06CR244, 2012 WL 3656636, at *2 (D. Neb. Aug. 24, 2012) (quoting United States v. Ray, 530 F.3d 666, 668 (8th Cir. 2008)).
[266] United States v. Robinson, 430 F. App'x 761, 762–63 (11th Cir. 2011) (per curiam).
[267] Id.

the crime scene but later recanted under oath, forcing the state to dismiss the charges.[268] Meanwhile, the federal government moved to revoke the defendant's supervised release based on the assault allegations and using the wife's hearsay statement as evidence.[269] At the revocation hearing, the state's attorney testified about dismissing the criminal charges, explaining that "in his experience" it was "very difficult to go forward in domestic violence cases where your victim is not cooperative," as well as "common for female domestic violence victims to recant their accusations," and that he "did not believe" the victim's recantation.[270] The court admitted the wife's hearsay statements, revoked the defendant's supervised release, and imposed a 46-month prison sentence.[271] On appeal, the U.S. Court of Appeals for the Eleventh Circuit found the proceedings satisfied the "minimal due process requirements" for the defendant because there was good cause for not producing the witness and the hearsay was reliable.[272] The margin cites several more examples of prosecutors using revocation proceedings to admit testimonial evidence that may have been barred by the Confrontation Clause in criminal prosecutions.[273]

3. Expand Power

Easing punishment of criminal conduct through revocation proceedings also allows the government to expand structural limits on federal authority. Revocation allows federal prosecutors and judges to target conduct that would ordinarily be beyond their power, thus altering the fundamental framework of constitutional law, including both federalism and the separation of powers.

By prohibiting defendants from committing any "Federal, State, or local" crime,[274] supervised release empowers the federal government to punish state or local offenses that it would ordinarily lack authority to

[268] Id. at 763.
[269] Id. at 762–63.
[270] Id. at 763–64.
[271] Id. at 763, 765–66.
[272] Id. at 766–67.
[273] United States v. Lillybridge, 944 F.3d 990, 991–92 (8th Cir. 2019) (per curiam); United States v. Dunlap, No. 8:06CR244, 2012 WL 3656636, at *1, *3 (D. Neb. Aug. 24, 2012); see also Oral Argument at 10:21, United States v. Peguero, 34 F.4th 143 (2d Cir. 2022) (No. 20-3798) (Judge Underhill: "The State here charged an assault, felony, and then dropped it because they couldn't prove it [once the victim refused to testify]. And then suddenly, the U.S. Attorney's Office picks it up and runs with it [by revoking supervised release].").
[274] 18 U.S.C. § 3583(d).

prosecute. The best example is *Robinson*, the domestic violence case discussed above in Subsection II.C.2. Although the federal government wields enormous authority over individuals, one of the few areas the Supreme Court has expressly held it cannot regulate under either the Commerce Clause or the Fourteenth Amendment is gender-based violence, which is "not, in any sense of the phrase, economic activity" and does not involve "state action."[275] But while the federal government cannot *prosecute* domestic violence, it can still punish that conduct by revoking supervised release.

To be clear: I am not suggesting that domestic violence revocations are unconstitutional or even improper. As Justice Thomas has explained, the federal government's authority to revoke supervised release is rooted in "the original criminal sentence itself," which "serves to execute the enumerated power that justifies the defendant's statute of conviction."[276] Instead, I cite this example to illustrate the uniquely broad power the federal government exercises when it revokes supervised release for criminal violations.

Another way that the government uses revocation proceedings is to avoid statutory limits on the Department of Justice's prosecutorial authority. A clear example is when the federal government revokes supervised release for use of medical marijuana that is legal under state law. Every year since 2014, Congress has enacted an appropriations rider forbidding the Department from spending funds to prevent states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[277] According to the U.S. Court of Appeals for the Ninth Circuit, this rider "prohibits DOJ from spending money on actions that prevent" states from "giving practical effect to their state laws that authorize the use, distribution, possession, or

[275] United States v. Morrison, 529 U.S. 598, 613, 620–21 (2000).

[276] United States v. Comstock, 560 U.S. 126, 174, n.12 (2010) (Thomas, J., dissenting).

[277] See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282–83 (2020); Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2317, 2431 (2019); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 348, 444–45 (2018); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135, 228 (2017); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015); see also Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (same). Supporters of the appropriations rider invoked "states' rights" and the Tenth Amendment, proclaiming that "[t]he Federal Government should not countermand State law." 160 Cong. Rec. 9238, 9238 (2014).

cultivation of medical marijuana," including by prosecuting people who use medical marijuana in compliance with state law.[278]

Because marijuana possession remains a federal crime, defendants on supervised release who use medical marijuana are still considered in violation.[279] And while the appropriations rider forbids the Department of Justice from spending money to prosecute state-authorized use of medical marijuana, the U.S. Attorney's Offices have successfully argued that they may revoke supervised release in these cases. In *United States v. Tuyakbayev*, for example, a magistrate judge held that the Department could revoke a defendant's supervised release for consuming medical marijuana in accordance with state law.[280] The judge explained that "revocation hearings are 'not a stage of a criminal prosecution'" and, misquoting the rider, found the law "only prohibits the DOJ from using funds to 'prosecute' defendants from conduct that is in strict compliance with state medical marijuana laws."[281]

Nevertheless, a few judges have pushed back against this attempt to expand federal power through revocation proceedings. In *United States v. Jackson*, for example, Judge DuBois of the Eastern District of Pennsylvania held that the appropriations rider prohibited the Department of Justice from spending funds to revoke a defendant's supervised release for state-authorized use of medical marijuana.[282] He explained that "[r]evoking a defendant's supervised release . . . would 'accomplish[] materially the same effect' as directly prosecuting him for his marijuana use and would prevent Pennsylvania from 'giving practical effect' to its

[278] United States v. McIntosh, 833 F.3d 1163, 1176 (9th Cir. 2016).

[279] See United States v. Schostag, 895 F.3d 1025, 1027–28 (8th Cir. 2018); United States v. Bey, 341 F. Supp. 3d 528, 531 (E.D. Pa. 2018); United States v. Johnson, 228 F. Supp. 3d 57, 58–59 (D.D.C. 2017); see also United States v. Wilkins, No. 4:08CR230, 2019 U.S. Dist. LEXIS 227782, at *4 (N.D. Ohio Dec. 16, 2019) (recommending a finding of a violation based on the defendant's use of medical marijuana).

[280] United States v. Tuyakbayev, No. 15-cr-00086, 2017 WL 3434089, at *2–3 (N.D. Cal. Aug. 10, 2017).

[281] Id. at *3 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)); see also United States v. Cannon, 36 F.4th 496, 502 (3d Cir. 2022) (per curiam) (holding appropriations rider does not apply to bail revocation based on medical marijuana use because "the [U.S. Probation Office], not the Department of Justice . . . petition[s] to have [the defendant's] bond revoked").

[282] United States v. Jackson, 388 F. Supp. 3d 505, 507, 513 (E.D. Pa. 2019).

law."[283] Federal prosecutors therefore could not use revocation to avoid the spending limits imposed by the rider.[284]

Revocation of supervised release also blurs lines in the separation of powers. Federal judges in revocation proceedings exercise a unique blend of judicial and executive authority, not only adjudicating allegations but also initiating them "sua sponte based on information acquired from any source."[285] Courts justify this exercise of traditionally executive power based on the "ongoing relationship between the sentencing court and the defendant . . . created by the imposition of a term of supervised release."[286] The U.S. Court of Appeals for the Tenth Circuit explained that "placing the sole discretion to initiate a revocation proceeding with the U.S. Attorney 'would be tantamount to abdicating the Judiciary's sentencing responsibility to the Executive.'"[287]

Federal probation officers also wield an unusual mix of powers in revocation proceedings. Officers serve as "an investigative and supervisory 'arm of the court,'" monitoring defendants for compliance with the conditions of supervised release,[288] while also effectively exercising executive power by filing petitions that may initiate revocation proceedings.[289] At the revocation hearing, they both may testify about what happened and recommend appropriate punishments.[290] As Professor Doherty put it, "probation officers arguably inhabit the roles of victim, witness, investigator, prosecutor, and judge, all in the same case."[291]

This supervisory relationship between the court, the probation officer, and the defendant subverts norms of impartiality that would ordinarily prohibit decision makers from adjudicating cases in which they have "an interest in the outcome."[292] Because revocation punishes the "breach of

[283] Id. at 513 (alteration in original) (quoting United States v. Samp, No. 16-cr-20263, 2017 WL 1164453, at *2 (E.D. Mich. Mar. 29, 2017)).

[284] See id. at 514.

[285] United States v. Davis, 151 F.3d 1304, 1307 (10th Cir. 1998).

[286] Id. at 1307–08.

[287] Id. at 1308 (quoting United States v. Berger, 976 F. Supp. 947, 950 (N.D. Cal. 1997)).

[288] Id. at 1306 (quoting United States v. Burnette, 980 F. Supp. 1429, 1433 (M.D. Ala. 1997)).

[289] United States v. Mejia-Sanchez, 172 F.3d 1172, 1175 (9th Cir. 1999).

[290] *Burnette*, 980 F. Supp. at 1434.

[291] Doherty, supra note 16, at 347.

[292] Williams v. Pennsylvania, 136 S. Ct. 1899, 1905–06 (2016) (quoting In re Murchison, 349 U.S. 133, 136 (1955)). Criminal contempt presents a similar situation where judges both adjudicate and sentence violations of their own authority. At most, however, there are only a few hundred contempt prosecutions annually, compared to tens of thousands of revocations. See U.S. Sent'g Comm'n, 2019 Annual Report and Sourcebook of Federal Sentencing

trust inherent in the conditions of supervision,"[293] judges and officers "are effectively sentencing crimes against themselves."[294] Judges even describe criminal violations in highly personal terms, in one case castigating the defendant for showing "a complete disrespect to me, to your probation officer, and to the law."[295]

Consider *Frederickson*, discussed above in Subsection II.C.2, where the defendant was acquitted of assaulting a probation intern but had his supervised release revoked based on the same allegations. Although the judge who adjudicated that case was brought in from a different district, her justification for imposing the maximum revocation sentence still focused on redeeming judicial authority, emphasizing that the defendant had "thumbed [his] nose at the [c]ourt, at Probation, and at law enforcement" and that a "severe sentence was warranted to deter others from assaulting members of the U.S. Probation Office while on supervised release, which is designed to help federal prisoners reintegrate into society."[296] On appeal, the defendant claimed that this sentencing explanation reflected an improper "vindictive motive," but the Court of Appeals for the First Circuit held that it was permissible for the judge to consider the defendant's "lack of appreciation for the terms of supervised release and the judicial system as a whole."[297] This decision exemplifies how revocation for criminal violations expands government authority by breaking down structural limits on the power to punish.

III. REVOCATION FOR ILLEGAL REENTRY

The immigration crime of illegal reentry is one of the most commonly punished criminal violations in the federal supervision system. Empirical analysis of the Commission's database suggests that illegal reentry

Statistics 46, 211 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf [https://perma.cc/RTB4-TL5Z] (reporting 698 "administration of justice" offenses in 2019, which include obstructing officers, contempt, obstruction of justice, perjury, bribery of a witness, failure to appear, misprision of felony, etc.).

[293] U.S. Sent'g Guidelines Manual ch. 7, pt. A, 3(b) (U.S. Sent'g Comm'n 2021).

[294] See Jacob Schuman, Revocation and Retribution, 96 Wash. L. Rev. 881, 934 (2021).

[295] United States v. Porter, 974 F.3d 905, 908 (8th Cir. 2020); see also United States v. Blackston, 940 F.2d 877, 880 (3d Cir. 1991) ("I put you on supervised release thinking that you would do better, you didn't. You ignored that trust. For that violation of trust you are going to go back to jail.").

[296] United States v. Frederickson, 988 F.3d 76, 80, 91 (1st Cir. 2021).

[297] Id. at 91, 93.

accounts for up to one-third of all revocations along the U.S.-Mexico border and one-third of revocations for felony violations nationally. Examination of federal case law shows that the government uses illegal reentry revocation both as an additional justification and an easier alternative for punishment. Below, I show how supervised release has become a tool of immigration enforcement. Later, in Section IV.C, I argue that revoking supervised release for illegal reentry is excessive and unfair.

A. Non-Citizen Grade B Violations

"Illegal reentry" is the crime of returning to the United States without permission after being deported.[298] Under federal law, it is a felony punishable by up to twenty years' imprisonment, depending on the defendant's criminal history.[299] In most cases, moreover, illegal reentry is an easy charge to prove. If the defendant is in the United States, is not a citizen, and has a record of a prior deportation, then the crime has been established.[300] Illegal reentry is also one of the most frequently sentenced federal crimes.[301] In 2019, federal judges sentenced 22,077 defendants for illegal reentry, accounting for approximately a quarter of all cases reported to the Sentencing Commission and 82.9% of criminal immigration cases.[302]

[298] 8 U.S.C. § 1326(a).

[299] Id. § 1326(b). After their prison sentences, these defendants are transferred to immigration custody for deportation. See Ingrid Eagly & Steven Shafer, The Institutional Hearing Program: A Study of Prison-Based Immigration Courts in the United States, 54 Law & Soc'y Rev. 788, 808 (2020).

[300] See United States v. Ortiz-Lopez, 24 F.3d 53, 55 (9th Cir. 1994) (citing United States v. Meza-Soria 935 F.2d 166, 168 (9th Cir. 1991)).

[301] See U.S. Sent'g Comm'n, Illegal Reentry Offenses 1 (2015) [hereinafter Illegal Reentry Offenses], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf [https://perma.cc/8Z6P-XDN2]; see also U.S. Sent'g Comm'n, Federal Sentencing of Illegal Reentry: The Impact of the 2016 Guideline Amendment 4 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220720_Illegal-Reentry.pdf [https://perma.cc/TA65-RPCQ] ("Over the last ten fiscal years, immigration offenders consistently have accounted for a sizable portion of the federal sentencing caseload, representing either the highest number or second-highest number of offenders sentenced annually across major crime types.").

[302] Quick Facts: Illegal Reentry Offenses, U.S. Sent'g Comm'n [hereinafter Quick Facts], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf [https://perma.cc/82DK-VWJY] (last visited Sept. 18, 2022) (facts for Fiscal Year 2019).

One might wonder how a person could commit the crime of illegal reentry while serving a term of supervised release. After all, anyone who commits an illegal reentry by definition must have been ordered removed from the United States and not permitted to return. Why would the federal government sentence a person to supervised release and then remove them from the country, where they will be outside the reach of the federal probation office?[303]

The answer to that question is that federal judges may impose supervised release on defendants who are subject to deportation in order to discourage them from returning to the United States. By default, the sentencing guidelines recommend against imposing supervised release on defendants who "likely will be deported after imprisonment."[304] However, they also recommend imposing supervised release in such cases if necessary to provide "an added measure of deterrence and protection."[305] In other words, the guidelines say that judges should impose supervised release on deportable defendants if the facts of the case make the threat of additional punishment via revocation necessary to discourage an illegal return.[306]

The default recommendation against imposing supervised release on deportable defendants appears to have limited impact. In 2019, federal judges sentenced 74.8% of all defendants to supervised release, but in immigration cases that rate fell to 57.7%.[307] This difference suggests that judges are following the guidelines' recommendation against supervised release for deportable defendants in at least some cases. However, these numbers do not include the rate of deportable defendants convicted of non-immigration crimes sentenced to supervised release. Even among immigration defendants, moreover, judges still sentence more than half to supervised release, approximately 16,500 people annually.[308]

To estimate the number of criminal violations for illegal reentry, I analyzed all 77,013 revocations of supervised release in the

[303] See United States v. Cole, 567 F.3d 110, 115 (3d Cir. 2009) (addressing the government's argument that a deported defendant "cannot be supervised effectively by U.S. Probation, whose reach does not extend beyond the borders of the United States").

[304] U.S. Sent'g Guidelines Manual § 5D1.1(c) cmt. n.5 (U.S. Sent'g Comm'n 2021).

[305] Id.

[306] See United States v. Azcona-Polanco, 865 F.3d 148, 153–55 (3d Cir. 2017) (justifying the imposition of supervised release based on factors such as serious criminal history, previous illegal reentries, and possession of forged documents).

[307] Overview, supra note 234, at 10.

[308] See id. at 5, 10.

Commission's database indicating the defendant's highest grade of violation and U.S. citizenship.[309] I used Grade B violations by non-citizens as a proxy for illegal reentry revocations based on two assumptions. First, illegal reentry is a felony that does not involve violence, guns, or drugs, and is not punishable by more than 20 years' imprisonment, making it a Grade B violation.[310] Second, most non-citizen defendants in the revocation database would have been subject to prosecution for illegal reentry. I drew this second inference based on the following chain of logic:

> 1. Every defendant in the revocation database must have been previously convicted of a federal crime in order to have been sentenced to a term of supervised release.
>
> 2. Because "deportation or removal" is "virtually inevitable" for the "vast number of noncitizens convicted of crimes,"[311] most non-citizen defendants in the database were likely deported following their prior convictions.
>
> 3. Because non-citizen defendants in the database had their supervised release revoked, they must have returned to the United States following their deportations.
>
> 4. Given the difficulty of obtaining permission to return to the United States following criminal conviction and deportation, prosecutors likely could have charged them with illegal reentry.[312]

[309] To arrive at this figure, I counted the number of revocations in the database that were (1) coded as supervised release violations (PV_VIOLTYP 2), (2) indicated the defendant's highest grade of violation (PV_GRADVIOL 1, 2, or 3), and (3) indicated the defendant's citizenship (NEWCIT 0 or 1). I excluded any revocations that either did not record whether they were supervised release or probation violations, did not indicate the defendant's highest grade of violation, or did not indicate the defendant's citizenship. This dataset is the starting point for all calculations below.

[310] See U.S. Sent'g Guidelines Manual § 7B1.1 (U.S. Sent'g Comm'n 2021); United States v. Santacruz-Hernandez, 648 F. App'x 456, 457 (5th Cir. 2016) (unpublished) (establishing that the defendant's illegal reentry constituted a Grade B violation, as defined in U.S.S.G. § 7B1.1(a)(2)).

[311] Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

[312] See Post-Deportation Hum. Rts. Project, Ctr. for Hum. Rts. & Int'l Just. at Bos. Coll., Returning to the United States After Deportation 2 (2011), https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Returning%20to%20the%20US%20AfterDeportation%20-%20A%20Self-Assessment%20FINAL.pdf [https://perma.cc/5XD7-D44S]; 8 U.S.C. § 1182(a)(9)(A); id. § 1182(a)(9)(C)(i)(II).

I recognize, of course, that this chain of logic is not perfect. Not all non-citizen Grade B violations are for illegal reentry, since some non-citizen defendants in the database might not have been deported, and others may have obtained permission to return to the United States.[313] Also, some non-citizens might have been accused of Grade B violations for crimes other than illegal reentry. On the flip side, some illegal reentry revocations could have been recorded as Grade C violations (for example, if the defendant was charged with illegal entry rather than illegal reentry or if the alleged violation was a failure to report to the probation office upon entering the United States).[314] Nevertheless, because the revocation database does not contain more specific information on the defendant's violation conduct, analyzing non-citizen Grade B violations is the best way to estimate revocations for illegal reentry.

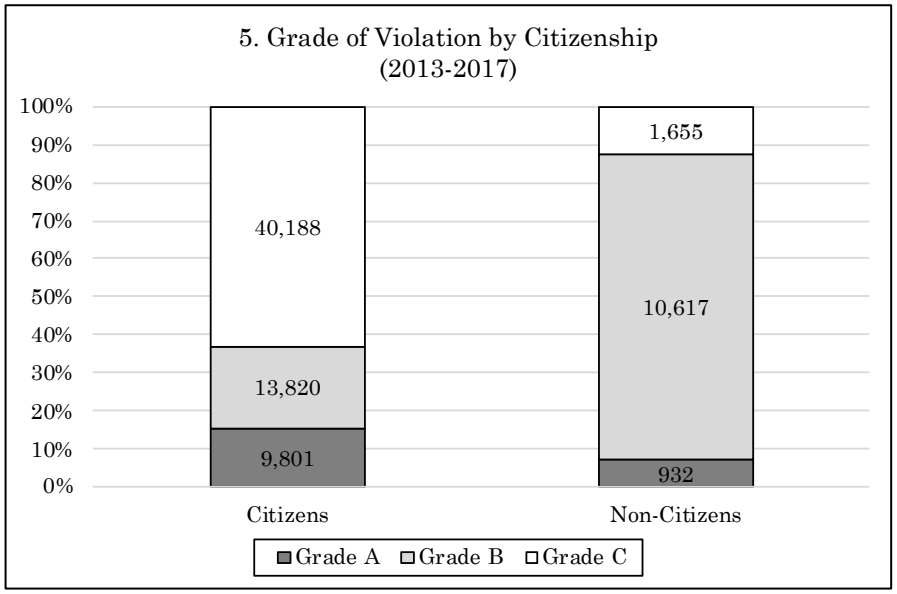
My study uncovered an extremely high rate of Grade B violations among non-citizen defendants. Figure 5 shows that citizen defendants were mostly revoked for Grade C violations (63%), whereas non-citizen defendants were overwhelmingly revoked for Grade B violations (80%).[315] The disparity suggests a relationship between Grade B violations and lack of citizenship, for which the most persuasive explanation is that they are revocations for illegal reentry. This explanation is also consistent with the data on federal criminal prosecutions, which shows that 80% of the charges filed against non-citizen defendants are for immigration crimes.[316]

[313] Entries marked as non-citizens in the database include legal and illegal aliens. U.S. Sent'g Comm'n, Variable Codebook for Federal Probation and Supervised Release Violations 7 (2020) [hereinafter Variable Codebook], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_PV_Report_2020_Codebook.pdf. [https://perma.cc/MVW8-6YS5].

[314] See 8 U.S.C. § 1325(a) (illegal entry punishable by maximum six months in prison).

[315] To arrive at this figure, I compared the number of revocations of citizens (NEWCIT 0) whose highest grade of violation was A, B, or C (PV_GRADVIOL 1, 2, or 3) to the number of revocations of non-citizens (NEWCIT 1) whose highest grade of violation was A, B, or C (PV_GRADVIOL 1, 2, or 3).

[316] Quick Facts: Non-U.S. Citizen Federal Offenders, U.S. Sent'g Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Non-Citizens_FY19.pdf [https://perma.cc/AMK7-88FG] (last visited Aug. 29, 2022) (facts for Fiscal Year 2019).



Alternative explanations for why non-citizens have a disproportionately high rate of Grade B violations are not consistent with the data. For example, one might argue that non-citizen defendants are less likely to commit Grade C violations simply because deportation puts them beyond the supervision of the probation office, where they cannot commit technical violations (missed meetings, curfews, treatments, etc.).[317] This theory, however, cannot explain the disparate ratios in Grade A versus B violations between citizens and non-citizens. In other words, if the lower rate of technical violations among non-citizens was the reason for their higher rate of Grade B violations, then we should still expect citizen and non-citizen defendants to commit similar rates of Grade A and Grade B violations. Instead, the data shows that citizens had a less than 1:2 ratio of Grade A to Grade B violations, while for non-citizens the ratio was over 1:10. The much higher proportion of Grade B versus Grade A violations among non-citizen defendants suggests that the connection between Grade B violations and lack of citizenship is not due to their

[317] The small number (13%) of Grade C violations by non-citizens likely reflect misdemeanors or technical violations related to illegal reentry, such as failure to report to the probation office upon returning. See 8 U.S.C. § 1325.

lower rate of Grade C violations. Instead, the best explanation is that non-citizen Grade B violations are revocations for illegal reentry.

B. Violations at the Border

The geographic data provides further evidence of a connection between non-citizen Grade B violations and illegal reentry. To measure the connection between geography and violation type, I analyzed all 77,013 revocations of supervised release in the Commission's database that indicated the defendant's citizenship, highest grade of violation, and the judicial district where the violation occurred.[318] I discovered that nearly all Grade B violations by non-citizens occurred in the five judicial districts along on the U.S.-Mexico border, where the government focuses most immigration enforcement.[319] This concentration of non-citizen Grade B violations on the southwest border is a powerful indication that they are revocations for illegal reentries.

Illegal reentry is a continuing offense, meaning that it can "occur" in multiple locations.[320] However, the standard rule is that the crime of illegal reentry "occur[s]" wherever the defendant first "enter[ed]" or "attempt[ed] to enter" the United States, or, if entry was successful, wherever federal authorities first "discovered his physical presence, identity, and immigration status."[321] Although the Commission did not explain how it determined where violations occurred for purposes of the revocation database,[322] I assumed for purposes of my study that it followed the standard rule for illegal reentry, meaning that these

[318] To arrive at this figure, I counted the number of revocations in the database that were (1) coded as supervised release violations (PV_VIOLTYP 2), (2) indicated the defendant's highest grade of violation (PV_GRADVIOL 1, 2, or 3), (3) indicated the defendant's citizenship (NEWCIT 0 or 1), and (4) indicated the district where the violation occurred (PV_CIRCDIST 1-94). I excluded any revocations that did not record whether they were supervised release or probation violations, did not indicate the defendant's highest grade of violation, did not indicate the defendant's citizenship, or did not indicate where the violation occurred. This dataset is the starting point for all calculations below.

[319] See Ingrid V. Eagly, The Movement to Decriminalize Border Crossing, 61 B.C. L. Rev. 1967, 1975–77 (2020).

[320] United States v. Orona-Ibarra, 831 F.3d 867, 870 (7th Cir. 2016).

[321] Id. at 874; see also United States v. Hernandez, 189 F.3d 785, 790 (9th Cir. 1999) (explaining that illegal reentry is a continuing offense, which makes it "a crime for a deported alien to remain in the United States until he is 'found' by the authorities" as the "act of discovering or finding the defendant completes the offense").

[322] Variable Codebook, supra note 313, at 8 (describing PV_CIRCDIST as the "[d]istrict in which revocation violated occurred").

violations were recorded as occurring wherever the defendant was first apprehended by federal immigration enforcement.

Figure 6 shows that the top five districts where non-citizen Grade B violations most frequently occurred were the same as the top five districts for the most illegal reentry prosecutions.[323] These five districts also all fell along the U.S.-Mexico border, where the "vast majority" of immigration apprehensions occur[324] and where "the caseloads of U.S. Attorneys are almost exclusively focused on immigration."[325] The geographic overlap between non-citizen Grade B violations and criminal immigration enforcement suggests they are illegal reentry revocations.

6. Top Five Districts (2013-2017)		
No.	*Non-Citizen Grade B Violations*	*Illegal-Reentry Prosecutions*[326]
1	Texas-South	Texas-South
2	Arizona	Texas-West
3	Texas-West	New Mexico
4	California-South	Arizona
5	New Mexico	California-South

[323] To arrive at this figure, I counted the number of revocations of non-citizens for Grade B violations (NEWCIT 1, PV_GRADVIOL 2) that occurred in each district. I then sorted the results based on the districts where the most of these revocations occurred. I discovered that the five districts with the most revocations of non-citizens for Grade B violations were numbers 35, 64, 36, 68, and 80, corresponding to Texas-South, Arizona, Texas-West, California-South, and New Mexico. See Variable Codebook, supra note 313, at 4–6.

[324] U.S. Immigr. & Customs Enf't, U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report 3 (2020), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/6KJM-YU3F] (noting that in 2019, the government identified or found inadmissible 1,148,024 people, 851,508 of whom were apprehended along the southern border).

[325] Eagly, supra note 319, at 1975–77.

[326] Although the top five districts for illegal reentry prosecutions remained the same between 2013 and 2017, the top three switched places each year. This table reflects the most common order, occurring in 2013 and 2017. See Quick Facts: Illegal Reentry Offenses, U.S. Sent'g Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY17.pdf [https://perma.cc/AN4X-GD7J] (last visited Aug. 29, 2022) (facts

Once again, there are alternative explanations for this geographic correlation, but they do not withstand scrutiny. One theory might be that the five border districts are home to larger populations of non-citizens, and therefore more violations by non-citizens occur in these districts, regardless of grade. Or, these five districts could simply be the highest-crime locations in the country and, therefore, contribute more violations of all types. In fact, the data indicates that both of these observations are true—the five border districts were the top five districts for non-citizen violations of all types[327] and for violations overall.[328]

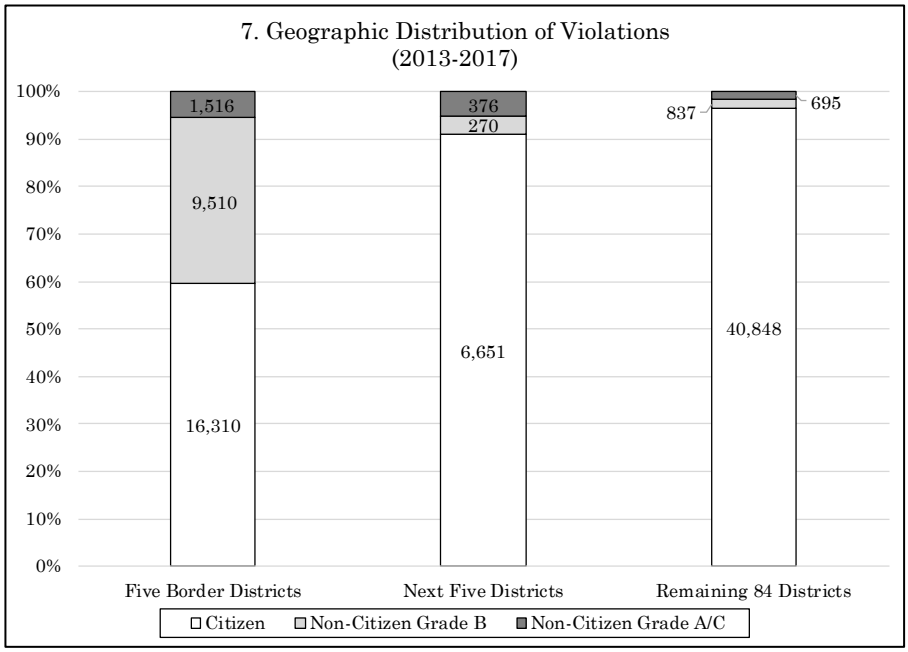
Nevertheless, these alternative interpretations still cannot explain the extremely high concentration of non-citizen Grade B violations in the five border districts. To show why, I compared revocations in different districts by violation type and citizenship. Figure 7 demonstrates that Grade B violations by non-citizens in the five border districts accounted for 35% of all violations, compared to just 4% of violations in the next five highest violation districts (Florida-South, Florida-Middle, Texas-North, Missouri-West, and North Carolina-West) and only 2% in the remaining 84 districts.[329]

for Fiscal Year 2017); Quick Facts: Illegal Reentry Offenses, U.S. Sent'g Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY16.pdf [https://perma.cc/V9WA-E4XN] (last visited Aug. 29, 2022) (facts for Fiscal Year 2016); Quick Facts: Illegal Reentry Offenses, U.S. Sent'g Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry_FY15.pdf [https://perma.cc/2LJ4-YKSE] (last visited Aug. 29, 2022) (facts for Fiscal Year 2015); Quick Facts: Illegal Reentry Offenses, U.S. Sent'g Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_Illegal-Reentry_FY14.pdf [https://perma.cc/ZPK2-364E] (last visited Aug. 29, 2022) (facts for Fiscal Year 2014); Illegal Reentry Offenses, supra note 301, at 8.

[327] To arrive at this figure, I counted the number of revocations of non-citizens (NEWCIT 1) that occurred in each district. I then sorted the results based on the districts where most of these revocations occurred. I discovered that the five districts with the most revocations of non-citizens were numbers 35, 64, 36, 68, and 80, corresponding to Texas-South, Arizona, Texas-West, California-South, and New Mexico. See Variable Codebook, supra note 313, at 4–6.

[328] To arrive at this figure, I counted the number of revocations that occurred in each district, and then sorted based on the districts with the most revocations overall. I discovered that the five districts with the most revocations were numbers 35, 36, 64, 68, and 80, corresponding to Texas-South, Texas-West, Arizona, California-South, and New Mexico. See Variable Codebook, supra note 313, at 4–6. I also discovered that the next five highest violation districts were numbers 91, 89, 34, 59, and 22, corresponding to Florida-South, Florida-Middle, Texas-North, Missouri-West, and North Carolina-West, which becomes relevant in the next calculation. See id.

[329] To arrive at this figure, I compared the number of revocations of citizens (NEWCIT 0), non-citizens for Grade B violations (NEWCIT 1, PV_GRADVIOL 2), and non-citizens for



If the high rate of non-citizen Grade B violations in the five border districts was due to these districts having larger populations of non-citizens, then we should expect their ratio of non-citizen Grade B violations to non-citizen Grade A/C violations to be consistent with districts throughout the rest of the country. In other words, violations by non-citizens in each group of districts should reflect roughly equal rates of Grade B violations versus Grade A or C violations. Instead, I found that the ratio of Grade B violations to Grade A/C violations by non-citizens in the five border districts was over 6:1, while in the next five districts this ratio was less than 1:1, and in the remaining 84 districts about 1:1. Although the five border districts had higher rates of violations by non-citizens, they also had *significantly* higher rates of Grade B violations by non-citizens. This disparity eliminates the larger non-citizen population as an explanation for the high rate of non-citizen Grade B

Grade A or C violations (NEWCIT 1, PV_GRADVIOL 1 and 3) between the five border districts (PV_CIRCDIST 35, 64, 36, 68, and 80), the next five highest violation districts (91, 89, 34, 59, and 22), and the remaining eighty-four districts (1–21, 23–33, 37–58, 60–63, 65–67, 69–79, 81–88, 90, 92–94). See Variable Codebook, supra note 313, at 4–6.

violations and instead suggests that the driver is illegal reentry revocations.

Similarly, if the high numbers of non-citizen Grade B violations in the five border districts were due to these districts having higher overall crime rates, then we should expect their total contribution of non-citizen Grade B violations to be equal to their contribution of all violations. In other words, as a percentage of violations nationwide, the five border districts should contribute roughly equal rates of non-citizen Grade B violations versus violations of all types. Instead, I found that the five border districts contributed 90% of all non-citizen Grade B violations in the entire country, compared to just 23% of violations of all types. By comparison, the next five highest violation districts contributed only 3% of all non-citizen Grade B violations and 9% of violations of all types. While the five border districts had more violations of all types, they also had *many* more non-citizen Grade B violations. The best explanation for this disparity is that non-citizen Grade B violations are revocations for illegal reentry.

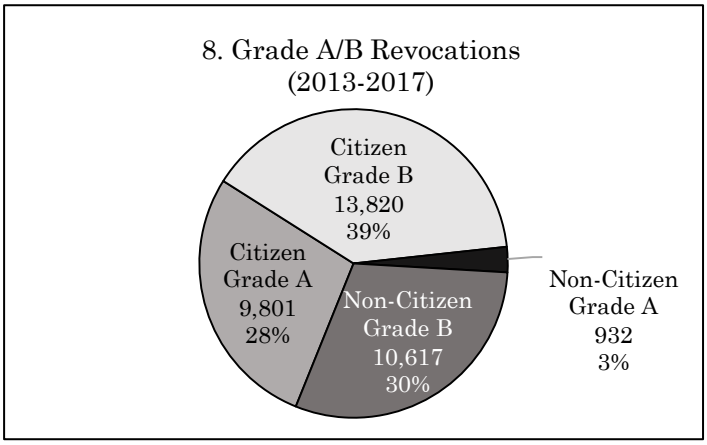
C. Revocation and Crimmigration

Illegal reentry revocation exposes the intersection between supervised release and "crimmigration law."[330] Professors Katherine Beckett and Heather Evans defined "crimmigration law" as the "growing enmeshment of the immigration and criminal legal systems" across three axes: increased federal prosecutions, special focus on criminals, and expanded disqualifications from legal status.[331] Supervised release has become a fourth axis of the crimmigration system, not only serving as a program of surveillance and support, but also a tool of immigration enforcement.

[330] Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367 (2006).

[331] Katherine Beckett & Heather Evans, Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation, 49 Law & Soc'y Rev. 241, 245 (2015).

The data on non-citizen Grade B violations suggests that illegal reentry is one of the most commonly punished criminal violations in the federal supervision system. Figure 8 demonstrates that between 2013 and 2017, there were 10,617 revocations of supervised release for non-citizen Grade B violations, accounting for 30% of all felony violations.[332] This does not include Grade C violations that might have been related to illegal entry, such as misdemeanor immigration crimes or technical violations related to the defendant's return. The high rate of revocations for illegal reentry is roughly consistent with other federal sentencing data, which show that illegal reentry accounts for approximately one quarter of criminal prosecutions.[333]



Federal case law shows that the government uses revocation of supervised release as a tool of immigration enforcement by both increasing and easing the punishment of illegal reentry. First, federal courts justify imposing supervised release on deportable defendants on the ground that the threat of revocation will deter them from returning by authorizing "longer"[334] or "escalat[ed]"[335] punishments for illegal reentry. When sentencing one defendant to supervised release, the judge warned:

[332] To arrive at this figure, I compared the number of revocations of non-citizens for Grade B violations (NEWCIT 1, PV_GRADVIOL 2) to the number of revocations of non-citizens for Grade A violations (NEWCIT1, PV_GRADVIOL 1) and the number of revocations of citizens for Grade A or B violations (NEWCIT 0, PV_GRADVIOL 1 or 2).

[333] Illegal Reentry Offenses, supra note 301, at 1.

[334] United States v. Aplicano-Oyuela, 792 F.3d 416, 421 (4th Cir. 2015).

[335] United States v. Alvarado, 720 F.3d 153, 158 (2d Cir. 2013).

"You will never, ever be authorized to come to the United States legally. So unless you want to essentially spend the rest of your life sitting in a U.S. prison cell, I strongly recommend that after . . . you're deported, you never return."[336] While this threat may have been exaggerated for effect, consecutive revocation sentences can significantly increase a defendant's punishment for illegal reentry, doubling or even tripling the total prison time.[337]

Federal judges also use consecutive revocation sentences as a second-opinion mechanism to increase punishments for illegal reentry that they deem too short. In *United States v. Ceballos-Santa Cruz*, for instance, a defendant on supervised release returned illegally to the United States.[338] He pled guilty in the District of Arizona to a misdemeanor for illegal entry and was sentenced to 180 days of imprisonment.[339] Six weeks before his projected release date, his probation officer in the District of Nebraska filed a petition to revoke his supervised release, alleging that he had also violated his supervision by illegally reentering the United States.[340] The district court agreed and sentenced him to a consecutive eighteen months in prison, noting that "he had been allowed to plead to a misdemeanor rather than a felony in Arizona."[341] The Eighth Circuit affirmed, holding that the judge could consider the "significant reduction" the defendant had received on the conviction sentence and "decided a longer sentence would help achieve . . . deterrence."[342]

Second, the federal government revokes supervised release for illegal reentry to take advantage of "the procedural ease of recommitting the

[336] United States v. Chavez-Morales, 894 F.3d 1206, 1217 (10th Cir. 2018).

[337] United States v. Gomez, 955 F.3d 1250 (11th Cir. 2020) (forty-six-month offense sentence, twenty-one-month revocation sentence); United States v. Contreras-Martinez, 409 F.3d 1236, 1238–39 (10th Cir. 2005) (thirty-month offense sentence, twenty-one-month revocation sentence); United States v. Ortiz-Lazaro, 884 F.3d 1259 (10th Cir. 2018) (twelve-month offense sentence, twenty-four-month revocation sentence); United States v. Ceballos-Santa Cruz, 756 F.3d 635, 636 (8th Cir. 2014) (180-day offense sentence, eighteen-month revocation sentence); United States v. Rodriguez-Quintanilla, 442 F.3d 1254, 1256 (10th Cir. 2006) (thirty-month offense sentence, fifteen-month revocation sentence); United States v. Reyes-Solosa, 761 F.3d 972 (9th Cir. 2014) (six-month offense sentence, twelve-month revocation sentence).

[338] *Ceballos-Santa Cruz*, 756 F.3d at 637.

[339] Id. at 636.

[340] Id. at 636–37.

[341] Id. at 637.

[342] Id. at 638.

individual on the basis of a lesser showing by the State."[343] One district court declared when sentencing a deportable defendant to three years of supervised release:

> You certainly need to be deterred, because [it] looks to me like you're going to try this [illegal reentry] again. No reason not to. And if you do, it should be easy for the government to come back to court . . . . [W]e'll get [you] in jail much faster than if we went through a separate prosecution.[344]

Revocation for illegal reentry also allows prosecutors to avoid procedural rights that would apply at trial. One of the most important procedural protections for a defendant charged with illegal reentry is their right to challenge the validity of the underlying deportation order, a constitutional protection guaranteed by the Supreme Court and implemented via 8 U.S.C. § 1326(d).[345] Yet even if a defendant successfully invokes this right to suppress a deportation order, prosecutors claim they may still revoke their supervised release based on the order because "[r]evocation proceedings are not criminal proceedings."[346] Although the question remains unresolved, revocation offers a potential "consolation prize" whenever constitutional rights stand in the way of immigration prosecutions.[347]

Revocation for illegal reentry also loosens structural limits on the government's power to punish immigration crimes. Because immigration is a federal issue, revoking supervised release for illegal reentry does not weaken norms of federalism in the same way that it does in the domestic violence or medical marijuana cases described earlier.[348] Nevertheless, a similar expansion of government power still occurs at the state level. The Supremacy Clause forbids state governments from prosecuting immigration crimes,[349] yet state prosecutors can still revoke probation or

[343] United States v. Aplicano-Oyuela, 792 F.3d 416, 426 (4th Cir. 2015) (citing Morrissey v. Brewer, 408 U.S. 471, 479 (1972)).

[344] Id. at 421–22.

[345] United States v. Reyes-Bonilla, 671 F.3d 1036, 1043 n.4 (9th Cir. 2012).

[346] Answering Brief for the United States at 47 n.11, United States v. Rubio-Munoz, 691 F. App'x 306 (9th Cir. 2017) (Nos. 15-50292 & 15-50293), 2016 WL 6137339.

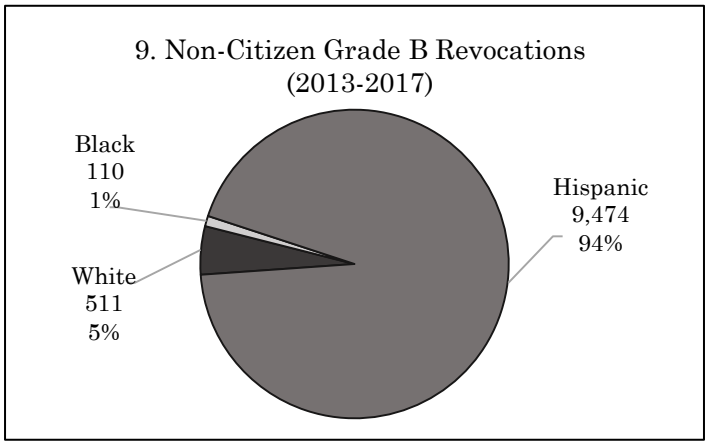
[347] Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 378 (1998) (Souter, J., dissenting). The right to collaterally challenge a prior deportation order is rooted in due process, see United States v. Mendoza-Lopez, 481 U.S. 828, 838–39 (1987), which still applies in revocation proceedings, see *Morrissey*, 408 U.S. at 481.

[348] See supra Subsection II.C.3.

[349] Arizona v. United States, 567 U.S. 387, 401–03 (2012).

parole on the ground that defendants violated their supervision by committing the federal crime of illegal reentry.[350] Once again, revocation for criminal violations allows prosecutors to escape federalist limits on the power to punish.

Finally, revocation for illegal reentry is deeply intertwined with race. While the racial breakdown of violators overall is roughly evenly distributed between Hispanic, white, and Black defendants,[351] Figure 9 shows that non-citizen defendants facing revocation for Grade B violations were 94% Hispanic, 5% white, and 1% Black.[352] This extreme racial disparity is consistent with other federal data, which show that immigration prosecutions are overwhelmingly focused on Hispanic defendants.[353]



Illegal reentry revocation exacerbates these racial disparities in immigration enforcement. Professor Ingrid Eagly has argued that an "ideology of racial subordination undergirds the criminalization of migration control," aimed at "associating immigrants of color with

[350] See, e.g., Jimenez v. State, 446 S.W.3d 544, 545 (Tex. Ct. App. 2014) (holding that defendant violated condition of community supervision agreement by illegally reentering the United States); State v. Maldonado, No. 1 CA-CR 13-0563, 2014 WL 2767071, at *3 (Ariz. Ct. App. June 17, 2014).

[351] Violations, supra note 33, at 19.

[352] To arrive at this figure, I compared the number of revocations of non-citizens for Grade B violations (NEWCIT1, PV_GRADVIOL 2) between White, Black, and Hispanic defendants (NEWRACE 1, 2, or 3). In addition to Black, Hispanic, and White, there were 18 non-citizen Grade B violators with the racial category "Other."

[353] Quick Facts, supra note 302.

crime."[354] Judge Du of the District Court for the District of Nevada even held that the illegal reentry statute violated the Equal Protection Clause because the law had a "discriminatory purpose and . . . a disparate impact" on Hispanic persons and the government had failed to show it "would have been enacted absent racial animus."[355] In the same way, revocation for illegal reentry exerts a disparate impact on Hispanic defendants by making punishments in their cases easier for the government and longer for them.

Notwithstanding Judge Du's decision, defendants in illegal reentry revocations typically win little sympathy from the federal courts. In *United States v. Flores*, for example, the Fifth Circuit acknowledged that a district court had committed "clear or obvious error" by sentencing a defendant to ten months of imprisonment for violating his supervised release by illegally reentering the country, consecutive to the 21-month sentence he received for the conviction.[356] Yet even "assuming" this error "affected [his] substantial rights," the court of appeals chose not to "exercise [its] discretion to correct" the judgment, finding it "difficult to say that a miscarriage of justice occurred."[357]

IV. PROBLEMS WITH REVOCATION LAW

My study of criminal violations in the federal supervision system uncovered major problems with the law of revocation. These problems are traceable to fundamental distinctions between how parole and supervised release are imposed and revoked. Parole granted the defendant conditional liberty from imprisonment, and therefore revocation could be justified as punishment for the original offense and breach of trust. Supervised release, by contrast, imposes conditional liberty to follow imprisonment, so revocation must be a sanction for the defendant's actual violation conduct. This fundamental distinction destabilizes the doctrines of revocation law and undermines the justifications for punishing criminal violations of supervised release.

[354] Eagly, supra note 319, at 1980–81.
[355] United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1000–01 (D. Nev. 2021).
[356] United States v. Flores, 862 F.3d 486, 488–89 (5th Cir. 2017).
[357] Id. at 489.

A. Three Doctrines

The cracks in the law of revocation begin with the concept of "conditional liberty." According to the Supreme Court, revoking supervised release for criminal violations is different from prosecuting crimes because revocation deprives the defendant of "conditional liberty," not absolute liberty.[358] However, the nature of "conditional liberty" under parole is different from under supervised release. Because of this difference, parole revocation may be considered punishment for the defendant's "original offense" and "breach of trust," but revocation of supervised release must be based on their new violation conduct. Without the traditional doctrines of revocation law, revoking supervised release for criminal violations appears to be unjustifiable and unfair.

1. Conditional Liberty

Parole and supervised release are both terms of "conditional liberty," insofar as the defendant's liberty under both forms of supervision is subject to "conditions" enforceable via criminal punishment. However, the relationship between the defendant's conditional liberty and their prison sentence is different under each system. Parole "granted" the defendant conditional liberty as early release from a lawful prison term.[359] Supervised release, by contrast, "imposes" conditional liberty to follow full service of a sentence.[360] As Judge Posner put it, "Parole mitigate[d] punishment; supervised release augments it."[361]

This change reflected a deeper ideological transformation in supervision law and policy. Parole was a trust-based system of supervision that granted defendants early release from prison as a reward for their rehabilitation and a test of their ability to obey the law.[362] During the 1970s and '80s, however, policymakers abandoned their early "welfarist" ambitions and instead began to emphasize community supervision's "control and risk monitoring" functions.[363] The SRA

[358] Morrissey v. Brewer, 408 U.S. 471, 480 (1972).
[359] 18 U.S.C. § 4206(c) (1982); 28 C.F.R. § 2.18 (1982).
[360] 18 U.S.C. § 3583(a).
[361] United States v. Thompson, 777 F.3d 368, 372 (7th Cir. 2015).
[362] See Fiona Doherty, Testing Periods and Outcome Determination in Criminal Cases, 103 Minn. L. Rev. 1699, 1707–16 (2019).
[363] Doherty, supra note 16, at 333; see also Klingele, supra note 5, at 1028–30 (observing "shift in focus among post-release supervision agents, away from a casework model and toward a crime control model"); Christine S. Scott-Hayward, The Failure of Parole:

implemented this more control-oriented approach, requiring defendants to serve their prison sentences in full, followed by an additional term of supervised release imposed as part of their sentence to "ease the[ir] . . . transition into the community"[364] and ensure they have "been sufficiently reformed so that [they are] able to lead a law-abiding life."[365]

The difference in imposing parole versus supervised release also leads to a difference in revocation. The Parole Commission punished violations by revoking the parolee's grant of conditional liberty and restoring their original prison sentence. Because supervised release follows full service of a prison term, however, there is nothing for the government to revoke as punishment. Justice Kavanaugh said it well during the *United States v. Haymond* oral argument: "Revocation of parole seems to me like a denied benefit, whereas revocation of supervised release seems like a penalty."[366] As Judge Jack Weinstein noted, the term "revoke" is actually a "misnomer" when used to describe punishment for violating supervised release, which by definition must be a new term of imprisonment.[367]

In his *Haymond* dissent, Justice Alito argued that supervised release "changed the form of federal sentences but not their substance" because the SRA still provides "the same sort of transition period as . . . parole."[368] He claimed that a "pre-SRA sentence of nine years' imprisonment meant three years of certain confinement and six years of possible confinement," which was "the substantive equivalent of a post-SRA sentence of three years' imprisonment followed by six years of supervised release."[369] In other words, he contended:

> [A] defendant sentenced to x years of imprisonment followed by y years of supervised release is really sentenced to a maximum punishment of $x + y$ years of confinement, with the proviso that any time beyond x

Rethinking the Role of the State in Reentry, 41 N.M. L. Rev. 421, 438–40 (2011) (recounting "shift in supervision styles" from "casework model that balanced treatment and reintegration" to "surveillance or managerial model, dominated by a risk management philosophy"); Malcolm M. Feeley & Jonathan Simon, The New Penology, 30 Criminology 449, 452 (1992) (describing a "new penology . . . less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender" and more "concerned with techniques to identify, classify, and manage groupings sorted by dangerousness").

[364] Senate Report, supra note 55, at 124.

[365] United States v. Haymond, 139 S. Ct. 2369, 2389 (2019) (Alito, J., dissenting).

[366] Transcript of Oral Argument at 32, United States v. Haymond, 139 S. Ct. 2369 (2019) (No. 17-1672).

[367] United States v. Trotter, 321 F. Supp. 3d 337, 346–47 (E.D.N.Y. 2018).

[368] *Haymond*, 139 S. Ct. at 2389–90 (Alito, J., dissenting).

[369] Id. at 2390.

> years will be excused if the defendant abides by the terms of supervised release.[370]

Nevertheless, Justice Alito's comparison of parole and supervised release is not accurate. While supervised release is a "transition period" following imprisonment, it is not the functional equivalent of an "excused" prison term. Parole was an "excused" prison sentence because it replaced the end of the defendant's prison term and could be revoked for violations. As a result, the maximum revocation sentence depended on the time remaining on the defendant's original sentence. Supervised release, by contrast, is *added* to the defendant's prison sentence, with violations punishable by a *new* term of imprisonment. This distinction changes both the form and the substance of the supervision because the maximum penalty for a violation is no longer limited by the original sentence. Instead, that penalty is set by its own statutory maximum,[371] meaning that the punishment for violating supervised release may be *longer* than the term of supervised release itself.[372] Rather than an "excused" term of imprisonment, supervised release is better described as supervision "with the potential for additional prison time if the terms . . . are violated."[373]

Justice Alito might contend that even this difference between parole and supervised release does not affect the constitutional analysis because revocation is still not a "criminal prosecution" within the meaning of the Sixth Amendment.[374] Yet even if we accept his view that the jury right does not apply to revocation proceedings, acknowledging that revocation of supervised release imposes a new punishment still undermines the other doctrines of revocation law. Unlike parole revocation, revocation of supervised release cannot be considered punishment for the defendant's "original offense" or "breach of trust." Instead, when a judge punishes a defendant for a violation of supervised release, they must be penalizing the defendant for their actual conduct. This distinction has major consequences for the punishment of criminal violations.

[370] Id. (emphasis added).
[371] 18 U.S.C. § 3583(e)(3).
[372] See United States v. Hampton, 633 F.3d 334, 341 (5th Cir. 2011).
[373] United States v. Hinson, 429 F.3d 114, 116 (5th Cir. 2005).
[374] *Haymond*, 139 S. Ct. at 2393 (Alito, J., dissenting).

2. Original Offense

Because revocation of supervised release results in a new prison sentence, that sentence cannot be attributed solely to the defendant's "original offense." The only reason *Johnson v. United States* gave for adopting the original offense doctrine—aside from wanting to avoid constitutional problems with supervised release—was precedent from under the parole system.[375] Under parole, however, it made sense to attribute revocation to the defendant's original offense because the punishment for a violation literally restored their original prison term. Under supervised release, by contrast, revocation imposes a *new* prison term, which is not limited by the defendant's original sentence. Indeed, Congress has voted three times to reaffirm that punishments for violating supervised release are distinct from punishments imposed in any prior sentencing proceedings.[376] *Johnson* therefore sidestepped constitutional problems "at the cost of disregarding the policy impetus behind the creation of supervised release."[377]

The only connection between the punishment for violating supervised release and the defendant's original offense is that, by statute, the maximum sentence for a violation depends on the felony classification of their original conviction.[378] In other words, a defendant convicted of a Grade A felony can be punished with a five-year prison sentence for violations, a defendant convicted of a Grade B felony with a three-year prison sentence, etc.[379] However, this relationship is still different from the one under parole, where the maximum revocation sentence depended on the time remaining on the defendant's original prison sentence. While parole revocation literally restored the defendant's original prison term, revocation of supervised release results in a new prison term limited by the class of the original conviction, not the original sentence.

As a "matter of formal logic," moreover, revocation of supervised release must be punishment for *both* the defendant's original offense *and* their new conduct in violating supervised release.[380] As the Sixth Circuit explained: "If the predicate offense had not been committed, the later

[375] Johnson v. United States, 529 U.S. 694, 700–01 (2000) (citing Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967)).
[376] See supra Section I.B.
[377] Doherty, supra note 103, at 1008–09.
[378] *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).
[379] 18 U.S.C. § 3583(e)(3).
[380] See United States v. Reese, 71 F.3d 582, 588 (6th Cir. 1995).

[violation] would not have resulted in such severe punishment. At the same time, if the current [violation] had not been committed, there would have been no new or additional punishment."[381] Revoking supervised release must be punishment at least in part for the defendant's new violation conduct because the original offense alone could not justify further imprisonment. Attributing revocation solely to the defendant's original offense ignores the dual nature of the penalty.

Finally, in practice, the defendant's new violation conduct likely exerts more influence on their revocation sentence than the details of their original offense. The federal sentencing guidelines base the recommended sentencing range for a violation on the seriousness of the violation conduct,[382] and judges are required to consider the "seriousness of the underlying violation" when revoking supervised release.[383] Courts of appeals also emphasize the importance of considering "the new violation underlying the revocation," as to ignore this factor would undermine the "ability to predict the violator's potential for recidivism and . . . ultimately, to deter the violator and to protect the public."[384] Because revocation of supervised release does not restore the defendant's sentence for their original offense, the punishment must be based in part on their new violation conduct.

3. Breach of Trust

Revocation of supervised release also is not punishment for the defendant's "breach of trust" but rather for their actual violation conduct. Parole revocation might have been considered a penalty for the defendant's breach of trust because the government allowed the defendant to leave prison early "in return for the parolee's assurance that he will comply with the . . . conditions of his release," and "only because it is able to condition [release] upon compliance."[385] In other words, by granting the parolee early release on parole, the government trusted that they would follow the conditions, and violating a condition could be

[381] Id.

[382] U.S. Sent'g Guideline Manual §§ 7B1.1, 7B1.4(a) (U.S. Sent'g Comm'n 2021).

[383] Id. ch. 7, pt. A, 3(b).

[384] United States v. Simtob, 485 F.3d 1058, 1062–63 (9th Cir. 2007).

[385] Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 (1998). Skeptics argue parole is not an act of trust but "a form of state regulation of deviant subgroups in our society." Jeremy Travis, Back-End Sentencing: A Practice in Search of a Rationale, 74 Soc. Rsch. 631, 640 (2007). Yet the matter of imposition still makes a difference, since it provides the "breach of trust" justification for parole revocation. See Schuman, supra note 294, at 907–08.

considered a wrongful "breach" of that "trust."[386] If a defendant on parole killed someone, for example, they would not only commit the wrongful act of murder but also betray their promise to obey the law once released.

With supervised release, by contrast, there is no trust relationship between the government and the defendant. Instead of releasing the defendant early from prison, the government imposes an additional term of restrictions to follow imprisonment. At best, supervised release is a "decompression stage" that follows imprisonment.[387] At worst, it is an act of *mistrust*—an extended period of restricted liberty following release from prison, based on the suspicion that the defendant will continue to break the law. Violating supervised release may be undesirable or even harmful, but it does not break any trust placed in the defendant.[388] The only justification for revoking supervised release, therefore, is as punishment for the defendant's actual violation conduct.

There is only one situation in which revocation of supervised release might be considered punishment for a breach of trust. If a judge sentenced a defendant to a shorter term of imprisonment in exchange for imposing a longer term of supervised release, then that substitution of supervision for imprisonment could be considered an act of trust, and violating a condition could be viewed as a breach of that trust. However, these situations are uncommon, if not rare. Neither the supervised release statute nor the sentencing guidelines require courts to exchange incarceration for supervision,[389] and studies show that judges almost always impose the recommended term of supervised release without discussion or argument.[390] When there is a mandatory minimum term of imprisonment or supervised release, moreover, judges have no ability to make this tradeoff. In nearly all cases, therefore, revocation of supervised release does not punish the defendant's breach of trust, but their actual conduct in committing the violation.

Finally, judges sentencing defendants for criminal violations are likely to focus more on their actual conduct than abstract notions like a breach of trust. Federal public defenders Paula Klei Biderman and Jon Sands

[386] See Schuman, supra note 294, at 907–08.
[387] Johnson v. United States, 529 U.S. 694, 709 (2000).
[388] See Schuman, supra note 294, at 907–08.
[389] See 18 U.S.C. § 3583(c); U.S. Sent'g Guideline Manual § 5D1.1 (U.S. Sent'g Comm'n 2021).
[390] United States v. Thompson, 777 F.3d 368, 374 (7th Cir. 2015); United States v. Siegel, 753 F.3d 705, 710 (7th Cir. 2014); Scott-Hayward, supra note 80, at 208–10.

argued that in their experience, "[t]here is no real distinction between what the [Sentencing] Commission calls the 'breach of trust' and the 'seriousness of the underlying violation.'"[391] The defendant "is punished for the new conduct with additional time added on to reflect the criminal history category."[392] This is particularly true for a "more serious violation," which courts regard as "a more serious breach of trust."[393] The differences in the imposition of "conditional liberty" under parole and supervised release lead to differences in revocation for violations, undermining the "original offense" and "breach of trust" doctrines.

B. Criminal Violations

If revocation of supervised release penalizes the defendant's violation conduct and not their original offense or breach of trust, then there are major consequences for the punishment of criminal violations. By allowing the government to increase and ease punishment for crimes committed under supervised release, the law of revocation results in unfair double punishment and erodes constitutional rights.

First, if revocation penalizes the defendant's actual conduct, then it is unnecessary and excessive to use criminal violations as an additional justification for punishing criminal convictions. When a defendant on supervised release is convicted of a new crime, the sentence they receive for that conviction will already punish them for their criminal behavior. Extending their total punishment through a consecutive revocation sentence punishes them twice for the same exact conduct. Without the blinders of the original offense and breach of trust doctrines, we can see that revocation for criminal violations doubles or duplicates the penalty for the conviction.[394]

Consecutive punishment for criminal violations also cannot be justified as a recidivist enhancement or a second-opinion mechanism. If a defendant on supervised release is convicted of a new crime, then the sentence they receive for the conviction will already include a recidivist enhancement for committing the crime while under supervision.[395]

[391] Paula Klei Biderman & Jon M. Sands, A Prescribed Failure: The Lost Potential of Supervised Release, 6 Fed. Sent'g Rep. 204, 206 (1994).

[392] Id.

[393] United States v. Dawson, 980 F.3d 1156, 1162 (7th Cir. 2020).

[394] Johnson v. United States, 529 U.S. 694, 700 (2000); U.S. Sent'g Guideline Manual ch. 7, pt. A(3)(b) (U.S. Sent'g Comm'n 2021).

[395] See, e.g., U.S. Sent'g Guideline Manual § 4A1.1(d) (U.S. Sent'g Comm'n 2021).

Imposing a consecutive revocation sentence for the exact same reason is superfluous.[396] Revocation also provides no benefit as a second-opinion mechanism. As the Sentencing Commission has recognized, in revocations involving "new criminal conduct that constitute[s] a violation of state or local law," it is "difficult in many instances for the court or the parties to obtain the information necessary" to accurately sentence this conduct.[397] As a result, punishing criminal violations will tend to result in inaccurate second opinions.[398]

Because it is never justified to use revocation to increase punishment for new criminal convictions, the Sentencing Commission should repeal § 7B1.3(f)'s recommendation of consecutive sentencing for criminal violations. Instead, the government should return to the Parole Commission's practice of imposing "concurrent" revocation sentences when defendants under supervision commit new crimes.[399]

Second, if revocation punishes the defendant's actual conduct, then even if it may sometimes be justified to use criminal violations as an easier alternative to criminal prosecution, this practice threatens constitutional rights and should be strictly limited. When a defendant on supervised release is accused of committing a serious new crime and appears likely to reoffend if not detained, but for some reason prosecution is impossible, then revoking supervised release may be necessary to prevent an immediate public safety threat. Domestic abuse cases like *United States v. Robinson* in Section II.C present the most compelling circumstances for using revocation as an easier alternative to prosecution.

Without the "original offense" and "breach of trust" doctrines, however, there are significant constitutional problems with the informal

[396] See supra Subsection II.B.2.

[397] U.S. Sent'g Guideline Manual ch. 7, pt. A(3)(b) (U.S. Sent'g Comm'n 2021).

[398] See Vermeule, supra note 214, at 1463 ("As the accuracy of the initial decision maker increases, the benefits of second . . . opinions diminish," and "as the accuracy of the second opinion increases, the benefits of obtaining it increase."). The only scenario in which revocation might be an effective second-opinion mechanism is when a defendant deserved a longer sentence for their conviction, but the judge was limited by a statutory maximum. In that case, imposing a consecutive revocation sentence would ensure an appropriately lengthy punishment. However, "courts rarely sentence . . . the statutory maxima," so these situations are rare. United States v. Caso, 723 F.3d 215, 224 (D.C. Cir. 2013); see also Illegal Reentry Offenses, supra note 301, at 9–10 (noting that almost all illegal reentry offenders were sentenced at or below the ten-year statutory maximum for offenders with less serious criminal histories, including a substantial portion who faced a maximum statutory penalty of twenty years due to their criminal histories).

[399] Moody v. Daggett, 429 U.S. 78, 87–88 (1976).

procedures used at revocation hearings, as both the Supreme Court and Sentencing Commission have recognized.[400] Nevertheless, these procedural limitations might still be permitted as conditions of supervised release. Conditions of supervised release "uncontroversially deprive the convicted of substantive constitutional rights," so they arguably can "also deprive the defendant of certain procedural constitutional rights for a specified term and under specific circumstances."[401]

Yet even if it is legal to use revocation as an easier alternative to prosecution, it is also constitutionally corrosive. Prosecutors can manipulate criminal violations to avoid the burden of trials and demote the jury from its "historic role . . . to low-level gatekeeping."[402] Particularly when the government tries and fails to prosecute a criminal defendant, invoking the "label[]" of revocation to achieve "materially the same effect" removes an important deterrent on official misconduct and undermines faith in the legal system.[403] By targeting criminal behavior rather than the defendant's compliance with the conditions of supervision, these cases "more closely resemble" punishment for new criminal conduct, but without the rights attending a new criminal prosecution.[404] The result is a loss of constitutional rights not by "gross denial, but by erosion."[405]

If federal prosecutors are going to revoke supervised release for criminal violations as an easier alternative to trial, then they should also be guided by specific rules to prevent arbitrariness and abuse. Currently, the Department of Justice's *Justice Manual* instructs federal prosecutors to revoke supervised release rather than prosecute whenever it serves the "public interest," a vague standard allowing nearly unlimited discretion.[406] Instead, the Department should return to the Parole Commission's post-1968 practice of using revocation as an alternative to

[400] Johnson v. United States, 529 U.S. 694, 700 (2000); see United States. v. Haymond, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring).

[401] United States v. Carlton, 442 F.3d 802, 810 (2d Cir. 2006) (emphasis omitted).

[402] See *Haymond*, 139 S. Ct. at 2380 (internal quotation marks omitted) (citing United States v. Booker, 543 U.S. 220, 306 (2005)); Hearings on H.R. 8569, supra note 230, at 2975–77; Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 378–79 (1998) (Souter, J., dissenting); Morrissey v. Brewer, 443 F.2d 942, 953–54 n.5 (1971) (Lay, J., dissenting).

[403] *Scott*, 524 U.S. at 378–79 (Souter, J., dissenting); *Haymond*, 139 S. Ct. at 2381; United States v. Jackson, 388 F. Supp. 3d 505, 513 (E.D. Pa. 2019).

[404] *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

[405] Id. at 2381 (internal quotation marks omitted) (quoting Apprendi v. New Jersey, 530 U.S. 446, 483).

[406] Justice Manual, supra note 224, § 9-27.230 cmt. 9.

prosecution only when necessary to avert an "immediate" danger to the public.[407]

C. Illegal Reentry Revocation

Revoking supervised release is especially excessive and unfair when used to punish illegal reentry. The revocation doctrines of conditional liberty, original offense, and breach of trust make no sense in the context of a defendant deported from the United States.[408] And because illegal reentry prosecutions already provide ample punishment through a streamlined procedure, there is no justification for using revocation of supervised release as an instrument of immigration enforcement.

What is conditional liberty for a person deported from the United States? They are beyond the reach of the probation office, so there is not even a pretense that the supervision is intended to provide them with surveillance or transitional support. Instead, judges impose supervised release on deportable defendants to enhance the punishment they will receive if they ever disobey their deportation orders.[409] The supervision is a legal fiction in service to future punishment, and the revocation is a penalty for their illegal return, not their prior offense and certainly not any breach of trust.

If illegal reentry revocation punishes the defendant's unlawful return to the United States, then the justifications for the practice begin to unravel. When a defendant on supervised release is convicted of illegal reentry, there is no reason to increase their sentence through revocation, because the punishment for their conviction will already account for their disobedience of the deportation order. That sentence will not only include a two-point criminal history enhancement for having committed the offense while under supervision,[410] but also multiple additional recidivist penalties specific to the law of illegal reentry.[411] It is unnecessary to

[407] Hearings on H.R. 8569, supra note 230, at 2975.

[408] See, e.g., United States v. Ortiz-Lazaro, 884 F.3d 1259, 1266 n.1 (10th Cir. 2018); United States v. Reyes-Solosa, 761 F.3d 972, 975 (9th Cir. 2014); United States v. Gomez-Gonzalez, 277 F.3d 1108 (9th Cir. 2002).

[409] U.S. Sent'g Guideline Manual § 5D1.1 cmt. n.5 (U.S. Sent'g Comm'n 2021).

[410] Id. § 4A1.1(d).

[411] See 8 U.S.C. § 1326(b) (increasing statutory maximum based on prior convictions); U.S. Sent'g Guideline Manual § 2L1.2 (U.S. Sent'g Comm'n 2021) (increasing sentencing range based on prior convictions and deportations).

increase the penalty even further by imposing a consecutive revocation sentence based on the secondhand observations of a second district judge.

There is also no justification for using revocation of supervised release as an easier alternative to prosecuting illegal reentry. While revocation may be more convenient for the government, there is already a "fast track" program for prosecuting immigration cases that "efficiently process[es] the large number of immigration offenders" and "saves . . . significant and scarce resources" by incentivizing guilty pleas "within 30 days of being taken into custody."[412] Revoking supervised release for illegal reentry may even erode constitutional rights by allowing prosecutors to evade § 1326(d) challenges to the validity of deportation orders, undermining an important deterrent on official misconduct in immigration proceedings.[413] When defendants on supervised release illegally reenter the United States, the government should only prosecute them, not revoke their supervision.[414]

CONCLUSION

Criminal violations are the primary engines of imprisonment via revocation of supervised release. By revoking supervised release for criminal violations, federal prosecutors open an exception to the ordinary rules of criminal prosecution, easing and increasing their power to punish. The high rate of punishment for criminal violations illustrates how power flows ineluctably toward this exception, even to the point of transforming a program of transitional support into a tool of immigration enforcement.

Revocations for criminal violations epitomize what the legal theorist Giorgio Agamben described as the tendency for the "state of exception" to "become the rule."[415] Agamben warned of a propensity in "Western democracies" for the temporary imposition of "exceptional measures" to

[412] Illegal Reentry Offenses, supra note 301, at 7; see also Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1316, 1321–25 (2010) ("[I]mmigration crime produces more guilty pleas at a faster rate than all other federal crime.").

[413] See 8 U.S.C. § 1326(d).

[414] A now "outdated" section of the Department of Justice's Criminal Resource Manual suggested that prosecutors revoke, not prosecute, illegal reentries in order to "save prosecutorial resources." U.S. Dep't of Just., Crim. Res. Manual § 1923.2 (1997), https://www.justice.gov/archives/jm/criminal-resource-manual-1923-deportation-condition-supervised-release-usefulness-provision [https://perma.cc/2ED7-CVLX]. This approach would reduce unnecessary punishment but still erode constitutional rights.

[415] Giorgio Agamben, State of Exception 6 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).

"gradually be[] replaced" by a "generalization of the paradigm of security as the normal technique of government."[416] Although his focus was on wartime policies like suspension of habeas corpus and mistreatment of detainees,[417] the same tendency is present, less dramatically yet perhaps more insidiously, in the law of revocation. Like declaring a state of emergency, revoking supervised release for a criminal violation suspends the legal order that would have applied in a criminal prosecution. By encouraging punishment for criminal violations, the Supreme Court, the Sentencing Commission, and the Department of Justice have all generalized this exception from "a provisional and exceptional measure" into a "lasting practice of government," which now "threatens radically to alter" the "structure and meaning of the traditional distinction between constitutional forms."[418]

Only Congress can truly close the revocation exception. If lawmakers voted to repeal the "obey all laws" condition in 18 U.S.C. § 3583(d), then defendants under supervision who committed new crimes would only be subject to prosecution, not revocation.[419] Judges might still prohibit criminal violations as a "special" condition of supervision, but they would have to justify that decision based on the unique facts of each case. More modestly, Congress could simply vote to prohibit revocation for illegal reentry in cases where the defendant will already be criminally prosecuted and subject to deportation, which would eliminate an unnecessarily punitive aspect of our immigration system. Whether changes are broad or narrow, criminal justice reform that fails to address criminal violations will miss a critical intersection between mass incarceration, crimmigration law, and community supervision.

[416] Id. at 2, 14.

[417] Id. at 3–4, 19–21.

[418] Id. at 2, 14. Given the relationship between the state of exception and national security, see id. at 3–4, 19–21, it is no surprise that revocation has become part of the immigration system, where the government casts "outsiders" into "zones of lawlessness," and "exclusion from th[e] legal order, gives meaning to the territorial nation-state." Marc E. Jacome, Human Rights on the Border: A Critical Race Analysis of *Hernandez v. Mesa*, 67 UCLA L. Rev. 1268, 1308 & n.200 (2020).

[419] Doherty, supra note 16, at 301.