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Revocation and Retribution

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REVOCATION AND RETRIBUTION

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Abstract: Revocation of community supervision is a defining feature of American criminal law. Nearly 4.5 million people in the United States are on parole, probation, or supervised release, and 1/3 eventually have their supervision revoked, sending 350,000 to prison each year. Academics, activists, and attorneys warn that "mass supervision" has become a powerful engine of mass incarceration.

This is the first Article to study theories of punishment in revocation of community supervision, focusing on the federal system of supervised release. Federal courts apply a primarily retributive theory of revocation, aiming to sanction defendants for their "breach of trust." However, the structure, statute, and purpose of supervised release all reflect a utilitarian design justified solely by deterrence and incapacitation, not retribution.

A utilitarian approach to revocation would not just be a theoretical change, but also would have a real-world impact by shortening prison terms, mitigating racial bias, and ending consecutive sentencing. While scholars view courts as the government branch most protective of criminal defendants, the judiciary has played a key role in expanding the state's power to punish through retributive revocation. Judges may feel a personal stake in sanctioning disrespect of their authority, yet they should revoke supervised release only to deter and incapacitate.

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INTRODUCTION

"The sword of Damocles hangs over a defendant every time he wakes up to serve a day of supervised release."[1]

On November 6, 2017, rapper Meek Mill appeared for a hearing in Philadelphia court.[2] Age thirty, he was a certified-platinum, multimillionaire recording artist.[3] But due to a 2008 conviction for drug and gun possession, he was also serving a ten-year term of probation.[4]

Mill had appeared before the same judge multiple times over the years on a series of technical (non-criminal) probation violations.[5] The judge had imposed a variety of punishments, including house arrest, imprisonment, more probation, and "etiquette classes."[6] This time, Mill was again in technical violation because eleven months earlier, he had tested positive for opiates, possessed a drug-masking agent, traveled for performances without giving notice to the government, and been arrested

1. United States v. Haymond, __ U.S. __, 139 S. Ct. 2369, 2380 n.5 (2019) (plurality opinion) (internal quotation marks, alterations, and citation omitted).

2. Joseph A. Slobodzian, *Meek Mill Sentenced to 2 to 4 Years in State Prison*, PHILA. INQUIRER (Nov. 6, 2017), https://www.inquirer.com/philly/news/crime/meek-mill-sentenced-state-prison-probation-violation-20171106.html [https://perma.cc/L5KU-S63P] (describing length of Mill's allocution).

3. Kory Grow, *Meek Mill's Legal Troubles: A History*, ROLLING STONE (Mar. 14, 2018, 6:17 PM), https://www.rollingstone.com/music/music-news/meek-mills-legal-troubles-a-history-117981/ [https://perma.cc/KXF7-69KU].

4. Commonwealth v. Williams, No. CP-51-CR-00011614-2007, 2018 Phila. Ct. Com. Pl. LEXIS 43, at *4–6 (Mar. 29, 2018).

5. *Id.*

6. *Id.*; *see also* C. Vernon Coleman II, *Meek Mill Ordered by Judge to Take Etiquette Classes*, XXL (June 30, 2013), https://www.xxlmag.com/meek-mill-ordered-by-judge-to-take-etiquette-classes/ [https://perma.cc/SAH2-WT4Q].

for fighting in an airport and recklessly driving an ATV.[7]

At the November 2017 hearing, Mill's probation officer testified that he was "meeting expectations."[8] The prosecutor recommended "probation be continued."[9] Mill offered a forty-minute apology and plea for leniency.[10] "I'm human. I'm not perfect," he implored.[11] "I'm asking for mercy. You gave me the ladder to do what I have to do to prevail in my struggle. I made it this far, I can't really go back and start over."[12]

Finally, the judge announced her decision. She revoked Mill's probation, ordered deputies to immediately take him into custody, and sentenced him to two to four years of imprisonment.[13] "I appreciate everything that you said," she said, "but I have been trying to help you since 2009 . . . and every time I do more and more and more to give you break after break after break . . . you . . . thumb your nose at me and just do what you want the way you want."[14] "This sentence," the judge declared, "is absolutely necessary to vindicate the authority of the Court. . . . [Y]ou have no respect for this Court."[15]

Mill's imprisonment sparked a backlash against the harsh treatment of people under community supervision, as his case became "a rallying cry for criminal justice reform in Philadelphia."[16] Friend and fellow rapper Jay-Z published a *New York Times* op-ed decrying how the criminal justice system stalks, "entraps and harasses hundreds of thousands of black people every day . . . consistently monitors and follows them for any minor infraction—with the goal of putting them back in prison."[17] Legal experts explained that "one of the grounds for revoking probation and putting someone in jail is to vindicate the authority of the court."[18]

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7. *See Williams*, 2018 Phila. Ct. Com. Pl. LEXIS 43, at *6–7, *13–14.

8. *Id.* at 10.

9. *Id.* at 16.

10. Slobodzian, *supra* note 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. Commonwealth v. Williams, No. CP-51-CR-00011614-2007, 2018 Phila. Ct. Com. Pl. LEXIS 43, at *72 (Mar. 29, 2018).

15. *Id.*

16. Kristine Phillips, *Meek Mill Denied Bail Again as Judge Calls Rapper a 'Danger to the Community'*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/20/how-rapper-meek-mills-actions-in-2007-fueled-racial-politics-in-2017/ [https://perma.cc/WHY9-GAH6].

17. *See* Jay-Z, *Jay-Z: The Criminal Justice System Stalks Black People Like Meek Mill*, N.Y. TIMES (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/opinion/jay-z-meek-mill-probation.html [https://perma.cc/NS6H-DY96].

18. Phillips, *supra* note 16 (internal quotation marks omitted).

Mill was "on the radar because of his prominence, but the problem" is "happening every day to poor people."[19]

Five months later, the Pennsylvania Supreme Court granted Mill bail based on a challenge to the 2008 conviction underlying the original probation sentence.[20] He was released from prison just in time to attend a Philadelphia 76ers game and rang a replica of the Liberty Bell "to wild applause."[21] In 2019, he succeeded in overturning the conviction.[22] The judge who revoked his probation was removed from his case for "unfairness and bias."[23]

Mill swore not to take his victory for granted, proclaiming to a crowd of supporters: "Meek free! I'm not on probation no more."[24] He addressed the crowd, "I know y'all probably have family members in jail or people going through the same thing as me," and promised, "I will continue to do what I do with the reform movement and help the people that help me."[25] Soon after, he joined with Jay-Z to found the REFORM Alliance,[26] a criminal justice advocacy organization "committed to changing mass supervision laws."[27] Two years later, a probation reform bill backed by the Alliance unanimously passed the Pennsylvania Senate.[28]

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19. *Id.*

20. Dennis Romero, *Rapper Meek Mill Freed on Bail on Order of Pennsylvania Supreme Court*, NBC NEWS (Apr. 24, 2018, 3:30 PM), https://www.nbcnews.com/news/crime-courts/rapper-meek-mill-be-freed-bail-order-pennsylvania-supreme-court-n868826 [https://perma.cc/NW4S-CD9M].

21. *Id.*

22. Bobby Allyn, *Meek Mill Pleads Guilty to Misdemeanor Gun Charge, Ends 12-Year Legal Case*, NPR (Aug. 27, 2019, 3:58 PM), https://www.npr.org/2019/08/27/754769378/meek-mill-pleads-guilty-to-misdemeanor-gun-charge-ends-12-year-legal-case [https://perma.cc/JWJ6-U6S6].

23. Milan Polk, *Meek Mill Granted Retrial and New Judge, Hopes to Have 'Injustice Rectified'*, VULTURE (June 4, 2019) (quoting Larry Krasner, Philadelphia district attorney), https://www.vulture.com/2019/06/rapper-meek-mill-philadelphia-district-attorney-retrial-support.html (last visited Sept. 8, 2021).

24. Allyn, *supra* note 22.

25. *Id.*

26. Michelle Kim, *JAY-Z, Meek Mill, Van Jones, More Launch New Criminal Justice Reform Organization*, PITCHFORK (Jan. 23, 2019), https://pitchfork.com/news/jay-z-meek-mill-van-jones-more-launch-new-criminal-justice-reform-organization/ [https://perma.cc/X5P3-U7FP].

27. Kelly Wynne, *After Kanye's Call-out, Find out What Meek Mill Actually Believes About Prison Reform*, NEWSWEEK (July 22, 2020, 3:50 PM), https://www.newsweek.com/after-kanyes-call-out-find-out-what-meek-mill-actually-believes-about-prison-reform-1519791 [https://perma.cc/EP5L-H73Q].

28. Ron Southwick, *Pa. Senate Unanimously Passes Bill to Reform Probation System; Supporters Call it a 'Milestone'*, PENNLIVE (July 16, 2020, 10:16 PM), https://www.pennlive.com/news/2020/07/pa-senate-unanimously-passes-bill-to-reform-probation-system-supporters-call-it-a-milestone.html [https://perma.cc/LX47-QWXC]. The Senate Judiciary Committee later amended the legislation to reflect a more modest House proposal, leading some reform groups to drop their support. *See SB14 Probation Reform*, ACLU PA., https://www.aclupa.org/en/legislation/sb-14-probation-reform [https://perma.cc/SF5E-NX87].

Mill's story of revocation and redemption illustrates the extraordinary sentencing power judges wield in an age of mass supervision. Without a jury or proof beyond a reasonable doubt, judges can revoke defendants' community supervision based solely on non-criminal conduct and sentence them to years of imprisonment.[29] Even if defendants are not a risk to themselves or others, judges may punish them solely to promote "respect" for the law.[30]

Revocation of community supervision is a defining feature of American criminal justice. Nearly 4.5 million people in the United States—more than one percent of the entire population—are currently serving terms of community supervision,[31] which is "five to ten times the rates of European nations."[32] In total, the United States sends approximately 350,000 people to jail or prison each year for violating conditions of their supervision,[33] accounting for more than a third of all prisoners in thirteen states, and more than half in Arkansas, Idaho, Missouri, and Wisconsin.[34]

Revocation of community supervision is "a major driver of mass incarceration."[35] As Michelle Alexander observed, community

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29. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding no right to counsel in revocation proceedings); Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972) (not requiring jury or proof beyond a reasonable doubt as "minimum requirements of due process" in revocation proceedings).

30. *See, e.g.*, Commonwealth v. Williams, 2018 Phila. Ct. Com. Pl. LEXIS 43, at *72 (Mar. 29, 2018) (citing Mill's lack of respect for the court as justification for revoking probation).

31. Danielle Kaeble & Mariel Alper, *Probation and Parole in the United States, 2017–2018*, U.S. DEP'T. OF JUST. 1 (Aug. 2020), https://www.bjs.gov/content/pub/pdf/ppus1718.pdf [https://perma.cc/YCK3-523P]; Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), https://www.prisonpolicy.org/reports/correctionalcontrol2018.html [https://perma.cc/5TZY-G3RG].

32. HUM. RTS. WATCH & ACLU, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION THE UNITED STATES 34 (2020), https://www.aclu.org/sites/default/files/field_document/embargoed_hrw_aclu_revoked_parole_and_probation_report_002.pdf [https://perma.cc/2QCE-PY7C].

33. THE PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 9 (Sept. 2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf [https://perma.cc/9LLN-C8R7]; *see also* Alan Greenblatt, *Probation and Parole Violations Are Filling up Prisons and Costing States Billions*, GOVERNING (June 18, 2019), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf [https://perma.cc/SFT9-BPDY] (citing approximately 280,000 people imprisoned for violations at any given time).

34. Greenblatt, *supra* note 33.

35. *Philadelphia DAO's Policies to End Mass Supervision*, THE JUST. WIRE 1 (Mar. 21, 2019), https://medium.com/philadelphia-justice/philadelphia-daos-policies-to-end-mass-supervision-fd5988cfe1f1 (last visited Sept. 8, 2021). A coalition of more than 100 current or former prosecutors and probation/parole chiefs recently joined in a "Statement on the Future of Probation & Parole in the

supervision has fueled an "increase in prison admissions," because "[p]robationers and parolees are . . . governed by additional rules that do not apply to everyone else," and "[v]iolation[s] of these special rules can land [them] right back in prison."[36] A 2020 report by the American Civil Liberties Union and Human Rights Watch found that rates of revocation have increased dramatically since the 1980s, from a small fraction to almost one-half of all prison admissions.[37] Between 1970 and 2008, the percent of U.S. state and federal prison admissions stemming from violations of community supervision more than doubled, from 16% to 36%, before falling slightly to 28% in 2018.[38] In state prisons, 45% of all admissions are for probation and parole violations. Even these numbers exclude people incarcerated for violations in jails, for which there is little data.[39]

Revocation of community supervision both reflects and amplifies racial inequality. A 2018 study showed that "Black adults are about 3.5 times as likely as whites to be supervised," and make up "30 percent of those on probation or parole" despite only being "13 percent of the U.S. adult population."[40] Controlling for nonracial and nonethnic characteristics, Black probationers also have "substantially and statistically significant higher odds of revocation," with "[t]he odds of revocation for white probationers . . . between 18 and 39 percent lower than for their black counterparts."[41] As activist Bryan Stevenson observed in the wake of

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United States," declaring that "[m]ass supervision has taken an enormous human and fiscal toll" and "become overly burdensome, punitive and a driver of mass incarceration." *Statement on the Future of Probation & Parole in the United States*, EXIT https://www.exitprobationparole.org/statement [https://perma.cc/4XVE-EPWY]; *see also* Priscilla A. Ocen, *Awakening to a Mass-Supervision Crisis*, ATLANTIC (Dec. 30, 2019, 12:18 PM), https://www.theatlantic.com/politics/archive/2019/12/parole-mass-supervision-crisis/604108/ [https://perma.cc/8EJK-Y2T8].

36. MICHELLE ALEXANDER, THE NEW JIM CROW 119 (10th ed. 2020).

37. HUM. RTS. WATCH & ACLU, *supra* note 32 at 1.

38. *Id.*

39. *Id.*

40. Jake Horowitz & Connie Utada, *Community Supervision Marked by Race and Gender Disparities*, PEW (Dec. 6, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/12/06/community-supervision-marked-by-racial-and-gender-disparities [https://perma.cc/TV25-K5PF]; *see also* Michael Winerip, Michael Schwirtz & Robert Gebeloff, *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html [https://perma.cc/TZ89-JPF2] (finding that Black and Hispanic prisoners are less likely to be granted early release at their first parole hearing).

41. JESSE JANNETTA, JUSTIN BREAUX, HELEN HO & JEREMY PORTER, URB. INST., EXAMINING RACIAL AND ETHNIC DISPARITIES IN PROBATION REVOCATION 4 (Apr. 2014), https://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF [https://perma.cc/6PPW-7XT3]; *see also* Kendra Bradner

Mill's sentencing, revocation is "burdened by the history of racial inequality."[42]

While legal scholars have long debated the philosophical justifications for penalizing criminal conduct,[43] no one has considered the theories of punishment underlying revocation of community supervision.[44] Aside from the death penalty, "punishment theory says surprisingly little about types of sanctions," instead describing sentencing in "abstract terms" like "'hard treatment' or 'unpleasant consequences' or 'legal deprivation,'" but not explaining "why incarceration, fines, or any other specific sanction is permissible or appropriate."[45] As Alice Ristroph argued, this abstract analysis "loses connection with real practices," leading scholars to "assume the existence of some entity that will impose the punishment."[46] Punishment theorists simply call that entity the "state," without considering "who or what constitutes the state, and how its various subsidiary institutions work together."[47]

One reason revocation of community supervision may have failed to attract scholarly attention is that violators are sometimes viewed as dangerous or hopeless recidivists, undeserving of social concern. As the United States Supreme Court put it, revocations represent "the problem case[s] among problem cases."[48] Nevertheless, people under supervision

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& Vincent Schiraldi, *Racial Inequities in New York Parole Supervision*, COLUM. U. JUST. LAB 5, 8, 10 (Mar. 2020), https://justicelab.columbia.edu/sites/default/files/content/NY%20Parole%20Racial%20Inequities.pdf [https://perma.cc/3YA9-3X6A] (finding that Black and Latinx people in New York are more likely to be under parole supervision, more likely to be detained pending a parole violation hearing, and more likely to be imprisoned for a parole violation); Michael Tapia & Patricia M. Harris, *Race and Revocation: Is there a Penalty for Young, Minority Males?*, 4 J. ETHNICITY CRIM. JUST. 1, 8, 14, 18 (2006) (finding that Black probationers in a "large south central state" were 66% more likely to have their probation revoked).

42. Bobby Allyn, *From Prison, Meek Mill Vows to Champion Changes in Pa. Criminal Justice System*, WHYY (Mar. 13, 2018), https://whyy.org/articles/prison-meek-mill-vows-champion-changes-pa-criminal-justice-system [https://perma.cc/Y58L-Q3LK].

43. Debates over punishment philosophy date back at least 200 years, to Immanuel Kant and Jeremy Bentham. *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW 194–98 (W. Hastie trans., 1887) (arguing for retributivism); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1, 14–18, 83–85 (Batoche Books 2020) (arguing for utilitarianism). Since then, "moral philosophers have killed many forests answering this question." Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1089 (2010).

44. Despite a surplus of articles on sentencing theory, there is only one 1988 piece examining the philosophy of punishment in probation revocation, and nothing on parole or supervised release. *See* Bradford C. Mank, *Postsentence Sentencing: Determining Probation Revocation Sanctions*, 18 CUMB. L. REV. 437 (1988).

45. Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1020, 1039–44 (2014).

46. *Id.* at 1039–40.

47. *Id.* at 1040.

48. Johnson v. United States, 529 U.S. 694, 709 (2000).

are also human beings with basic constitutional rights and inherent dignity who deserve study and attention.[49] On a more practical level, states spend a total of $9.3 billion annually imprisoning people for violations of community supervision, not including costs of jailing them before hearings.[50] Given the constitutional, humanitarian, and fiscal interests, revocation is a significant matter of social policy.

This is the first Article to study theories of punishment in revocation of community supervision, focusing on the federal system of supervised release.[51] Federal judges apply a primarily retributive theory of revocation, aiming to punish defendants for their "breach of trust."[52] However, the structure, statute, and purpose of supervised release all reflect purely utilitarian goals of deterrence and incapacitation, not retribution.[53] A utilitarian approach to revocation would not just be a philosophical change, but also would have a significant real-world impact by shortening prison terms, mitigating implicit racial bias, and eliminating the justification for consecutive sentencing.[54] While scholars typically view courts as the government branch most protective of criminal

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49. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

50. *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, JUST. CTR., THE COUNCIL OF STATE GOV'TS (June 18, 2019), https://csgjusticecenter.org/publications/confined-costly/ [https://perma.cc/DYR9-HB5J].

51. One possible objection to comparing revocation of supervision with ordinary criminal sentencing is that ordinary sentencing "is the act of imposing sanctions for criminal behavior, proven in a court following a trial or plea of guilty," whereas revocation "is merely the continuing application of that original sentence." Jeremy Travis, *Back-End Sentencing: A Practice in Search of a Rationale*, 74 SOC. RSCH.: INT'L Q. 631, 632 (2007). This distinction is technically accurate for revocation of supervised release, which is legally considered punishment for the original conviction, not the violation conduct itself. *See Johnson*, 529 U.S. at 700 (adopting this view to avoid "the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release"). However, "the conceptual and operational similarities between the two systems are . . . so compelling," that revocation should be regarded as "a form of sentencing," despite the formal distinction. Travis, *supra*, at 632, 634. As Jeremy Travis explained:

> In both systems, we use the enforcement agencies of the state (police or parole) to detect violations of rules (criminal laws or conditions of supervision), arrest and detain those suspected of those infractions (defendants or parole violators), bring cases and suspects before a neutral adjudicative entity (judge or hearing officer), provide an opportunity for determinations of fact through adversarial process (with some distinctions between the systems), determine guilt (with differing levels of proof) and impose sanctions for violations of those rules, up to and including the deprivation of liberty."

Id. at 632. Since revocation of supervised release imposes a prison term as a penalty for a violation of legal rules of conduct, it is substantively a form of sentencing, not just administration of the original sentence.

52. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

53. *See infra* Part 0.

54. *See infra* sections III.0–.B.

defendants,[55] the judiciary has instead played a key role in expanding the state's power to punish through the retributive theory of revocation.[56] Rather than sanction violators for disrespecting their authority, judges should revoke supervised release only to deter and incapacitate.

Part I reviews the law and history of supervised release. The statute authorizing revocation omits retribution as a factor to consider, yet a majority of Supreme Court justices, the Sentencing Commission, and the circuit courts have adopted a "primarily" retributive theory of revocation sentencing focused on sanctioning defendants for their "breach of trust."[57] Trial judges revoke supervised release for retribution, even though that factor is the only theory of punishment not listed in the statute as a consideration.[58]

Part II argues that the retributive theory of revocation contradicts the structure, statute, and purpose of supervised release, which all reflect a purely utilitarian goal of ensuring the defendant's safe and successful return to the community:

The structure of conditional liberty under supervised release involves no act of grace or risk by the government, so there is no "trust" for defendants to "breach."

The statute governing revocation of supervised release deliberately omits retribution from the factors judges may consider.

The purpose of supervised release is to ease the transition to the community, not punish wrongdoing.

Finally, Part III shows that a purely utilitarian theory of revocation would shorten prison terms, mitigate implicit racial bias, and end the arbitrary and unnecessary practice of consecutive revocation sentencing. While the traditional narrative of criminal law portrays courts as the branch of government most likely to limit criminal liability, retributive revocation reveals the federal judiciary's role in expanding the state's power to punish violators. Judges may feel a personal stake in sanctioning disrespect of their authority, but they should solely consider deterrence and incapacitation when revoking supervised release.

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55. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510, 541, 557, 576 (2001).

56. *See infra* section III.0.

57. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

58. *See infra* section I.C.0 (discussing cases in which judges revoked supervised release for retribution).

I. THEORIES OF FEDERAL SENTENCING

In the Sentencing Reform Act of 1984,[59] Congress replaced parole with a new form of supervision called supervised release, intended "to ease the defendant's transition into the community."[60] Two years later, Congress authorized judges to revoke supervised release, but limited the purposes to deterrence and incapacitation, not retribution.[61] Despite this utilitarian design, the Sentencing Commission, the Supreme Court, and the circuit courts have all endorsed a primarily retributive theory of revoking supervised release, aimed at sanctioning defendants for their "breach of trust."[62]

A. Sentencing Reform Act of 1984

Congress created the modern federal sentencing system in the Sentencing Reform Act of 1984.[63] The Act endorses two basic theories of punishment, retributivism and utilitarianism.[64] The law then instructs sentencing judges to selectively apply these theories depending on the kind of punishment they impose.[65]

Retributivism, also known as non-consequentialism, is the theory that criminals deserve "just punishment" based on their "moral culpability."[66] This is a metaphysical justification rooted in "a commitment to asserting moral truth in the face of its denial."[67] Retributivist sentencing is backward-looking, attempting to balance the offender's blameworthy conduct with an equivalent penalty. Crime violates the "primary rules" of

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59. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742, 28 U.S.C. §§ 991–98).

60. S. REP. NO. 98-225, at 124–25 (1983).

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

62. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

63. *See generally* Mistretta v. United States, 488 U.S. 361, 363–67 (1989).

64. *See* 18 U.S.C. §§ 3553(a)(2)(A)-(D).

65. *See* 18 U.S.C. §§ 3562(a), 3572(a) 3582(a). A third theory of punishment is restorative justice, which uses a "negotiated outcome" to "allow participants . . . to decide upon resolutions that emerge from particular circumstances." Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1268–69 (2005). However, "mainstream punishment theory," which aims "to impose external constraints and consistency rules on outcomes," has "not yet been able to encompass" this approach. *Id.*

66. Rita v. United States, 551 U.S. 338, 349 (2007); *see also* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179–82 (1988).

67. Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 124–28 (1988).

society, and punishment serves to "restore[] the equilibrium."[68] As Justice Holmes put it, "there is a mystic bond between wrong and punishment . . . wrong being the negation of right, punishment is the negation of that negation, or retribution."[69]

Utilitarianism, also known as consequentialism, is the belief that criminal defendants should be punished to "increase the general welfare."[70] This approach focuses on the three "useful purposes that punishment serves"—deterrence, incapacitation, and rehabilitation.[71] Utilitarian sentencing is forward-looking, concerned not with moral culpability but achieving good outcomes. Crime harms society, and punishment serves to reduce the frequency of that harmful conduct. In the memorable words of the Marquis of Halifax: "Men are not hang[e]d for stealing Horses, but that Horses may not be stolen."[72]

In the Sentencing Reform Act, Congress endorsed both retributive and utilitarian theories of punishment. Title 18, Section 3553(a) lists ten "[f]actors to be considered in imposing a sentence," including four "purposes" of punishment:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[73]

These four purposes correspond to (A) retributivism and (B–D) utilitarianism. As the Supreme Court explained, "[t]hese four

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68. Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 476–79 (1968). A theory of punishment seeking to restore social equilibrium in order "to prevent lynchings, blood feuds, and other ugly forms of self-help," or to "promote[] social solidarity," would be utilitarian, not retributivist, because it would treat punishment as a "signaling mechanism" that produces good outcomes, not as an "intrinsic good" in itself. Albert Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 15–17 (2003).

69. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 42 (1881).

70. *Id.* at 47.

71. KENT GREENAWALT, *Punishment*, 3 ENCYC. OF CRIME & JUST. 1282–84 (2d ed. 2002); *see also* Ristroph, *supra* note 45, at 1038; Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316–17 (2000) (explaining the "utilitarian purposes" of punishment in more detail).

72. GEORGE SAVILE, A CHARACTER OF KING CHARLES THE SECOND: AND POLITICAL, MORAL AND MISCELLANEOUS THOUGHTS AND REFLECTIONS 72 (1750).

73. 18 U.S.C. § 3553(a)(2)(A)–(D). The other factors are "the nature and circumstances of the offense and the history and characteristics of the defendant," § 3553(a)(1), "the kinds of sentences available," § 3553(a)(3), and "the need to avoid unwarranted sentence disparities.", § 3553(a)(6).

considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally, and a court must fashion a sentence 'to achieve the[se] purposes . . . to the extent that they are applicable' in a given case."[74]

Having defined these four theories of punishment, the Act then incorporates them into sentencing practice by cross-referencing them to the different kinds of "authorized sentences."[75] When a judge sentences a defendant, each theory of punishment "may apply differently, or even not at all, depending on the kind of sentence" imposed.[76] For example, when sentencing a defendant to probation, the Act states that the judge "shall consider the factors set forth in section 3553(a) to the extent that they are applicable."[77]

When sentencing a defendant to imprisonment, the Sentencing Reform Act instructs that the judge "shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation*."[78] The emphasized language means that judges may sentence defendants to imprisonment based on all "the specified rationales of punishment *except for* rehabilitation," which is "an unsuitable justification for a prison term."[79] The reason the law excludes rehabilitation as a factor justifying imprisonment is that Congress had concluded that "the system's attempt to 'achieve rehabilitation of offenders had failed'" and that prisons lacked "the capacity . . . to rehabilitate."[80] While the Act endorses four theories of punishment, the statute selectively applies these theories in order to limit each kind of punishment to its proper purpose.

B. Supervised Release

The Sentencing Reform Act also created a new kind of sentence called "supervised release," which replaced parole.[81] Although courts generally view parole, probation, and supervised release as the same basic sentence

74. Tapia v. United States, 564 U.S. 319, 325 (2011) (quoting 18 U.S.C. § 3551(a)).

75. 18 U.S.C. § 3551(b).

76. *Tapia*, 564 U.S. at 326.

77. 18 U.S.C. § 3562(a).

78. *Id.* § 3582(a) (emphasis added).

79. *Tapia*, 564 U.S. at 327 (emphasis in original).

80. *Id.* at 324, 327 (quoting Mistretta v. United States, 488 U.S. 361, 366 (1989)). In fact, the Act does not even "grant[] courts the power to ensure that offenders participate in prison rehabilitation programs." *Id.* at 330.

81. 18 U.S.C. § 3583(a).

of community supervision,[82] they are actually very different penalties. Recognizing the differences between these forms of supervision is the key to understanding theories of punishment in revocation of supervised release.

Probation, parole, and supervised release are all terms of supervision by a probation officer served outside prison, subject to a set of conditions.[83] But while these terms of supervision may look the same, each bears a different relationship to the defendant's prison sentence. Probation and parole *reduce* prison time by allowing the defendant to avoid prison or obtain early release. Supervised release, by contrast, *adds* to imprisonment by imposing more supervision after completion of the prison sentence.

This distinction reflects the different theories of punishment underlying probation, parole, and supervised release. Probation and parole emerged from the penal reform movement of the mid-nineteenth century,[84] "premised on a faith in rehabilitation."[85] Probation allowed a defendant to avoid imprisonment by serving a term of supervision in the community.[86] The supervision was "designed to provide a period of grace in order to aid the rehabilitation of a penitent offender," and was "conferred as a privilege . . . a matter of favor," not "a right."[87] Today, probation remains available in the federal system for first-time offenders charged with minor offenses.[88]

Parole began as a way to encourage prisoners to reform themselves by promising early release in exchange for good behavior. The federal parole system, established in 1910, allowed defendants who served one-third of their prison sentences[89] to go before the Parole Commission and ask for early release.[90] The Commission would evaluate their records and decide

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82. *See generally* Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587 (2020) (criticizing this trend with respect to supervised release and parole).

83. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 5B1.1–1.3 (U.S. SENT'G COMM'N 2018) (noting federal Sentencing Guidelines for imposing a term of probation or supervised release).

84. HOWARD ABADINSKY, PROBATION AND PAROLE: CORRECTIONS IN THE COMMUNITY 68–76, 135–43 (13th ed. 2018).

85. *Tapia*, 564 U.S. at 323–24.

86. ABADINSKY, *supra* note 84, at 68–76.

87. Burns v. United States, 287 U.S. 216, 220 (1932).

88. 18 U.S.C. § 3561(a); U.S. SENT'G GUIDELINES MANUAL § 5B1.1 (U.S. SENT'G COMM'N 2018) (describing sentencing guidelines for imposing probation).

89. 18 U.S.C. §§ 4205(a), 4206(a) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2006)). Federal judges also had discretion to make defendants they sentenced eligible for parole at an earlier date. *See* 18 U.S.C. § 4205(b)(2) (repealed 1987).

90. The Parole Commission was an agency within the Department of Justice, with members

whether they had been "rehabilitated and should be released from confinement."[91] After release, the parolees would be subject to "conditions of parole" and supervised by a parole officer.[92] If they violated a condition, then the Commission could revoke their release and send them back to prison to serve the rest of their original sentence.[93] Parole was also known as "indeterminate sentencing" because the ultimate length of the prison term was not decided by the judge at the sentencing hearing, but rather by parole commissioners, depending on the defendant's behavior in prison.[94] At the system's height, at least two-thirds of all federal prisoners were granted parole.[95]

Beginning in the 1960s and 70s, however, Americans began to lose faith in the rehabilitative theory of imprisonment. Lawmakers came to believe that "the system's attempt to 'achieve rehabilitation of offenders had failed,'" as they "increasingly doubted that prison programs could 'rehabilitate individuals on a routine basis'—or that parole officers could 'determine accurately whether or when a particular prisoner ha[d] been rehabilitated.'"[96] Critics questioned the "supposed expertise of parole officials,"[97] who seemed to exercise their power in an arbitrary and discriminatory manner.[98] Reformers called for "truth in sentencing," so that defendants and victims would know the length of the sentence on the day it was imposed.[99]

In the Sentencing Reform Act of 1984, Congress abolished parole in favor of a "determinate" approach to punishment.[100] Going forward,

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appointed by the President and confirmed by the Senate. Peter B. Hoffman, *History of the Federal Parole System: Part I (1910–1972)*, 61 FED. PROB. 23, 23 (1997).

91. Tapia v. United States, 564 U.S. 319, 324 (2011). Parole regulations instructed that the Commission should grant release if the prisoner had "substantially observed the rules of the institution" and release would not "depreciate the seriousness of his offense or promote disrespect for the law" or "jeopardize the public welfare." 18 U.S.C. §§ 4205(a), 4206(a)(1)–(2) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2006)).

92. 18 U.S.C. §§ 4209, 4214 (1984), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742).

93. *Id.*

94. *Tapia*, 564 U.S. at 323–24.

95. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 30 (1979) (Marshall, J., dissenting in part). By comparison, three-quarters of state prisoners were granted parole. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 489 (1999).

96. *Tapia*, 564 U.S. at 324–25 (first quoting Mistretta v. United States, 488 U.S. 361, 366 (1989); then quoting S. REP. NO. 98-225, at 40 (1983)).

97. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 109 (1973).

98. *See* Schuman, *supra* note 82, at 600.

99. United States v. Haymond, __ U.S. __, 139 S. Ct. 2369, 2389 (2019) (Alito, J., dissenting).

100. *Tapia*, 564 U.S. at 325.

federal prisoners would no longer be eligible for early release. Instead, all defendants would be required to serve at least 85% of their prison terms, with the Bureau of Prisons awarding 15% "good time" credit to well-behaved inmates.[101]

The Sentencing Reform Act created "supervised release" to "ease the defendant's transition into the community" following completion of the prison sentence.[102] Congress intended this new form of post-release supervision to rationalize the system. Under parole, the length of the supervision term was often arbitrary, turning "on the almost sheer accident" of how much time was left on the defendant's prison term.[103] A well-behaved prisoner would win early parole and then serve a long term of supervision, while a poorly behaved prisoner would not be paroled and then have no supervision after release.[104]

Unlike parole, lawmakers intended supervised release to be based on each individual defendant's particular needs. Congress authorized sentencing judges to impose supervised release to follow imprisonment depending on the unique facts of each case[105] in order to focus resources on defendants "who actually need supervision,"[106] using "the district courts' discretionary judgment to allocate supervision to those releasees who needed it most."[107] The Senate Report makes clear that judges should not impose supervision as "punishment," which "will have been served to the extent necessary by the term of imprisonment."[108]

In the most significant break from parole practice, Congress did not create any mechanism for revoking supervised release. Under parole, the

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101. *See* 18 U.S.C. § 3624(b). The original Sentencing Reform Act gave defendants only 10% good time credit, requiring them to serve 90% of their prison terms, but a later amendment slightly increased the available credit to 15%. *See* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 996 (2013); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226 n.10 (1993).

102. S. REP. NO. 98-225, at 124–25 (1983).

103. *Id.* at 124.

104. *See id.* at 122–23.

105. 18 U.S.C. § 3582(a).

106. S. REP. NO. 98-225, at 125 (1983).

107. Johnson v. United States, 529 U.S. 694, 709 (2000). The Sentencing Commission later undermined Congress's attempt to selectively impose supervision by adopting Guidelines that recommend judges impose supervised release on *all* defendants sentenced to more than one-year imprisonment. *See* U.S. SENT'G GUIDELINES MANUAL § 5D1.1 (U.S. SENT'G COMM'N 2018). Congress also backtracked on its original goal of limiting post-release supervision by creating mandatory-minimum supervised release terms for certain crimes. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A)(viii) (mandating five-year minimum supervised release term for first-time drug offenders).

108. S. REP. NO. 98-225, at 125 (1983).

Parole Commission had broad power to revoke release if a defendant violated a condition. Parole revocations were conducted before an administrative board, with no jury, proof beyond a reasonable doubt, or formal rules of evidence.[109] In designing supervised release, however, lawmakers "d[id] not believe that a minor violation of a condition . . . should result in resentencing of the defendant."[110] If any defendants flagrantly and repeatedly violated their conditions, they could be charged with contempt of court or a new crime,[111] which would require a full criminal prosecution and trial, with all the traditional constitutional rights.[112]

Just two years after the Sentencing Reform Act, however, Congress dramatically changed the system by adding a provision empowering judges to revoke supervised release. The Anti-Drug-Abuse Act of 1986[113] authorized judges to sentence defendants to imprisonment for violations of supervised release in proceedings without a jury and using a preponderance-of-the-evidence standard of proof.[114] In 1987, 1994, 2002, and 2003, lawmakers voted to toughen revocation by imposing longer revocation sentences, more supervised release to follow revocation, and mandatory revocation for drug-, gun-, and sex-related violations.[115]

The statutory scheme for revoking supervised release is intricate, yet precise. Codified at 18 U.S.C. § 3583(e)(3), the provision reads:

> The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) . . . revoke a 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 that resulted in such term of supervised release.[116]

This long list of cross-references includes all the purposes of punishment

109. *See* Schuman, *supra* note 82, at 590–91, 604.

110. S. REP. NO. 98-225, at 125.

111. *Id.*

112. Doherty, *supra* note 101, at 1000.

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

114. The maximum prison sentence a judge can impose when revoking supervised release depends on the class of the defendant's original conviction. 18 U.S.C. § 3583(e)(3). The guidelines range for the revocation sentence, by contrast, turns on the nature of the violation and the defendant's criminal history. U.S. SENT'G GUIDELINES MANUAL § 7B1.4(a) (U.S. SENT'G COMM'N 2018); *see* FED. R. CRIM. P. 32.1.

115. *See* Schuman, *supra* note 82, at 603–07.

116. 18 U.S.C. § 3583(e)(3).

except one—§ 3553(a)(2)(A), or retribution.[117]

Today, revocation of supervised release is a major function of the federal criminal justice system. Judges impose supervised release in 99% of cases where the defendant is sentenced to more than one year in prison,[118] with more than 50,000 people beginning terms of supervised release each year,[119] and the average term lasting forty-seven months.[120] One-third of all defendants eventually have their supervised release revoked and are sent back to prison, for an average eleven-month prison sentence.[121] In 2019 alone, federal judges revoked release in nearly 16,500 cases, making revocations about 15–20% of all federal sentencings.[122] Approximately 110,000 people are currently subject to supervised release, and according to a 2010 report, more than 12,000 were in prison for violations.[123]

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117. *Id.* §§ 3553(a)(2)(A), 3553(a)(3). The provision mandating revocation for drug- and gun-related violations does not include a list of considerations, see 18 U.S.C. § 3583(g), but circuit courts hold that mandatory revocation is governed by the § 3553(a) factors. *See* United States v. Thornhill, 759 F.3d 299, 307–310 (3d Cir. 2014).

118. *Federal Offenders Sentenced to Supervised Release*, U.S. SENT'G COMM'N 4 (July 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf [perma.cc/3W8K-FL85].

119. *Federal Probation System Statistical Tables for the Federal Judiciary*, U.S. CTS. tbl.E-1 (Dec. 31, 2019) [hereinafter Table E-1], https://www.uscourts.gov/statistics/table/e-1/statistical-tables-federal-judiciary/2019/12/31 [https://perma.cc/4UC4-7AEL].

120. *Number of Offenders on Federal Supervised Release Hits All-Time High*, PEW (Jan. 24, 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/8ETS-LY6L].

121. *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 4, 63. Although the eleven-month figure comes from a 2010 report, it matches the findings of the Sentencing Commission's 2020 report, which addressed probation and supervised release violations. *Federal Probation and Supervised Release Violations*, U.S. SENT'G COMM'N 34 (July 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf [https://perma.cc/8SYU-Y872] (analyzing probation and supervised release violations together).

122. *Federal Probation System Judicial Business*, U.S. CTS. tbl.E-7A (Sept. 30, 2019) [hereinafter Table E-7A], https://www.uscourts.gov/statistics/table/e-7a/judicial-business/2020/09/30 [https://perma.cc/CAM3-QGHK] (recording 16,383 revocations); *U.S. District Courts–Criminal Judicial Business*, U.S. CTS. tbl.D-5 (Sept. 30, 2019) [hereinafter Table D-5], https://www.uscourts.gov/statistics/table/d-5/judicial-business/2019/09/30 [https://perma.cc/QJ8U-7HG7] (recording 78,767 sentencings following conviction). The total number of revocation hearings is probably slightly higher, as judges only revoke release 85% of the time the government seeks revocation. *Federal Probation and Supervised Release Violations*, *supra* note 121, at 34.

123. *Federal Probation System Statistical Tables for the Federal Judiciary*, U.S. CTS. tbl.E-2 (Dec. 31, 2019) [hereinafter Table E-2], https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2019/12/31 [https://perma.cc/4UC4-7AEL]; *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 69.

C. Retributive Theory of Revocation

When judges revoke supervised release, the Sentencing Commission, a majority of Supreme Court Justices, and the circuit courts have endorsed a primarily retributive theory of punishment, aimed at sanctioning defendants for their "breach of trust."[124] Defendants have challenged the retributive theory of revocation as contrary to the language of the statute, but the lower courts have rejected their arguments. While there is a circuit split as to whether § 3583(e)(3) fully endorses retributive revocation, no circuit prohibits district judges from considering retribution when revoking supervised release.

1. Sentencing Commission

In 1990, the United States Sentencing Commission published the first official Sentencing Guidelines on revocation of supervised release.[125] The Guidelines address supervised release together with probation in a "single set of policy statements."[126] They state that supervised release and probation share the same "purpose" of "integrati[ng] of the violator into the community, while providing the supervision designed to limit further criminal conduct."[127] Therefore, the Guidelines conclude, "violations of the conditions of probation and supervised release a[re] functionally equivalent."[128]

According to the introductory note preceding the Guidelines on revocation, the Commission considered "two different approaches to sanctioning violations of probation and supervised release."[129] The first approach would punish a violation as a "breach of trust inherent in the conditions of supervision," with "revocation . . . intended to sanction the violator for failing to abide by the conditions of court-ordered supervision."[130] The second would seek to "sanction violators for the particular conduct triggering the revocation as if that conduct were being

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124. *See infra* sections I.C.0–3.

125. Earlier editions included extremely bare-boned preliminary revocation guidelines that said nothing about theories of punishment. *See* U.S. SENT'G GUIDELINES MANUAL §§ 7A1.1–.4 (U.S. SENT'G COMM'N 1989); U.S. SENT'G GUIDELINES MANUAL §§ 7A1.1–.4 (1988); U.S. SENT'G GUIDELINES MANUAL §§ 7A1.1–.4 (U.S. SENT'G COMM'N 1987); U.S. SENT'G GUIDELINES MANUAL §§ 7A1.1–.4 (U.S. SENT'G COMM'N 1986).

126. U.S. SENT'G GUIDELINES MANUAL §§ 7A3(b), 7A4 (U.S. SENT'G COMM'N 1990); *id.* § 7B. The remainder of this section cites to the current version of the Guidelines, which is substantively the same as the 1990 edition.

127. U.S. SENT'G GUIDELINES MANUAL § 7A4 (U.S. SENT'G COMM'N 2018).

128. *Id.* § 7B.

129. *Id*. § 7A3(b).

130. *Id.*

sentenced as new federal criminal conduct."[131] In other words, the Commission considered either punishing defendants for violating the judge's order to follow the conditions of release, or instead punishing them for the conduct underlying that violation as though it were a new crime.

Ultimately, the Commission endorsed the first, "breach of trust" approach, concluding that a "detailed revocation guideline system" based on underlying conduct would be "impractical" due to "the wide variety of behavior that can lead to revocation."[132] The Commission also expressed concern that if a defendant under supervision committed a new crime, then revocation based on the underlying conduct "would have the revocation court substantially duplicate the sanctioning role of the court with jurisdiction over . . . [the] new criminal conduct," meaning any sentence for the revocation would have to "to run concurrently with, and thus generally be subsumed in, any sentence imposed for that new criminal conduct."[133] Because the Commission believed that "as a breach of trust inherent in the conditions of supervision, the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct," it adopted the view that revocation would "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."[134]

Courts have interpreted this "breach of trust" concept as reflecting a retributive theory of revocation. *United States v. Blackston*[135] is a good example. In that case, a defendant on supervised release tested positive for cocaine and admitted to using drugs.[136] The judge revoked his release and sentenced him to the maximum of three years' imprisonment, telling him: "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."[137] The judge warned that supervised release was "a long rope that will reach out . . . so you can be dragged in here to account for your activities."[138] By punishing the defendant to hold him accountable for his breach of trust, the judge applied a retributive theory of revocation.

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. 940 F.2d 877 (3d Cir. 1991).
136. *Id.* at 879.
137. *Id.* at 880.
138. *Id.*

2. United States Supreme Court

In 2019, the Supreme Court issued its first landmark decision on supervised release in *United States v. Haymond*,[139] with a majority of justices endorsing a retributive theory of revocation.[140] In *Haymond*, the defendant challenged the constitutionality of 18 U.S.C. § 3583(k), which imposed a five-year, mandatory-minimum sentence on sex offenders who violated their supervised release by committing another sex offense.[141] The Court struck down the mandatory minimum, but split 4-1-4 on the reasoning. Justice Breyer's decisive concurrence joined the plurality in striking down § 3583(k), yet agreed with the dissent's retributive theory of revocation.[142]

Justice Gorsuch's plurality opinion applied a formal analysis that invalidated the mandatory minimum without taking any substantive view on the justifications for revoking supervised release.[143] According to him, § 3583(k) violated the defendant's Fifth and Sixth Amendment right to a jury trial under *Apprendi v. New Jersey*,[144] which held that any fact increasing a defendant's sentencing range must be proved to a jury beyond a reasonable doubt.[145] Because § 3583(k) increased the defendant's minimum sentence to five years based on a violation found by a judge, not a jury, the provision violated the jury right.[146]

The Supreme Court had never applied *Apprendi* to parole revocation, yet Justice Gorsuch found supervised release distinguishable, because it did not "replace a portion of the defendant's prison term," but rather ran "*after* the completion of his prison term."[147] This "structural difference" bore "constitutional consequences," he explained, because parole revocation "exposed a defendant only to the *remaining* prison term," while § 3583(k) imposed an "*additional*" prison sentence that could last "*beyond* that authorized by the jury's verdict."[148] Therefore, he concluded,

139. __ U.S. __, 139 S. Ct. 2369 (2019) (plurality opinion).

140. *See id.* Between 1984 and 2019, the Court issued five decisions on supervised release, all involving technical issues of statutory interpretation and none addressing the justifications for revocation. Mont v. United States, 139 S. Ct. 1826 (2019); Johnson v. United States, 529 U.S. 694 (2000); United States v. Johnson, 529 U.S. 53 (2000); Gozlon-Peretz v. United States, 498 U.S. 395 (1991).

141. *Haymond*, 139 S. Ct. at 2373.

142. *Id.* at 2385 (Breyer, J., concurring).

143. *Id.* at 2378–79.

144. 530 U.S. 466 (2000).

145. *See id.*

146. *Haymond*, 139 S. Ct. at 2381–82.

147. *Id.* at 2382 (2019) (emphasis in original).

148. *Id.* (emphasis in original).

parole revocation was consistent with *Apprendi*, while § 3583(k) was not.

In his dissent, Justice Alito advocated for upholding § 3583(k) based on a retributive view of revocation.[149] He "start[ed] with the proposition that the old federal parole system did not implicate the . . . jury trial right," and that revocation of supervised release was "not fundamentally different," having "changed the form" of supervision rather than its "substance."[150] Like parole revocation, "[t]he principal reason for assigning a penalty to a supervised-release violation is . . . that the violative act is a breach of trust."[151] Since the jury right only applies to punishment for "criminal conduct," it should not apply to revocation of supervised release, which is instead "designed to 'sanction primarily the defendant's breach of trust.'"[152]

Justice Alito warned that applying *Apprendi* to § 3583(k) would cast all revocation of supervised release into doubt. He highlighted language in the plurality opinion suggesting that revocations "must be conducted in compliance with the Sixth Amendment—which means that the defendant is entitled to a jury trial, which means that as a practical matter supervised-release revocation proceedings cannot be held."[153] Under the plurality's logic, he cautioned, "the whole concept of supervised release" would "come crashing down."[154]

The deciding vote came down to Justice Breyer, who joined the plurality in invalidating § 3583(k) but also "agree[d] with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is consistent with that of traditional parole."[155] Like the dissent, Justice Breyer endorsed a retributive view of revocation, quoting the Sentencing Guidelines: "The 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 as if that conduct were being sentenced as new federal criminal conduct.'"[156] Furthermore, Justice Breyer said he would not apply *Apprendi* to revocation of supervised release due to the

149. *Id.* at 2391–400 (Alito, J., dissenting).

150. *Id.* at 2391 (Alito, J., dissenting).

151. *Id.* at 2393 (Alito, J., dissenting) (citing U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018)).

152. *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018)).

153. *Id.* at 2388.

154. *Id.*

155. *Id*. at 2385 (Breyer, J., concurring).

156. *Id.* at 2386 (citing U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018)).

"potentially destabilizing consequences."[157]

Nevertheless, Justice Breyer voted to invalidate § 3583(k) based on "three aspects" that made it "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach."[158] *First*, the penalty applied to "a discrete set of federal criminal offenses."[159] *Second*, it "t[ook] away the judge's discretion to decide whether a violation of a condition of supervised release should result in imprisonment and for how long."[160] And *third*, it "limit[ed] the judge's discretion" in the "particular manner" of "imposing a mandatory minimum term of imprisonment of 'not less than 5 years.'"[161] Because these three features were "difficult to reconcile" with the "typical[]" understanding of revocation, Justice Breyer found that § 3583(k) violated the jury right.[162] Ironically, this decisive (and controlling[163]) concurrence applied the dissent's retributive theory of revocation to join the plurality in striking down the five-year mandatory-minimum sentence.

3. United States Courts of Appeal

Criminal defendants have challenged the retributive theory of revocation as violating the language of the Sentencing Reform Act, which omits retribution as a factor for judges to consider when revoking supervised release. In fact, § 3583(e)(3) lists eight factors to be considered, yet excludes § 3553(a)(2)(A), the retributive theory of punishment. Nevertheless, the courts of appeals have unanimously held that judges may revoke supervised release for retribution, although there is a circuit split as to how much emphasis they may place on this factor.

The First, Second, Third, Sixth, and Seventh Circuits hold that the omission of retribution from the list of required considerations does not prohibit judges from considering it.[164] According to these courts, the statute's enumeration of § 3553(a) factors judges must consider does not

157. *Id.* at 2385.

158. *Id*. at 2386.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. As the narrower opinion, Justice Breyer's concurrence sets forth the holding of the Court. *See id.* at 2386 (Alito, J., dissenting) (noting that Justice Breyer's "narrow[er]" opinion contains "today's holding"); *see also* Marks v. United States, 430 U.S. 188, 193–94 (1977) (explaining that when there is no majority opinion, the narrowest opinion controls); United States v. Garner, 969 F.3d 550, 552 (5th Cir. 2020); United States v. Coston, 964 F.3d 289, 295 (4th Cir. 2020).

164. *See* United States v. Clay, 752 F.3d 1106 (7th Cir. 2014); United States v. Young, 634 F.3d 233 (3d Cir. 2011); United States v. Vargas-Davila, 649 F.3d 129 (1st Cir. 2011); United States v. Lewis, 498 F.3d 393 (6th Cir. 2007); United States v. Williams, 443 F.3d 35 (2d Cir. 2006).

prevent judges from also considering other relevant factors as well.[165] As the Third Circuit put it, "[t]he mere omission of § 3553(a)(2)(A) from the mandatory supervised release revocation considerations" does not "preclude a court from taking into account . . . the need for the resulting sentence to promote respect for the law and provide just punishment."[166]

These circuits further contend that § 3553(a)(2)(A) is "inextricably intertwined,"[167] or "essentially redundant with,"[168] considerations that judges must weigh when revoking supervised release. For example, judges must consider "the seriousness of the offense"[169] when contemplating other listed factors such as "the nature and circumstances of the offense," the need to "afford adequate deterrence," and the need to "protect the public from further crimes of the defendant."[170] Therefore, they say, it would be impossible to exclude this factor from consideration.[171]

Finally, these circuits cite the Sentencing Guidelines as endorsing a retributive theory of revocation sentencing. The Sixth Circuit quoted the Guidelines in explaining that "revocation sentences are . . . intended to 'sanction,' or, analogously, to 'provide just punishment for the offense' of violating supervised release."[172]

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165. *See, e.g.*, *Young*, 634 F.3d at 239 ("[T]he enumeration . . . of specified subsections of § 3553(a) that a court *must* consider . . . does not mean that it may not take into account any other pertinent factor.") (emphasis in original); *see also Vargas-Davila*, 649 F.3d at 132 ("Although section 3583(e)(3) incorporates by reference, and thus encourages, consideration of certain enumerated subsections of section 3553(a), it does not forbid consideration of other pertinent section 3553(a) factors."); *Lewis*, 498 F.3d at 400 ("[T]he fact that § 3583(e) does not require that courts consider § 3553(a)(2)(A) does not mean that courts are forbidden to consider that factor . . . ."); *Williams*, 443 F.3d at 47 ("[W]e interpret § 3583(e) simply as requiring consideration of the enumerated subsections of § 3553(a), without forbidding consideration of other pertinent factors."); *accord* United States v. Vandergrift, 754 F.3d 1303, 1308 (11th Cir. 2014) (citing circuit split to reject defendant's argument on plain error that sentencing judge improperly considered retribution, while noting that "[t]he text of § 3583(e) does not . . . *explicitly* forbid a district court from considering § 3553(a)(2)(A)") (emphasis in original).

166. *Young*, 634 F.3d at 240.

167. *Id.* at 239, 241 n.3 (citing 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(B), 3553(a)(2)(C)); *see also Clay*, 752 F.3d at 1108 ("[T]here is significant overlap between these factors and § 3553(a)(2)(A) . . . ."); *Williams*, 443 F.3d at 48 ("[W]e cannot see how, in order to impose a sentence that will provide 'adequate deterrence,' . . . and protection of the public from 'further crimes of the defendant,' . . . in light of 'the nature and circumstances of the offense,' the court could possibly ignore the seriousness of the offense.").

168. *Young*, 634 F.3d at 239 (quoting *Lewis*, 498 F.3d at 400).

169. *Id.* at 238 (quoting United States v. Bungar, 478 F.3d 540, 543 (3d Cir.2007)).

170. *Id.* at 239 (quoting 18 U.S.C. § 3553(a)).

171. *Williams*, 443 F.3d at 48.

172. *Lewis*, 498 F.3d at 400 (quoting 18 U.S.C. App'x § 3(b)); *see also Young*, 634 F.3d at 241 ("[T]he primary purpose of a sentence for the violation of supervised release is 'to sanction the defendant's breach of trust.'").

By contrast, the Fourth, Fifth, and Ninth Circuits read § 3583(e)(3) to exclude retribution as justifying supervised release, yet still permit judges to consider it.[173] The Ninth Circuit, for example, called it "improper" to consider retribution, given that "§ 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing."[174] Yet the court ultimately held that judges were only prohibited from placing "primary" reliance on retribution, and emphasized that "a mere reference to promoting respect for the law" is not "in itself . . . unreasonable."[175]

The circuit courts are unanimous that judges may consider retribution when revoking supervised release, with only minor disagreement about the weight they may place on it. Although § 3583(e)(3) omits retribution as a factor, the circuit courts have followed the Sentencing Commission and the Supreme Court in promoting a retributive theory of revocation.

II. SUPERVISED RELEASE: STRUCTURE, STATUTE, AND PURPOSE

The retributive theory of revocation contradicts the structure, statute, and purpose of supervised release. First, the structure of conditional liberty under supervised release involves no act of "trust" by the government, so there is nothing for defendants to "breach." Second, the statute deliberately excludes retribution from the list of factors to consider when revoking supervised release. Finally, the purpose of supervised release is to safely transition prisoners back to the community, not punish them for misconduct. Rather than seek retribution, judges should revoke supervised release purely for utilitarian purposes.

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173. United States v. Miller, 634 F.3d 841 (5th Cir. 2011); United States v. Miqbel, 444 F.3d 1173 (9th Cir. 2006); United States v. Crudup, 461 F.3d 433 (4th Cir. 2006).

174. *Miqbel*, 444 F.3d at 1182.

175. *Id.*; *see also* United States v. Simtob, 485 F.3d 1058, 1062 (9th Cir. 2007) ("The seriousness of the offense underlying the revocation, though not a focal point of the inquiry, may be considered to a lesser degree as part of the criminal history of the violator."); United States v. Webb 738 F.3d 638, 642 (4th Cir. 2013) ("[A]lthough a district court may not impose a revocation sentence based predominately on the seriousness of the releasee's violation or the need for the sentence to promote respect for the law and provide just punishment, we conclude that mere reference to such considerations does not render a revocation sentence procedurally unreasonable when those factors are relevant to, and considered in conjunction with, the enumerated § 3553(a) factors."); United States v. Rivera, 797 F.3d 307, 309 (5th Cir. 2015) ("Our opinion holds only that 'making the seriousness of the [offense constituting the supervised release violation] and the need for just punishment dominant factors in [the] revocation sentence' was error. Determining precisely to what extent a district court may rely on the 'seriousness of the offense' in applying the other section 3583(e) factors, e.g., the 'nature and circumstances of the offense,' and the Guidelines is an issue left unaddressed by our opinion, and it is best left to future cases.").

A. Structure of Conditional Liberty

Because supervised release involves no act of "trust" by the government, there is nothing for defendants to "breach." Violating a condition of supervised release may be undesirable or even harmful, but it does not betray any promise by the defendant. While the Sentencing Commission intended the "breach of trust" concept to distinguish between offense sentencing and revocation sentencing, courts have misinterpreted its language as suggesting an independent retributive basis for revocation.

1. Supervised Release Is Not Probation

The "breach of trust" concept originated in the Sentencing Commission's initial decision to address revocation of probation and supervised release together in a "single set of policy statements."[176] The Commissioners acknowledged "considerable debate" about this choice, yet ultimately concluded that the sentences shared the same "purpose" of "integrati[ng] . . . the violator into the community, while providing . . . supervision . . . to limit further criminal conduct"[177] making "violations of the conditions of probation and supervised release . . . functionally equivalent."[178]

Combining probation and supervised release revocations was a mistake. Whether or not these sentences share the same "purpose" or "function[]," they are structurally distinct.[179] Probation is conditional liberty granted *in lieu of* imprisonment, while supervised release is conditional liberty imposed *in addition to* a prison sentence. Therefore, probation involves an act of "trust" by the government, while supervised release does not.

Probation is "an alternative to incarceration,"[180] which is "conferred as a privilege . . . a matter of favor," not "a right."[181] Much like a parolee, a probationer is spared imprisonment "based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person."[182] And just like releasing a parolee, sentencing a defendant to probation involves "a risk that [the probationer] will not be able to live in society without committing additional antisocial

176. U.S. SENT'G GUIDELINES MANUAL § 7A4 (U.S. SENT'G COMM'N 1990).

177. *Id.*

178. *Id.* § 7B.

179. U.S. SENT'G GUIDELINES MANUAL §§ 7A3(b), 7B1.4 (U.S. SENT'G COMM'N 2018).

180. U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. B, introductory cmt. (U.S. SENT'G COMM'N 2018).

181. Burns v. United States, 287 U.S. 216, 220 (1932).

182. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

acts."[183] Because probation is "an act of grace," it "may be coupled with . . . conditions in respect of its duration."[184]

There is no grace in supervised release.[185] Supervised release runs after the prison sentence, which the defendant must serve in full.[186] The government does not take a risk by granting the defendant supervised release, but rather imposes it to "facilitate the reintegration of the defendant into the community."[187] Supervised release extends the defendant's sentence rather than reducing it, as Judge Posner said: "Supervised release does not shorten prison time; instead it imposes restrictions on the prisoner to take effect upon his release from prison. Parole [and probation] mitigates punishment; supervised release augments it."[188] In *Haymond*, Justice Gorsuch emphasized a similar "structural difference" between parole and supervised release,[189] because "'[u]nlike parole,' supervised release wasn't introduced to replace a portion of the defendant's prison term," but rather comes "*after* the completion of his prison term."[190] The same distinction holds between probation and supervised release.

2. Violations Do Not Breach Trust

Because supervised release adds to prison time rather than replacing it, a violation of supervised release does not "breach" any "trust" placed in the defendant.[191] A violation of supervised release may be harmful or socially undesirable, but the defendant has not betrayed any promise to obey the conditions. While the Sentencing Commission adopted the "breach of trust" concept to distinguish between offense sentencing and

183. *See id.* at 483.

184. Escoe v. Zerbst, 295 U.S. 490, 492–93 (1935).

185. After defendants complete one year of supervised release, they may petition the court to terminate their supervision early. *See* 18 U.S.C § 3583(e)(1). This action, arguably, is a reward for good behavior that involves an "act of grace." *Escoe*, 295 U.S. at 492. Unlike probation or parole, however, early termination does not *justify* conditions of release, but rather *ends* them. Furthermore, early termination is rarely granted, see *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 35, and defendants who sign plea agreements with appellate waivers may not seek it. *See* United States v. Damon, 933 F.3d 269 (3d Cir. 2019).

186. 18 U.S.C. § 3583(a).

187. United States v. Vallejo, 69 F.3d 992, 994 (9th Cir. 1995) (quoting U.S. SENT'G GUIDELINES MANUAL § 5D1.1 cmt. n.2 (U.S. SENT'G COMM'N 1992)); *see also* 18 U.S.C. § 3583(d); U.S. SENT'G GUIDELINES MANUAL § 5D1.3 (U.S. SENT'G COMM'N 2018).

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

189. United States v. Haymond, __ U.S. __, 139 S. Ct. 2369, 2382 (2019) (plurality opinion).

190. *Id.* (emphasis in original) (quoting U.S. SENT'G GUIDELINES MANUAL § 7A2(b) (U.S. SENT'G COMM'N 2012)). For a constitutional analysis of this difference between supervised release and parole, see generally Schuman, *supra* note 82.

191. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

revocation sentencing, its use of backwards-looking, moral language inaccurately suggests an independent retributive basis for revoking supervised release.

Violating a condition of *probation* is arguably a breach of trust and moral wrong. By sentencing a defendant to probation, the government trusts in the "promise" that they will "return to society and function as a responsible, self-reliant person."[192] The scope of this trust is expressed in the conditions of probation, which the defendant must obey in exchange for being spared a term of imprisonment.[193] Therefore, if a defendant violates a condition of probation, they break the trust placed in them by allowing them to avoid imprisonment.

Of course, this benevolent description does not always reflect reality. Defendants sentenced to probation often face a stark power disparity with the government, making supervision more a matter of coercion than consent.[194] But whether the defendant's promise to obey is explicit or implicit, compelled or free, the structure of probation still involves an act of government "risk" or "grace" in granting the defendant supervision instead of imprisonment.[195] This structure at least arguably justifies revocation as punishment for the defendant's breach of trust.

Supervised release, by contrast, involves no act of trust by the government. Instead, supervised release is the *opposite* of trust—additional supervision to follow full service of the prison term. The supervision is not "granted" as an alternative to imprisonment, but rather *imposed* by the judge at sentencing to follow the defendant's prison sentence.[196] Defendants make no "promise" to obey the conditions of release, and the government engages in no act of "risk" or "grace" by sentencing them to supervision.[197] Violating a condition of supervised release might be misguided and even harmful, and sanctions may well be warranted for reasons of deterrence, incapacitation, or rehabilitation. But violations of supervised release do not "breach" any "trust" that would

192. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

193. 18 U.S.C. § 3563.

194. *See* Travis, *supra* note 51, at 640 (arguing that probation and parole are not an act of mercy or trust but rather "a form of state regulation of deviant subgroups in our society, with significant racially disparate consequences").

195. *Morrissey*, 408 U.S. at 483; Escoe v. Zerbst, 295 U.S. 490, 492–93 (1935).

196. Judges impose supervised release in 99% of eligible cases, which include felonies and grade A misdemeanors. *See* 18 U.S.C. § 3583(a); *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 7. Supervised release is also mandatory for certain offenses, such as drug-trafficking crimes. *See* 21 U.S.C. §§ 841(b), 859(b), 860(a)–(b), 960(b) (manufacturing, distributing, or possessing with intent to distribute above certain quantities; distributing to persons under twenty-one; distributing or manufacturing in or near schools and colleges).

197. *Morrissey*, 408 U.S. at 483; *Escoe*, 295 U.S. at 492–93.

justify retributive punishment.

In fact, the name "supervised release" is itself a misnomer. Defendants on supervised release are not *released* from anything, but rather subject to additional supervision *after* their prison terms.[198] The word "revocation" is also misleading. As Judge Weinstein has explained, because supervised release grants defendants nothing, there is nothing for judges to revoke:

> Parole was based on early release from prison—by the grace of the parole board a person was conditionally released from prison, and the leniency could be 'revoked.' A person on supervised release has completed his or her prison term and is serving an independent term of supervision separately ordered by the court. Supervised release is not being 'revoked'; rather, a supervisee is being punished for violating conditions.[199]

Justice Kavanaugh made a similar observation at the *Haymond* oral argument: "Revocation of parole seems to me . . . like a denied benefit, whereas revocation of supervised release seems like a penalty."[200]

Justice Alito offered a possible counter-argument to this position in his *Haymond* dissent when he suggested that sentencing judges shortened prison terms in exchange for imposing supervised release.[201] In that case, the imposition of supervised release instead of imprisonment would arguably be an act of trust, offering a retributive basis for revocation. Yet neither the statute nor the Guidelines require judges to make this trade-off, and the empirical data does not suggest judges engage in it. Instead, judges impose supervised release on virtually all eligible defendants,[202] with both the average prison sentence and the number of people under supervision rising dramatically since 1984.[203] In many cases, mandatory

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198. As an alternative, Fiona Doherty has suggested the term "conditional release." Doherty, *supra* note 101, at 961. This name is an improvement, yet still inaccurately suggests that defendants have been granted "release" from prison subject to certain "conditions," when in reality, they have completed their full prison sentences and now must serve additional supervision in the community. A better name for supervised release would be "restricted liberty," or "conditional supervision."

199. United States v. Trotter, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018).

200. Transcript of Oral Argument at 32, United States v. Haymond, __ U.S. __, 139 S. Ct. 2369 (2019) (No. 17-1672).

201. *See* United States v. Haymond, __ U.S. __, 139 S. Ct. 2369, 2390 (2019) (Alito, J., dissenting).

202. *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 206 (2013) (finding "supervised release was almost never contested at sentencing. . . . neither discussed by judges at the sentencing hearing, nor mentioned by the parties in sentencing submissions").

203. *See* United States v. Portillo, 981 F.3d 181, 186–87 (2d Cir. 2020) ("The average time served by all federal prisoners in 1986, the year before the repeal of parole became effective, was 14.6 months; in 2012, it was 37.5 months."); Jacob Schuman, *America's Shadow Criminal Justice System*, THE NEW REPUBLIC (May 30, 2018), https://newrepublic.com/article/148592/americas-shadow-

minimum terms of both imprisonment and supervision make it impossible for judges to reduce one penalty in favor of the other.[204] Because judges typically do not reduce prison sentences in exchange for supervised release, violations cannot generally be considered a "breach of trust."[205]

3. Courts Have Misinterpreted the Guidelines

Although violations of supervised release do not breach any trust, the "breach of trust" concept still expresses an important distinction in revocation sentencing. When the Commission described violations as a "breach of trust," it was distinguishing between punishing a defendant for criminal conduct and punishing a defendant for violating a condition of supervision. Unfortunately, courts have misinterpreted this language as instead providing an independent retributive basis for revoking supervised release.

The Guidelines use the "breach of trust" concept to distinguish between punishing criminal conduct and punishing a violation of supervision.[206] That distinction is important because one-third of all revocations involve defendants who have committed new crimes while under supervision.[207] When this happens, the defendant will face two separate proceedings: first, a prosecution for the criminal offense, resulting in a conviction and

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criminal-justice-system [https://perma.cc/Z2MU-PA57] (explaining that since 1984, "the number of people under supervision has increased five-fold"); *see also Prison Time Surges for Federal Inmates*, PEW TRUSTS (Nov. 18, 2015), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates#:~:text=The%20average%20length%20of%20time,offenses%E2%80%94imprisonment%20periods%20increased%20significantly [https://perma.cc/9A4Z-J4UP].

204. The parties may privately agree to trade supervision for imprisonment in plea negotiations, but the final decision is up to the judge. *See* United States v. Thompson, 777 F.3d 368, 374 (7th Cir. 2015) ("[T]he conditions recommended to the judge at the sentencing hearing may be a product of negotiation between prosecution and defense. The defendant's lawyer may offer the prosecution a trade—more supervised release for a reduced prison term—and the prosecutor may agree. And when adversaries agree on the outcome of a legal proceeding the sentencing judge, habituated as American judges are to adversary procedure, may be reluctant to subject the agreement to critical scrutiny.").

205. Intriguingly, the Sentencing Guidelines *do* recommend that judges should punish violations of supervised release more harshly if the defendant's "original sentence was the result of a downward departure . . . or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct." U.S. SENT'G GUIDELINES MANUAL § 7B1.4 cmt. n.4 (U.S. SENT'G COMM'N 2018). This enhancement could be justified on the ground that the original, lenient prison sentence was an act of trust, and the violation of supervised release more culpable for betraying that trust. But because defendants do not usually receive downward departures or charge reductions resulting in a sentence below the guideline range, it does not apply in most cases.

206. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

207. *See* Table E-7A, *supra* note 122.

prison sentence, and second, a revocation proceeding for the violation,[208] resulting in a revocation and yet another prison sentence.

In these cases, the Guidelines instruct that judges should not punish the defendant "as if [the] conduct were being sentenced as new federal criminal conduct," but rather "for failing to abide by the conditions of the court-ordered supervision."[209] In other words, the Guidelines say that judges should "not . . . punish a defendant's violation as if it were a new federal crime, but rather . . . sanction the defendant's breach of the court's trust—that is, his or her failure to comply with court-ordered conditions arising from the original conviction."[210]

The Commission distinguished between punishing a "new federal crime" and a "breach of trust" for practical reasons.[211] "Given the relatively narrow ranges of incarceration available" and the "difficulty in obtaining [the] information necessary" at revocation hearings, it would be hard to apply a "detailed revocation guideline system" equivalent to the "offense guidelines" that govern "initial sentencing."[212] Furthermore, when a defendant is found in violation of supervision based on a new conviction, the "breach of trust" concept is necessary to justify a consecutive revocation sentence. Otherwise, the "revocation court" would "substantially duplicate the sanctioning role of the court with jurisdiction over . . . [the] new criminal conduct," and the revocation sentence would have "to run concurrently."[213]

The Commission's distinction between punishing a crime versus punishing a violation is "subtle indeed."[214] Yet the difference has become critical in defining the scope of defendants' constitutional rights. In his *Haymond* concurrence, Justice Breyer voted to strike down the five-year mandatory-minimum revocation sentence because its severity and selective application to sex offenses made it less like "ordinary revocation," which "sanctions . . . the defendant's 'breach of trust,'" and more like "punishment for a new offense, to which the jury right would

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208. By statute, every term of supervised release must include a condition requiring that "the defendant not commit another Federal, State, or local crime." 18 U.S.C. § 3583(d).

209. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

210. United States v. Dawson, 980 F.3d 1156, 1162 (7th Cir. 2020) (citing United States v. Haymond, __ U.S. __, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring)).

211. *See id.*

212. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

213. *Id.*

214. United States v. Miqbel, 444 F.3d 1173, 1182 (9th Cir. 2006); *see also* United States v. Rivera, 797 F.3d 307, 309 (5th Cir. 2015) (calling the distinction "a (very) fine line"); Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT'G. REP. 204, 206 (1994) ("There is no real distinction between what the Commission calls the 'breach of trust' and the 'seriousness of the underlying violation.'").

typically attach."[215] According to this opinion, a revocation sentence that targets the defendant's underlying conduct violates the jury right.

While the Commission intended to distinguish between the bases for revoking supervision, courts have also misinterpreted the "breach of trust" concept as providing an independent retributive basis for revoking supervised release. The phrase is misleadingly retributive in two respects. First, it focuses on the defendant's past conduct, rather than the consequences of revocation. Second, it uses moral terminology suggesting that violations of supervised release are intrinsically blameworthy and deserving of punishment. Justice Alito made this mistake in his *Haymond* dissent, asserting that "[t]he *principal reason* for assigning a penalty to a supervised-release violation . . . is that the violative act is a breach of trust."[216] The Sixth Circuit made the same error, saying that "revocation sentences are . . . intended to 'sanction,' or, analogously, to 'provide just punishment for the offense' of violating supervised release."[217]

Using the "breach of trust" concept to justify retributive revocation misunderstands the structure of conditional liberty under supervised release. Unlike probation, supervised release involves no act of risk or grace by the government, so there is no trust for the defendant to breach. Courts might revoke supervision to discourage violations or protect the public but have no independent justification for punishing the defendant's "breach of trust." Instead, the Commission intended the "breach of trust" concept to distinguish between sentencing criminal conduct and sentencing a violation of supervision. The Commission never meant to suggest that violating supervised release deserved retributive punishment.

B. Statutory Language

The plain language of the Sentencing Reform Act forbids judges from considering retribution when revoking supervised release. The key provision is 18 U.S.C. § 3583(e)(3), which enumerates eight factors for judges to consider, but omits 18 U.S.C. § 3553(a)(2)(A), the retributive theory of punishment. The best reading of this language is that judges

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215. United States v. Haymond, __ U.S. __, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring) (quoting U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018)). Justice Alito applied similar reasoning but reached the opposite conclusion, saying that revocation of release never requires a jury because it punishes the defendant's "'breach of trust,' not 'new criminal conduct.'" *Id.* at 2393 (Alito, J., dissenting) (quoting U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018)).

216. *Id.* (Alito, J., dissenting) (emphasis added).

217. United States v. Lewis, 498 F.3d 393, 400 (6th Cir. 2007) (quoting 18 U.S.C. § 3583(e)); *see also* United States v. Clay, 752 F.3d 1106, 1109 (7th Cir. 2014) (finding reference to "just punishment" at a revocation hearing "appropriately describe[d] a sanction that conveys the importance of obeying conditions of supervised release").

must ignore retribution as a factor in revocation decisions.

1. Section 3583(e)(3) Omits Retribution

Section 3583(e)(3) lists eight factors for judges to consider when revoking supervised release. Those include the three utilitarian purposes of punishment—(1) deterrence, (2) incapacitation, and (3) rehabilitation, as well as five other factors—(4) the characteristics of the offense and the offender, (5) the Sentencing Guidelines' recommended sentence, (6) the Sentencing Guidelines' policy statements, (7) the need to avoid unwarranted sentencing disparities, and (8) the need to provide restitution to any victims.[218] By omitting the fourth purpose of punishment—retribution—§ 3583(e)(3) prohibits judges from considering retribution when revoking supervised release.

According to the "ancient" canon of *expressio unius est exclusio alterius*,[219] a statute "expressing one item of [an] associated group or series excludes another left unmentioned."[220] In other words, "[i]f a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health."[221] While this rule "does not apply to every statutory listing or grouping," it does carry "force . . . when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[222] For example, the Supreme Court applied the *expressio unius* canon in holding that a statute's particularity requirement for all pleadings alleging "fraud or mistake" necessarily excluded any particularity requirement for other forms of action.[223]

Section 3583(e)(3) is a classic example of where the *expressio unius* canon should apply. The provision enumerates a series of eight associated sentencing factors for consideration, all from § 3553(a): "[t]he court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) . . . revoke a term of

218. 18 U.S.C. § 3583(e)(3) (cross-referencing 18 U.S.C. § 3553(a)(2)(B)–(D)).

219. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n. of R.R. Passengers, 414 U.S. 453, 458 (1974).

220. NLRB v. SW Gen., Inc., __ U.S. __, 137 S. Ct. 929, 933 (2017) (quoting Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002)).

221. *Id.*

222. Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).

223. Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993) (quoting FED. R. CIV. P. 9(b)).

supervised release."[224] This list includes three of the four "purposes" of punishment.[225] The only purpose not listed is § 3553(a)(2)(A), retribution. The *expressio unius* canon strongly suggests that it was "excluded by deliberate choice."[226]

The force of the *expressio unius* canon is especially strong here, "[w]here Congress include[d] particular language in one section of a statute but omit[ted] it in another section of the same Act."[227] The Sentencing Reform Act lists retribution as a factor when judges impose other kinds of sentences, such as fines or imprisonment for criminal convictions,[228] but not when judges revoke supervised release. The best interpretation is that judges may not revoke supervised release for retributive reasons.

The deliberate exclusion of retribution finds additional support in § 3583(e)(3)'s omission of one other factor from the list of considerations: § 3553(a)(3), the "kinds of sentences available." While there is no legislative history explaining this omission, it appears intentional and even quite thoughtful. The actions authorized under § 3583(e) present the judge with limited sentencing options: terminating supervised release (which ends supervision), modifying supervised release or imposing house arrest (which changes the conditions), and revoking supervised release (which sends the defendant back to prison).[229] For each of these actions, there are no other "kinds of sentences available," and thus no reason to consider § 3553(a)(3).[230] Just as the statute is careful to exclude this unnecessary factor from revocation decisions, it also is deliberate in omitting the retributive theory of punishment.

2. Section 3553(a)(2)(A) Is a Distinctive Theory

Despite § 3583(e)(3)'s omission of § 3553(a)(2)(A) as a consideration,

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224. 18 U.S.C. § 3583(e)(3). Those eight factors are: § 3553(a)(1), the nature and circumstances of the offense and the history and characteristics of the defendant; § 3553(a)(2)(B)–(D), the need for the sentence imposed to afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; § 3553(a)(4), the applicable guidelines or policy statements issued by the Sentencing Commission; § 3553(a)(5), any pertinent policy statement issued by the Sentencing Commission; § 3553(a)(6) the need to avoid unwarranted sentence disparities; and § 3553(a)(7), the need to provide restitution to any victims.

225. 18 U.S.C. § 3553(a).

226. *Barnhart*, 537 U.S. at 168.

227. Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

228. *See* 18 U.S.C. § 3572(a); *id.* § 3582(a).

229. *See id.* § 3583(e)(1)–(4).

230. 8 U.S.C. § 3553(a)(3).

a majority of circuit courts hold that retribution is "inextricably intertwined"[231] or "essentially redundant"[232] with other factors judges must consider when revoking supervised release. That interpretation, however, misinterprets the language of § 3553(a)(2)(A), which justifies punishment "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[233] Unlike the utilitarian theories in the Sentencing Reform Act, this provision expresses a distinctively non-consequentialist theory of punishment that judges can exclude from revocation decisions.

The Sentencing Reform Act lists four "purposes" of punishment in four different subsections: retribution, deterrence, incapacitation, and rehabilitation.[234] By assigning each purpose to a distinct subsection, the Act allows other parts of the law to selectively cross-reference these provisions in order to vary the justifications for the various kinds of sentences, such as imprisonment, supervised release, etc.[235] Reading § 3553(a)(2)(A) as redundant with the other purposes undermines this careful statutory design.

Read closely, each of the three clauses in § 3553(a)(2)(A) conveys a non-consequentialist theory of punishment, distinct from the utilitarian justifications in the other subsections. While the circuit courts in revocation cases have conflated § 3553(a)(2)(A) with the other factors, the provision describes a uniquely retributive theory of punishment that judges are capable of excluding when revoking supervised release.

"[*T*]o *reflect the seriousness of the offense* . . . ."[236] This is backwards-looking, retributive language that describes punishment as justified based on the wrongfulness of the defendant's conduct. The circuit courts, however, claim they "cannot see how" a judge "could possibly ignore the seriousness of the offense" when "impos[ing] a [revocation] sentence that will provide 'adequate deterrence,' and protection of the public from 'further crimes of the defendant.'"[237] The error in their reading is that § 3553(a)(2)(A) does not express a measure of the severity of the

231. United States v. Young, 634 F.3d 233, 239, 241 n.3 (3d Cir. 2011) (citing 18 U.S.C. §§ 3553(a)(1), (a)(2)(B), (a)(2)(C)); *see also* United States v. Clay, 752 F.3d 1106, 1109 (7th Cir. 2014); United States v. Williams, 443 F.3d 35, 48 (2d Cir. 2006).

232. *Young*, 634 F.3d at 239 (quoting United States v. Lewis, 498 F.3d 393, 400 (6th Cir. 2007)).

233. 18 U.S.C. § 3553(a)(2)(A).

234. Tapia v. United States, 564 U.S. 319, 325 (2011).

235. *See* 18 U.S.C. §§ 3582, 3583, 3586.

236. 8 U.S.C. § 3553(a)(2)(A).

237. United States v. Williams, 443 F.3d 35, 48 (2d Cir. 2006) (quoting 18 U.S.C. §§ 3553(a)(2)(B), (a)(2)(C)); *see also* United States v. Clay, 752 F.3d 1106, 1108 (7th Cir. 2014) ("[T]he 'nature' of a violation includes its 'seriousness.'" (quoting 18 U.S.C. §§ 3553(a)(1), (a)(2)(A))); *Lewis*, 498 F.3d at 400; *Young*, 634 F.3d at 239.

defendant's conduct, but rather a substantive basis for imposing punishment. Judges can exclude the "seriousness" of the violation from their consideration when revoking supervised release by assessing the severity of the defendant's misconduct in deciding what sentence is warranted to deter and incapacitate while excluding the blameworthiness of the violation as an *independent* reason for revocation.[238] In other words, judges can consider the gravity of the violation when weighing the utilitarian factors, but not as a standalone retributive basis for the punishment.

"[*T*]*o promote respect for the law . . . .*"[239] This clause also takes a retributive view of sentencing, describing punishment as an assertion of the law's authority in the face of a transgression. The circuit courts, however, have missed the "mystic" import of this language in revocation cases,[240] conflating it with the need for deterrence and rehabilitation. They assert that "'promot[ing] respect for the law' is a means of deterring future violations,"[241] and "help[ing]" defendants by teaching them "to obey the conditions of . . . supervised release."[242] These readings, however, overlook the retributive message in the provision—that promoting respect for the legal system is good for its own sake. Judges can exclude this consideration by revoking supervised release solely to deter and rehabilitate, and not punishing simply to vindicate the authority of the law.

"[*A*]*nd to provide just punishment for the offense."*[243] Finally, this clause expresses the retributive philosophy that punishment is a way to restore equilibrium after an individual violates the basic rules of the community.[244] Yet while the circuit courts acknowledge that violations of supervised release "generally do not entail conduct as serious as crimes," they nevertheless hold that "revocation sentences are similarly intended to 'sanction,' or, analogously, to 'provide just punishment for the offense' of violating supervised release."[245] This conflation of supervision violations and criminal offenses does not withstand scrutiny, however, as

238. *See* United States v. Burden, 860 F.3d 45, 56–57 (2d Cir. 2017) (distinguishing between sentencing a defendant based on the "seriousness of the offense per se," and "the risk to the public that the seriousness of the defendant's offense suggested").

239. 18 U.S.C. § 3553(a)(2)(A).

240. HOLMES, *supra* note 69, at 42.

241. *Clay*, 752 F.3d at 1109 (quoting United States v. Vargas-Davila, 649 F.3d 129, 131–32 (1st Cir. 2011)).

242. United States v. Lewis, 498 F.3d 393, 400 (6th Cir. 2007)).

243. 18 U.S.C. § 3553(a)(2)(A).

244. Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 476–79 (1968).

245. *Lewis*, 498 F.3d at 400; *see also Clay*, 752 F.3d at 1109 (referencing "just punishment" at a revocation hearing "appropriately describe[d] a sanction that conveys the importance of obeying conditions of supervised release").

violations do not break generally applicable laws and may include entirely non-criminal conduct.[246] Indeed, the plain language of § 3553(a)(2)(A) suggests that only conduct serious enough to be a criminal "offense" merits "just punishment."[247] Judges can exclude this consideration when revoking supervised release by focusing solely on the consequences of the revocation, and not any inherent justice in punishment.

3. Section 3583(e)(3) Is a Rule of Exclusion

Finally, to serve any purpose, § 3583(e)(3)'s list of factors to consider when revoking supervised release must exclude the omitted factors from consideration. If the list is merely inclusive—requiring judges to consider the enumerated factors but not excluding others—then it has no function, because judges are not required to make express findings on the factors they do consider. If the list serves to exclude, by contrast, then it provides a way for reviewing courts to identify errors when judges revoke supervised release based on an improper factor. While a majority of circuit courts have held § 3583(e)(3) to be a rule of inclusion rather than exclusion,[248] these interpretations render the list surplusage, which is not the best reading.

The Sentencing Reform Act requires district judges to explain the reasons for their sentences on the record, but this rule amounts to very little in practice.[249] Sentencing explanations can be "brief," and need only "set forth enough to satisfy the appellate court that [the judge] has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making authority."[250] There is "no requirement that the district court recite every section 3553(a) factor,"[251] so long as the judge "give[s] an adequate statement of reasons."[252] In other words, the

246. Approximately half of all violations are for non-criminal conduct. *See* Schuman, *supra* note 82, at 629 n.291.

247. 18 U.S.C. § 3553(a)(2)(A).

248. *See* United States v. Young, 634 F.3d 233, 239 (3d Cir. 2011).

249. *See* 18 U.S.C. §§ 3553(a), (c).

250. Rita v. United States, 551 U.S. 338, 356 (2007).

251. United States v. Bryant, 606 F.3d 912, 919 (8th Cir. 2010); *see also* United States v. Kirby, 418 F.3d 621, 626 (6th Cir. 2005) ("The court need not recite the[] factors [listed in 18 U.S.C. § 3553(a)] but must articulate its reasoning in deciding to impose a sentence in order to allow for reasonable appellate review.").

252. United States v. Panaigua-Verdugo, 537 F.3d 722, 728 (7th Cir. 2008); *see also* United States v. Kelley, 359 F.3d 1302, 1305 (10th Cir. 2004) ("We do not require 'a ritualistic incantation to establish consideration of a legal issue,' nor do we demand that the district court 'recite any magic words' to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider." (quoting United States v. McCellan, 164 F.3d 308, 310 (6th Cir. 1999))).

"duty 'to consider' the statutory factors is not a duty to make findings."[253] Even if the judge does "not discuss the § 3553(a) factors,"[254] reviewing courts will "defer to 'the district court's sentence as long as the court has provided a plausible explanation, and the overall result is defensible."[255]

The same rule applies when judges revoke supervised release,[256] meaning that a judge can revoke supervised release without discussing the § 3553(a) factors. Because the judge need not mention the listed factors in explaining the revocation decision, § 3583(e)(3)'s list of considerations serves no purpose unless it *excludes* the unlisted factors from consideration. If § 3583(e)(3) is merely a rule of inclusion, then it is a dead letter, because the judge can revoke supervision without making any express findings on those factors.[257] The only way § 3583(e)(3) has any practical effect is if it excludes the omitted factors from consideration, allowing a reviewing court to determine if the judge violated the statute by relying on a prohibited consideration. The best reading of § 3583(e)(3) is that by excluding retribution as a factor, it forbids judges from revoking supervised release for that reason.[258]

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253. United States v. Dean, 414 F.3d 725, 729–30 (7th Cir. 2005) (quoting 18 U.S.C. § 3663(a)(1)(B)(i)). Circuit courts allow judges this "shortcut" around the § 3553(a) factors because express consideration would "doubl[e] the amount of work involved in sentencing." *Id.*; *see also* United States v. Lopez-Flores, 444 F.3d 1218, 1222 (10th Cir. 2006) ("When the defendant has not raised any substantial contentions concerning non-Guidelines § 3553(a) factors and the district court imposes a sentence within the Guidelines range," the court need not "explain on the record how the § 3553(a) factors justify the sentence."); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) ("When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required.").

254. United States v. Sainz-Preciado, 566 F.3d 708, 716 (7th Cir. 2009).

255. United States v. Ofray-Campos, 534 F.3d 1, 39 (1st Cir. 2008) (quoting United States v. Dixon, 449 F.3d 194, 204 (1st Cir. 2006)). In *Ofray-Campos*, the district court judge sentenced the defendant to 200 months in prison for his role in a drug-dealing conspiracy, explaining the sentence as follows: "The court notes that the defendant[']s substantial participation in furtherance of an extensive and violent drug trafficking enterprise and its detrimental consequences to society, which [sic] warrants a sentence at the middle of the guideline range." *Id.* On appeal, the First Circuit found this explanation sufficient, as there was "no indication that the district court failed to consider, or accord sufficient weight, to the relevant sentencing factors." *Id.*

256. United States v. McBride, 633 F.3d 1229, 1234 (10th Cir. 2011); *see also* United States v. Michael, 909 F.3d 990, 995 (8th Cir. 2018) ("We do not require a district court to mechanically list every § 3553(a) consideration when sentencing a defendant upon revocation of supervised release." (quoting United States v. Petreikis, 551 F.3d 822, 824–25 (8th Cir. 2009))).

257. Alternatively, the courts may have misinterpreted the Sentencing Reform Act. If Congress intended to require sentencing judges to make express findings on every § 3553(a) factor, then § 3583(e) could plausibly function as either a rule of inclusion or exclusion. Given the current state of the law, however, the only way to ensure § 3583(e) is not superfluous is by reading it as a rule of exclusion.

258. Duncan v. Walker, 533 U.S. 167, 174–75 (2001) (explaining it is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be

The Supreme Court applied a similar approach in *Tapia v. United States*,[259] which interpreted a provision of the Sentencing Reform Act, codified at 18 U.S.C. § 3582(a), stating the factors to be considered when judges impose a prison sentence.[260] The provision states that judges should "consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation*."[261] The Court read this language to forbid judges from considering rehabilitation when sentencing a defendant to imprisonment,[262] rejecting the argument that this instruction was merely a "reminder . . . a kind of loosey-goosey caution not to put *too* much faith in the capacity of prisons to rehabilitate."[263] "[T]he drafters . . . could have used still more commanding language," the Court acknowledged, but "Congress expressed itself clearly . . . even if armchair legislators might come up with something even better."[264]

Although § 3583(e)(3) uses different language than § 3582(a), its meaning is equally clear. Just like § 3582(a) instructed judges imposing a prison sentence to consider all the § 3553(a) factors except rehabilitation, § 3583(e)(3) tells judges revoking supervised release to consider a list of § 3553(a) factors, omitting retribution. Just as *Tapia* held that judges may not rely on rehabilitation as a justification for imprisonment, so too judges must exclude retribution when revoking supervised release.

To be sure, § 3583(e)(3) might have been phrased more clearly. In addition to listing eight sentencing factors and omitting retribution, Congress could also have expressly stated that district judges *must not* consider retribution when revoking supervised release. But just like in *Tapia*, demanding such a high degree of clarity is not the most natural reading of the statute.[265] By enumerating the factors to consider and omitting § 3553(a)(2)(A), § 3583(e)(3) prohibits judges from considering

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prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" and courts have a "duty to 'give each word some operative effect' where possible") (first quoting Williams v. Taylor, 529 U.S. 362, 404 (2000); then quoting Mkt. Co. v. Hoffman, 1010 U.S. 112, 115 (1879); and then quoting Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 209 (1997)). Courts may consider words as surplusage if they appear "inadvertently inserted" or are "repugnant to the rest of the statute," Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (quoting K. LLEWELLYN, THE COMMON LAW TRADITION 525 (1960)), but that is not the case here.

259. Tapia v. United States, 564 U.S. 319 (2011).

260. *Id.*

261. 18 U.S.C. § 3582(a) (emphasis added).

262. *Tapia*, 564 U.S. at 327.

263. *Id.* (emphasis in original).

264. *Id.* at 327–28.

265. *Id.*

retribution when revoking supervised release.

C. Purpose of Supervised Release

Finally, the retributive theory of revocation contradicts Congress's utilitarian purpose in creating supervised release. The legislative history for the Sentencing Reform Act reflects a plan for a limited, humanitarian program of transitional support to assist former prisoners returning to the community. The addition of a revocation mechanism in 1986 made the system more punitive, but the core justifications for that change were still consequentialist rather than moral. The retributive theory of revocation is inconsistent with this purely utilitarian design.

1. Imposition of Supervised Release Is Utilitarian

Congress created supervised release with a utilitarian purpose. Lawmakers expressly rejected any retributive justification for imposing a term of post-release supervision and envisioned the system as a way to provide transitional services to defendants who needed help returning to the community.[266] Based on the legislative history and the statutory language, the circuit courts have held judges may not *impose* supervised release for retribution. The same conclusion should apply to revocation.

The Senate Report for the Sentencing Reform Act states that the "primary goal" of supervised release is "to ease the defendant's transition into the community."[267] Supervision should not be imposed for "punishment," which "will have been served to the extent necessary by the term of imprisonment."[268] By way of example, the Report suggests supervised release for a defendant serving "a long prison term for a particularly serious offense," or "who has spent a fairly short period in prison . . . but still needs supervision and training programs after release."[269] The "evident congressional purpose" of this system is "to improve the odds of a successful transition from the prison to liberty."[270]

Reflecting that humanitarian ideal, the Sentencing Reform Act omits

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266. S. REP. NO. 98-225, at 124–25 (1983) ("The committee has concluded that the sentencing purpose[] of . . . punishment would not be served by a term of supervised release . . . . The term of supervised release . . . may not be imposed for purposes of punishment.").

267. *Id.* at 124.

268. *Id.* at 125. The Report also states that supervised release is not intended to incapacitate the defendant, and the Act did not originally list incapacitation as a factor to be considered when imposing supervised release. *Id.* at 124. Congress later added incapacitation as a factor in the Sentencing Act of 1987. *See* Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1266, 1267 (codified as amended at 18 U.S.C. § 3553(a)(2)(C)).

269. S. REP. NO. 98-225, at 124 (1983).

270. Johnson v. United States, 529 U.S. 694, 708–09 (2000).

retribution as a justification for imposing supervised release. In 18 U.S.C. § 3583(c), the law lists eight factors to consider when imposing supervised release, but excludes retribution: "The court, in determining whether to include a term of supervised release . . . shall consider the factors set forth in section 3553(a)(1), (a)(2)(B)–(D), and (a)(4)–(7)."[271]

The federal courts have held that § 3583(c)'s omission of § 3553(a)(2)(A) as a factor to be considered when imposing supervised release forbids judges from considering retribution as justification for supervision. The reason the provision omits retribution, they explain, is that "supervised release is not, fundamentally, part of the punishment."[272] Instead, supervised release "fulfill[s] rehabilitative ends,"[273] with "the primary purpose . . . to facilitate the reentry of offenders into their communities, rather than to inflict punishment."[274] The Supreme Court has even cited § 3583(c) as an example of how the law limits the theories of punishment justifying each kind of sentence: "[A] particular purpose [of punishment] may apply differently, or even not at all, depending on the kind of sentence under consideration. For example, a court may *not* take account of retribution . . . when imposing a term of supervised release."[275]

While the circuit courts have drawn careful philosophical distinctions between the retributive and utilitarian theories justifying *imposition* of supervised release, they have failed to apply the identical distinction for *revocation* of supervised release. In *United States v. Burden*,[276] a district judge sentenced a defendant to 365 months of imprisonment followed by a lifetime of supervised release.[277] Although the district judge "believed [the defendant] was a 'changed person,'" they imposed a lifetime of supervision due to the "the seriousness of what [the defendant] did."[278]

Finding the judge's explanation "inflected with retributive interests,"

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271. 18 U.S.C. § 3583(c). A separate subsection governs imposition of supervised release following a revocation sentence. *See* 18 U.S.C. § 3583(h). Although this provision does not list factors for the judge to consider in making that decision, courts apply the same considerations "listed in 18 U.S.C. § 3583(c)." United States v. Clark, 726 F.3d 496, 501 (3d Cir. 2013).

272. United States v. Brooks, 889 F.3d 95, 99 (2d Cir. 2018) (per curiam) (quoting United States v. Aldeen, 792 F.3d 247, 252 (2d Cir. 2015)).

273. *Brooks*, 889 F.3d at 99 (quoting *Johnson*, 529 U.S. at 59).

274. United States v. Thompson, 777 F.3d 368, 374 (7th Cir. 2015) (quoting United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012)).

275. Tapia v. United States, 564 U.S. 319, 326 (2011) (emphasis in original) (citing 18 U.S.C. § 3583(c)); *see also Murray*, 692 F.3d at 280.

276. United States v. Burden, 860 F.3d 45 (2d Cir. 2017).

277. *Id.* at 51.

278. *Id.* at 56.

the Second Circuit held that "the supervised release term cannot stand."[279] Previously, in *United States v. Williams*,[280] the court had held that judges "may properly" consider § 3553(a)(2)(A) when revoking supervised release.[281] However, the *Burden* court distinguished *Williams* because the sentencing judge in *Williams* had "focused not on the seriousness of the offense *per se*, but on the risk to the public that the seriousness of the defendant's offense suggested."[282] The judge in *Burden*, by contrast, "repeatedly emphasized that [the] sentence was driven by the seriousness of [the defendants'] crimes and that, though Burden had changed in the intervening years, a long sentence was necessary to reflect the seriousness of Burden's crimes."[283] Because the lifetime term of supervised release appeared "to have been driven largely by the past seriousness of the defendants' crimes, standing alone," the sentence was improperly retributive.[284]

The list of factors for judges to consider when imposing supervised release under § 3583(c) is identical to the list of factors for judges to consider when revoking supervised release under § 3583(e)(3).[285] Both lists include all the utilitarian theories of punishment, but omit retribution. Just as *Burden* found judges should exclude retribution as a factor when they sentence a defendant to supervised release, so too should judges exclude retribution when revoking supervised release.

2. Revocation Is Punitive but Also Utilitarian

Congress's decision in 1986 to authorize judges to revoke supervised release for violations undoubtedly made the system more punitive. Nevertheless, the legislative history for this change suggests that lawmakers intended revocation to serve solely utilitarian goals of deterrence and public safety, not retribution.

The original Sentencing Reform Act deliberately omitted any provision

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279. *Id.*; *see also* United States v. Kopp, 922 F.3d 337, 340 (7th Cir. 2019) ("[A] judge may not consider retribution when imposing a term of supervised release.").

280. United States v. Williams, 443 F.3d 35 (2d Cir. 2006).

281. *Id.* at 48.

282. *Burden*, 860 F.3d at 57.

283. *Id.*

284. *Id.*

285. There is one small difference in the statutory language: 18 U.S.C. § 3583(c) says the court "shall consider" the listed factors when imposing supervised release, while § 3583(e)(3) says the court "may, after considering" the listed factors, revoke supervised release. This language does not appear to make a difference as to whether the court may consider unlisted factors like retribution when making the decision. Indeed, the *Burden* Court interpreted § 3583(c) to exclude retribution based solely on its enumeration of factors, *see* 860 F.3d at 56, and in that respect, § 3583(e)(3) is indistinguishable.

for revoking supervised release, because lawmakers "d[id] not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant."[286] Only if defendants engaged in "repeated or serious violations of the conditions of supervised release" could they be punished with "contempt of court" proceedings,[287] which would require a formal criminal prosecution affording full constitutional protections.[288]

Just two years later, however, Congress voted to authorize judges to revoke supervised release. While there is no recorded congressional debate on this change,[289] the Parole Commission and the federal judiciary both advocated for the amendment, offering some insight into the reasons behind its enactment.

First, Chairman Benjamin F. Baer of the Parole Commission asked Congress to add a revocation mechanism "both to protect the community and to aid the offender in his transition back to society."[290] Chairman Baer criticized supervised release as "seriously flawed," and argued that using contempt of court to enforce release conditions was "cumbersome, tax[ing] the limited resources of the courts . . . [and] ma[de] revocation much more difficult."[291] More "expeditious[]" revocation was necessary, he said, to "remove drug abusers from the streets before the drug habit reaches the point that it can only be supported through criminal activity."[292]

Second, the Administrative Office of the United States Courts, an agency within the judicial branch that "provides . . . legislative, legal, financial, technology, management, administrative, and program support services to federal courts,"[293] lobbied Congress to enact a revocation mechanism to "streamline[]" the "procedure for enforcing the conditions of supervised release."[294]

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286. S. REP. NO. 98-225, at 125 (1983).

287. *Id.*

288. *See* Doherty, *supra* note 101, at 999–1000.

289. The addition of a revocation mechanism did not even receive its own subheading, instead being grouped with several minor alterations as "miscellaneous technical amendments." Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207, 3207-7.

290. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1986: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 99th Cong. 64 (1985) (statement of Benjamin F. Baer, Chairman, U.S. Parole Comm'n) [hereinafter *Hearings*].

291. *Id.* at 65–66.

292. *Id.* at 67–68.

293. *Judicial Administration*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/judicial-administration [https://perma.cc/N7XG-VTVL].

294. 131 CONG. REC. 14,177 (1985).

Empowering judges to revoke supervised clearly reflected a harsher attitude toward crime. Yet the arguments put forward by the Parole Commission and the Administrative Office still sounded in utilitarian concerns of deterrence and incapacitation, without any suggestion that violations should be punished as moral wrongs. Their goal was to use revocation to promote compliance and public safety, not inflict retribution. While this change made the system more coercive, it was still consequentialist in design. Revocation was simply a more aggressive approach to achieving the system's original goal of ensuring a safe and successful transition to the community.

3. Retribution Contradicts Legislative Intent

Retributive revocation is contrary to the utilitarian intent behind supervised release. While critics of the Sentencing Reform Act have called it part of "a conceptual anti-movement," whose "only clear goals . . . were the repudiation of rehabilitation as the dominant theory of punishment . . . ,"[295] that appraisal is not quite fair when it comes to supervised release. Congress may have been vague about the justifications for imprisonment,[296] but was clear and consistent in creating a purely consequentialist system of post-release supervision, focused on rehabilitation over retribution.

Far from an anti-movement, lawmakers designed supervised release based on a deliberately utilitarian vision of community supervision. While the Sentencing Reform Act rejected the rehabilitative theory of imprisonment,[297] Congress did not give up hope that defendants could be rehabilitated outside prison. The legislative history makes clear that supervised release was intended to promote "rehabilitation" in the form of "supervision and training programs,"[298] which would "fulfill[] rehabilitative ends, distinct from those served by incarceration."[299] Judges would administer the supervision to "facilitate the reentry of offenders into their communities, rather than to inflict punishment."[300] Indeed, the drafters of the original statute so favored rehabilitation over retribution that they did not even include a mechanism for punishing violations.

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295. Douglas Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 11 (2005).

296. *See* Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 6–8 (1987) (noting that the Act's four purposes of punishment "often suggest different and sometimes conflicting policies").

297. *See* 18 U.S.C. § 3582(a); Tapia v. United States, 564 U.S. 319, 320 (2011) ("§ 3582(a) tells courts to acknowledge that imprisonment is not suitable for the purpose of promoting rehabilitation.").

298. S. REP. NO. 98-225, at 124 (1983).

299. United States v. Johnson, 529 U.S. 53, 59 (2000).

300. United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012).

Although the Probation Commission and Administrative Office of U.S. Courts quickly persuaded Congress to authorize revocation for violations, they still based their arguments on deterrence and public safety, not retribution. Lawmakers appear to have realized that by replacing parole with supervised release, they also had eliminated any retributive justification for punishing violations.[301] Without parole's moral foundation in "grace" and "trust," revocation of supervised release had to be justified by the consequences, such as encouraging the defendant to follow the court's conditions and protecting the community. While the legislative history does not mention this distinction, the statute lists only utilitarian theories of punishment as justifying revocation of supervised release.[302]

Congress created supervised release to encourage a safe and successful return to the community. Lawmakers intended that everything in the system—from the imposition of conditions to the punishment of violations—be limited to utilitarian purposes of deterrence, incapacitation, and rehabilitation. Retributive revocation has no place in this purely utilitarian design.

III. UTILITARIAN REVOCATION

A utilitarian approach to revocation would not just be a theoretical change, but also have a significant practical impact by shortening prison terms, mitigating implicit racial bias, and eliminating the justification for consecutive revocation sentencing. The traditional story of criminal law portrays courts as the branch of government most likely to defend individuals against the state. Yet by promoting retributive revocation, the federal judiciary played a key role in expanding the state's power to punish. While judges may feel a personal stake in sanctioning violators for their disrespect, they should revoke supervised release based solely on deterrence and incapacitation.

A. Revoking to Deter and Incapacitate

Excluding retribution from revocation decisions would leave the Sentencing Reform Act's three remaining utilitarian "purposes" of punishment: deterrence, incapacitation, and rehabilitation. But that is not the end of the analysis. Under *Tapia*, the Act also rejects rehabilitation as a justification for imprisonment, including when a judge imposes a

301. *See supra* section II.A.0

302. *See* 18 U.S.C. § 3583(e).

sentence of imprisonment via revocation of supervised release.[303] As a result, there are only two factors judges should weigh when revoking supervised release: deterrence and incapacitation. While it might seem strange to consider just two theories of punishment, this approach aligns well with the legislative history, which emphasized "deterren[ce]" and "protect[ing] the community" as grounds for revocation,[304] but never retribution or rehabilitation.

What would a purely deterrent and incapacitative theory of revocation look like? If a defendant were to commit technical violations but did not seem likely to reoffend or pose a threat to the public (e.g., failing a drug test, losing a job, or leaving the district without permission), then there would be no justification for revoking supervised release, because there would be no need for deterrence or incapacitation.[305] By contrast, if a defendant were to violate supervised release in a way that suggested a risk of recidivism—for example, harassing a prior victim in breach of a no-contact order—then revocation might be appropriate to encourage compliance and protect the public.

Under a purely utilitarian theory of revocation, reviewing courts would vacate orders revoking supervised release if the trial judge were to erroneously cite retribution as a factor. This approach finds support in *Tapia*, where the Supreme Court held that a district judge violated the Sentencing Reform Act by improperly considering rehabilitation in imposing a prison sentence "to ensure that [the defendant] could complete the 500 Hour Drug Program."[306] The Court remanded for the court of

303. The circuit courts unanimously hold that *Tapia* applies to revocation of supervised release. *See* United States v. Schonewolf, 905 F.3d 683, 687 (3d Cir. 2018); United States v. Vandergrift, 754 F.3d 1303, 1309 (11th Cir. 2014); United States v. Deen, 706 F.3d 760, 765–67 (6th Cir. 2013); United States v. Lifshitz, 714 F.3d 146, 150 (2d Cir. 2013); United States v. Garza, 706 F.3d 655, 657 (5th Cir. 2013); United States v. Mendiola, 696 F.3d 1033, 1041–42 (10th Cir. 2012); United States v. Taylor, 679 F.3d 1005, 1006 (8th Cir. 2012); United States v. Bennett, 698 F.3d 194, 198 (4th Cir. 2012); United States v. Molignaro, 649 F.3d 1, 4–5 (1st Cir. 2011); United States v. Grant, 664 F.3d 276, 280 (9th Cir. 2011). Applying *Tapia* to revocation might seem strange, since § 3583(e)(3) specifically lists rehabilitation as a factor to consider. However, the explanation lies in the statute's structure, which contains a single list of factors for judges to consider when taking four different actions: (1) terminating supervised release, (2) extending or modifying supervised release, (3) revoking supervised release, and (4) imposing house arrest. *See* 18 U.S.C. §§ 3583(e)(1)–(4). The first, second, and fourth of these actions do not involve imprisonment, and therefore are consistent with *Tapia*'s rule "not [to] think about *prison* as a way to rehabilitate an offender." Tapia v. United States, 564 U.S. 319, 330 (2011) (emphasis added). Revocation of supervised release, by contrast, does involve imprisonment, and therefore must not be based on rehabilitation under *Tapia*. A judge may consider rehabilitation when deciding whether to modify the conditions or terminate supervision, but not when deciding whether to revoke supervised release.

304. *Hearings*, *supra* note 290, at 64–66.

305. In some circumstances, violations like these might be warning signs of danger, but when they were not, judges would not punish them with revocation.

306. *Tapia*, 564 U.S. at 334.

appeals to consider whether the violation was plain error, which it ultimately did, vacating the sentence and remanding for resentencing.[307] While § 3583(e)(3) uses different language than the provision in *Tapia*, it performs the same function by eliminating a factor from consideration at sentencing. The same remedy should therefore apply. If a judge were to improperly revoke supervised release based on retribution, reviewing courts would vacate and remand for resentencing.[308]

B. Impact of Utilitarian Revocation

Adopting a purely utilitarian theory of revocation would not just be a philosophical change. If judges ignored retribution and focused only on deterrence and incapacitation, then they would also reduce prison terms, mitigate implicit racial bias, and end the arbitrary and unfair practice of consecutive revocation sentencing.

First, excluding retribution from the revocation analysis would lead judges to impose shorter prison sentences for violations. If judges did not consider retribution when revoking supervised release, then they would have one less justification for imposing a prison term. Because they currently place primary emphasis on retribution in revocation proceedings,[309] considering only deterrence and incapacitation could significantly shorten prison sentences. The same dynamic occurred after *Tapia*—when reviewing courts vacated prison sentences for improper consideration of rehabilitation, the sentencing judge often imposed a shorter sentence on remand.[310] In the same way, removing retribution as

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307. *Id.* at 334–35; *see also* United States v. Tapia, 665 F.3d 1059, 1063 (9th Cir. 2011). The circuit courts have held that sentencing a defendant to imprisonment for rehabilitative reasons can be reversible error. *See* United States v. Tidzump, 841 F.3d 844, 845 (10th Cir. 2016); United States v. Wooley, 740 F.3d 359, 368–69 (5th Cir. 2015); United States v. Culbertson, 712 F.3d 235, 243–44 (5th Cir. 2013); *Garza*, 706 F.3d at 663; United States v. Broussard, 669 F.3d 537, 548, 550 (5th Cir. 2012); United States v. Olson, 667 F.3d 958, 963 (8th Cir. 2012); *Mendiola*, 696 F.3d at 1042; United States v. Escalante-Reyes, 689 F.3d 415, 425–26 (5th Cir. 2012) (en banc); *Taylor*, 679 F.3d at 1007; United States v. Cordery, 656 F.3d 1103, 1107–08 (10th Cir. 2011); *Grant*, 664 F.3d at 279–82; *Molignaro*, 649 F.3d at 4–5.

308. Abolishing the retributive theory of revocation would require the eight circuits that have already ruled on this issue to revisit their precedents through an en banc proceeding. By contrast, the four circuit courts that have not yet addressed retributive revocation—specifically, the Eighth, Tenth, Eleventh, and D.C. Circuits—would not have that problem, and should follow the structure, statute, and purpose of supervised release in adopting a purely utilitarian approach to revocation.

309. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

310. *See, e.g.*, *Wooley*, 740 F.3d at 365–66 (applying *Tapia* to vacate thirty-month sentence); Judgment in a Criminal Case at 3, United States v. Wooley, No. 08-136 "B" (E.D. La. Apr. 25, 2014) (imposing twenty-five-month sentence on remand); *Broussard*, 669 F.3d at 553 (applying *Tapia* to vacate forty-year sentence); Amended Judgment in a Criminal Case at 2, United States v. Broussard, 6:10-CR-00217-001 (W.D. La. Mar. 12, 2013) (imposing twenty-year sentence on remand);

a factor in revocation decisions would likely lead judges to impose to shorter prison terms.

Defense advocates might worry that excluding the retributive theory of punishment could actually *increase* revocation sentences by empowering judges to revoke release without considering the seriousness of the violation. In other words, judges might impose longer sentences for minor violations based on purely utilitarian concerns like public safety.

Yet that worst-case scenario is improbable, as it depends on a theory of "limiting retributivism" that federal sentencing law does not adopt.[311] Limiting retributivism holds that retribution sets "outer limits on permissible punishments," while "utilitarian goals . . . operate within those limits."[312] According to this logic, if retributivism limits punishment, then excluding it could lead judges to impose longer revocation sentences. However, that outcome is unlikely, as the Sentencing Reform Act does not limit punishment based on retribution.[313] Instead, the Act caps sentences through a more general "parsimony principle,"[314] which instructs judges to impose punishment "sufficient, but not greater than necessary, to comply with the purposes [of punishment] set forth in [the Act]."[315] Under the parsimony principle, excluding

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Escalante-Reyes, 689 F.3d at 423–24 (applying *Tapia* to vacate sixty-month sentence); Amended Judgment in a Criminal Case at 2, United States v. Escalante-Reyes, 5:11CR00152-001 (S.D. Tex. Oct. 1, 2012) (imposing thirty-five-month sentence on remand); *Cordery*, 656 F.3d at 1106 (applying *Tapia* to vacate fifty-six-month sentence); Judgment in a Criminal Case at 2, United States v. Cordery, No. DUTX2:08CR000467-001-CW (D. Utah. Nov. 4, 2011) (imposing forty-five-month sentence on remand).

311. Berman, *supra* note 295, at 48.

312. *Id.*

313. Paul Hofer and Mark Allenbaugh have argued that the Sentencing Guidelines endorse a form of limiting retributivism by tying the offense levels used to calculate the recommended sentencing range to the specifics of the defendant's criminal conduct, thus placing "primary weight" on punishing wrongdoing. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 51–52 (2003); *see also* U.S. SENT'G GUIDELINES MANUAL §§ 1B1.1(a)(1)–(4) (U.S. SENT'G COMM'N 2018). Only after calculating the sentencing range do the Guidelines give "secondary weight" to utilitarian concerns like deterrence and incapacitation. Hofer & Allenbaugh, *supra*, at 52; *see also* U.S. SENT'G GUIDELINES MANUAL §§ 1B1.1(b)–(c) (U.S. SENT'G COMM'N 2018). The Guidelines on revocation work the same way, using the gravity of the defendant's conduct to determine the grade of the violation, which in turn determines the recommended sentencing range. *See id.* §§ 7B1.1(a), 7B1.3(a), 7B1.4(a). Nevertheless, this structure does not mean the Guidelines require judges to adopt a retributive theory of punishment. Because the severity of the defendant's misconduct is always a relevant factor in determining what sentence is necessary to achieve deterrence and public safety, tying offense levels or violation grade to the defendant's conduct can still reflect a purely utilitarian theory of punishment. *See* United States v. Clay, 752 F.3d 1106, 1108 (7th Cir. 2014); United States v. Young, 634 F.3d 233, 239 (3d Cir. 2011); United States v. Lewis, 498 F.3d 393, 400 (6th Cir. 2007); United States v. Williams, 443 F.3d 35, 48 (2d Cir. 2006).

314. Berman, *supra* note 295, at 49.

315. *Id.*

retribution from consideration would give judges less, not more, reason to punish violations of supervised release.

Second, rejecting the retributive theory of punishment could reduce implicit racial bias in revocation of supervised release. A 2020 Sentencing Commission report found that Black defendants comprise 24% of the population under federal supervision (including both probation and supervised release), yet 33.8% of defendants sentenced for violations.[316] Empirical analysis of state parole systems suggests that people of color are treated more harshly in revocation proceedings, even controlling for non-racial factors.[317]

There are multiple plausible explanations for this trend,[318] but one cause may be the retributive theory of revocation. Empirical studies show "a deep and inextricable connection between race and retribution," including "a significant implicit association" between Black faces and retributivist words, and a direct relationship between "implicit Black-retribution biases" and "support for retributive theories of punishment."[319] Retributive thinking appears rooted in intuitive, instinctive, or even "biological" impulses, making it especially vulnerable to unconscious biases.[320] The retributive theory of revocation therefore may lead judges to impose harsher punishments on people of color.[321] If this is true, then excluding the retributive theory would not only reduce revocation sentences in individual cases, but also make revocation of supervised

316. *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 19.

317. *See generally* Jannetta et al., *supra* note 41; Bradner & Schiraldi, *supra* note 41; Tapia & Harris, *supra* note 41.

318. For example, "biased policing could lead to more arrests for communities of color, which would automatically initiate or be reason for revocation." Jannetta et al., *supra* note 37, at 9. Alternatively, conditions forbidding contact with anyone who has a felony conviction may weigh heavier on people of color, forcing them "to choose between obeying the rules on one hand, or, on the other, risking a parole violation by spending time with relatives and friends who could be valuable sources of support, stability, housing, or employment connections." Bradner & Schiraldi, *supra* note 41, at 5. Another explanation could be systematic racism in transportation or employment: "Black and brown communities disproportionately lack access to adequate transportation, and requirements to report for meetings with a parole officer will be more difficult for someone who lives in a neighborhood with poor public transit coverage." *Id.* (citation omitted). "Similarly, Black and brown people face employment discrimination, and requirements to obtain employment and pay supervision fees will . . . be even more difficult for people living in areas with limited employment options." *Id.* (citation omitted).

319. *See* Justin D. Levinson, Robert J. Smith, & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 879–83 (2019).

320. *Id.* at 849–50.

321. *See id.* at 850–71 (explaining historical and psychological forces at play when people think about retributive punishment); *see also* Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 58 (2003) ("The dramatic increase in the severity of sentences, and the consequent ballooning of the prison population, occurred largely in the 1980s and 1990s, and followed almost immediately upon the shift from rehabilitation to retributive rationales for punishment . . . .").

release more equitable overall.

Finally, excluding the retributive theory of revocation would also end the unnecessary and unfair practice of consecutive revocation sentencing when defendants under supervision are convicted of new crimes. In about one-third of revocations, defendants violate their supervised release by committing new crimes.[322] When this happens, the Sentencing Guidelines recommend that the judge impose a revocation sentence to run "consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation."[323] In other words, the Guidelines recommend that the judge impose a revocation sentence *in addition to and following* the sentence for the new crime.[324] In fact, the Sentencing Commission adopted the "breach of trust" concept precisely to justify a consecutive revocation sentence in this scenario.[325]

Committing a crime while on supervised release is obviously a serious violation, yet consecutive revocation sentences are still arbitrary and excessive.[326] In some cases, these sentences may equal or even exceed the

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322. Table E-7A, *supra* note 122. Courts hold that it does not violate the Double Jeopardy Clause to charge a defendant with both a crime and a supervised release violation based on the same conduct. *See* United States v. Wyatt, 102 F.3d 241, 245 (7th Cir. 1996); United States v. Woodrup, 86 F.3d 359, 362–63 (4th Cir. 1996); United States v. Soto-Olivas, 44 F.3d 788, 789–90 (9th Cir. 1995). In fact, the government may introduce the record of the criminal conviction at the revocation hearing as sufficient proof of the violation. *See* United States v. Goodon, 742 F.3d 373, 375–76 (8th Cir. 2014); United States v. Spraglin, 418 F.3d 479, 481 (5th Cir. 2005); United States v. Huusko, 275 F.3d 600, 602–03 (7th Cir. 2001).

323. U.S. SENT'G GUIDELINES MANUAL ch. 7, pt. B, introductory cmt (U.S. SENT'G COMM'N 2018); *see also id.* § 7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.").

324. Similarly, when a judge sentences defendant for a conviction *after* a revocation hearing, the Guidelines recommend that "any sentence of imprisonment for a criminal offense . . . be run consecutively to any term of imprisonment imposed upon revocation." *Id.* § 7B1.3 cmt. n.4.

325. *Id.* § 7A3(b). Otherwise, the Commission explained, "the revocation court [would] substantially duplicate the sanctioning role of the court with jurisdiction over a defendant's new criminal conduct," and "punishment imposed upon revocation [would] run concurrently with, and thus generally be subsumed in, any sentence imposed for that new criminal conduct." *Id.*

326. The Sentencing Commission's confusion on this issue goes well beyond the Sentencing Guidelines. The Commission's 2020 report on Federal Probation and Supervised Release Violations analyzed trends in revocation hearings, yet combined defendants on probation with those on supervised release as "offenders 'sentenced to supervision.'" *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 2. Given the differences between probation and supervised release, however, the demographics of these two populations are almost certainly different. For example, because probation involves an act of trust while supervised release does not, defendants on probation will tend to have less aggravated criminal histories than those on supervised release. And since criminal history is an important factor at revocation hearings, judges are likely to punish supervised-release violators more harshly than probation violators. *See* U.S. SENT'G GUIDELINES MANUAL § 7B1.4 (U.S. SENT'G COMM'N 2018). The Report's failure to recognize this distinction

punishment for the conviction—doubling the defendant's total prison time, solely for committing the offense while on supervised release.[327] And even when consecutive revocation sentences are short, they are often needless. In *United States v. Ramos*,[328] a defendant on supervised release killed a police officer, a crime for which she was convicted in state court and sentenced to fifteen years to life imprisonment.[329] She was released from state prison after twenty-two years, then "immediately transferred to federal custody" for a revocation hearing on the ground that the killing also violated her supervised release.[330] The judge revoked her release and sentenced her to another two years in federal prison, explaining that his "'role . . . [wa]s not to sentence [the defendant] for' the death of [the officer], but to sentence her for the 'breach of trust' associated with the violation of her supervised release."[331] It is hard to believe that after this

clouds its analysis. Going forward, the Commission must make sure to distinguish between these two systems in order to obtain a clear understanding of revocation practices.

327. *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. Schonewolf, 905 F.3d 683, 685–86 (3d Cir. 2018) (offense sentence twenty-four to forty-eight months, revocation sentence forty months); United States v. Valure, 835 F.3d 789, 790 (8th Cir. 2016) (offense sentence sixty-three months, revocation sentence sixty months); United States v. Reyes-Solosa, 761 F.3d 972, 973–74 (9th Cir. 2014) (offense sentence six months, revocation sentence twelve months); United States v. Ceballos-Santa Cruz, 756 F.3d 635, 636–37 (8th Cir. 2014) (offense sentence six months, revocation sentence eighteen months); United States v. Banks, 743 F.3d 56, 58 (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. Jackson, 176 F.3d 1175, 1176 (9th Cir. 1999) (offense sentence thirty-six months, revocation sentence forty-eight months); United States v. McGee, 60 F.3d 1266, 1267–68 (7th Cir. 1995) (offense sentence twenty-four months, revocation sentence twenty-four months).

328. 979 F.3d 994 (2d Cir. 2020).

329. *Id.* at 997.

330. *Id.* at 997, 1000.

331. *Id.* at 997; *see also* Andrews v. Warden, 958 F.3d 1072, 1074 (11th Cir. 2020) (offense sentence 188 months, revocation sentence twenty-four months); United States v. Watters, 947 F.3d 493, 495 (8th Cir. 2020) (offense sentence 262 months, revocation sentence sixty months); United States v. Cruz-Olavarria, 919 F.3d 661, 661 (1st Cir. 2019) (offense sentence 120 months, revocation sentence twenty-four months); United States v. Trung Dang, 907 F.3d 561, 562–63 (8th Cir. 2018) (offense sentence 240 months, revocation sentence sixty months); United States v. Ferguson, 876 F.3d 512, 513–14 (3d Cir. 2017) (offense sentence 120–240 months, revocation sentence twenty-four months); United States v. Mulero-Algarin, 866 F.3d 8, 9 (1st Cir. 2017) (offense sentence 120 months, revocation sentence thirty-six months); United States v. Hernandez-Pineda, 849 F.3d 769, 771 (8th Cir. 2017) (offense sentence 300 months, revocation sentence twenty-four months); United States v. Peterson, 852 F.3d 629, 630 (7th Cir. 2017) (offense sentence forty-eight months, revocation sentence six months); United States v. Johnson, 786 F.3d 241, 242–43 (2d Cir. 2015) (offense sentence 216 months, revocation sentence thirty-six months); United States v. Rivera, 784 F.3d 1012, 1014 (5th Cir. 2015) (offense sentence 336 months, revocation sentence sixty months); United States v. Johnson, 640 F.3d 195, 199 (6th Cir. 2011) (offense sentence 144 months, revocation sentence thirty-six months); United States v. Moore, 624 F.3d 875, 877 (8th Cir. 2010) (offense sentence 188 months,

defendant served a twenty-two-year state prison sentence and was released on parole, there was any legitimate need to incarcerate her for another two years in federal prison.

Without the retributive theory of punishment, there is no justification for imposing consecutive revocation sentences in these cases. When a defendant on supervised release is convicted of a new crime, the judge sentencing the defendant for that conviction will already consider *both* the criminal conduct *and* the fact that the defendant committed it while under supervised release.[332] That judge will likely view the criminal conduct as more aggravated because the defendant committed it while under supervision, and very likely will impose a longer sentence as a result.[333]

Because the judge sentencing the defendant for the conviction already imposes an appropriate sentence based on all the relevant factors, there is no utilitarian benefit to having a different judge at a revocation hearing decide whether additional punishment is necessary for the violation of supervised release. The judge who sentences the defendant for the conviction already considers the appropriate punishment to deter and incapacitate based on the circumstances of the offense, including the fact that the defendant was under supervision at the time of the criminal conduct. The judge at the revocation hearing is no better suited to determine what punishment is necessary for deterrence and incapacitation. In fact, the revocation judge is in a *worse* position, as it is "difficult in many instances for the court or the parties to obtain the information . . . and witnesses" regarding the underlying conduct.[334]

The only plausible justification for a consecutive revocation sentence when defendants on supervised release are convicted of new crimes is as retribution for their "breach of trust inherent in the conditions of supervision."[335] Under the retributive theory of revocation, the judge who imposed the supervision would arguably be better placed to assess the appropriate penalty for the defendant's "breach of trust." But without the retributive theory, there is no legitimate reason for imposing a consecutive

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revocation sentence twenty-four months); United States v. Huusko, 275 F.3d 600, 602 (7th Cir. 2001) (offense sentence 180 months, revocation sentence twenty-four months); United States v. Woodrup, 86 F.3d 359, 360 (4th Cir. 1996) (offense sentence 240 months, revocation sentence twenty-four months); United States v. Caves, 73 F.3d 823, 824 (8th Cir. 1996) (offense sentence 108 months, revocation sentence twelve months).

332. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 4A1.1(d) (U.S. SENT'G COMM'N 2018) (adding "2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status").

333. *See id.*

334. *Id.* § 7A3(b).

335. *Id.*

revocation sentence. While there may be grounds to impose a *concurrent* revocation sentence,[336] consecutive revocation sentencing is not justified by the purely utilitarian considerations listed in § 3583(e)(3).

C. Judicial Pathology in Revocation

Professor Bill Stuntz famously diagnosed American criminal justice as "pathological."[337] No matter who comes into power or how the world changes, the criminal law seems to grow harsher and more expansive over time.[338] Professor Stuntz attributed this trend to a "tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes," versus the "growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones."[339] In this two-against-one battle, "prosecutorial and legislative power reinforce each other, and together both these powers push courts to the periphery."[340] To cure these pathological politics, Stuntz looked to the courts as the branch most likely to push back against expanding criminal liability and "take the interests of defendants into account."[341]

The law of federal sentencing, however, reveals a different, darker institutional dynamic—a judicial pathology in revocation of supervised release. This pathology began with the Sentencing Reform Act of 1984, which transferred authority over community supervision from the Parole

336. There are potentially three utilitarian justifications for imposing a *concurrent* revocation sentence when a defendant on supervised release commits a new crime. First, if the defendant is ultimately not prosecuted for the new crime, then the judge may wish to revoke release in order to provide deterrence and incapacitation. *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 2. Second, if the defendant is prosecuted and convicted for the new crime, but there is a possibility that the conviction could be overturned on appeal, then the judge might impose a concurrent revocation sentence to ensure the defendant spends time in prison. Finally, even if the defendant's conviction is not overturned, the judge may wish to ensure that the violation of supervised release is reflected in the criminal history in case the defendant is ever convicted of another federal offense. *See* U.S. SENT'G COMM'N, REVOCATIONS AMONG FEDERAL OFFENDERS 5–7 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf [https://perma.cc/92GA-9VEZ] (explaining that a revocation sentence can impact a defendant's criminal history score by increasing the number of "points" assigned to their original conviction, or by "reviv[ing]" an old conviction that would otherwise not be counted).

337. *See generally* Stuntz, *supra* note 55.

338. *See id.* at 507.

339. *Id.* at 510; *see also id.* at 557 ("Courts are a good deal less prone to that bias [toward overcriminalization]."); *id.* at 576 ("Courts' lawmaking tendencies are more balanced, less tilted in favor of broader [criminal] liability.").

340. *Id.* at 528.

341. *Id.* at 541.

Commission to the federal courts.[342] Far from "marginaliz[ing]" courts,[343] Congress placed judges *at the center* of supervised release by authorizing them to impose terms of supervision and monitor compliance.

While lawmakers hoped that courts would use supervision sparingly,[344] judges instead embraced their new authority, imposing supervised release on virtually every defendant sentenced to more than a year in prison.[345] Today, the judiciary polices a population of more than 100,000 people under supervised release—five times more than were under parole in 1984.[346] In 1994, a congressional study committee proposed returning control over community supervision to the Parole Commission, yet the Judicial Conference of the United States actively opposed the idea.[347]

Lawmakers also sought to limit judicial power by omitting any mechanism for judges to revoke supervised release. Unlike parole, violations of supervised release would only be punishable through a criminal contempt prosecution providing a full criminal trial and all the traditional constitutional rights. Yet within two years, the Administrative Office of the U.S. Courts successfully lobbied Congress to add a revocation provision that created a more streamlined process for punishing defendants who violated conditions of supervision, without a jury or proof beyond a reasonable doubt.[348] Judges revoke supervised release in one-third of all cases,[349] nearly 17,000 times each year.[350]

Even in enacting the revocation provision, Congress sought to constrain the courts by excluding retribution from the list of factors they could consider under § 3583(e)(3).[351] Yet this attempt failed, as a majority of circuit courts and Supreme Court justices endorsed a "primarily" retributive theory of revocation.[352] The Sentencing Commission—a commission within the judicial branch[353]—also enacted Sentencing Guidelines that described violations in moral, backwards-looking terms,

342. Peter B. Hoffman, *History of the Federal Parole System: Part I (1910–1972)*, 61 FED. PROB. 23, 23–24 (1997).

343. *See* Stuntz, *supra* note 55, at 510.

344. *See* Johnson v. United States, 529 U.S. 694, 708–09 (2000); S. REP. NO. 98-225, at 125 (1983).

345. *See Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 3–4.

346. *See id.* at 69; Table E-1, *supra* note 119; Schuman, *supra* note 82, at 589; PROBATION AND PAROLE 1984, BUREAU OF JUST. STATS. BULL. 4 (1984).

347. *See* David N. Adair, *Revocation of Supervised Release—A Judicial Function*, 6 FED. SENT. REP. 190, 190–91 (1994).

348. *See* 131 CONG. REC. 14,169 (1985).

349. *Federal Offenders Sentenced to Supervised Release*, *supra* note 118, at 4, 63.

350. Table E-7A, *supra* note 122.

351. *See* 18 U.S.C. § 3583(e)(3).

352. U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018).

353. 28 U.S.C. § 991(a).

using the "breach of trust" concept to justify consecutive revocation sentencing. While Professor Stuntz envisioned courts as the institution most likely to protect criminal defendants against prosecutors and legislatures, the federal judiciary has instead played a key role in expanding state power to punish through the retributive theory of revocation.

What is most pathological about this development is the extreme judicial investment in the revocation process. Federal judges not only impose conditions of supervision and monitor compliance, but also sentence defendants for violations. Because judges are the parties whose "trust" is "breached," they are effectively sentencing crimes against themselves. Perhaps it is natural that the victim of a violation would seek retribution against the violator.[354] Yet this personal stake in the revocation also creates a conflict of interest, contrary to "the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'"[355] Rather than sanction violators for their disrespect, judges should revoke supervised release only to deter and incapacitate.

CONCLUSION

Congress created supervised release as a program of transitional support for former prisoners. Lawmakers eventually authorized revocation for violations, but limited its purposes to deterrence and incapacitation, not retribution. Nevertheless, the federal judiciary endorsed a retributive theory of revocation based on a "breach of trust" concept that lacks legal support, needlessly amplifies punishment, and suggests a conflict of interest on the part of the sentencing judge. Adopting a purely utilitarian approach to revocation can help break the connection between mass supervision and mass incarceration.

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354. Friedrich Nietzsche vividly described the personal element in retributive punishment: "[T]o what extent can suffering balance debts or guilt? To the extent that to *make* suffer was in the highest degree pleasurable, to the extent that the injured party exchanged for the loss he had sustained, including the displeasure caused by the loss, an extraordinary counterbalancing pleasure: that of *making* suffer—a genuine *festival* . . . ." FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 65 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1989) (1967) (emphasis in original) (footnote omitted).

355. Williams v. Pennsylvania, __ U.S. __, 136 S. Ct. 1899, 1905–06 (2016). Defendants have unsuccessfully challenged the probation officer's part in revocation proceedings as violating the separation of powers. *See* United States v. Burnette, 980 F. Supp. 1429, 1438 (M.D. Ala. 1997); *see also* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 347 (2016) ("[P]robation officers arguably inhabit the roles of victim, witness, investigator, prosecutor, and judge, all in the same case."). But no one has ever questioned the sentencing judge's conflict of interest.