THE CONSTITUTIONAL LIMITS OF CRIMINAL SUPERVISION

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Nearly four million people are under criminal supervision in the United States. Most are on probation or parole. They can be sent to prison if a judge concludes that they violated the terms of their supervision. When that happens, there is no right to a jury trial. The violation only needs to be proven to a judge by a preponderance of the evidence. This creates a constitutional puzzle. In several important cases, the Supreme Court has recognized that the Sixth Amendment right to trial by jury is not limited to the formal elements of criminal statutes. It applies in any situation where proving a fact to a court triggers additional punishment. So then why is criminal supervision constitutionally permitted, when it involves judges sending people to prison based on facts not proven to a jury? Under current doctrine, the answer is surprisingly unclear. The Court's 2019 decision in United States v. Haymond raised this issue directly but failed to provide an answer.

This Article proposes a new solution to this constitutional puzzle: the conditional sentencing theory. This theory explains how criminal supervision can be made compatible with the Sixth Amendment. It holds that a criminal sentence can include provisions that change the defendant's custody status if certain conditions are satisfied. Such a sentence contains an amount of custody time, an amount of supervision time, an amount of suspended custody time for supervision violations, and a list of acts that trigger violations. Under this theory, a judge sentencing a person for a supervision violation is not imposing a new punishment. They are instead implementing the terms of the original sentence, switching someone from

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supervision to custody based on triggering rules announced at the initial sentencing hearing.

The conditional sentencing theory places two important constitutional limits on criminal supervision, which are not currently recognized. First, a judge cannot retroactively change a supervision sentence by lengthening it, adding more conditions, or adding more prison time. Second, a sentence for a supervision violation cannot exceed the statutory maximum for the underlying crime. Numerous state and federal supervision laws transgress these limitations. Many state probation laws, for example, let judges extend probation or change its terms at a violation hearing. In some states, like Wisconsin and Pennsylvania, this process can repeat indefinitely. The same is true in the federal system of supervised release. That system lets judges extend supervision unlimited times, keeping supervisees trapped in an endless cycle of new punishments—a life sentence on an installment plan. The Article closes by arguing more broadly that judges should direct greater constitutional scrutiny at institutions, like criminal supervision, that make incarceration more efficient by circumventing defendants' rights.

INTRODUCTION

In 2006, a federal judge in South Carolina sentenced Keith Conyers to three months in prison for a fraud crime, to be followed by five years of supervised release.[1] Shortly after Mr. Conyers got out of prison, he was charged with violating the terms of his supervised release by using illegal drugs, failing to submit to drug testing, and failing to report to his probation officer.[2] Because this was a revocation hearing and not a new criminal case, these charges only had to be proven to the judge by a preponderance of the evidence.[3] Mr. Conyers was found in violation, and the judge gave him a prison sentence of eight months, followed by a new three-year term of supervision.[4] In 2010 the judge revoked Mr. Conyers' supervised release again for possessing illegal drugs and failing to report to probation.[5] This time the sentence was fourteen months in prison and a new three-year term of supervision.[6] And the cycle continued. In 2011, Mr. Conyers was found in violation again and given eight months of house arrest.[7] Later that same year he was given fourteen more months in prison and another three-year term of supervision.[8] Between all of these revocation sentences, Mr. Conyers ended up spending multiple years in prison. And under current federal law, this cycle of supervised release, violation sentences, prison time, and more supervised release can continue forever for certain crimes.[9] Defendants

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1 Brief for Appellant at 4, United States v. Conyers, 469 F. App'x 152 (4th Cir. 2012) (No. 11-4940).

2 *Id.* at 5.

3 *See* 18 U.S.C. § 3583(e)(3).

4 Brief for Appellant, *supra* note 1, at 5.

5 *Id.*

6 *Id.*

7 *Id.* at 6–7.

8 *Id.*

9 *See* 18 U.S.C. §§ 3583(e)(3), (h) (permitting federal judges to impose a new term of supervised release after a violation and resetting the maximum possible prison sentence with each new violation, so that additional prison and supervision sentences can be imposed). For some crimes (most notably federal sex, drug, and terrorism crimes, though not the fraud crime Mr. Conyers was convicted of), this can mean unlimited extensions of supervision time and prison time. *See* United States v. Cassesse, 685 F.3d 186, 191 (2d Cir. 2012). And, under current circuit case law, such supervised release sentences are not constrained by the statutory maximum for the underlying crime. *See, e.g.*, United States v.

can end up serving a life sentence on an installment plan, without ever seeing a jury.[10]

Mr. Conyers is not alone. Nearly half of the people who go to prison in the United States are sent there for violations of criminal supervision—probation, parole, or supervised release.[11] On any given day, about a quarter of the American prison population is incarcerated because of such violations.[12] And nearly four million Americans are under some type of supervision sentence, roughly double the number that are incarcerated in prisons and jails.[13] These supervisees can be sent to prison without the right to a trial by jury. The facts underlying a violation—be it a failed drug test, a missed meeting with a probation officer, or a new crime—only need to be proven to a judge by a preponderance of the evidence.[14] This is done at an informal hearing where the supervisee has only limited due process rights. The rights one has at a criminal trial to confront witnesses, suppress illegal evidence, exclude hearsay tes-

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Celestine, 905 F.2d 59, 60–61 (5th Cir. 1990); United States v. Reese, 71 F.3d 582, 588 (6th Cir. 1995).

10 The author has represented many clients who were trapped in this cycle, commonly due to addiction problems. *See also* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 958–61 (2013) (arguing that this feature of supervised release has moved federal sentencing from a determinate system to an indeterminate system).

11 COUNSEL STATE GOV'TS, CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISONS AND BURDENING BUDGETS (2019), https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf [https://perma.cc/ES24-NMZS] (concluding that 45 percent of new state prison admissions nationwide are for probation or parole violations).

12 *Id.* ("On any given day, 280,000 PEOPLE in prison—nearly 1 IN 4—are incarcerated as a result of a supervision violation, costing states more than $9.3 BILLION ANNUALLY.").

13 *See* DANIELLE KAEBLE, BUREAU JUST. STAT., DEP'T JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2020 1 (2021), https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf [https://perma.cc/V2JZ-M7E3] ("At yearend 2020, an estimated 3,890,400 adults were under community supervision (probation or parole) . . ."); Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), https://www.prisonpolicy.org/factsheets/pie2020_allimages.pdf [https://perma.cc/5SLN-AC6H] (showing 2,148,000 people incarcerated in jail or prison as of 2020); ALLISON FRANKEL, AM. CIV. LIBERTIES UNION, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 1 (2020), https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states [https://perma.cc/MFV8-AYRK] ("As of 2016 . . . 2.2 million people were incarcerated in United States jails and prisons, but more than twice as many, 4.5 million people—or one in every 55—were under supervision.").

14 *See* Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973); Morrissey v. Brewer, 408 U.S 471, 483 (1972); *see also* FRANKEL, *supra* note 13, at 83–84. Throughout, I will refer to a "judge" as the person conducting the violation hearing, even though sometimes it is instead a parole board member, hearing officer, or other official.

timony, be released on bond, or demand a speedy trial have either limited or no application in violation hearings.[15] Nonetheless, if a violation is found, the supervisee can be sentenced to years or even decades in prison.[16]

Why don't people like Mr. Conyers have the right to a jury trial at these hearings? The Sixth Amendment guarantees the right to trial by jury in all criminal prosecutions.[17] In several recent decisions, the Supreme Court has held that this right extends beyond proving the formal elements of a criminal charge. It also applies to sentencing enhancements. In *Apprendi v. New Jersey*, the Court struck down a state law that permitted a judge to increase a defendant's sentence above the statutory maximum based on facts decided by the judge.[18] The Court concluded that any fact increasing the maximum punishment for a crime must be proven to a jury beyond a reasonable doubt.[19] In *Alleyne v. United States*, the Court similarly found a jury trial right in situations where judge-found facts increase a mandatory minimum sentence.[20] And in *United States v. Booker*, the Court extended this logic to the Federal Sentencing Guidelines.[21] It held that the Guidelines were unconstitutional because they required judges to increase defendants' sentences based on judicially-determined facts.[22] This line of Sixth Amendment cases creates serious constitutional questions for the practice of probation, parole, and supervised release sentencing. As the Court concluded in *Apprendi*, "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[23] Yet, in violation hearings, judges decide facts that trigger additional prison time. By the logic of *Apprendi*, *Alleyne*, and *Booker*,

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15 *See* Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1040–41 (2013); FRANKEL, *supra* note 13, at 83–85, n.270; Esther K. Hong, *Friend or Foe? The Sixth Amendment Confrontation Clause in Post-conviction Formal Revocation Proceedings*, 66 SMU L. REV. 227, 260 (2013); FED. R. CRIM. P. 32.1(b)(1)(B)(iii).

16 *See, e.g.*, FRANKEL, *supra* note 13, at 113–18; State v. Raymond B., No. 20-0605, 2021 WL 2580715, at *2 (W. Va. June 23, 2021) ("[T]he circuit court found that petitioner violated three terms and conditions of his supervised release and sentenced petitioner to fifteen years in prison . . . .").

17 U.S. CONST. amend. VI.

18 530 U.S. 466, 491–92, 497 (2000).

19 *Id.* at 490.

20 570 U.S. 99, 117 (2013).

21 543 U.S. 220, 235, 243–44 (2005).

22 *Id.* at 243–44.

23 *Apprendi*, 530 U.S. at 490 (quoting Jones v. United States, 526 U.S. 227, 252–53 (1999) (Stevens, J., concurring)).

shouldn't the defendants in these hearings have the right to a jury trial?[24]

In the 2019 case *United States v. Haymond*, the Supreme Court faced this question squarely for the first time.[25] Andre Haymond had been convicted of possessing child pornography and sentenced to thirty-eight months in prison, followed by ten years of supervised release.[26] While Mr. Haymond was on supervised release, the government searched his electronic devices and discovered fifty-nine new images of child pornography.[27] Mr. Haymond violated the terms of his supervision by possessing these images, and a specific law imposes a five-year mandatory minimum sentence for a federal sex crime supervisee found committing another federal sex crime.[28] Mr. Haymond had no right to a jury trial at his violation hearing—the judge determined that he had possessed child pornography, and sentenced him to the mandatory minimum five years in prison.[29]

The case then went to the Supreme Court, and a majority of the justices decided that Mr. Haymond's sentence violated the Sixth Amendment. Justice Gorsuch wrote the plurality opinion for four justices, which adopted the logic of *Apprendi*: the fact that Mr. Haymond possessed these images increased his possible sentence length, and therefore that fact needed to be proven to a jury beyond a reasonable doubt.[30] Justice Breyer concurred separately, emphasizing that he believed the larger supervised release system was constitutionally valid, but

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24 Several pieces of recent scholarship (many by law students) have argued that *Apprendi* is in fundamental conflict with criminal supervision, rendering violation hearings unconstitutional. *See, e.g.*, Scott H. Ikeda, *Probation Revocations as Delayed Dispositional Departures: Why* Blakely v. Washington *Requires Jury Trials at Probation Violation Hearings*, 24 MINN. J. LAW & INEQ. 157, 179–80 (2006); Brett M. Shockley, *Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 WASH. & LEE L. REV. 353, 397–99 (2010); Danny Zemel, Comment, *Enforcing Statutory Maximums: How Federal Supervised Release Violates the Sixth Amendment Rights Defined in* Apprendi v. New Jersey, 52 U. RICH. L. REV. 965, 966–67 (2018); Robert McClendon, Note, *Supervising Supervised Release: Where the Courts Went Wrong on Revocation and How* United States v. Haymond *Finally Got It Right*, 54 TULSA L. REV. 175, 178 (2018); Stephen A. Simon, *Re-imprisonment Without a Jury Trial: Supervised Release and the Problem of Second-class Status*, 69 CLEV. ST. L. REV. 569, 570–71 (2021).

25 139 S. Ct. 2369, 2373–75 (2019).

26 *Id.* at 2373.

27 *Id.* at 2374.

28 *See* 18 U.S.C. § 3583(k).

29 *See Haymond*, 139 S. Ct. at 2375.

30 *See id.* at 2378–79. In particular, the plurality focused on the fact that Mr. Haymond faced a higher mandatory minimum sentence. *See id.* at 2378.

agreeing that this specific mandatory minimum provision required a jury trial.[31] Justice Alito dissented with three other justices, arguing that the plurality's theory spelled doom for all forms of criminal supervision.[32] He wrote that "if every supervised-release revocation proceeding is a criminal prosecution, as the plurality suggests, the whole concept of supervised release will come crashing down."[33] Professor Kate Stith has sounded a similar warning, writing that, "Justice Gorsuch's approach is radical; if followed to its logical conclusion, there would be a right to a jury in every probation or parole revocation proceeding."[34] Justice Alito and Professor Stith have a point. The plurality opinion in *Haymond* declined to explain why the practice of proving supervision violations to a judge is compatible with the Constitution. The decision in *Haymond* has thus left criminal supervision in constitutional limbo. One federal judge, Stefan Underhill, has subsequently written (in a dissent) that defendants facing federal supervised release revocations should enjoy the same Fifth and Sixth Amendment rights as defendants in normal criminal cases.[35]

So, is there a right to a jury trial in every probation, parole, and supervised release revocation hearing? To answer this question, we need to clarify the relationship between original criminal sentences and later violation sentences. Prior judicial decisions have outlined two different theories of this relationship. However, neither of these theories can explain why supervision sentences are compatible with the Constitution. The first theory is that a supervision violation represents a new offense.[36] So when a supervisee commits a violation, this constitutes a new unlawful act that the court is punishing. This

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31 *Id.* at 2385–86.

32 *See id.* at 2386–400.

33 *Id.* at 2388.

34 Kate Stith, Apprendi*'s Two Constitutional Rights*, 99 N.C. L. REV. 1299, 1304 (2021).

35 *See* United States v. Peguero, 34 F.4th 143, 165–79 (2d Cir. 2022) (Underhill, district judge sitting by designation, dissenting) (concluding that the defendant has a right to an indictment and full trial under the Fifth and Sixth Amendments for a supervised release violation); *see also* Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297, 297–98 (2022).

36 *See, e.g.*, United States v. Page, 131 F.3d 1173, 1175 (6th Cir. 1997) (explaining that a federal supervised release violation "imposed a new sentence for the later misconduct of violating the terms of the supervised release, and therefore it did not extend the original sentence for the original offense"), *abrogated by* Johnson v. United States, 529 U.S. 694 (2000); *see also* Johnson v. United States, 529 U.S. 694, 699–700 (2000) ("The Sixth Circuit . . . appl[ied] its earlier cases holding the application of § 3583(h) not retroactive at all: revocation of supervised release imposes punishment for defendants' new offenses for violating the condi-

theory flatly conflicts with *Apprendi*—if the violation is a new offense, then the facts giving rise to that offense need to be proven to a jury.[37] The second theory is that the violation is not a new offense, but is instead an opportunity for the court to revisit and increase the length of the original sentence.[38] Under this theory, the supervisee is not being given a new sentence for a new illegal act but is having their original sentence retroactively lengthened based on the violation. This theory also conflicts with the logic of *Apprendi*. If facts triggering a higher sentence must be proven to a jury at the original sentencing hearing, then they must also be proven to a jury if they trigger an increased sentence at a later hearing.[39]

This Article proposes a unified theory of criminal supervision that resolves this constitutional dilemma: the conditional sentencing theory. The basic idea is that when someone is convicted of a crime, a judge can sentence them to a package of conditions that depend, in part, on their own future actions. For example, a judge could sentence a drunk driving defendant to a suspended six months in jail, with that six months only actually being served if the person drives drunk again within the next year. Such a sentence is "conditional" because it contains punishment that is only imposed if the defendant does a certain thing in the future. There are four elements to a conditional sentence: (1) an amount of custody time; (2) an amount of supervision time; (3) a specific list of prohibited conduct that triggers additional punishment through revocation hearings; and (4) an amount of suspended custody time that can be

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tions of their supervised release." (internal quotation marks omitted) (quoting *Page*, 131 F.3d. at 1176)).

37 Apprendi v. New Jersey, 530 U.S. 466, 477, 490 (2000) ("Taken together, these rights indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (alteration in original) (internal quotation marks omitted)).

38 *See, e.g.*, *Johnson*, 529 U.S. at 700 ("Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties."); United States v. Haymond, 139 S. Ct. 2369, 2380 n.5 (2019) ("[W]hen a defendant is penalized for violating the terms of his supervised release, what the court is really doing is adjusting the defendant's sentence for his original crime."); State v. Prado, 937 P.2d 636, 638 (Wash. Ct. App. 1997).

39 *See Haymond*, 139 S. Ct. at 2379 ("Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.' Calling part of a criminal prosecution a 'sentence modification' imposed at a 'postjudgment sentence-administration proceeding' can fare no better.").

imposed for violations. So, for example, a defendant could be sentenced to three years in prison, followed by two years of supervision, with up to one year of suspended prison time for supervision violations. If that defendant were later charged with a violation, they could only be punished according to the rules set out at the initial sentencing hearing (e.g., no more than one year in prison). Conditional sentencing treats supervision violations as part of the original declared sentence and as constrained by the rules established in that sentence. It thereby resolves the Sixth Amendment problem with criminal supervision. There is no right to a jury trial at a revocation hearing because the judge is administering an existing criminal sentence, not declaring a new one.

The conditional sentencing theory imposes two important constitutional limits on supervision, which render numerous state and federal laws unconstitutional. First, a court cannot retroactively change the conditions set out at the original sentencing. To do so would be to impose a new sentence. If the original sentence provided for up to eight months of possible custody time, a judge cannot later extend it to more than eight months. Similarly, a judge cannot extend supervision past the time announced in the original sentence or impose new conditions that were not in the original sentence. The punishment terms of a conditional sentence can only be altered if the defendant consents to change them or if the defendant is given a new jury trial. This means that the widespread state practice of empowering judges to extend or modify probation is unconstitutional.[40] It also means that the federal system of supervised release is, in part, unconstitutional. One provision, Section 3583(h), empowers judges to sentence defendants to new terms of supervised release after each revocation.[41] As Mr. Conyers' case illustrates, this law creates an indefinite cycle of incarceration and supervision.[42] Under the conditional sentencing theory, this practice violates the Sixth Amendment. A judge cannot announce a new term of supervision at a violation hear-

40 *See, e.g.*, People v. Cookson, 820 P.2d 278, 281 (Cal. 1991) ("A court may revoke or modify a term of probation at any time before the expiration of that term. This power to modify includes the power to extend the probationary term." (internal citation omitted)); State v. Dowdy, 808 N.W.2d 691, 698 (Wis. 2012) ("Included within a circuit court's statutory authority to impose probation is the authority under Wis. Stat. § 973.09(3)(a) to 'extend probation for a stated period or modify the terms and conditions thereof.'"); KAN. STAT. ANN. § 21-6608(c)(8) (2022) ("[T]he court may modify or extend the offender's period of supervision, pursuant to a modification hearing and a judicial finding of necessity.").

41 *See* 18 U.S.C. § 3583(h).

42 *See supra* notes 1–9 and accompanying text.

ing, because doing so imposes a new sentence on the defendant. All that the judge can do is play out the rules established in the original sentence. Section 3583(h) is therefore unconstitutional.

The second limitation is that supervision sentences cannot exceed the statutory maximum punishment for the underlying crime. In other words, the initial sentence and all subsequent revocation sentences cannot add up to more than the statutory maximum. The logic here is straightforward. Under the conditional sentencing theory, a sentence for violating supervision is part of the sentence for the original crime. And at the original sentencing hearing, a judge cannot impose more punishment than the criminal statute allows. If a statute provides a five-year maximum sentence, the judge can only impose up to five combined years of custody time and conditional custody time. Similarly, if a statute provides for up to three years of supervision, the judge cannot extend the supervision time beyond those three years. The only exception is if the legislature explicitly provides for such additional punishment by lengthening the statutory maximum sentence.

Supervision has created an enormous shadow criminal justice system where most rights do not apply. The Sixth Amendment and the *Apprendi* line of cases provide an opportunity to impose real limits on this system. Fundamentally, *Apprendi* and its progeny represent an effort to translate the constitutional principle of the jury trial into the modern criminal justice system. Institutional innovations like plea bargaining, sentencing guidelines, and criminal supervision have transformed our system from the one the Founders knew. And these innovations all share a common feature—they render the processing of cases more efficient by circumventing the constitutional role of the jury. These innovations have facilitated the stunning growth of incarceration in America over the last five decades. Judges should not respond to these changes by deferring to the government and limiting constitutional rights to their original narrow applications. As our criminal justice institutions transform, the limits imposed by the Constitution must be translated into novel institutional contexts. This Article is one attempt to do that.

The argument of the Article proceeds in six parts. Part I describes the basic framework of criminal supervision in the United States, focusing on its three most common types—probation, parole, and federal supervised release. Part II lays out the Sixth Amendment problem with revocation sentences. It

details the procedural informality of revocation hearings and shows how criminal supervision can trap a person in a cycle of repeated revocation and punishment without recourse to a jury trial or other constitutional rights. Part III analyzes two theories of criminal supervision that have been embraced by courts at various times—that a supervision violation is a new crime, and that it is an additional punishment for the original crime. Neither of these theories is adequate to the constitutional challenge. Both cause supervision to violate the Sixth Amendment, and both pose significant constitutional problems under the Double Jeopardy Clause. Part IV introduces conditional sentencing and describes its basic features—the elements of a conditional sentence; the role of the initial sentencing hearing in fixing the terms of punishment; and the restrictions on changing a sentence after it is imposed. Part V furnishes two major doctrinal payoffs to the conditional sentencing theory—that it prevents retroactive extension or modification of supervision terms (rendering numerous state and federal systems unconstitutional, including federal supervised release), and that it limits revocation sentences to the statutory maximums of the underlying crimes. Finally, Part VI critiques many judges' practice of deferring to criminal justice policies, such as criminal supervision, that make incarceration more efficient by limiting constitutional rights.

I
THE VARIETIES OF CRIMINAL SUPERVISION

There are three major systems of criminal supervision in the United States: probation, parole, and federal supervised release.[43] These three systems share a number of common features. All of them prohibit supervisees from doing certain things (e.g., using drugs, committing new crimes, traveling out of state), incarcerate supervisees for violating these prohibitions, and appoint government officers to monitor supervisees' behavior.[44] There are also important differences between these systems. Probation is classically understood as an alternative to incarceration, meaning that it is imposed instead of a full

43 *See* KAEBLE, *supra* note 13, at 1, 8–9. Many states have other names for their systems, such as "community supervision" or "supervised release," but here I am grouping all state supervision systems under the categories of "probation" and "parole." The federal system of supervised release is, as Section I.C will show, unique.

44 *See* Klingele, *supra* note 15, at 1030–42.

prison sentence.[45] Parole generally involves being released from custody before the official end of a prison sentence.[46] And federal supervised release is imposed on top of a prison sentence, meaning that it is served after the full custody term is finished.[47] This Part describes the basic features of these three systems of criminal supervision. It explains how they differ from one another, and it details their institutional variation across jurisdictions.

A. Probation

There are about three million people on probation in the United States, making it by far the most common form of criminal supervision.[48] Indeed, probation is the most frequently imposed sentence in the American criminal justice system.[49] Probationary sentences are available in all fifty states, as well as in the federal system.[50] They are imposed in both felony and misdemeanor cases.[51]

Probation was originally conceived as an alternative to incarceration.[52] The basic logic was that a defendant would be ordered to spend a certain amount of time under the supervision of a probation officer, and if they successfully completed that time without any violations then they would avoid imprisonment. The creation of probation is commonly credited to a Massachusetts shoemaker named John Augustus.[53] Beginning in the 1840s, Augustus volunteered to supervise men and women convicted of crimes as an alternative to imprisonment. Augustus personally supervised nearly 2,000 people in the 1840s and 50s.[54] Massachusetts passed the first probation

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45 *See id.* at 1022–25. Note however, as discussed below, that today many probationary sentences also include terms of incarceration. *See infra* notes 59–64 and accompanying text.

46 *See* Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 597–601 (2020).

47 *See* Doherty, *supra* note 10, at 1017–19.

48 *See* KAEBLE, *supra* note 13, at 3.

49 Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 354 (2016).

50 *See* KAEBLE, *supra* note 13, at 19–20.

51 *Id.* at 23.

52 *See* Klingele, *supra* note 15, at 1022–25.

53 *See* Charles L. Chute, *John Augustus—Pioneer of Probation*, 5 FED. PROBATION 36, 36–37 (1941); Klingele, *supra* note 15, at 1022–23. *But see* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 957–61 (2000) (observing that Augustus took advantage of an already-existing court procedure, through which a prosecutor could secure a guilty plea but postpone the sentencing indefinitely if the defendant did not violate certain conditions).

54 Chute, *supra* note 53, at 37.

law in the United States after Augustus's death, and the practice soon spread throughout the country.[55]

The way probation originally worked, a sentencing judge had to choose between incarcerating someone and giving them probation.[56] So a judge could not both imprison a person and place them on probation after their release from custody. Probation was thus, if successfully completed, a way of avoiding a prison sentence altogether. That has changed. Now there are two basic types of probation. One type is "on file" probation, which is closer to the original vision of probation.[57] In an "on file" system, imposition of the sentence is delayed for a defined period of time, and if the defendant avoids any violations during that time, they might also avoid a prison sentence. The other type is "sentenced" probation, in which a term of probation is imposed as part of the sentence itself.[58] In a "sentenced" probation system, a judge can impose both incarceration and probation at the initial sentencing hearing.[59] This practice is sometimes called imposing a "split sentence."[60] For example, a judge in Wisconsin could sentence a D.U.I. defendant to a six-month jail term *and* three years of probation.[61] Such sentences are not available in every jurisdiction—the federal system, for example, still adheres to the original version of probation as an alternative to custody.[62] However, the practice is widespread in state systems.[63] Data from the 1990s suggest that split sentences are common in the United States, comprising around a quarter of state felony sentences.[64] The practice

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55 *See* Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1710–12 (2019); Klingele, *supra* note 15, at 1022–24; Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 155–56 (1997).

56 *See* Doherty, *supra* note 55, at 1711–12.

57 *See id.* at 1756–72.

58 *See id.* at 1751–56.

59 *See* Klingele, *supra* note 15, at 1022.

60 *Id.*

61 *See* State v. Neill, 938 N.W.2d 521, 523 (Wis. 2020) ("The circuit court placed Neill on probation for 3 years with 6 months jail time as a condition of probation.").

62 18 U.S.C. § 3561(a)(3); United States v. Forbes, 172 F.3d 675, 676 (9th Cir. 1999).

63 *See* Doherty, *supra* note 49, at 340 ("Most states combine prison and probation by providing for split sentences.").

64 PATRICK A. LANGAN & ROBYN L. COHEN, BUREAU JUST. STAT., DEP'T JUST., STATE COURT SENTENCING OF CONVICTED FELONS, 1992, at 31 (1996) (showing that 26 percent of state felony sentences were split sentences involving both custody and probation). This appears to be the most recently available data on this question. *See* Klingele, *supra* note 15, at 1022 n.22; ALEX ROTH, SANDHYA KAJEEPETA & ALEX BOLDIN, VERA INST. JUST., THE PERILS OF PROBATION: HOW SUPERVISION CONTRIBUTES TO JAIL POPULATIONS 12 (2021).

of split sentencing illustrates how modern probation has transformed from an act of clemency into a form of punishment. Rather than giving the defendant a chance to avoid incarceration altogether through a period of good behavior, modern probation is a means of controlling the defendant going forward through the threat of further custody time.[65] Indeed, probation violations have become a significant driver of incarceration in the United States.[66]

When a person violates the conditions of their probation, the judge can impose a sentence for that violation. This sometimes means sending the person to prison. The amount of prison time available varies from state to state. The probation systems in Arizona, Florida, New York, Oregon, and Pennsylvania allow a judge to give up to the maximum prison sentence for the underlying crime.[67] In such systems, the judge is essentially resentencing the person for the original criminal charge. The systems in Alabama, Indiana, and Maine require the judge to name a specific prison sentence when they grant probation, and then to "suspend" that sentence subject to probation being completed.[68] In such systems, if a judge imposes a three-year suspended prison term at the initial sentencing hearing, then they cannot give more than three years at a later violation hearing. Still other states impose separate statutory maximums based on the nature of the violation.[69] In North Carolina, for example, you cannot get more than ninety days in custody for a first-time probation violation (other than one for committing a new crime or absconding).[70] Beyond sending

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65 *See* Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1704–16 (2015).

66 *See* FRANKEL, *supra* note 13, at 132–34 (noting that the percentage of prison admissions for probation violations nearly doubled from 1978 to 2018, from 16 percent to 28 percent); ROTH, KAJEEPETA & BOLDIN, *supra* note 64, at 30–31 ("[P]robation violations are a source of racial disparities in jails and can significantly contribute to jail populations, primarily through the longer [lengths of stay] associated with incarceration for violations.").

67 *See* FRANKEL, *supra* note 13, at 115; KELLY LYN MITCHELL, KEVIN R. REITZ, ALEXIS WATTS & CATHERINE A. ELLIS, ROBINA INST. CRIM. L. & CRIM. JUST., PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES 16, 28, 60, 72, 76 (2014), https://robinainstitute.umn.edu/publications/profiles-probation-revocation-examining-legal-framework-21-states [https://perma.cc/PZT4-ST8B].

68 *See* MITCHELL, REITZ, WATTS, & ELLIS, *supra* note 67, at 12, 32, 40. Some states, like California, Massachusetts, and Wisconsin, have both systems and leave it up to the sentencing judge whether or not to specify a sentence in advance. *Id.* at 20, 44, 92–93.

69 *Id.* at 52, 63, 88 (describing statutory limits on revocation sentences for probation violations in Mississippi, North Carolina, and Washington).

70 N.C. GEN. STAT. § 15A-1344(d2) (2022). Some states also use sentencing guidelines to cabin judges' sentencing discretion in revocation hearings. *See, e.g.*,

probationers to prison for violations, judges can also give them additional time on probation, as well as additional probation conditions.[71] Several states even let judges extend or modify probation without finding a violation.[72] And judges can also do all of these things at once: send the defendant into custody for a period of time, extend their probation term, and impose new rules in response to a violation. This flexibility allows courts to cycle people in and out of prison over long periods of time, sometimes even decades, for repeated probation violations.[73]

B. Parole

Parole is a tool for releasing a person from prison before their sentence is finished.[74] Once someone is released on parole, they are given a set of rules to follow and assigned to a parole officer. If they violate the rules, they can be returned to prison for up to the balance of the sentence. As of 2020, there are about 850,000 people released on some form of parole in the United States.[75]

Parole was first developed in the British and Irish penal systems and was brought to the United States in the 1870s by a penologist named Zebulon Brockway.[76] As superintendent of New York's Elmira Reformatory, Brockway implemented a system of early release from prison. Under this system, prisoners at Elmira were classified based on their conduct in the prison, and if a prisoner had good conduct for sufficient time, they would be released into the community.[77] After release, they would be supervised for an additional six months by volunteer "guardians" (early parole officers) to ensure their good behavior

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MITCHELL, REITZ, WATTS, & ELLIS, *supra* note 67, at 72 (describing Oregon's system of presumptive guideline punishments); VA. CRIM. SENT'G COMM'N, SENTENCING REVOCATION REPORT AND PROBATION VIOLATION GUIDELINES 10–11 (2.8 ed., 2022).

71 *See, e.g.*, MITCHELL, REITZ, WATTS, & ELLIS, *supra* note 67, at 47, 67, 79–80, 83 (describing the procedures for extending probation terms and imposing new conditions in Minnesota, Ohio, Utah, and Texas).

72 *Id.* at 11, 20, 23–24, 51, 64, 91 (describing the procedures in Alabama, California, Colorado, Mississippi, North Carolina, and Wisconsin, where probation can be modified or extended without a formal violation).

73 *See, e.g.*, FRANKEL, *supra* note 13, at 85–86 (describing an interview with a man in Pennsylvania who was given four years of probation in 1999 and has now been on probation for more than twenty years because of violation sentences).

74 *See* Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 479–80 (1999); Schuman, *supra* note 46, at 597–601.

75 KAEBLE, *supra* note 13, at 24 (counting 862,113 on parole as of December 31, 2020).

76 *See* Petersilia, *supra* note 74, at 488–89; Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 431 (2011).

77 Petersilia, *supra* note 74, at 488–89.

continued.[78] In 1907, New York's legislature created a formal parole system that involved indeterminate sentences, a parole board to decide on early releases, and parole officers to monitor supervisees.[79] This model of parole spread throughout the country, and by the 1940s it had been adopted by every state and the federal government.[80]

This original system of parole made the majority of felony sentences in the United States indeterminate.[81] The sentencing judge would impose an amount of prison time, but the period of time actually served would be up to the discretion of a parole board. Beginning in the 1970s, this indeterminate sentencing system came under criticism from academics, criminal justice professionals, and political leaders.[82] It was viewed by academics as ineffective for rehabilitation, by liberal reformers as too discretionary and random, and by tough-on-crime types as too lenient. Consequently, as incarceration rates went up in the 1970s and 80s, Congress and numerous state legislatures ended their discretionary parole systems.[83] Some jurisdictions abolished early release altogether, while others replaced it with non-discretionary systems of release. Today thirty-four states still have functioning parole boards, while sixteen states and the federal system have either eliminated or significantly curtailed them.[84]

As a result of these changes, there are now two main types of parole in the United States: discretionary systems and

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78 *Id.*

79 *Id.* at 489.

80 *Id.* at 489–92; Scott-Hayward, *supra* note 76, at 431–32.

81 Petersilia, *supra* note 74, at 492; Scott-Hayward, *supra* note 76, at 431 ("For most of the twentieth century, the vast majority of prisoners in the United States were released under this original model—an indeterminate sentence, discretionary release by a parole board, and post-release supervision.").

82 Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 473–77 (2010); Petersilia, *supra* note 74, at 492–94; Scott-Hayward, *supra* note 76, at 432–33.

83 Petersilia, *supra* note 74, at 494–98; Scott-Hayward, *supra* note 76, at 433–34.

84 EDWARD E. RHINE, ALEXIS WATTS & KEVIN R. REITZ, ROBINA INST. OF CRIM. L. & CRIM. JUST., PAROLE BOARDS WITHIN INDETERMINATE AND DETERMINATE SENTENCING STRUCTURES (2018), https://robinainstitute.umn.edu/articles/parole-boards-within-indeterminate-and-determinate-sentencing-structures [https://perma.cc/RH8W-PGN9] (noting that Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin all abolished or significantly curtailed their parole boards). Congress abolished federal parole in 1984. Doherty, *supra* note 10, at 959–60.

mandatory systems.[85] In discretionary systems release is determined by a parole board, while in mandatory systems it is automatic by operation of law. In Minnesota's mandatory system, for example, the first two-thirds of a felony sentence are served in custody, and the last one-third is served on supervision.[86] And many states, like California, have both systems—you are given either mandatory or discretionary parole depending on the crime.[87] The Bureau of Justice Statistics estimates that in 2019, about 178,000 people entered parole through discretionary release and about 85,000 people entered it through mandatory release.[88]

If a person commits a violation while on parole, they can be sent back to prison. In this respect parole works much like probation. One key difference, however, is that parole revocation hearings are usually conducted by a parole board rather than by a judge.[89] In some states the entire parole board conducts revocation hearings, in some states just a single member of the board does, and in some states the board designates a separate hearing officer.[90] If the board finds a violation of pa-

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85 *See* RHINE, WATTS, & REITZ, *supra* note 84.

86 MINN. STAT. § 244.101 (2023).

87 *See* RHINE, WATTS, & REITZ, *supra* note 84 ("Most jurisdictions exhibit features of both for designated categories of crimes or offenders."). In California most felony sentences are determinate, but people convicted of first-degree murder (for example) can receive indeterminate terms of twenty-five years to life. *See* LEG. ANALYST'S OFF., OVERVIEW OF FELONY SENTENCING IN CALIFORNIA 1 (2017), https://lao.ca.gov/handouts/crimjust/2017/Overview-of-Felony-Sentencing-in-California-022717.pdf [https://perma.cc/T3BE-X23C].

88 BARBARA OUDEKERK & DANIELLE KAEBLE, BUREAU JUST. STAT., DEP'T JUST., PROBATION AND PAROLE IN THE UNITED STATES 2019, at 29 (2021), https://bjs.ojp.gov/content/pub/pdf/ppus19.pdf [https://perma.cc/Q7CT-JYZZ] (noting 178,074 new entrants from discretionary parole systems, and 85,049 new entrants from mandatory ones).

89 EBONY L. RUHLAND, EDWARD E. RHINE, JASON P. ROBEY & KELLY LYN MITCHELL, ROBINA INST. OF CRIM. L. & CRIM. JUST., THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 39 (2016), https://s32082.pcdn.co/wp-content/uploads/2019/08/1.23.2017.apai_.national.survey.pdf [https://perma.cc/38D3-U7X7] (showing that of thirty-eight parole boards surveyed, thirty-one boards retain authority to adjudicate parole violations, while that authority resides elsewhere for the remaining seven boards).

90 *See, e.g.*, ALEXIS LEE WATTS, MIKE MCBRIDE & EDWARD E. RHINE, ROBINA INST. OF CRIM. L. & CRIM. JUST., PROFILES IN RELEASE AND REVOCATION: NEW JERSEY 10 (2018), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/new_jersey_parole_profile.pdf [https://perma.cc/H7NJ-NQNN] (stating that in New Jersey, "[a] hearing officer who is an employee of the Board conducts the revocation hearing."); ALEXIS LEE WATTS, JULIA BARLOW, ERIC ARCH & EDWARD E. RHINE, ROBINA INST. OF CRIM. L. & CRIM. JUST., PROFILES IN RELEASE AND REVOCATION: NORTH DAKOTA 8 (2019), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/north_dakota_parole_profile.pdf [https://perma.cc/YGY4-8NMG] (in North Dakota, the entire parole board conducts revocation hearings); ALEXIS LEE WATTS, BRENDAN DELANEY & EDWARD E. RHINE, ROBINA

role, it cannot impose more prison time than what remains on the underlying sentence.[91] For example, if a person has served four years of a ten-year prison sentence before being paroled, they can only be sent back to prison for up to six years on a revocation. States vary significantly in the severity of their parole revocations. Some states require that the entire remaining balance of the prison sentence be imposed, some impose the balance minus the time already served on parole, and some impose significantly shorter sentences (especially for technical violations not involving new crimes).[92] If a revocation sentence is less than the remaining prison time, a person can also be put back on parole after they are released and then sent back to prison again for further violations.[93] Thus, much like probation, parole can cycle a person into and out of custody multiple times over a period of years.

C. Federal Supervised Release

The federal system has a unique type of criminal supervision called "supervised release." Supervised release is different from probation and parole because it is imposed in addition to a prison sentence.[94] It does not provide the defendant with any kind of relief from incarceration—it is simply additional punishment. For example, a federal judge might sentence someone to twenty-two years in prison followed by a three-year term of supervised release, and the supervised release term does noth-

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INST. OF CRIM. L. & CRIM. JUST., PROFILES IN RELEASE AND REVOCATION: WEST VIRGINIA 8 (2019) (hereinafter PROFILES IN RELEASE AND REVOCATION: WEST VIRGINIA), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/west_virginia_parole_profile.pdf [https://perma.cc/5UA7-WR68] (In West Virginia, "[r]evocation matters are decided by a panel of three Board members, two of whom must be present at the hearing.").

91 *See* EDWARD E. RHINE, KELLY LYN MITCHELL AND KEVIN R. REITZ, ROBINA INST. OF CRIM. L. & CRIM. JUST., LEVERS OF CHANGE IN PAROLE RELEASE AND REVOCATION 22 (2019), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/parole_landscape_report.pdf [https://perma.cc/TF8H-ZRFM].

92 *Id.* at 22–24.

93 *Id.* at 24.

94 *See* Schuman, *supra* note 46, at 623. There are some states, such as California and Colorado, with determinate parole systems that resemble federal supervised release in having fixed supervision terms that happen after the full prison sentence. *See* RHINE, MITCHELL AND REITZ, *supra* note 91, at 22; People v. Martin, 58 Cal. App. 5th 189, 196–97 (2020). The practice of using "split sentences" that combine jail time and probation also creates some similarity to federal supervised release. The key difference is that probationary sentences generally involve relatively short periods of custody time, while federal sentences with supervised release terms can involve decades in prison. In addition, federal probation does not permit split sentences. *See supra* note 62 and accompanying text.

ing to reduce the prison sentence.[95] Congress created supervised release in 1984, simultaneously abolishing discretionary parole for federal prisoners.[96] As of 2020, there were about 108,000 people on federal supervised release.[97]

How much supervised release a judge can impose depends on the specific crime. Federal law classifies felonies into five different categories based on their maximum sentences.[98] Class "A" felonies have a maximum of life in prison, class "B" have a maximum of twenty-five years or more, class "C" have a maximum of ten years or more but less than twenty-five, class "D" have a maximum of five years or more but less than ten, and class "E" have a maximum of more than one year but less than five.[99] The amount of supervised release available depends on the class of felony. For "A" or "B" felonies the judge can give up to five years of supervised release, for "C" or "D" felonies up to three years, and for "E" felonies up to one year.[100] There are also many federal crimes—most notably drug-, sex-, and terrorism-related crimes—for which the maximum supervision term is life and a mandatory minimum supervision term may apply.[101] When supervised release is revoked for a violation, the maximum prison sentence depends on the category of the underlying crime.[102] For "A" felonies the judge can give up to five years for a violation, "B" felonies up to three years, "C" and "D" felonies up to two years, and "E" felonies up to one year.[103] There are also federal sentencing guidelines for supervised release revocations, which provide recommended sentences based on a person's prior criminal record and the nature of their violation (e.g., whether it is a new crime or a technical violation).[104] These guidelines are advisory, however,

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95 *See, e.g.*, Judgment in a Criminal Case at 4–5, United States v. Joseph Maldonado-Passage, No. 5:18-cr-00227 (W.D. Okla. Jan. 23, 2020), 2020 WL 1277634, at *2, ECF No. 134 (sentencing the defendant to twenty-two years in prison followed by three years of supervised release).

96 Doherty, *supra* note 10, at 995–97.

97 KAEBLE, *supra* note 13, at 24.

98 18 U.S.C. § 3559(a).

99 *Id.*

100 *Id.* § 3583(b).

101 *See, e.g.*, *id.* § 3583(k); Doherty, *supra* note 10, at 1003; CHARLES DOYLE, CONG. RSCH. SERV., RL31653, SUPERVISED RELEASE (PAROLE): AN OVERVIEW OF FEDERAL LAW 4–6 (2021) (listing federal crimes with a potential lifetime supervision sentence).

102 18 U.S.C. § 3583(e)(3).

103 *Id.*

104 U.S.C.G. § 7B1.4 cmts. (1)–(2).

and judges are able to disregard them and sentence up to the maximum.[105]

The most unusual feature of federal supervised release is that a person can become trapped in an endless cycle of supervision, violation hearings, and prison terms.[106] When a judge finds someone in violation of supervised release, the judge can impose a prison sentence followed by an entirely new term of supervised release.[107] A person can thus receive multiple new terms of supervised release and new prison sentences for a single criminal conviction. This is what happened to Mr. Conyers, whose case was discussed at the beginning of this Article.[108] Further, in a 2003 law called the PROTECT Act, Congress eliminated the caps on aggregate reimprisonment time across multiple violations.[109] This means that when a judge imposes a new term of supervised release, the statutory maximum prison sentence resets, and you do not get credit for prison time served on prior revocations.[110] So with a class "B" felony, for example, you can receive up to three years in prison for each separate supervised release violation. Some federal circuit courts have interpreted the supervised release statute to create an indirect limit on aggregate prison time for certain crimes.[111] These courts have reasoned that, for crimes where the supervised release term is subject to a statutory maximum (e.g., one, three, or five years), the judge cannot impose more supervised release for a violation than that maximum term minus any prison time previously served for violations. So in those circuits, if someone convicted of a class "A" felony has served five or more total years in prison for supervision violations, they cannot get more supervised release time on a violation sentence. However, even that aggregate limit does not apply to crimes that lack a statutory maximum for supervision

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105 *See* Kimbrough v. United States, 552 U.S. 85, 103 (2007).

106 *See generally* Doherty, *supra* note 10, at 1004–11.

107 18 U.S.C. § 3583(h).

108 *See supra* notes 1–10 and accompanying text.

109 PROTECT Act, Pub. L. No. 108-21, § 101, 117 Stat. 650, 651–62; *see* 18 U.S.C. § 3583(e)(3); Doherty, *supra* note 10, at 1010–11.

110 *See* United States v. Epstein, 620 F.3d 76, 80 (2d Cir. 2010) ("Since the 2003 amendment in the PROTECT Act, every Court of Appeals to have considered the issue has interpreted the amendment to § 3853(e)(3) to eliminate the credit for terms of imprisonment resulting from prior revocations."); Doherty, *supra* note 10, at 1009–11.

111 *See* United States v. Hampton, 633 F.3d 334, 339 (5th Cir. 2011) (interpreting § 3583(h) to not permit further supervision time if the maximum amount of supervision time has been served in prison for violation sentences); United States v. Hunt, 673 F.3d 1289, 1293 (10th Cir. 2012) (same); United States v. Williams, 675 F.3d 275, 279 (3d Cir. 2012) (same).

time.[112] This means that for drug-, sex-, and terrorism-related crimes, which make up a substantial portion of the federal docket, judges can impose an infinite number of new supervision terms and prison sentences for violations.[113] This can literally mean a life sentence on an installment plan, no matter how short the original term of supervision was. Federal judges have even held that violation sentences can exceed the maximum sentence for the underlying crime.[114] So you can end up serving more prison time than the law allows for the original crime through supervised release violations. State probation and parole systems do not create such never-ending loops because they have built-in limits on aggregate incarceration for multiple violations.[115] Supervised release is thus a uniquely powerful tool for keeping people trapped in a cycle of supervision and incarceration.

II
THE SIXTH AMENDMENT PROBLEM WITH CRIMINAL SUPERVISION

This Part explores the conflict between defendants' constitutional rights and the current system of criminal supervision. Criminal supervision creates a state of exception from the normal criminal justice system. Someone under supervision can be sent to prison for violating rules declared by a judge. When this happens, the person does not enjoy the constitutional rights afforded in a normal criminal case. They are far more limited in their ability to confront witnesses, exclude hearsay testimony, suppress evidence, be released on reasonable bond,

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112 *See, e.g.*, United States v. Cassesse, 685 F.3d 186, 191 (2d Cir. 2012).

113 *See* Fiona Doherty, *"Breach of Trust" and* U.S. v. Haymond, 34 FED. SENT'G REP. 274, 275 n.25 (2022) (noting that these crimes make up about 49 percent of the non-immigration federal criminal caseload); DOYLE, *supra* note 101, at 4–6.

114 *See, e.g.*, United States v. Celestine, 905 F.2d 59, 60 (5th Cir. 1990) (upholding twenty months of aggregate violation sentences where the underlying crime was a misdemeanor with a one-year statutory maximum); United States v. Wirth, 250 F.3d 165, 170 n.3 (2d Cir. 2001) ("[P]unishment for a violation of supervised release is separate from punishment for the underlying conviction and may, when combined with the latter, exceed the statutory maximum for the underlying offense.").

115 *See* United States v. Haymond, 139 S. Ct. 2369, 2377 (2019). Aggregate parole sentences are limited by the full term in the judge's initial sentencing order. RHINE, MITCHELL AND REITZ, *supra* note 91, at 22. Aggregate probation sentences are limited by either the statutory maximum of the underlying crime, or the sentence that the judge suspended at the original sentencing. *Supra* notes 67–70 and accompanying text.

or demand a speedy trial.[116] And the violation only needs to be proved to a judge by a preponderance of the evidence, not to a jury beyond a reasonable doubt.[117] This lack of adversarial rights creates a conflict between criminal supervision and the Supreme Court's Sixth Amendment jurisprudence. In a series of cases beginning with *Apprendi v. New Jersey*, the Court concluded that a defendant has a right to a jury trial whenever proving a fact will increase the minimum or maximum punishment.[118] This principle has been applied to sentencing guidelines, death penalty statutes, and criminal fines.[119] It would seem to apply equally to supervision violation hearings, where supervisees are exposed to additional punishment based on facts proven in court.

A. Supervision as Constitutional Netherworld

When a person is sentenced to a term of probation, parole, or supervised release, they are given a list of rules that they must follow. These are called "conditions" of supervision. If the person violates one of these conditions, they can be sentenced for that violation and incarcerated. Some are "standard" conditions that get imposed on everyone, while others are "special" conditions that are tailored to the individual case.[120] Further, some conditions are mandated by statutes, while others are at the discretion of the judge.[121] Every jurisdiction imposes a standard condition that the supervisee must obey all federal, state, and local laws.[122] This means that any new crimes committed by someone on supervision will also count as violations, and can be punished at a revocation hearing.[123] Other commonly-imposed conditions include: reporting to the

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116 *See* Klingele, *supra* note 15, at 1040–41; FRANKEL, *supra* note 13, at 83 n.270; Hong, *supra* note 15.

117 *See* Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973); Morrissey v. Brewer, 408 U.S 471, 483 (1972); Klingele, *supra* note 15, at 1040–41.

118 530 U.S. 466, 466 (2000).

119 *See* Ring v. Arizona, 536 U.S. 584, 585 (2002) (death penalty); Blakely v. Washington, 542 U.S. 296, 296 (2004) (state sentencing guidelines); United States v. Booker, 543 U.S. 220, 220 (2005) (federal sentencing guidelines); S. Union Co. v. United States, 567 U.S. 343, 343 (2012) (criminal fines).

120 *See* Doherty, *supra* note 49, at 300–01; U.S.S.G. § 5D1.3(c) (laying out standard supervised release conditions); U.S.S.G. § 5D1.3(d) (describing special conditions of supervised release that might apply in certain cases).

121 *See, e.g.*, 18 U.S.C. § 3583(d) (mandatory conditions of supervised release); U.S.S.G. § 5D1.3(b) (discretionary conditions of supervised release).

122 *See* Doherty, *supra* note 49, at 301.

123 *See, e.g.*, Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1846 (finding that from 2013–2017, about 46 percent of federal supervised release revocations were for new felony crimes).

probation/parole officer, truthfully answering any questions asked by the probation/parole officer, not leaving the state without permission, submitting to drug testing, maintaining full-time employment, not associating with people who have criminal records, not using alcohol or drugs, completing a drug rehab or mental health program, wearing an ankle monitor, not possessing a firearm, paying any fines or child support, and submitting to law enforcement searches without recourse to the Fourth Amendment.[124]

Violations of these conditions are adjudicated in proceedings called revocation hearings. The Supreme Court defined the procedural requirements for revocation hearings in the 1970s in two cases: *Gagnon v. Scarpelli* (probation revocations) and *Morrissey v. Brewer* (parole revocations).[125] In both decisions, the Court distinguished revocation hearings from trials. Revocation hearings, the Court instructed, lack the "formal procedures and rules of evidence" required in a criminal trial.[126] Instead, the Court concluded that only the Due Process Clause governs revocation hearings.[127] Specifically, the Court articulated seven requirements: (1) written notice of the alleged supervision violations; (2) disclosure of the evidence against the supervisee; (3) the opportunity to testify and present evidence; (4) the ability to confront witnesses, unless the judge finds good cause to disallow confrontation; (5) a neutral decision-maker (e.g., a judge, parole board, or hearing officer); (6) a written statement of the reasons for revoking supervision; and (7) a preliminary hearing after the arrest but before the revocation hearing to determine whether there is probable cause for the violation.[128] These rights fall far short of those provided at a full criminal trial. The differences fit into three categories: prehearing rights, the nature of the decisionmaker, and the procedures of the hearing itself.

First consider a supervisee's prehearing rights.[129] Before a criminal trial, the Eighth Amendment guarantees a right to

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124 *See, e.g.*, MINN. JUD. BRANCH, STANDARD CONDITIONS OF PROBATION FOR FELONY CONVICTIONS (2015); U.S.S.G. § 5D1.3; PROFILES IN RELEASE AND REVOCATION: WEST VIRGINIA, *supra* note 90, at 7; *see also* Doherty, *supra* note 49, at 300–16; Klingele, *supra* note 15, at 1032–36.

125 Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973); Morrissey v. Brewer, 408 U.S 471, 483 (1972).

126 *Gagnon*, 411 U.S. at 789.

127 *Id.* at 789–80; *Morrissey*, 408 U.S. at 482.

128 *Morrissey*, 408 U.S. at 487–90.

129 In addition to the rights discussed here, a defendant in a federal felony case also has the right to force the government to obtain an indictment from a grand jury. U.S. CONST. amend. V; FED. R. CRIM. P. 7(a)(1)(b). That right has not

reasonable bail.[130] But courts have consistently held that this right does not apply in the supervision context.[131] Supervisees are thus normally detained without bond, even absent proof that they are dangerous or a flight risk.[132] This means they remain in custody while awaiting the revocation hearing. There is also no right to a speedy trial. In a criminal case, the trial normally must begin within a certain period of time. If it does not, the charges can be dismissed under both statutory and constitutional law.[133] But this is not so with supervision revocations.[134] And the lack of a speedy trial right means supervisees can be kept in jail for long periods without a revocation hearing or sentence.[135] In one infamous case, a young man named Kalief Browder was detained at Rikers Island for three years pending a probation revocation only to have the charge ultimately dismissed.[136] There is a much more limited defense right to discovery, including disclosure of exculpatory evidence, in a revocation hearing than in a normal criminal case.[137] And there is not even an absolute right to a court-appointed lawyer in a revocation hearing for indigent supervisees. In a normal criminal case, an indigent defendant has the right to government-appointed defense counsel.[138] But for revocation hearings, the Supreme Court has said only that counsel should be appointed on a "case-by-case basis" based on factors like the complexity of the case and whether the

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been applied in the supervision context. *See* United States v. Peguero, 34 F.4th 143, 157 (2d Cir. 2022).

130 U.S. CONST. amend. VIII.

131 *See, e.g.*, Faheem-El v. Klincar, 841 F.2d 712, 728–29 (7th Cir. 1988); Galante v. Warden, Metropolitan Correctional Center, 573 F.2d 707, 708 (2d Cir.1977); Luther v. Molina, 627 F.2d 71, 76 n.10 (7th Cir.1980); In re Whitney, 421 F.2d 337, 338 (1st Cir. 1970).

132 *See* Note, *The Right to Be Free from Arbitrary Probation Detention*, 135 HARV. L. REV. 1126, 1129–33 (2022); FRANKEL, *supra* note 13, at 90–102.

133 U.S. CONST. amend. VI; Klopfer v. N.C., 386 U.S. 213, 220 (1967). States and the federal government also have speedy trial statutes. *See, e.g.*, 18 U.S.C. § 3161; N.Y. CRIM. PROC. § 30.30 (McKinney 2020); N.M. STAT. ANN. § 5-604 (2023); MISS. CODE. ANN. § 99-17-1 (2023); IND. R. CRIM. P. 4; CAL. PENAL CODE § 1382 (West 2023).

134 *See* United States v. Gavilanes-Ocaranza, 772 F.3d 624, 628 (9th Cir. 2014); United States v. House, 501 F.3d 928, 930–31 (8th Cir. 2007); United States v. Tippens, 39 F.3d 88, 89 (5th Cir. 1994).

135 *See, e.g.*, FRANKEL, *supra* note 13, at 95–98.

136 *See* Note, *supra* note 132, at 1126. Browder's violation was for allegedly stealing a backpack. Tragically, he later committed suicide. *Id.*

137 Alison K. Guernsey, *Rethinking Supervised Release Discovery with an Eye Toward Real "Fundamental Fairness"*, 34 FED. SET'G REP. 295, 296 (2022).

138 Gideon v. Wainwright, 372 U.S. 335, 336–45. (1963).

supervisee has a defense.[139] As a consequence, some jurisdictions regularly deny counsel at revocation hearings.[140]

The second set of differences concerns who adjudicates the violation. In a normal criminal case, the defendant has a right to a jury trial if the maximum sentence is over six months.[141] However, revocation hearings are not conducted before juries. In supervised release and probation cases they are normally heard by judges, and in parole cases they are normally heard by parole boards or hearing officers.[142] The burden of proof at a violation hearing is set at a "preponderance of the evidence" standard, lower than the "beyond a reasonable doubt" standard applicable in criminal trials.[143] Probation and parole officers also play multiple roles that are normally kept separate in criminal cases. These officers initiate revocation proceedings by filing charging documents, serve as fact witnesses at the hearings, and provide sentencing recommendations.[144] And in many jurisdictions, these officers are employees of the very agency running the hearing (e.g., the judiciary or the parole agency).[145] This overlap of functions differs starkly from a normal criminal case, where the judge and prosecutor work for separate branches of government and the prosecutor cannot serve as a witness.[146]

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139 Gagnon v. Scarpelli, 411 U.S. 778, 790–91 (1973). *But see* Mempa v. Rhay, 389 U.S. 128, 133–37 (1967) (holding that there is a right to counsel in probation revocation proceedings where the initial sentence for the crime was deferred, so that the revocation is functionally the sentencing hearing for the original case).

140 *See* ASLI BASHIR, RACHEL SHUR, THEODORE TORRES & FIONA DOHERTY, SAMUEL JACOBS CRIM. JUST. CLINIC, PAROLE REVOCATION IN CONNECTICUT 8–9 (2017) (noting that 94 percent of parole revocation hearings in Connecticut happened without defense counsel); FRANKEL, *supra* note 13, at 88–90 (describing a county in Georgia where defense counsel is nonexistent in misdemeanor revocations); Olinda Moyd, *In the Shadow of* Gideon*: No Sixth Amendment Right to Counsel at Parole Revocation Hearings*, 6 HOW. HUM. & C.R. L. REV. 31, 52 (2021).

141 Baldwin v. New York, 399 U.S. 66, 69 (1970). In the federal system, there is also a right to compel the government to present the case to a grand jury for indictment. *See* Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911, 1922–32 (2018).

142 Klingele, *supra* note 15, at 1040; *supra* note 89 and accompanying text.

143 *See* FRANKEL, *supra* note 13, at 198.

144 *See* MITCHELL, REITZ, WATTS & ELLIS, *supra* note 67, at 11, 20, 40; United States v. Whitlock, 639 F.3d 935, 937 (9th Cir. 2011); P.O. DOE, ON THE STAND: COURTROOM TESTIMONY FOR PROBATION OFFICERS (2017).

145 Petersilia, *supra* note 55, at 169–70; Klingele, *supra* note 15, at 1025, 1030.

146 On the importance of separation of powers in the criminal process, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1011–34 (2006); Carissa Byrne Hessick, *Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 159, 179–83 (2021). *But see* Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 40–58 (2021).

Finally, there are significantly fewer procedural rights in a revocation hearing than there are in a trial. The rules of evidence do not apply in a revocation hearing.[147] This means, notably, that a person can be violated based on hearsay evidence so long as the judge deems the hearsay reliable.[148] Confrontation rights are also limited in revocation hearings. In criminal trials there is a right to confront witnesses against you through cross-examination, but in revocation hearings this right is balanced against any reasons the government gives for disallowing cross-examination.[149] This means a person can be sent to prison based on out-of-court testimony, for example that of an alleged victim, that cannot be cross-examined.[150] There is no ability to suppress unconstitutionally obtained evidence at a revocation hearing.[151] People on supervision can have their persons, homes, electronic devices, or cars searched without the protection of the Fourth Amendment.[152] They are also commonly ordered to truthfully answer any questions from their probation or parole officer, notwithstanding the Fifth Amendment right to remain silent.[153] When such searches or questions provide evidence of a violation, it cannot be excluded on constitutional grounds.

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147 Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973).

148 *See* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) ("[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."). *See, e.g.*, State v. Stotts, 695 P.2d 1110, 1119–20 (Ariz. 1985); State v. Giovanni P., 110 A.3d 442, 447–48 (Conn. App. Ct. 2015); Reyes v. State, 868 N.E.2d 438, 441–42 (Ind. 2007); State v. Graham, 30 P.3d 310, 313 (Kan. 2001); Bailey v. State, 612 A.2d 288, 292 (Md. App. Ct. 1992); State v. Guthrie, 257 P.3d 904, 914–15 (N.M. 2011).

149 *See* FED. R. CRIM. P. 32.1(b)(2)(C) (stating that defendant is entitled to "question any adverse witness unless the court determines that the interest of justice does not require the witness to appear"); United States v. Bell, 785 F.2d 640, 642–43 (8th Cir. 1986); United States v. Chin, 224 F.3d 121, 124 (2d Cir. 2000); United States v. Walker, 117 F.3d 417, 420 (9th Cir. 1997); United States v. Grandlund, 71 F.3d 507, 510 (5th Cir. 1995); United States v. Frazier, 26 F.3d 110, 114 (11th Cir. 1994).

150 *See, e.g.*, United States v. Chin, 224 F.3d 121, 123 (2d Cir. 2000) (discussing violation found for an assault based on police officer's testimony, with no testimony by the alleged victim).

151 Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 369 (1998); Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 770 (2010).

152 *See* Doherty, *supra* note 49, at 317–18; Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 728–29 (2020).

153 *See* 18 U.S.C. § 3563(b)(17); Doherty, *supra* note 49, at 316–17; MITCHELL, REITZ, WATTS & ELLIS, *supra* note 67, at 23, 39, 71.

This absence of constitutional rights significantly curtails a supervisee's power to either maintain their innocence or negotiate over their sentence. It thus makes criminal supervision an efficient tool for incarcerating people. Every aspect of the process is less burdensome for the government than in a normal criminal case.[154] It is easier to gather evidence of a violation because supervisees can be searched without Fourth Amendment protections and questioned without Fifth Amendment protections. It is less burdensome to prove a violation in court because there is no need to empanel a jury, present all of the fact witnesses, or even (in some cases) provide the supervisee with appointed defense counsel. Indeed, because of this more efficient court process, prosecutors frequently opt to prosecute crimes as supervision revocations rather than as new criminal charges.[155] This lets them incarcerate a supervisee without the burden of normal criminal procedures. In addition, the high rate of detention and lack of speedy trial rights take away many defendants' power to get a hearing.[156] Supervisees like Kalief Browder can be kept in custody for years without having the violations proven in court.[157] And because supervision can be extended as a punishment for a violation, people become trapped in this constitutional netherworld for years or even decades.[158] This is an especially common scenario for people suffering from addiction, homelessness, or mental illness.[159]

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154 *See* Horwitz, *supra* note 151, at 767–72.

155 *See, e.g.*, United States v. Haymond, 139 S. Ct. 2369, 2381 (2019) ("Instead of seeking a revocation of supervised release, the government could have chosen to prosecute Mr. Haymond under a statute mandating a term of imprisonment of ten to twenty years for repeat child-pornography offenders. But why bother with an old-fashioned jury trial for a new crime when a quick-and-easy 'supervised release revocation hearing' before a judge carries a penalty of five years to life?" (internal citations omitted)); FRANKEL, *supra* note 13, at 84–85; Doherty, *supra* note 55, at 1730–31 ("A low-level charge, which might have been ignored if it required an actual criminal proceeding, can be dealt with more severely if the person is in a Testing Period.").

156 *See* FRANKEL, *supra* note 13, at 101. Remaining in custody pre-trial also has a significant effect on defendants' leverage in normal criminal cases, and results in more guilty pleas and longer sentences. *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714 (2017).

157 *See* Note, *supra* note 132, at 1126.

158 *See* FRANKEL, *supra* note 13, at 85–86.

159 *Id.* at 153–79.

B. *Apprendi*, *Haymond*, and the Right to a Jury Trial

In *Apprendi v. New Jersey*, the Supreme Court first recognized the right to jury determination of facts that trigger additional punishment even when those facts are not formal elements of a crime.[160] Charles Apprendi pled guilty to several charges involving unlawful possession of a firearm, and the default maximum penalty under his plea agreement was twenty years in prison.[161] However, a provision of New Jersey law allowed the judge to increase the maximum sentence to thirty years if the judge found that Apprendi's crime was motivated by racial bias.[162] The judge applied this provision, but the sentence was ultimately reversed by the Supreme Court. The majority opinion reasoned that, under the Sixth Amendment, a fact increasing the maximum penalty for a crime needs to be proven to a jury beyond a reasonable doubt.[163] This principle has since reverberated throughout American criminal procedure. In *Alleyne v. United States*, the Court extended it to facts that increase a mandatory minimum penalty.[164] The Court has also applied it to facts that trigger the death penalty, increase penalties under state sentencing guideline systems, and give rise to criminal fines.[165] And in *United States v. Booker*, the Court used the *Apprendi* principle to declare that the previously-mandatory system of federal sentencing guidelines was now only advisory.[166]

This understanding of the Sixth Amendment poses a problem for criminal supervision. If any fact that exposes a person to additional prison time needs to be proven to a jury, then it seems revocation hearings need to be decided by juries.[167] In a revocation hearing, the supervisee can only be sent to prison if the judge finds that a supervision condition was violated. This means that the prosecuting attorney must prove certain facts—a new crime, a skipped drug test, failure to pay child support, or something else that constitutes a violation. Once such facts are proven, and only then, can the judge sentence the

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160 530 U.S. 466, 474–97 (2000).

161 *Id.* at 469–70.

162 *Id.* at 470.

163 *Id.* at 490.

164 570 U.S. 99, 103 (2013).

165 Ring v. Arizona, 536 U.S. 584, 585 (2002) (death penalty); Blakely v. Washington, 542 U.S. 296, 296 (2004) (state sentencing guidelines); S. Union Co. v. United States, 567 U.S. 343, 343 (2012) (criminal fines).

166 543 U.S. 220, 246 (2005).

167 *See generally* Ikeda, *supra* note 24, at 157–58; Shockley, *supra* note 24; Zemel, *supra* note 24.

supervisee to time in custody.[168] In this respect, a condition of supervision is like the sentencing law struck down in *Apprendi*. It establishes a fact that, if proven to a judge, increases the maximum amount of time that the defendant can spend in prison. Judge Underhill has made precisely this point in arguing that federal supervised release violates the Fifth and Sixth Amendments.[169]

The Supreme Court recently considered this problem in *United States v. Haymond*.[170] That case involved a unique provision of federal law, 8 U.S.C. § 3583(k), which applies to people put on federal supervised release for crimes requiring registration as a sex offender.[171] If a judge determines that such a person has committed one of several enumerated sex crimes, then their supervised release must be revoked and they must serve between five years and life in prison for the violation.[172] In *Haymond*, five justices decided that this provision is unconstitutional. However, only four justices signed on to the broader proposition that supervised release revocations can trigger the Sixth Amendment right to a jury trial.[173] Justice Breyer, concurring separately, confined his reasoning to the specific features of Section 3583(k).[174] And Justice Alito dissented, writing for four justices.[175]

Justice Gorsuch's plurality opinion applied the logic of *Apprendi* and *Alleyne* in straightforward fashion. For the underlying crime, Mr. Haymond was looking at a sentence of between zero and ten years in prison. Yet for the violation of supervised release, he faced a sentence between five years and life in prison.[176] Since this latter range of penalties has a higher minimum sentence than the original crime, the violation needed to be proven to a jury beyond a reasonable doubt.[177] In announcing this conclusion, the plurality reaffirmed the basic principle of *Apprendi*—that any fact increasing the range of possible penalties must be proven to a jury, even if the legislature labels it a "sentencing enhancement," "supervision condi-

168 Morrissey v. Brewer, 408 U.S 471, 479–80 (1972).
169 *See* United States v. Peguero, 34 F.4th 143, 165–79 (2d Cir. 2022) (Underhill, district judge sitting by designation, dissenting); Underhill & Powell, *supra* note 35, at 298.
170 139 S. Ct. 2369 (2019).
171 *See* 8 U.S.C. § 3583(k).
172 *Id.*; *see Haymond*, 139 S. Ct. at 2373.
173 *See Haymond*, 139 S. Ct. at 2372.
174 *See id.* at 2385–86 (Breyer, J., concurring).
175 *Id.* at 2386–400 (Alito, J., dissenting).
176 *Id.* at 2375.
177 *Id.* at 2379–80.

tion," or something else.[178] The plurality also endorsed the theory that revocation sentences are punishments for the original crime.[179] Under this theory, a violation does not constitute a new offense in itself but instead provides an opportunity to revisit and increase the initial sentence.[180] The problem with Section 3583(k), then, is not that additional prison time is imposed for a violation, but that the available sentencing range increases (from zero to ten years to five years to life). The plurality leans on this theory to distinguish traditional probation and parole revocations.[181] Both are limited by the underlying sentence: a probationer's punishment for a revocation must fall within the statutory range of the original crime, while a parolee can only serve the remaining balance of their existing sentence.[182] By contrast, Section 3583(k) made Mr. Haymond's sentencing range higher for the revocation than for the underlying crime. Thus, the plurality claims, Section 3583(k) can be struck down without posing a risk to state probation and parole systems.[183]

Justice Alito authored a dissenting opinion, also speaking for four justices.[184] The dissent took issue with the proposition that the Sixth Amendment applies to revocation hearings in the first place. According to Alito, supervised release revocations are not new punishments. They are instead sanctions for the defendant's "breach of trust" in failing to comply with the judge's sentencing order.[185] Because they take place after the final judgment is imposed, they are not part of a criminal prosecution and therefore are not subject to the Sixth Amendment.[186] Alito interprets the plurality opinion to mean that *all* supervised release revocations require a jury trial, not merely those involving a mandatory minimum sentence.[187] In Alito's eyes, this would be a disaster. Juries would need to be empaneled for all revocation hearings, making the system unworkable.[188] He warns: "under the plurality opinion, the whole

178 *See id.* at 2379.
179 *See id.* at 2379–80.
180 *See infra* Section III.B for more detailed discussion of this theory.
181 *See Haymond*, 139 S. Ct. at 2381–82.
182 *See id.* at 2382.
183 *Id.*
184 *Id.* at 2386–400 (Alito, J., dissenting).
185 *Id.* at 2393.
186 *See id.* at 2391–400.
187 *See id.* at 2386–88.
188 Of note here, *Apprendi* has not significantly disrupted state sentencing guideline systems because most cases are still resolved through guilty pleas. *See* Nancy J. King, *Handling Aggravating Facts After* Blakely: *Findings from Five Pre-*

system of supervised release would be like a 40-ton truck speeding down a steep mountain road with no brakes."[189]

Justice Breyer cast the deciding vote, concurring with the plurality on narrower grounds.[190] Breyer declined to endorse the principle that the Sixth Amendment applies to supervised release revocations, noting his concern with "the potentially destabilizing consequences."[191] However, he did join the plurality in striking down Section 3583(k). Breyer explained that three features of that statute gave him concern: that it applies only to violations involving specific crimes, that it requires the judge to revoke supervision, and that it imposes a mandatory minimum prison term.[192] For these reasons, he found that Section 3583(k) triggers the right to a jury trial. Because Breyer cast the deciding vote, *Haymond* only stands for the proposition that certain mandatory minimum revocation sentences are unconstitutional. It does not resolve the larger issue of criminal supervision's constitutionality.[193]

III
TWO INADEQUATE THEORIES OF SUPERVISION

To resolve the Sixth Amendment question posed in *Haymond*, we must first address a broader question: why can judges sentence people for supervision violations in the first place? The answer will clarify the relationship between a su-

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sumptive-guidelines States, 99 N.C. L. REV. 1241, 1264–85 (2021) (describing how, even with a Sixth Amendment jury trial right over aggravating sentencing factors, defendants regularly resolve sentencing issues through plea bargains). It does seem likely, however, that applying *Apprendi* to supervision sentencing would cause significantly more disruption. Sentencing guidelines are part of an ordinary criminal prosecution that already carries the right to a jury trial, whereas supervision violations are not. Extending the Sixth Amendment to violation hearings, then, would make them more administratively demanding and increase defendants' procedural leverage. *See supra* Section II.A.

189 *Haymond*, 139 S. Ct. at 2391 (Alito, J., dissenting); *see also* Stith, *supra* note 34, at 1309 ("Justice Gorsuch's *Haymond* opinion lays down the beginnings of an ambitious effort to extend the *Apprendi* line well beyond its present confines.").

190 *Haymond*, 139 S. Ct. at 2385–86 (Breyer, J., concurring).

191 *Id.* at 2385.

192 *See id.* at 2386.

193 Lower state and federal courts have largely declined to extend the holding in *Haymond* beyond its specific context. *See* Stith, *supra* note 34, at 1309–10 n.88 (collecting state and federal cases). *See, e.g.*, United States v. Doka, 955 F.3d 290, 296 (2d Cir. 2020); United States v. Seighman, 966 F.3d 237, 243–44 (3d Cir. 2020); United States v. Garner, 969 F.3d 550, 552–53 (5th Cir. 2020); United States v. Eagle Chasing, 965 F.3d 647, 651 (8th Cir. 2020); People v. Schaffer, 267 Cal. Rptr. 3d 666, 670–71 (Cal. Ct. App. 2020); State v. Dunlap, 225 A.3d 1068, 1079–80 (N.J. Super. Ct. App. Div. 2020).

pervision violation and the original crime. This Part explores two alternative theories that have been embraced in prior judicial opinions. The first theory is that a violation of supervision constitutes a new illegal act. Under this theory, supervision conditions establish a set of criminal prohibitions and to violate one is effectively to commit a new crime. A more subtle variant of this theory (endorsed by Justices Alito and Breyer in *Haymond*) draws an analogy to criminal contempt: the punishment is for failing to follow the court's orders, and thereby "breach[ing]" the court's "trust."[194] The second theory (adopted by the *Haymond* plurality) is that a violation sentence is attributable to the underlying crime.[195] Under this theory, the judge is not punishing the supervisee for the violation itself but is instead revisiting and increasing their original sentence. And this second theory also has a variant: in cases where no initial custody time is imposed (as in traditional probation cases), a violation sentence is merely the delayed imposition of the original sentence. As this Part will show, none of these theories (with the limited exception of the delayed sentencing theory) can justify denying supervisees a jury trial at a revocation hearing.

A. The New Crime/Contempt Theory

One way to understand supervision violations is that they are basically new criminal offenses. Under this theory, the judge's supervision order enumerates a list of acts that, if the supervisee commits them, are punishable as crimes. The federal Sixth Circuit Court of Appeals endorsed this theory in the 1995 case *United States v. Reese*, which concerned an ex post facto issue.[196] In 1988, Congress had enacted a supervised release law requiring mandatory minimum sentences for drug-related violations.[197] Defendants argued that, under the Ex Post Facto Clause, these mandatory minimums should only apply to supervised release terms that were imposed after the law took effect.[198] The Sixth Circuit rejected this argument,

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194 *See Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring); *id.* at 2393 (Alito, J., dissenting).

195 *See id.* at 2379–80.

196 71 F.3d 582 (6th Cir. 1995); *see also* United States v. Page, 131 F.3d 1173, 1175 (6th Cir. 1997).

197 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7303, 102 Stat. 4181, 4464 (repealed 1994); *see* Doherty, *supra* note 10, at 1004.

198 *See* Doherty, *supra* note 10, at 1004–09.

reasoning that revocation sentences are punishments for the new offense of violating a supervision condition.[199]

This understanding of violation sentences, as focused on the new conduct rather than the original crime, fits with how some supervision systems determine punishment. In the federal system, for example, the sentencing guidelines for both probation and supervised release revocations base the recommended penalty on the type of violation.[200] Misdemeanors and technical violations get classified as "Grade C" and receive the lowest sentences.[201] Violations that are felonies are classified as "Grade A" (the most serious, including crimes of violence and drug crimes) or "Grade B" (all other felonies), and the recommended sentence depends on the grade.[202] Some state parole revocation rules, such as Oregon's and Minnesota's, similarly graduate punishments based on the severity of the violation conduct.[203]

The new crime theory presents a number of constitutional problems. To start with, it pretty clearly does not save supervision from *Apprendi*. If a supervision violation is treated as a new criminal offense, then the Sixth Amendment right to a jury trial should apply.[204] A judge cannot sentence a defendant to lose their right to a jury trial in future criminal cases.[205] In addition, the new crime theory creates a double jeopardy problem. If a violation constitutes a new criminal offense, then the government cannot both charge the defendant with a crime and revoke their supervision.[206] The Supreme Court rejected the new crime theory in *Johnson v. United States*, partly due to this double jeopardy concern.[207] The majority wrote: "[w]here

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199 *Reese*, 71 F.3d at 588 ("Because supervised release, unlike the previous parole system, is a form of punishment that is separate from the maximum incarceration period that attaches to the original offense, a violation of that supervised release also results in a separate punishment that does not implicate the Ex Post Facto Clause.").

200 U.S.S.G. § 7B1.4.

201 *Id.* § 7B1.1(a)(3).

202 *Id.* § 7B1.1(a)(1)–(2).

203 *See, e.g.*, OR. ADMIN. R. 255-075-0079 (1994); MINN. R. 2940.3800 (2019).

204 *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

205 *See* Underhill & Powell, *supra* note 35, at 316 n.95 ("[A]lthough the underlying criminal conviction may certainly deprive one of certain constitutional rights, the right to be indicted and the right to trial by jury for a new prosecution are not among them.").

206 Theoretically, a court could order that the new crime and the supervision violation merge in order to solve this double jeopardy problem so that a defendant could only be sentenced for one of them. But under current law, double jeopardy is not implicated in these circumstances. *See* Johnson v. United States, 529 U.S. 694, 700 (2000).

207 *Id.*

the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense."[208] Finally, the new crime theory treats supervision conditions as essentially criminal laws pronounced by a court. This seems to create significant tension with the principle, enshrined in federal law since *United States v. Hudson*, that only a legislature can enact crimes.[209]

The new crime theory thus seems like a bad candidate. It does not distinguish *Apprendi*, creates numerous constitutional issues, and has been outright rejected by the Supreme Court. There is, however, a more subtle variant of this theory: the contempt theory. Judges have a long-recognized power to punish people for disobeying their orders by holding such people in criminal contempt.[210] And this same basic power—so the theory goes—also lets judges sanction violations of supervision conditions.[211] This theory appears to be endorsed by Justices Breyer and Alito, who argued in *Haymond* that revocation sentences are sanctions for a "breach of trust."[212] Breyer wrote, for instance, that they "are first and foremost considered sanctions for the defendant's breach of trust—his failure to follow the court-imposed conditions that followed his initial conviction—not for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct."[213] This idea originated in the Federal Sentencing Guidelines' section on revocation sentencing,[214] which explains that under a "breach of trust" approach, "the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-or-

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208 *Id.*

209 11 U.S. 32, 34 (1812). *But see* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 978–87 (2019) (noting that common law crimes are still permitted in some states).

210 *See Hudson*, 11 U.S. at 34 ("To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.").

211 *Cf.* Nirej S. Sekhon, *Punitive Injunctions*, 17 U. PENN. J. L. & SOC. CHANGE 175, 197–204 (2014) (characterizing probation as a "punitive injunction" that courts have the authority to enforce through revocation hearings).

212 United States v. Haymond, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring); *id.* at 2393 (Alito, J., dissenting).

213 *Id.* at 2386 (internal quotation marks omitted).

214 On the history of this "breach of trust" language, which comes from the Sentencing Guidelines (and not from the actual statute), see generally Doherty, *supra* note 113, 274–75.

dered supervision."[215] The logic of such a "breach of trust" sentence is functionally the same as that of a sentence for criminal contempt. In both cases, the judge is exercising their power to enforce their own orders by punishing people who violate those orders.[216]

However appealing this contempt theory might be, it does not evade *Apprendi*. There is no contempt exception to the Sixth Amendment. In a series of cases in the 1960s, the Supreme Court recognized the constitutional right to a jury trial in any criminal contempt case carrying a penalty over six months.[217] This is the same rule as for normal crimes—if the punishment can exceed six months, a jury must be empaneled.[218] The contempt theory would thus only let a judge avoid a jury trial if they committed to sentence the supervisee to six months or less. And even then, the other protections of criminal trials would still apply, including proof beyond a reasonable doubt, the right against self-incrimination, and the right to confront witnesses.[219] That would mean a full bench trial rather than a summary revocation hearing. And, in addition, the contempt theory does not solve the double jeopardy problem. In *United States v. Dixon*, the Court determined that a defendant cannot be both prosecuted for a crime and prosecuted for a contempt charge stemming from the same crime.[220] It follows that, if supervision violations are a form of criminal contempt, it would violate the Double Jeopardy Clause to prosecute a crime as both a new charge and a supervision viola-

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215 U.S.S.G. § 7A3(b). The use of the word "trust" in this context is quite strange, given that (unlike probation or parole) federal supervised release does not give any benefit to the defendant. It is imposed *in addition to* the full prison sentence, not as a means to reduce that sentence. A more appropriate phrase would be "breach of the court's order." *See* Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 906–09 (2021); Doherty, *supra* note 113, at 278–79.

216 It is worth noting that the law creating federal supervised release originally relied on contempt proceedings as the sole enforcement mechanism. Only later was the law changed to create the current revocation hearing procedure. Doherty, *supra* note 10, at 997–1002.

217 Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); Bloom v. Illinois, 391 U.S. 194, 199–200 (1968) ("The Constitution guarantees the right to jury trial in state court prosecutions for contempt just as it does for other crimes.").

218 District of Columbia v. Clawans, 300 U.S. 617, 627–28 (1937).

219 International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826 (1994) ("Criminal contempt is a crime in the ordinary sense . . . and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." (internal quotation marks omitted)).

220 509 U.S. 688, 712 (1993).

tion.[221] Since the contempt power is constrained by defendants' constitutional rights, so too should be any contempt-adjacent power to sanction violations of probation, parole, and supervised release orders.[222] The contempt theory cannot explain the absence of constitutional rights in revocation hearings.[223]

B. The Resentencing/Delayed Sentencing Theory

Another way to understand supervision violations is that they trigger a resentencing of the original crime. Under this theory the violation sentence is an additional punishment for that crime, rather than a separate punishment for the later violation conduct. Basically, because the supervisee failed to follow the rules of supervision, the judge can revisit the initial sentence and make it more punitive.[224] The Supreme Court has endorsed this theory in the federal supervised release context. In *Johnson*, the majority wrote that it would "attribute postrevocation penalties to the original conviction."[225] The plurality opinion in *Haymond* also embraced the resentencing theory. Justice Gorsuch wrote: "[a]s *Johnson* recognized, when

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221 This is the same constitutional problem the Court identified in *Johnson* when rejecting the new crime theory. *See* Johnson v. United States, 529 U.S. 694, 700 (2000).

222 While both Alito and Breyer rely on the "breach of trust" theory in *Haymond*, they do not discuss what the concept means in any detail. Their opinions are not clear on whether they mean to invoke courts' inherent contempt power or are instead trying to invent a new (and less constitutionally limited) power to punish "breach[es] of trust." *See* United States v. Haymond, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring); *id.* at 2393 (Alito, J., dissenting); *see also* Doherty, *supra* note 113, at 274, 277.

223 It should be noted that contempt prosecutions require proof that that the defendant willfully disobeyed the court's order, whereas supervision violations generally do not. Thus, the power posited by the contempt theory would be somewhat broader than the actual contempt power. Doherty, *supra* note 10, at 1000. This does not change the analysis of trial and double jeopardy rights, however.

224 There could be a number of potential justifications for such a practice, according to conventional theories of criminal law. Perhaps the additional violations make the defendant appear more dangerous and justify incapacitation, or perhaps they reveal additional facts that make the original crime appear more wrongful. *Cf.* Schuman, *supra* note 215, at 924–34 (advocating a utilitarian approach to supervision revocations); Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1390–93 (summarizing utilitarian and retributivist arguments for recidivist sentence enhancements).

225 *Johnson*, 529 U.S. at 701. For a state court case adopting this theory, see State v. Prado, 937 P.2d 636, 638 (Wash. Ct. App. 1997) ("When a defendant violates a condition or requirement of his sentence, the court may modify the sentence and order a maximum additional 60 days confinement per violation. The statute intends the violation of the condition to relate to the original prosecution, rather than constitute a new prosecution." (internal citation omitted)).

a defendant is penalized for violating the terms of his supervised release, what the court is really doing is adjusting the defendant's sentence for his original crime."[226] This is why the plurality focused on the idea that the revocation sentence under Section 3583(k) increased the punishment range for the original crime.[227] Mr. Haymond was effectively sentenced twice for that crime—once with a range of zero to ten years, and then again with a range of five years to life. It was that increased range, under the plurality's theory, that triggered the right to a jury trial.[228]

Just like the new crime theory, the resentencing theory cannot explain the absence of juries in revocation proceedings. In this respect, Justice Alito's *Haymond* dissent is correct: the plurality's theory is not limited to violations carrying a mandatory minimum, but instead implicates every sentence for a violation of probation, parole, or supervised release.[229] If revocation sentences are treated as additional punishment for the original crime, then they are practically identical to the sentencing enhancements struck down in *Apprendi*, *Alleyne*, *Booker*, and the other Sixth Amendment cases.[230] When a person begins their period of criminal supervision, the in-prison portion of their sentence has already been served. At that point, per *Gagnon* and *Morrissey*, they can only be sent back to prison for violating a rule of supervision.[231] So the person is in a situation where their prison sentence will be retroactively increased if and only if certain facts are proven to a court. This is just like the racial bias enhancement in *Apprendi* and the sentencing guidelines in *Booker*, with the only difference being that those enhancements happen at the original sentencing hearing while enhancements for supervision violations happen later. And that is a formal distinction of the kind that the *Apprendi* line of cases specifically eschews.[232] Imagine the fol-

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226 *Haymond*, 139 S. Ct. at 2380 n. 5.

227 *See id.* at 2381–82.

228 *See id.* at 2382.

229 *See id.* at 2389–90 (Alito, J., dissenting); *see also* Stith, *supra* note 34, at 1304.

230 *See supra* Section II.B.

231 *See* Morrissey v. Brewer, 408 U.S 471, 485–89 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

232 *See Haymond*, 139 S. Ct. at 2379 ("Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.' Calling part of a criminal prosecution a 'sentence modification' imposed at a 'postjudgment sentence-administration proceeding' can fare no better."); Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of

lowing statute: "(1) Any defendant convicted of possessing marijuana shall receive a sentence of up to six months; (2) If at any point within three years of such sentence the defendant possesses marijuana again, the sentence may be increased by up to three months on the government's motion." It seems clear that Section (2) of this statute would be an element of the crime under *Apprendi*. And it should make no difference if we added the words "probation condition." If supervision violations increase the punishment for the original crime, then the rules of supervision function as elements of that crime subject to the Sixth Amendment.[233]

The resentencing theory also creates a potential double jeopardy issue. The Double Jeopardy Clause prohibits the government from imposing multiple criminal punishments in successive proceedings for the same offense.[234] Under the resentencing theory, that is exactly what a judge is doing at a revocation hearing. The defendant already received a punishment for their crime at the original sentencing, and the judge is now imposing an additional punishment for the same act based on intervening events.[235] Intuitively, that does seem like the essence of double jeopardy.[236] The Supreme Court has not specifically addressed whether revocation sentences, if understood as additional punishments for the original crime, violate the Double Jeopardy Clause.[237] And judicial decisions are unclear on the precise scope of the larger right against double jeopardy at resentencing. The key question under current doc-

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the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.").

233 This also holds true if the person was originally given a sentence with no prison time (unless it is a "delayed" sentence, as discussed below). *See* King, *supra* note 188, at 1258–61 (discussing why upward "dispositional" departures from supervision to custody trigger *Apprendi* rights under state sentencing guideline systems).

234 U.S. CONST. amend. V; Hudson v. United States, 522 U.S. 93, 98–100 (1997); Ohio v. Johnson, 467 U.S. 493, 497–98 (1984) ("The Double Jeopardy Clause, of course, affords a defendant three basic protections: [I]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (alteration in original) (internal quotation marks omitted)).

235 *See* Shockley, *supra* note 24, at 378–82.

236 In the federal system, it also seems to violate the statutory prohibition on modifying a term of imprisonment after it has been imposed. 18 U.S.C. § 3582(c).

237 *See Double Jeopardy*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 461, 463 (2010) (collecting appellate cases). The Court has noted in dicta that probation revocations pose no double jeopardy issues, but that was outside the context of the resentencing theory. United States v. DiFrancesco, 449 U.S. 117, 137 (1980).

trine is whether there is a legitimate "expectation of finality" in the sentence.[238] For example, when a conviction or sentence is reversed on appeal, the defendant can get a higher sentence on remand.[239] This poses no double jeopardy problem because the case never officially ended, so the sentence was not final. On the other hand, many state and federal appeals courts have held that resentencing a defendant to correct an error in the original sentence violates double jeopardy if the sentence has already been served.[240] Neither of these situations is precisely analogous to resentencing someone for a supervision violation, so the question remains open. One way to frame the issue is to ask whether a judge could give someone additional punishment for post-sentence conduct in the absence of supervision. Imagine that a judge imposes a sentence of six months in jail for a drunk driving conviction, and then after that sentence has been served the defendant is arrested again for driving drunk. Could the judge then reopen the original sentencing hearing and give the defendant an additional six months for the first D.U.I.? And would it make a difference if the judge announced this possibility at the first sentencing hearing? Or if the legislature passed a statute allowing the judge to do this? Under the resentencing theory, that situation is functionally identical to a revocation sentence.

The resentencing theory, then, does not solve the constitutional problems with criminal supervision. But there is a variant of the theory that could fare better: the delayed sentencing theory. Under this theory, the sentence for the supervision violation *is* the sentence for the initial crime. Basically, if a person is convicted of a crime, the judge can delay sentencing for some period of time to see how the defendant behaves.[241] This is how probation worked when it was first created in Massachusetts.[242] The defendant was convicted and then released

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238 *DiFrancesco*, 449 U.S. at 139.

239 *Id.* at 137–39.

240 *See, e.g.*, United States v. Earley, 816 F.2d 1428, 1434 (10th Cir. 1987); United States v. Jones, 722 F.2d 632, 638–39 (11th Cir. 1983); March v. State, 782 P.2d 82, 83, 111 (N.M. 1989); Commonwealth v. Selavka, 14 N.E.3d 933, 941 (Mass. 2014); Commonwealth v. Borrin, 12 A.3d 466, 472 (Pa. 2011), *aff'd*, 622 Pa. 422 (2013); Lanier v. State, 270 So.3d 304, 310 (Ala. Crim. App. 2018). *Cf.* Lippman v. State, 633 So.2d 1061, 1064 (Fla. 1994) (adding new conditions to a probation sentence was a violation of double jeopardy).

241 *See* Doherty, *supra* note 55, at1723–27, 1765–72.

242 *Id.* at 1707–16; Fisher, *supra* note 53, at 936–42 (describing the original Massachusetts probation system, wherein the defendant pled guilty but sentencing was delayed so the defendant could demonstrate good behavior, and if there were no violations the case was ultimately dismissed).

before sentencing to the supervision of a probation officer. If they performed well on supervision, then the judge would not sentence them to prison. This is also how probation works in the federal system and in some states—a judge who imposes a probationary sentence is effectively suspending the sentencing hearing for a period of time, and if the defendant does well on probation they will not be incarcerated.[243] Probation of this kind saves the defendant from prison, so long as they commit no violations. It is the judge conditionally exercising their prerogative not to punish.

Delayed sentencing solves both the *Apprendi* problem and the double jeopardy problem. The right to a jury trial is not triggered because a probation violation merely causes the judge to hold the sentencing hearing they had previously chosen to delay. The violation does not increase a sentence previously imposed, nor does it create an additional sentence for a new criminal act. And there is only one punishment for the initial crime, the one imposed after the defendant failed on probation. However, the delayed sentencing theory does have one crucial limitation: it only works if the defendant is not sentenced to both supervision and custody time. For example, it cannot work for "split" sentences.[244] If a judge imposes custody time at the initial sentencing hearing, then the defendant has already been punished once and the constitutional problems with the resentencing theory resurface. Similarly, if probation is revoked and the person is sent to custody, then any further violation sentences that happen later raise the same *Apprendi* and double jeopardy problems. The delayed sentencing theory only works once, before any custody time is imposed. Due to this limitation, it cannot be applied to parole or federal supervised release because those occur after a prison sentence.[245] The delayed sentencing theory thus provides only a partial answer to the constitutional riddle.

IV
CONDITIONAL SENTENCING

This Part introduces the concept of conditional sentencing. Conditional sentencing is a unified theory of criminal supervi-

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243 *See supra* note 62 and accompanying text; Doherty, *supra* note 241, at 1723–27 (describing a system of suspended sentencing in Connecticut where no prison sentence is imposed if the defendant abides by the court's rules for several years).

244 *See supra* notes 59, 61–64 and accompanying text.

245 *See supra* Sections I.B. and I.C.

sion, encompassing probation, parole, and supervised release. Under the conditional sentencing theory, a criminal sentence can include a defined period of conditional custody time that is only imposed if the defendant breaks certain rules. For example, a judge could sentence you to X months in custody followed by Y years of supervision, and up to Z additional months of conditional custody for any violations of the supervision conditions. With such a sentence you would receive at least X months of incarceration, and at most X+Z months, depending on your future actions. The key to a conditional sentence is that the initial punishment and any subsequent revocation punishments must all be *contained in the original sentence*. If they are, then the judge at a violation hearing is not imposing a new sentence for the violation, nor are they resentencing the original crime. Instead, they are administering an already-existing sentence according to its own terms by imposing the previously suspended custody time. For the conditional sentencing theory to work, the judge must name a specific amount of supervision time (Y) and suspended custody time (Z) at the initial sentencing hearing and cannot increase these later. If the judge changes the terms of the sentence at a later revocation hearing, that constitutes an entirely new sentence. And a new sentence can only be imposed if the supervisee consents or is given a jury trial. However, if a judge administers the existing sentence according to its terms, then violations trigger only the due process rights of ordinary revocation hearings.[246]

A. The Elements of a Conditional Sentence: Custody, Supervision, Suspended Custody, and Triggering Rules

Conditional sentencing takes seriously the idea that later violation sentences are contained in the original sentence. In a conditional sentence, the supervision rules and potential additional custody time are all spelled out at the time of sentencing and cannot be changed later. There are four elements of a conditional sentence: (1) custody time, (2) supervision time, (3) suspended custody time, and (4) rules that trigger violations. When a person is sentenced for a crime, the judge must fill in all of these terms.[247] Consider the above illustration, where a

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246 *See* Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973); Morrissey v. Brewer, 408 U.S. 471, 483–84 (1972).

247 A judge could also, theoretically, include suspended supervision time in a sentence. For example, they could sentence a defendant to three years of supervision, with an additional two years of supervision suspended and imposable for

judge imposes X months in custody, followed by Y years of supervision subject to a set of triggering rules, with up to Z additional months of conditional custody time for violations of those triggering rules. After such a sentence is imposed, criminal supervision consists of the sentence's rules being played out. The person will first serve the initial term of custody X. Then they will be released and placed on criminal supervision subject to the rules contained in the original sentence. If the supervisee violates a rule, they can be made to serve some portion of the suspended custody time and then returned to supervision. But they cannot be given more supervision time than the Y that was originally imposed. If it is never proven that they violated any of the supervision rules, then they cannot be made to serve more than X custody time. If violations are proven, their total custody time is capped at X+Z.[248] This formula encompasses every major form of criminal supervision—probation, parole, and supervised release. Each involves an initial period of custody time, followed by supervision and the possibility of a return to custody.[249]

Under the conditional sentencing theory, a supervisee lacks full trial rights at a violation hearing because they are not being given either a new sentence or a higher sentence. *Apprendi* and its progeny only apply to situations where proving a fact in court will increase the maximum or minimum sentence.[250] With a conditional sentence, there is no increase because the conditional custody time was already announced at the original sentencing hearing. The judge is not changing the sentence; they are instead administering it. In the example above, the judge imposed Z months of suspended custody time that can be activated if the supervisee breaks the rules of supervision. Any later violation hearing would be the court's pro-

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violations. The defendant would then have at least three and at most five years of supervision, depending on if they were found in violation. Just like with suspended custody time, the specific amount of suspended supervision time would need to be spelled out in the initial sentence and could not be increased later.

248 There are additional complications that could be added. For example, in some supervision systems the time spent on supervision also counts against the suspended custody time. In such systems the total amount of possible custody time would be X+(Z–y) where y is the time spent on supervision without a violation. In other systems, the entire amount of Z custody time could be imposed on the last day of supervision. Both kinds of systems can be accommodated within the conditional sentencing theory.

249 The only caveat is that some forms of probation, such as that in the federal system, involve no initial custody time. For such probation sentences X would be set at zero. *See* Doherty, *supra* note 55, at 1711–12.

250 *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Alleyne v. United States, 570 U.S. 99, 103 (2013).

cess for administering this sentence by deciding whether the rules were broken. There is one important caveat—if after a violation hearing a judge wants to alter the sentence by adding more supervision time (a number greater than Y) or adding more suspended custody time (a number greater than Z), then that does trigger the right to a jury trial. That would involve imposing a new and higher criminal sentence based on facts proven at the hearing. But if the rules of the existing sentence do not change, then there is no right to a trial at a violation hearing.[251] *Apprendi* rights apply if you are increasing the sentence, whereas only the more limited *Gagnon* and *Morrissey* rights apply if you are administering the sentence.

An analogy can be drawn to the provision of "good time" credit in prison systems. Most states have a process where people can reduce their prison terms by completing programs and avoiding disciplinary problems in custody.[252] For example, in the federal system a prisoner can reduce their sentence by up to 54 days of "good time credit" for each year they spend in prison.[253] In California, prisoners can remove up to half of their sentences through good time credit.[254] But these reductions can be revoked by prison administrators if the person gets into a fight or commits some other infraction while in prison. For example, if a person has earned 60 days off their sentence for good time, the prison officials might take away 10 of those days if the person gets into a fight, making it only 50. When that happens, there is no right to a jury trial to decide whether the good time credit is revoked.[255] The Supreme Court has determined that only limited due process requirements apply—notice of the allegations, a written statement of the evidence, and a limited right to present evidence in defense.[256] This is because the prison system is merely administering the existing prison sentence, not lengthening it. A prison official could not lengthen a person's sentence beyond what was im-

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251 Similarly, there is no double jeopardy issue with a conditional sentence because it does not involve (1) retroactively increasing punishment or (2) charging someone with a new crime. See the discussion *supra* notes 206, 234–240 and accompanying text.

252 *See generally* NAT'L CONF. STATE LEGISLATURES, GOOD TIME AND EARNED TIME POLICIES FOR STATE PRISON INMATES (2016).

253 *See* 18 U.S.C. § 3624(b)(1).

254 CAL. PENAL CODE § 2933(b) (West 2023).

255 Wolff v. McDonnell, 418 U.S. 539, 563–66 (1974).

256 *Id.* at 563–66. These rights are more limited than those in *Gagnon* and *Morrissey*—notably, the *Wolff* court finds no right to cross-examination or to the presence of counsel, where the *Gagnon* and *Morrissey* courts established qualified versions of those rights. *Id.* at 567–72.

posed by the judge unless there were a new criminal charge. So if the judge gave a sentence of one year, the prison could not keep the person in custody longer than a year through disciplinary violations. The judge's sentence determines the maximum prison term, and the administration of that sentence is delegated to prison officials who decide how much to reduce it based on the state's good time rules.[257] This is also how the conditional sentencing theory works. With a conditional sentence, the sentencing judge sets the maximum possible term of incarceration and delegates to future judges (or parole boards) the administration of the sentence.[258]

B. The Importance of Announcing the Sentence

The key to the conditional sentencing theory is that any suspended custody time must be explicitly included as a term of the original sentence. If it is not, then any later violation hearing triggers the right to a jury trial. So if a judge wants to punish someone for violating a rule of supervision, then the original sentence needs to contain a specific amount of additional incarceration time hanging over that person's head. In numerous state probation systems, for example, a judge announces a specific prison sentence and then suspends the execution of that sentence pending successful completion of probation.[259] If the defendant fails on probation, then they may have to serve all or part of that suspended sentence in custody. In Texas, for instance, a person could be sentenced to

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257 Similarly, the prison system can send someone to different kinds of custodial settings, from severely restrictive ones like solitary confinement or a maximum-security prison to less restrictive ones like a minimum-security camp or a halfway house. The system can also move people between these settings based on considerations like their disciplinary record. Such designation decisions are another way that the sentencing judge delegates administration of the sentence to the prison system. *See Wolff*, 418 U.S. at 571 n.19 (noting that when a person is sent to solitary confinement "there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate"); United States v. Haymond, 139 S. Ct. 2369, 2383 n.8 (2019) ("[W]e distinguish between altering a prisoner's conditions of confinement, which generally does not require a jury trial, and sentencing a free man to substantial additional time in prison, which generally does."). *But see* John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9, 44 (2020) (arguing that the use of solitary confinement is a separate punishment requiring specific authorization through a judicial sentence).

258 A future violation hearing could be heard by the same judge, a different judge, or another body like a parole board.

259 *See* Doherty, *supra* note 55, at 1721–33, 1751–56 (discussing the Connecticut, Texas, and Rhode Island systems); MITCHELL, REITZ, WATTS & ELLIS, *supra* notes 67–68, at 12, 32, 40 and accompanying text (discussing the systems in Alabama, Indiana, and Maine).

five years of supervision with a ten-year suspended prison sentence, and then have to serve that prison time for later supervision violations.[260] The law treats this suspended custody time as part of the original punishment for the crime. Indeed, the Supreme Court has held that a suspended prison sentence of this kind triggers the constitutional right to counsel in the initial criminal case (and not just at a later revocation hearing).[261] And suspended custody time also gives rise to collateral consequences, such as deportation, even if it is never actually served.[262] The requirement of announcing the suspended custody time provides notice to the defendant of what could happen if they violate the rules of supervision.[263] It also, crucially, allows us to distinguish between administering an existing sentence and imposing a new one. If the original sentencing judge does not specify the suspended custody time, then a later violation hearing cannot be understood as administering an existing sentence. It must instead be understood as either increasing the prior sentence or imposing an entirely new sentence.[264]

To see why this is so, consider the following scenario. You are convicted of a crime, and at the sentencing hearing, the judge says: "I hereby sentence you to six months in custody followed by three years of probation. If at any time you violate the rules of probation, I may sentence you to additional custody time and probation as the law permits." This judge has not solved the *Apprendi* problem, because they have not announced an amount of suspended custody time. Therefore, the punishment for a later violation is not contained in the original sentencing order but is instead enabled by extrinsic statutes. The judge here is simply saying "you are put on notice that I can impose another sentence later for a different act." But notice is not enough to satisfy *Apprendi*. When that later act

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260 *See* Doherty, *supra* note 55, at 1753.

261 Alabama v. Shelton, 535 U.S. 654, 654 (2002). Notably, the majority rejected Justice Scalia's position, in dissent, that it would be adequate to give trial-like procedural rights at the later revocation hearing. *Id.* at 678–79 (Scalia, J., dissenting). This implies that, for right to counsel purposes, the suspended custody time is treated as part of the original sentence. The conditional sentencing theory maintains that it should also be treated that way for purposes of other Fifth and Sixth Amendment rights.

262 For example, suspended custody time can trigger federal immigration consequences even when the person does not actually serve the custody time. *See, e.g.*, Fish, *supra* note 224, at 1374–76, 1431, 1437–38 (discussing the treatment of suspended sentences in the immigration system).

263 *Cf.* Morrissey v. Brewer, 408 U.S. 471, 485–89 (1972) (discussing constitutional notice requirement).

264 *See supra* Part III (discussing the new crime and resentencing theories).

gets punished, the judge is coming up with a new sanction for new conduct, not administering the prior sentence by implementing its pre-established bundle of punishment rules. To solve the *Apprendi* problem, the judge needs to sentence you in Time 1 to the conditional custody time that can later be triggered in Time 2. Only then can the punishment for the probation violation be treated as part of the original sentencing order.

It is helpful here to think of the judge's sentence as a law-generating speech act.[265] When a judge pronounces a sentence (orally, through a written order, or both), this triggers a number of legal consequences that empower and constrain future actors. The sentencing order freezes the sentence's terms in place, makes those terms legally binding, and enables future actors to administer those terms as they have been declared. The pronouncement of a ten-year prison sentence, for example, empowers the jurisdiction's prison system to hold the defendant for a ten-year period. But the prison cannot continue keeping the defendant in custody beyond that ten-year period, because such incarceration would be unlawful.[266] If a punishment is not contained within the sentence, then that punishment cannot be imposed unless the sentence is later changed.[267] The mandatory minimum provision at issue in *Haymond*, for example, was not contained in Mr. Haymond's initial sentencing order.[268] It was therefore not a part of his original sentence, notwithstanding the fact that it could be found in the United States Code.[269] And under the conditional sentencing theory, punishment can only be imposed for a violation if that punishment was included in the original sentence. Thus, the five-year mandatory minimum in Section 3583(k) could not be applied to Mr. Haymond unless he was given a

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265 *See, e.g.*, JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 12–24 (1962) (defining a performative utterance as a statement that changes social reality, e.g., the naming of a ship).

266 *See, e.g.*, Sullivan v. Cnty. of Los Angeles, 12 Cal.3d 710, 722 (1974) (holding that a defendant can sue a county for false imprisonment for being kept in custody illegally beyond the end of a sentence); Stinneford, *supra* note 257, at 13 ("Executive officials are supposed to implement the punishments authorized by the other branches of government. They do not have the authority to enhance punishments on their own.").

267 *See, e.g.*, 18 U.S.C. § 3582(c) (enumerating the limited conditions under which a federal judge can modify a sentence of imprisonment after it has been imposed).

268 *See* Judgment in a Criminal Case, United States v. Haymond, 4:08-CR-00201 (N.D. Okla. June 21, 2010), ECF No. 150.

269 18 U.S.C. § 3583(k).

new jury trial.[270] If the sentencing order fails to include a term of punishment, that punishment does not become part of the sentence merely because it is in a statute. Even statutorily mandated punishment terms are not treated as part of a sentence unless a judge actually includes them in the sentence. If a judge issues a sentence that fails to include a mandatory minimum punishment, for example, that sentence can only be corrected by another judge through an appeal or other legal proceeding.[271] If it is not corrected, then the sentence stands regardless of whether it violates the statute. Similarly, statutes alone cannot empower a judge to punish a supervision violation without a jury trial—any such punishment must be contained in the original sentencing order for the underlying crime.

C. Resentencing through Consent and Discretion

The *Apprendi* line of cases does acknowledge several exceptions to the right to a jury trial. One exception is that there is no right to have a jury decide the fact of a prior criminal conviction.[272] So if a supervision violation is based solely on a new conviction, *Apprendi* rights are not triggered under current law.[273] There are two further exceptions that may affect the conditional sentencing theory. First is that the defendant can

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270 Mr. Haymond was given a condition that he not commit any crimes, but this condition carried no mandatory minimum sentence. Judgment in a Criminal Case, *supra* note 268, at 3. It was only subject to the default maximum sentence under the supervision statute. Under the logic of *Alleyne* and the conditional sentencing theory, any mandatory minimum for a specific type of violation would have to be spelled out in the original sentence in order to be imposed later without a jury trial. *See* Alleyne v. United States, 570 U.S. 99, 115–16 (2013). If it is not spelled out in the original sentence, then its later imposition cannot be characterized as administering that sentence.

271 *See, e.g.*, Commonwealth v. Selavka, 14 N.E.3d 933, 941 (Mass. 2014) ("[W]e conclude that even an illegal sentence will, with the passage of time, acquire a finality that bars further punitive changes detrimental to the defendant."); In re Garner v. N.Y. Dep't of Corr. Serv., 889 N.E.2d 467, 469–70 (N.Y. 2008) (holding only a sentencing judge can pronounce a supervision sentence); *see also* Bozza v. United States, 330 U.S. 160, 166 (1947) (noting that erroneous sentences can be corrected via appeals and habeas corpus proceedings).

272 *See* Almendarez-Torres v. United States, 523 U.S. 224, 224 (1998).

273 This means that a judge could potentially change the terms of a conditional sentence based on a new criminal conviction without involving a jury (although such a resentencing raises double jeopardy issues, see *supra* Section III). For violations that do not involve a new conviction (even those involving new criminal conduct), *Apprendi* rights would still be triggered. This seemingly arbitrary distinction underscores the unjustifiability of the prior convictions exception. *See* Nancy J. King, *Sentencing and Prior Convictions: The Past, The Future, and the End of the Prior-conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 552–58 (2014).

waive their right to a jury trial, most commonly by entering a guilty plea.[274] Second is that there is no jury trial right in situations where the law is merely advisory, and the judge retains discretion over the decision regardless of what facts are proven.[275] These exceptions will be considered in turn.

Per the consent exception, defendants can waive their right to jury determination of facts that increase the amount of punishment. Such a waiver could involve agreeing to the facts, or it could involve allowing a judge to decide them rather than a jury.[276] Applied to conditional sentencing, the consent exception permits a judge to later change the terms of a sentence if the defendant agrees. For example, in discretionary parole systems, the defendant affirmatively requests that a parole board change their sentence.[277] If the request is granted, the parole board will alter the terms of the sentence by lowering the amount of custody time and replacing it with supervision time and suspended custody time. This amounts to resentencing the defendant with their consent.[278] Supervisees might also waive their *Apprendi* rights as part of a negotiation. In one common scenario, if a supervisee is accused of a crime, they can be prosecuted through both a new criminal charge and a supervision violation.[279] In the plea negotiation process, the supervisee might agree to be resentenced on the supervision charge (waiving their *Apprendi* rights) in exchange for dismissal of the new criminal charge. The supervisee might also waive their *Apprendi* rights as part of the negotiation over a violation sentence. Imagine a scenario where the supervisee has committed a violation on their last week of supervision, and the judge could place them in prison for up to a year. However, this judge would rather change the sentence by extending supervision for another two years and sending the supervisee to a drug rehabilitation program. The supervisee could make a deal to waive their *Apprendi* rights, extend supervision, and avoid prison time.[280] The key in these scenarios is that the defen-

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274 Blakely v. Washington, 542 U.S. 296, 310 (2004).

275 United States v. Booker, 543 U.S. 220, 233 (2005).

276 *See* King, *supra* note 188, at 1266 ("[D]efendants convicted at trial often waive the right to a jury trial of the aggravating fact and opt for a bench trial instead or simply admit the aggravating fact.").

277 *See supra* Section I.B.

278 There are also rare cases where a person affirmatively requests custody time instead of supervision time because they find the custody time less onerous. *See* King, *supra* note 188, at 1269.

279 *See supra* note 206 and accompanying text.

280 *See* MITCHELL, REITZ, WATTS & ELLIS, *supra* note 67, at 40 (noting a similar procedure in Maine, whereby a probationer agrees to new conditions in order to

dant's *Apprendi* rights give them leverage in the negotiation process. They can waive their right to a jury trial in exchange for some benefit. If the Sixth Amendment did not apply to supervision violations, the supervisee's sentence could be lengthened or otherwise modified without involving a jury. The supervisee would then have less bargaining power because they could not force the government to expend resources on a trial. The right to a jury trial matters even in cases where no jury is empaneled, because it gives the defense more leverage to negotiate over the outcome.[281]

Where a law is merely advisory and does not bind judges, there is no right to a jury trial because proving a fact in court does not increase the minimum or maximum punishment. The most prominent example of this exception is the federal Sentencing Guidelines. In *United States v. Booker*, the Supreme Court declared that the Guidelines are nonbinding and that judges can decline to follow them.[282] This solved the *Apprendi* problem because it meant that the Guidelines no longer determined the lawful range of imprisonment. In the supervision context, a court or legislature could hypothetically try a *Booker*-style remedy by permitting judges to resentence supervisees at their discretion. In such a system a supervisee's sentence could be changed even if no violation of the rules were proven. So a judge could give someone more supervision time, more suspended custody time, and more supervision conditions whenever the judge wanted to.[283] This would raise serious due process and double jeopardy concerns.

Unlike the discretionary guidelines created by *Booker*, such a system would involve giving additional punishment without proof of a crime (or a violation). And one basic requirement of constitutional due process is that punishment can only

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avoid a violation). Also note that in many systems judges are involved in plea bargaining, so a supervisee might make such a deal directly with a judge. *See generally* Nancy King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

281 *See* Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295, 298–307 (2001) (discussing how *Apprendi* gave defendants more leverage in plea bargaining); Doherty, *supra* note 55, at 1727–29 (noting that probation takes away a defendant's negotiating leverage over the amount of punishment).

282 *See* 543 U.S. 220, 222 (2005).

283 A number of states do permit judges to add additional probation time and/or probation conditions for "good cause" without proof of a violation. *See* MITCHELL, REITZ, WATTS & ELLIS, *supra* note 67, at 11, 23, 51, 55, 59, 64, 71 (discussing policies in Alabama, Colorado, Mississippi, Missouri, New York, North Carolina, and Oregon).

be imposed for violating previously established rules.[284] Absent this requirement, our liberty could be taken away on the individual whim of an enforcement authority. The Court applied this requirement to criminal supervision in *Gagnon* and *Morrissey*, instructing that a supervisee cannot be sent to prison without adequate proof that they violated a previously announced rule.[285] This requirement should equally apply to the imposition of additional supervision and suspended custody time on a supervisee. These are criminal sanctions as well, and so they too should only be imposable for violations of established rules.[286] There is also a double jeopardy problem with a judge adding to a conditional sentence after it is imposed. The Florida Supreme Court recognized this problem in *Lippman v. State*, in which it held that imposing new probation conditions without a violation hearing violated the Double Jeopardy Clause.[287] If the rules of the sentence are locked in at the initial sentencing hearing for *Apprendi* purposes, a later decision to change them would constitute a second punishment. This is basically the same double jeopardy problem that the resentencing theory presented.[288] If a judge can go back and increase your punishment after the fact based on intervening events, you are effectively being punished twice for the same crime.[289] These due process and double jeopardy concerns would make a system of discretionary resentencing constitutionally problematic.

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284 *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (1983) (concluding in a void-for-vagueness case, specificity in criminal prohibitions is constitutionally necessary because "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections" (alteration in original) (internal quotations omitted)); Hessick, *supra* note 209, at 973–74 (collecting sources on the canonical nature of the "legality principle" in American criminal law).

285 *See* Morrissey v. Brewer, 408 U.S 471, 485–89 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); *see also* State v. Ornelas, 675 N.W.2d 74, 80 (Minn. 2004) (holding that probation cannot be revoked for a probation condition that was not imposed by the court).

286 *Cf.* King, *supra* note 188, at 1261 (pointing out that state sentencing guidelines trigger Sixth Amendment *Apprendi* rights when they determine the length of probation, meaning that more probation time counts as punishment for the crime).

287 633 So.2d 1061, 1064 (Fla. 1994) ("Thus, the double jeopardy protection against multiple punishments includes the protection against enhancements or extensions of the conditions of probation.").

288 *See supra* notes 234, 235, 236, 237, 238, 239, 240 and accompanying text.

289 *See* Ohio v. Johnson, 467 U.S. 493, 497–98 (1984) ("The Double Jeopardy Clause . . . protects against multiple punishments for the same offense.").

V
THE CONSTITUTIONAL NETHERWORLD HAS A TIME LIMIT

The conditional sentencing theory places two important constitutional limits on supervision sentences. The first limit is that the terms of the sentence must be established in the initial sentencing order and cannot be changed later at a violation hearing. So the judge is stuck with the amount of supervision time and suspended custody time that they imposed when they sentenced the original crime. This means that the federal system of supervised release is unconstitutional. It permits judges to add more supervision time and conditional custody time with each violation.[290] Many state probation systems also violate this prohibition on retroactively increasing the sentence. For example, the Wisconsin and Pennsylvania probation systems permit judges to endlessly extend probation terms after violations, and the California and Washington systems let judges impose custody time that was not part of the original sentence.[291] The second limit is that the aggregate amount of custody time that a person serves on their sentence, between the initial punishment and all of the later punishments for violations, cannot exceed the statutory maximum for the original crime. The federal system of supervised release violates this requirement, insofar as it has been interpreted to permit violation sentences that exceed the crime's maximum punishment.[292] Taken together, these two limitations prevent supervision from converting a criminal sentence into a constitutional netherworld where the supervisee can become trapped forever.

A. The Sentence Cannot Later be Increased

Under the conditional sentencing theory, a judge sentencing a supervision violation can only play out the rules of the original sentence. They cannot change those rules after the fact by adding new conditional custody time, imposing new rules, or extending the supervision term. If they do one of those things, *Apprendi* rights are triggered.

State parole systems largely follow these restrictions because they abide by the terms of the original sentence. In mandatory parole systems the defendant is given a defined period of custody followed by a defined period of parole, and a defined period of conditional custody is hanging over their head

290 *See supra* notes 106–114 and accompanying text.
291 *See infra* notes 312–317.
292 *See, e.g.*, United States v. Celestine, 905 F.2d 59, 60–61 (5th Cir. 1990); United States v. Reese, 71 F.3d 582, 588 (6th Cir. 1995).

for future violations.[293] In discretionary parole systems the parole board generally (at the defendant's request) replaces the remaining prison time with a defined period of supervision time and conditional custody time.[294] So if a defendant has three years left on their prison sentence and parole is granted, this can become three years of parole with the possibility of returning to custody for up to three years on any violations. In both kinds of systems, the supervision and custody time are not extended beyond the maximum term in the original sentence.[295] State parole systems, then, are generally valid under the conditional sentencing theory.[296] Federal supervised release and state probation systems, on the other hand, face more difficulties.

Federal supervised release is the most constitutionally problematic type of supervision in the United States. Recall how the system works.[297] At the initial sentencing hearing, the defendant is given a prison term and a defined period of supervised release.[298] If a condition of supervised release is violated, the person can be sent back to prison for a defined period of time (usually up to one, two, three, or five years in prison, depending on the nature of the underlying crime).[299] So far this is fine. But under Section 3583(h), the judge can also add an entirely new term of supervision at the end of a violation sentence.[300] When this happens, the maximum punishment for future violations is reset per Section 3583(e)(3). And for many crimes there is no statutory limit on these new sentences, so someone can keep getting additional periods of supervision and prison time *ad infinitum*.[301] For example, if a person is convicted of drug distribution and given three years

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293 RUHLAND, RHINE, ROBEY, & MITCHELL, *supra* note 89, at 13–15.

294 *Id.*

295 RHINE, MITCHELL, & REITZ, *supra* note 91, at 22.

296 This analysis is focused on parole revocations, not initial parole release decisions. David Ball has argued that denials of discretionary parole can violate *Apprendi* in cases where the parole board categorically denies release based on its factual determinations concerning the original crime of conviction. *See* W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUMB. L. REV. 893, 893 (2009).

297 *See supra* Section I.C.

298 *See* 18 U.S.C. § 3583(b). Many federal drug, sex, and terrorism crimes can carry up to a lifetime of supervised release and/or a mandatory minimum term of supervised release. *See, e.g.*, *id.* § 3583(k); Doherty, *supra* note 10, at 1003; United States v. Brooks, 889 F.3d 95, 99 (2d Cir. 2018); DOYLE, *supra* note 101, at 4–6.

299 *See* 18 U.S.C. § 3583(e)(3).

300 *Id.* § 3583(h).

301 *See* Doherty, *supra* note 10, at 1009–11; *supra* Section I.C.

of supervised release at their initial sentencing, they can be sent to prison for up to five years on a supervision violation.[302] After the first violation sentence, they can be put back on supervision and get another up to five years in prison for any subsequent violation. If they keep being found in violation, this can keep happening over and over and over again without any end point.[303] This system is unconstitutional under the conditional sentencing theory. In particular, Section 3583(h) is invalid.[304] Because of this provision, federal supervised release does not confine the judge to the custody and supervision terms set out in the original sentence. Instead, it allows a potentially unlimited number of new sentences to be imposed.

Some state probation systems have similar problems. Many states empower judges to add more probation time at a violation hearing.[305] Many states also permit judges to add new probation conditions after the sentence has been imposed.[306] These practices are unconstitutional under the con-

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302 *See* 21 U.S.C. § 841(b) (life statutory maximum sentence for several drug trafficking crimes, along with mandatory minimum supervised release terms); 18 U.S.C. § 3559(a) (crimes with life statutory maximums are Class A felonies); *id.* § 3583(b), (e)(3) (Class A felonies get you up to five years in prison for a violation); United States v. Brooks, 889 F.3d 95, 99 (2d Cir. 2018) ("We have interpreted the presence of a mandatory minimum term in 18 U.S.C. § 841(b), without a maximum, to allow the district court to impose up to lifetime supervised release notwithstanding the limits of section 3583(b).").

303 *See* United States v. Cassesse, 685 F.3d 186, 191 (2d Cir. 2012).

304 One counterargument might be that the residual lifetime of supervision and lifetime of custody available under § 3583(h) qualify as a conditional sentence. But this counterargument misunderstands the conditional sentencing theory. The theory only permits judges to impose additional punishment for supervision violations if those punishments are traceable to specific terms of suspended punishment that were announced in the original sentence. *See supra* Section IV.A. For most federal crimes, the supervised release statute does not permit a judge to impose a lifetime of suspended custody or a lifetime of suspended supervision at the initial sentencing. *See supra* notes 98–103 and accompanying text. And even if a defendant were informed at sentencing that § 3583(h) permits infinite additional sentences, this would not solve the *Apprendi* problem. Simply giving the defendant notice is not enough. There is an important distinction between "I hereby announce a specific term of suspended custody time as part of this sentence, to be possibly imposed later for specific violations" and "I hereby inform you that the law lets me give you additional sentences in the future as new punishments." The former is constitutionally permissible under *Apprendi*, while the latter is not. *See supra* Section IV.B.

305 Such states include at least Alabama, California, Colorado, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Utah, Washington, and Wisconsin (this is not an exhaustive list). *See* MITCHELL, REITZ, WATTS, & ELLIS, *supra* note 67, at 11, 20, 23, 27, 31, 35, 43, 47, 51, 55, 60, 64, 67, 71, 75, 79–80, 83, 88 & 91.

306 *See id.* at 11, 15, 20, 23, 27, 31, 35, 40, 43, 51, 55, 59, 64, 67, 71, 75, 79, 83, 88 & 91 (describing the procedures for modifying probation in Alabama, Arizona, California, Colorado, Florida, Indiana, Iowa, Maine, Massachusetts, Mis-

ditional sentencing theory. The Supreme Court has held that even an increase in monetary fines triggers the right to a jury trial under the Sixth Amendment.[307] Extensions of probation and new probation conditions should thus also trigger Sixth Amendment rights, because these generally involve greater deprivations of liberty than do fines.[308] Under the conditional sentencing theory, the duration and terms of probation need to be announced at the original sentencing hearing.[309] If a judge at a later violation hearing imposes new probation time or conditions that were not in the original sentence, that judge effectively creates a new sentence and triggers *Apprendi* rights.[310] Thus, probation can only be extended or modified if the supervisee either consents or is given a jury trial.[311]

This would be a significant restriction in many states. While some states only allow limited extensions of probation, there are others where probation can be extended indefinitely (much like federal supervised release).[312] In Wisconsin, for example, there is no ceiling on probation extensions.[313] The

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sissippi, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Utah, Washington, and Wisconsin).

307 Southern Union Co. v. United States, 567 U.S. 343, 343 (2012).

308 *See* Lippman v. State, 633 So.2d 1061, 1064 (Fla. 1994) (concluding that probation is a criminal punishment); Holcomb v. Sunderland, 894 P.2d 457, 460 (Or. 1995) (same); King, *supra* note 188, at 1261. This reasoning may not apply to probation that involves avoiding a custody sentence altogether, because in that situation probation is arguably a form of relief from punishment. *See supra* Section III.B (discussing the delayed sentencing theory).

309 A judge could also theoretically include suspended supervision time in the original sentence, which would then be imposed for any future violations. For example, a judge could give you three years of supervision with an additional three years of suspended supervision, so that you will serve between three and six years depending on whether you violate the rules. This would work the same as suspended custody time and would satisfy the requirements of the conditional sentencing theory. It would also be subject to any statutory maximums for supervision time. *See infra* Section V.B.

310 One possible exception would be if a judge imposed a conditional probation term at the original sentencing that triggered in specific circumstances. For example, if one of the original probation terms was that "if you use drugs while on probation, you may be ordered to attend a rehabilitation program," then a rehabilitation condition could be imposed later once the triggering condition was met.

311 As noted earlier, the defendant could potentially negotiate a deal to extend probation or add new conditions in exchange for a lighter sentence. *See supra* notes 279–281 and accompanying text.

312 For examples of states that limit extensions, see, e.g., 4 MISS. CODE ANN. § 47-7-37(1) (West 2018) (Mississippi law limiting probation and any extensions to a five-year cap); MO. ANN. STAT. § 559.016(3) (West 2012) (Missouri law limiting probation time plus any extensions to the statutory maximum term of one, two, or five years plus one additional year for a violation).

313 State v. Luu, 769 N.W.2d 125, 129 (Wis. Ct. App. 2009) ("The statute does not purport to place any limits on the length of time that probation may be extended."). There are statutory limits on the original grant of probation, but not

same is true in Pennsylvania.[314] People in such states can be kept on probation for up to their entire lives if a judge keeps finding them in violation. Take for example the experience of Angel Ortiz in Pennsylvania's system. In 1999, when he was eighteen years old, Mr. Ortiz was convicted of a felony and sentenced to a prison term followed by four years of probation.[315] Mr. Ortiz's probation was then extended five times through revocations: by two years in 2002, by four years in 2006, by four years in 2007, by six years in 2009, and by five years in 2018.[316] That is more than twenty years of probation extensions after the original four-year term. This pattern is relatively common in states like Wisconsin and Pennsylvania—many people become trapped on probation for a large portion of their lives because of repeated extensions.[317]

California's and Washington's probation systems have another constitutional problem—they allow judges to impose custody time that was not part of the original sentence. To see why this is unconstitutional, it is first necessary to understand the two major forms of probation.[318] Professor Fiona Doherty refers to them as the "sentenced" model and the "on-file" model.[319] In the "sentenced" model of probation, the judge must select a specific length of prison time for the crime and announce it at the sentencing hearing. This prison sentence is then either partly or fully suspended, and for future violations the supervisee can only be made to serve the remaining bal-

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on extensions. WIS. STAT. § 973.09(2) (2022) (enumerating maximum terms of probation for different crimes).

314 FRANKEL, *supra* note 13, at 123–24.

315 Court Summary at 2, Commonwealth v. Ortiz, No. CP-51-CR-0910201-1999 (Pa. Ct. Com. Pl. Nov. 11, 2002).

316 FRANKEL, *supra* note 13, at 123; Docket at 4–5, Commonwealth v. Ortiz, No. CP-51-CR-1205481-1999 (Pa. Ct. Com. Pl. Nov. 11, 2002).

317 *See* FRANKEL, *supra* note 13, at 123–24; Samantha Melamed & Dylan Purcell, *When it Comes to Probation, Pennsylvania Leaves Judges Unchecked to Impose Wildly Different Versions of Justice*, PHILA. INQUIRER (Oct. 24, 2019), https://www.inquirer.com/news/inq/probation-parole-pennsylvania-philadelphia-judges-criminal-justice-system-20191024.html?utm_campaign=2019-11-25+PSPP&utm_medium=Email&utm_source=pew [https://perma.cc/ZN6X-4MP5]; Charles R. Davis, *A Sentence that Never Ends: How Probation Kept a Pennsylvania Man Locked up Through the Pandemic—Even After his Release Date*, BUS. INSIDER (Feb. 4, 2022), https://www.businessinsider.nl/a-sentence-that-never-ends-how-probation-kept-a-pennsylvania-man-locked-up-through-the-pandemic-even-after-his-release-date/ [https://perma.cc/6T53-WUXP].

318 These two forms of probation track the earlier distinction between probation as a form of punishment and probation as a form of relief from punishment. *See supra* Section I.A.

319 Doherty, *supra* note 55, at 1702; *see also supra* notes 57–59 and accompanying text.

ance of the suspended sentence.[320] This model is consistent with the conditional sentencing theory, because all the custody time imposed for later violations is contained in the original sentence. The "on-file" model, by contrast, involves the judge accepting a conviction but declining to issue a sentence during the probation period.[321] If the defendant gets through probation without any violations, they are rewarded with a mitigated sentence that may involve no custody time. This model is constitutional under the delayed sentencing theory, because the violation only triggers a previously delayed hearing, it does not increase the lawful range of punishment.[322] However, a judge cannot both impose custody time on the defendant and delay the sentencing, because custody time is necessarily part of a criminal sentence.

States use both "sentenced" and "on-file" probation systems, and the conditional sentencing theory is generally consistent with both these models.[323] However, California and Washington practice a particular version of "on-file" sentencing that is constitutionally problematic.[324] In these states a judge can suspend the imposition of a sentence (as in the "on-file" model) and also give the defendant a period of custody time as a "condition of probation."[325] If the defendant then violates their probation down the line, the judge can impose a new sentence

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320 *Id.* at 1721–23.

321 *Id.* at 1734.

322 *See supra* notes 241–245 and accompanying text.

323 *See* Doherty, *supra* note 55, at 1719–72 (describing "sentenced" and "on-file" probation systems in Connecticut, Texas, California, Rhode Island, New York, Georgia, Michigan, and Illinois); MITCHELL, REITZ, WATTS, & ELLIS, *supra* note 67 (describing both "on-file" and "sentenced" probation systems in twenty-one states).

324 In California the "on-file" probation model is called probation with "imposition of sentence suspended," whereas the "sentenced" model is called probation with "execution of sentence suspended." *See* CAL. PENAL CODE § 1203.1(a) (West 2023); People v. Segura, 188 P.3d 649, 656 (Cal. 2008) ("A trial court grants probation by suspending the imposition of a sentence or imposing a sentence and suspending its execution."); JEREMY PRICE, FIRST DIST. APP. PROJECT, PROBATION, MANDATORY SUPERVISION, PAROLE, AND POSTRELEASE COMMUNITY SUPERVISION: UNDERSTANDING THE DIFFERENCES 10–11 (2021).

325 *See* CAL. PENAL CODE § 1203.1(a) (West 2023); WASH. REV. CODE § 9.95.210(2) (2023); People v. Camillo, 198 Cal. App. 3d 981, 986 (1988) ("Imposition of sentence was suspended and defendant was placed on probation on condition she be incarcerated in the county jail for 30 days and pay a fine."); League of Women Voters of Cal. v. McPherson, 145 Cal. App. 4th 1469, 1475 (2006) ("[W]here a probationer is ordered to serve time in a local facility because either imposition or execution of sentence has been suspended, he or she has not been imprisoned for the conviction of a felony, but has been confined as a condition of probation . . .").

up to the statutory maximum for the underlying crime.[326] This practice is unconstitutional because it is neither a delayed sentence nor a conditional sentence. The judge already imposed punishment by giving the defendant custody time at the original sentencing hearing, and so any later custody time constitutes a second punishment. Furthermore, the original sentence contained no suspended custody time, and so future punishments are not traceable to it. For a probation sentence to be constitutionally valid, then, it must either (1) be a true delay of the sentence wherein no custody time is imposed, or (2) enumerate all of the suspended custody time that the defendant can serve for later violations. If a probation sentence does neither of these things, then the defendant keeps their *Apprendi* rights at any violation hearing.

The conditional sentencing theory thus places several important limits on criminal supervision. This gives rise to a question—if these limits were widely adopted in American law, how might judges and prosecutors respond? One prediction might be that they would enlarge sentences on the front end to make up for their inability to do so on the back end. It is indeed plausible that judges and prosecutors, especially in more serious cases, would increase the up-front supervision time and suspended custody time if they knew they were limited to the punishment contained in the original sentence.[327] At the most extreme, they might even order a lifetime of supervision and suspended custody time. There are, however, some legal and practical limitations on such increases. The first limit is statutory maximums. Criminal sentences are normally subject to maximum terms of supervision, usually of only a few years for most types of crime.[328] Unless a legislature eliminated these maximums, judges would remain constrained by them. A sec-

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326 *See* People v. Howard, 946 P.2d 828, 832 (Cal. 1997); PRICE, *supra* note 324, at 10.

327 For example, in the state of Washington judges sentencing misdemeanors commonly impose suspended sentences of a full year in custody, even for relatively minor crimes, so that they can impose up to a year on the defendant for any future probation violations. Fish, *supra* note 224, at 1375; *see, e.g.*, State v. Marshall, 17 Wash. App. 2d 1016, 1016 (2021) (D.U.I. with 360 day suspended sentence and one day of jail time); State v. Busev, 189 Wash. App. 1015, 1015 (2015) (shoplifting charge with 300 day suspended sentence and 64 days of time served); State v. Leavitt, 27 P.3d 622, 623 (Wash. Ct. App. 2001) (violating a protective order charge with 363 day suspended sentence and two days of time served).

328 *See, e.g.*, 18 U.S.C. § 3583(e)(3), (h) (maxima for federal supervised release); WIS. STAT. § 973.09(2) (2023) (maxima for Wisconsin probation); ARIZ. REV. STAT. ANN. § 13-902 (2023) (maxima for Arizona probation); CAL. PENAL CODE § 1203.1(a), (l) (West 2023) (maxima for California probation); IND. CODE § 35-50-

ond limit is provided by the sentencing process. If every term of a supervision sentence must be enumerated at the initial sentencing hearing, then those terms will be determined within the substantive and procedural context of the original criminal case. And several institutional mechanisms regulate such sentences, including sentencing guidelines,[329] the plea-bargaining market,[330] and jurisdiction-specific sentencing norms.[331] These mechanisms will produce a range of sentencing outcomes that depend on the specific circumstances of each particular case. It is unlikely that defendants will regularly be sentenced to a lifetime of criminal supervision, except in especially serious cases.[332] Similarly, judges will not always impose the maximum possible suspended custody time.[333] By contrast, in the status quo defendants in several jurisdictions receive possible lifetime sentences on supervision by default. In the federal system, and in states like Wisconsin and Pennsylvania, certain supervision sentences necessarily carry with them the possibility of never escaping the criminal justice system.[334] The conditional sentencing theory would at least require judges in these jurisdictions to impose such never-ending sentences on the front end. To sentence someone to a lifetime of supervision a judge must make an explicit decision that, based on this specific crime, this person needs to be in the system forever.

3-1 (West 2023) (maxima for Indiana misdemeanor probation); N.Y. PENAL LAW § 65.00(1)(b) (McKinney 2014) (maxima for New York probation).

329 *See* King, *supra* note 188, at 1246–47 (noting that several state guideline systems specify probation lengths).

330 *See* Doherty, *supra* note 55, at 1723–27, 1734–41 (describing plea bargain negotiations in Connecticut over supervision sentences, which include negotiations over supervision time and suspended custody time).

331 These norms include local sentencing norms particular to a courthouse, as well as state-law proportionality requirements enforced by appellate judges. *See* Fish, *supra* note 224, at 1415–16 (discussing local sentencing norms); Julia Fong Sheketoff, Note, *State Innovations in Noncapital Proportionality Doctrine*, 85 N.Y.U. L. REV. 2209, 2218–2230 (2010) (describing various states' sentencing proportionality doctrines in non-capital cases, which are significantly more robust than the United States Supreme Court's).

332 Sentences of a lifetime on supervision are normally only imposed up front for especially serious crimes, such as violent crimes or sex-related crimes. MITCHELL, REITZ, WATTS, & ELLIS, *supra* note 67, at 6; *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-902(E) (2023); COLO. REV. STAT. ANN. § 18-1.3-1004 (2023); MO. REV. STAT. § 559.106(1) (West 2012); 18 U.S.C. § 3583(k).

333 *See, e.g.*, People v. Ramirez, 159 Cal. App. 4th 1412, 1418 (2008) (case where judge imposed a suspended custody term below the available maximum); Doherty, *supra* note 55, at 1736–41 (describing probation sentences with a negotiated "cap" that limits possible custody time to an agreed-upon number below the statutory maximum).

334 *See supra* notes 106–114, 312–317 and accompanying text.

B. The Sentence Cannot Exceed the Statutory Maximum

Under the conditional sentencing theory, the time spent in prison for violation sentences cannot exceed the maximum sentence for the underlying crime. This is because conditional custody time is part of the original sentence. It is therefore attributable to the underlying crime, and subject to that crime's maximum punishment terms. For example, consider a crime that carries a maximum of five years in prison. When sentencing such a crime, a judge could impose a combination of prison time and suspended prison time that adds up to no more than five years. If the judge gave three years' prison time and three years' suspended prison time, that would be an illegal sentence because the total time would be six years. And the same logic applies to supervision time. If a criminal statute carries a maximum amount of supervision time, then the judge cannot exceed that number through later violation sentences.

A legislature can, if it chooses, provide for a longer statutory maximum to accommodate possible violation sentences.[335] By doing so, it would be effectively lengthening the statutory maximum punishment to account for supervision-based punishment. So in the prior example, if the statute contained a five-year maximum prison term and an additional one-year term for violation sentences, the real maximum would be six years. However, if a legislature is to extend the maximum in this way it must do so explicitly. If the statute is silent or ambiguous, then it should not be construed as lengthening the maximum sentence.[336]

State probation and parole systems generally have no problem following this restriction. In state probation systems, the judge at a violation hearing is normally limited by the range of sentences in the underlying criminal statute.[337] In state

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335 For example, California's parole statute provides for up to three years of parole in most non-life cases, and limits additional custody time in such cases to no more than four years. CAL. PENAL CODE § 3000(b)(1), (6) (West 2023). This parole period cannot be fit into the statutory maximum for most underlying crimes, because most felonies in California lack a traditional sentencing range (e.g., something like "between one and ten years"). California uses a determinate sentencing system with a "triad" of possible sentences, for example sixteen months, two years, or three years. CAL. PENAL CODE § 1170(h)(1) (West 2023). In this system, California judges must pick one of the three numbers in the triad. Because these crimes lack traditional sentencing ranges, the statutory provision for parole sentences effectively increases the maximum punishment for the underlying crime.

336 *See generally* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 924–31 (2020).

337 *See supra* notes 67–70 and accompanying text.

parole systems, a violation can normally only return a person to prison for the remaining duration of the original sentence.[338]

Federal supervised release, on the other hand, proves troublesome yet again. Federal judges have interpreted the supervised release law to allow violation sentences that exceed the maximum penalty for the underlying crime.[339] In *United States v. Celestine*, for example, the defendant Mr. Celestine was arrested for shoplifting from a store on a military base.[340] He pled guilty to a misdemeanor charge for theft of government property valued at less than $100. This crime carries a maximum penalty of one year in prison, and Mr. Celestine was sentenced to eight months in custody followed by one year of supervised release.[341] He was later found in violation of his supervised release, and the judge gave him an additional one year in prison for the violation.[342] Celestine thus spent twenty months in prison for a crime with a maximum punishment of twelve months. This reveals yet another troubling feature of federal supervised release: it can keep you in prison longer than a year for a misdemeanor conviction.[343]

Justice Gorsuch's plurality opinion in *Haymond* expresses significant doubts about the idea that a violation sentence can exceed the maximum punishment for the underlying crime.[344] However, the specific holding in *Haymond* concerned only the five-year mandatory minimum punishment in Section 3583(k), not the increased maximum.[345] The conditional sentencing theory vindicates the plurality's doubts. A defendant's total

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338 *See* RHINE, MITCHELL, & REITZ, *supra* note 91, at 22; United States v. Haymond, 139 S. Ct. 2369, 2377 (2019) ("But here, too, the prison sentence a judge or parole board could impose for a parole or probation violation normally could not exceed the remaining balance of the term of imprisonment already authorized by the jury's verdict.").

339 *See, e.g.*, United States v. Celestine, 905 F.2d 59, 61 (5th Cir.1990); United States v. Wright, 2 F.3d 175, 180 (6th Cir. 1993); United States v. Colt, 126 F.3d 981, 983 (7th Cir. 1997); United States v. Purvis, 940 F.2d 1276, 1276 (9th Cir. 1991); United States v. Robinson, 62 F.3d 1282, 1282 (10th Cir. 1995); United States v. Proctor, 127 F.3d 1311, 1311 (11th Cir. 1997).

340 905 F.2d at 60.

341 *Id.*

342 *Id.*

343 Arguably this increase in maximum punishment would convert the crime from a misdemeanor into a felony. *See* 18 U.S.C. §§ 3559(a)(6)–(8). That change carries with it additional procedural rights, such as the right to indictment by a grand jury. *See Celestine*, 905 F.2d at 60; Underhill & Powell, *supra* note 35, at 311.

344 *See* United States v. Haymond, 139 S. Ct. 2369, 2383–84 (2019) (discussing the potential unconstitutionality of revocation sentences that exceed the statutory maximum of the underlying crime).

345 *Id.* at 2382 n.7.

aggregate prison time on the initial sentence and later supervision violations cannot exceed the statutory maximum for the underlying crime. The punishment for a violation is part of the punishment for the original crime, and the federal supervised release statute does not purport to increase the maximum sentence for any crime.[346] A federal supervisee should therefore not serve more time in custody, between the initial sentence and the violation sentences, than the law permits for their original crime.

VI
THE CONSTITUTIONAL LAW OF MASS INCARCERATION

Today's criminal justice system would be unrecognizable to the Framers of the Constitution. Prior to 1787 criminal cases were decided by local juries without the use of lawyers, trials were ubiquitous and short, and punishments were mandatory (frequently the death penalty) with no separate sentencing phase.[347] Over the ensuing centuries, and especially over the last fifty years, our system has transformed into a vast case processing machinery that now confines two million people.[348] The major features of this system—plea bargains, criminal supervision, judicial sentencing, prosecutorial and police agencies—are latter-day innovations.[349] The Bill of Rights was written for a world of local trial-based justice administered by judges and lay juries. Today that world has been replaced by a modern system of municipal bureaucracies that process people into custody with only the occasional trial.[350] Given this momentous change, what role can an Eighteenth-Century Constitution play in a Twenty-First Century criminal justice system?

The story of how we got from the Framers' system to the current one is a story of institutional innovations. And some of the biggest innovations share a common feature: they make incarceration more efficient by circumventing the rights of the accused.[351] Plea bargaining was the most important such in-

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346 *See* 8 U.S.C. § 3583(e)(3) (providing penalties for supervision violations).

347 *See* Stephanos Bibas, Apprendi *at 20: Reviving the Jury's Role in Sentencing*, 99 N.C. L. REV. 1189, 1190–91 (2021); Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692–94 (2010).

348 SAWYER & WAGNER, *supra* note 13.

349 *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 13–27 (2012).

350 *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL 20 (2021) ("[S]ince 1995 the guilty plea rate has remained above 90 percent.").

351 This pattern could justify special scrutiny of changes to criminal law, sometimes called an "antinovelty principle." The criminal law context is one where novelty is uniquely threatening to constitutional rights, given the enduring

novation, because it provided a way of avoiding jury trials. Mass incarceration at the present scale would be impossible without plea bargains because trials would eat up the system's resources.[352] Criminal supervision is another such innovation. It widens the system's net to nearly four million additional people and provides an easy way to imprison those people without the normal procedural hurdles.[353] There are other innovations that also diminish rights to expand the system, including the creation of mass misdemeanor courts, the development of surveillance and policing technologies, and the privatization of law enforcement functions.[354] All these changes create a dilemma for the judiciary. How can it preserve the constraints in the Bill of Rights as the system evolves to shed them? Contemporary judges have adopted two basic approaches to this dilemma. One approach is to defer to the state and let criminal justice institutions evolve in ways that circumvent rights. The other is to provide meaningful constraints by translating Eighteenth-Century rights into modern institutional contexts.

In *Haymond*, the opinions of Justices Breyer and Alito embody two different ideologies of constitutional deflation. Breyer embraces a pro-government brand of constitutional pragmatism.[355] He agrees with the plurality that the mandatory minimum five-year sentence in *Haymond* is unconstitutional, but he does so on the narrowest possible grounds by confining his reasoning to the specific facts.[356] He then cautions that "in light of the potentially destabilizing consequences, I would not

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political imperative to expand prosecutions. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1407 (2017) (describing and arguing against the antinovelty principle); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508–11 (2001) (describing the development of criminal law as a one-way ratchet leading to ever-greater liability, and in particular legislatures' incentives to expand criminal law's net).

352 *See* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205, 205 (2021); HESSICK, *supra* note 350, at 32–34.

353 *See supra* Section II.A.

354 *See, e.g.*, Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 959–60 (2018); Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 19 (2017); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 49 (2004); SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 265 (2019); Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1343 (2018); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1171–93 (1999).

355 *See* Mark S. Kende, *Constitutional Pragmatism, the Supreme Court, and Democratic Revolution*, 89 DENVER U. L. REV. 635, 651–53 (2012) (discussing Breyer's "democratic pragmatism," which involves frequent use of balancing tests and deference to state interests).

356 *See* United States v. Haymond, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring).

transplant the *Apprendi* line of cases to the supervised-release context."[357] Hence he will defer to the government on the Sixth Amendment issue, in order to avoid disrupting the current structure of criminal supervision. This approach is consistent with Breyer's opinions in other criminal cases concerning topics like judicial sentencing guidelines, the government's power to collect DNA evidence, the criminalization of firearms, and the right to confront witnesses.[358] He avoids interpreting rights too broadly so as not to interfere with the machinery of the state. Justice Alito, by contrast, embraces narrow formalism combined with constitutional originalism.[359] He draws a hard line at the judgment and sentence—after these are imposed, the Sixth Amendment no longer applies.[360] He also points out that criminal supervision did not exist at the Founding, and that loosely analogous practices like whipping prisoners and releasing convicts on bond were not understood to require a jury.[361] Alito's logic, it seems, is that juries should only be used as they were in the late 1700s, without regard to later institutional developments that the Founders could not have anticipated. These two approaches start from different methodological premises, but they achieve the same basic result in the criminal justice context. Both the narrow formalism of Alito and the deferential pragmatism of Breyer help to expand incarceration. They do so by shrinking constitutional rights and enabling the system to imprison more efficiently.[362]

The *Apprendi* cases, including the plurality in *Haymond*, represent a more functionalist approach. They apply the Sixth Amendment to modern criminal justice institutions by treating it as a far-reaching principle that transcends institutional forms. Under this approach, the rule that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury" applies even in complex modern prosecu-

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357 *Id.* at 2385.

358 *See* Maryland v. King, 569 U.S. 435, 439–66 (2013) (joining Justice Kennedy's opinion); Bullcoming v. New Mexico, 564 U.S. 647, 675–84 (2011) (joining Justice Kennedy's dissent); District of Columbia v. Heller, 554 U.S. 570, 681–723 (2008) (Breyer, J., dissenting); United States v. Booker, 543 U.S. 220, 326–32 (2004) (Breyer, J., dissenting); Apprendi v. New Jersey, 530 U.S. 466, 555–66 (2000) (Breyer, J., dissenting).

359 *See Haymond*, 139 S. Ct. at 2386–400 (Alito, J., dissenting).

360 *See id.* at 2393–95, 2398–400.

361 *Id.* at 2397–98.

362 For an insightful critique of the Supreme Court's deference to carceral expansion, see Rachel E. Barkow, *The Court of Mass Incarceration*, 2021-2022 CATO SUP. CT. REV. 11, 17–31 (2022).

tions that have multiple post-conviction phases.[363] *Apprendi*-style functionalism gives little weight to whether a fact is formally labeled as an "element," a "sentencing enhancement," or a "guideline."[364] If proving that fact increases the possible sentencing range, then it needs to be proven to a jury beyond a reasonable doubt. This preserves the right to a jury as a fundamental norm of American criminal law, even as our institutions evolve.[365] Unlike Alito's narrow brand of originalism, it does not confine the jury to the specific form it took in the late Eighteenth Century. Yet this approach is also consistent with a different kind of constitutional originalism. Numerous scholars have argued that originalist judges should focus not on the specific applications the Framers anticipated, but instead on the public meaning of the principles that the Constitution established.[366] In this more capacious version of originalism, constitutional rules like the right to a jury trial are abstracted away from the specific institutional context of the Eighteenth Century. The work of constitutional law is to translate the principles in the original document into our very different modern world. And numerous justices, including justices Scalia, Thomas, and Gorsuch, have embraced this version of originalism in the criminal justice context.[367] The *Haymond* plurality, in particular, focuses on the importance of the criminal jury to

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363 U.S. CONST. amd. VI.

364 *See Haymond*, 139 S. Ct. at 2380 ("Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.' Calling part of a criminal prosecution a 'sentence modification' imposed at a 'postjudgment sentence-administration proceeding' can fare no better."); Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.").

365 Another good illustration is Orin Kerr's theory that courts adjust the scope of the Fourth Amendment over time in response to technological or institutional changes that expand government power. *See* Orin S. Kerr, *An Equilibrium-adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 476 (2011).

366 *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3–4 (2011); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1266 (1993); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 453 (2018); James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 436 (2013).

367 *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 30–41 (2001) (opinion by Scalia); Apprendi v. New Jersey, 530 U.S. 466, 468–97 (2000) (opinion joined by Scalia and Thomas); United States v. Booker, 543 U.S. 220, 303, 313 (2005) (constitutional holding joined by Scalia and Thomas); *Haymond*, 139 S. Ct. at 2371–85 (plurality opinion by Gorsuch). The appeal of this approach to original-

the authors of the Constitution.[368] As the plurality suggests, the functionalist approach embodied in *Apprendi* is especially appropriate in the Sixth Amendment context.[369] There is strong historical evidence that the Framers saw juries as the main constitutional check on government abuses and deprivations of liberty.[370] As the modern drift of criminal law diminishes the jury's role, one job of constitutional law should be to reassert its importance.[371] As William Stuntz observed, "constitutional law adds the most value when it advances interests that the political process will not advance on its own."[372]

The conditional sentencing theory is also an example of this functionalist approach. It preserves the right to a jury trial by translating it into institutional contexts the Framers did not anticipate: probation, parole, and supervised release. These

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ists may help explain the unusual ideological lineups in these cases, which do not divide the justices into conventional "liberal" and "conservative" camps.

368 *See Haymond*, 139 S. Ct. at 2375–79.

369 *Id.* at 2376 ("Because the Constitution's guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt every fact which the law makes essential to [a] punishment that a judge might later seek to impose." (alteration in original) (internal quotation marks omitted)); *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PENN. L. REV. 33, 36–37 (2003) (arguing that the jury's central role in our constitutional structure justifies an expansive view of *Apprendi* for mandatory sentencing laws); *see also* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship*, Stigma, and the Civil-criminal Distinction*, 38 AM. J. CRIM. L. 117, 123 (2011) (arguing that *Apprendi* should be applied to some forms of civil detention as well); Daniel Epps & William Ortman, *The Informed Jury*, 75 VANDERBILT L. REV. 823, 884–89 (arguing that the prior convictions exception to *Apprendi* should be eliminated, and that juries should be informed of the sentencing consequences of their decisions to convict, acquit, or nullify enhancements based on prior convictions); Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 559, 608 (2022) (arguing that the right to a jury trial extends to petty offenses).

370 *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869–76 (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–85 (1991).

371 The *Haymond* plurality's extended quotation of Blackstone makes this point well. *See Haymond*, 139 S. Ct. at 2384 ("In what now seems a prescient passage, Blackstone warned that the true threat to trial by jury would come less from 'open attacks,' which 'none will be so hardy as to make,' as from subtle 'machinations, which may sap and undermine i[t] by introducing new and arbitrary methods.' This Court has repeatedly sought to guard the historic role of the jury against such incursions. For 'however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.'" (alterations in original) (citations omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343–44 (1769)).

372 William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818 (2006) (paraphrasing John Hart Ely).

systems did not exist at the Founding, but today they control nearly four million people.[373] The practical consequence of the conditional sentencing theory is not that it will force these systems to actually empanel juries. Much like with the remedial holding in *Booker*, the Sixth Amendment can limit supervision by defining the boundary of what is permitted in the absence of juries.[374] Sentencing guidelines cannot be mandatory without juries.[375] Similarly, sentences for supervision violations cannot add new punishment without juries. The federal supervised release system illustrates why such limits are so important. It creates an entire second criminal justice system that takes over after the prison sentence is complete. This second system contains few procedural protections for defendants and can produce an unlimited number of supervision extensions and additional prison terms.[376] It is a constitutional monstrosity.[377] And that is the danger of abandoning the Sixth Amendment in the face of institutional change. Doing so allows the government to build new systems that will do the work of criminal courts without the burden of defense rights. The government will inevitably search out methods of incarcerating people more efficiently. Jury trials, precisely because they are so burdensome, are a powerful check on such carceral expansion.

CONCLUSION

Criminal supervision was originally conceived as a merciful alternative to imprisonment. Today it has metastasized into a sprawling system of incarceration and social control. Nearly four million people are caught in its net.[378] Supervision makes it much easier to imprison these people. It does so by depriving them of rights—the right to a jury, to confront witnesses, to

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373 KAEBLE, *supra* note 13, at 1.

374 *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PENN. L. REV. 1631, 1633, 1635 (2012) (praising the post-*Booker* Guidelines system as rational, transparent, and less harsh).

375 *See* United States v. Booker, 543 U.S. 220, 243–44 (2005).

376 *See supra* notes 106–114 and accompanying text.

377 *See, e.g.*, *Haymond*, 139 S. Ct. at 2384 ("If the government and dissent were correct, Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything. At oral argument, the government even conceded that, under its theory, a defendant on supervised release would have no Sixth Amendment right to a jury trial when charged with an infraction carrying the death penalty.").

378 KAEBLE, *supra* note 13, at 1.

exclude evidence, to have charges proven beyond a reasonable doubt. By circumventing these rights, supervision turns the criminal justice system into a tool for managing people's lives through the threat of incarceration. It creates a constitutional underclass of people whose liberty can be deprived with relative ease. People on supervision cycle in and out of prison for things like traveling without permission, associating with people who have criminal records, missing drug tests, failing to complete treatment programs, and facing new criminal charges. And when they commit such violations, supervision is often extended. They can become trapped in this constitutional netherworld for years, decades, even a lifetime.

This Article has sought to articulate constitutional limits for supervision. It has done so by embracing the project of *Apprendi* and its progeny: to translate the Sixth Amendment right to a jury trial into the context of complex modern criminal justice institutions. The conditional sentencing theory is an attempt at such translation. This theory explains how supervision can be structured so that it does not trigger the right to a jury trial. It takes seriously the ideas that criminal supervision is part of the sentence for the original crime, and that that sentence must end once all the punishment it contains has been suffered. The theory requires that the terms of supervision must be laid out explicitly in the initial sentence, and that any future punishments for violations of supervision must be contained in that initial sentence. This means that criminal supervision is not a blank check to control someone's life indefinitely. Judges cannot later add more rules, more supervision time, and more custody time that was absent from the original sentence. The sentence must actually end when it was supposed to end. This requirement limits the government's power to keep people trapped in a never-ending cycle of violation, extension, and incarceration.