

THE YALE LAW JOURNAL

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Apprendi, Punishment, and a Retroactive Theory of Revocation

ABSTRACT. In *Apprendi v. New Jersey*, the Supreme Court announced what is now a seminal rule of constitutional criminal procedure: any fact that increases the penalty for a crime beyond the prescribed statutory maximum cannot be found by a judge, but must be submitted to a jury and proved beyond a reasonable doubt. The doctrine arising from *Apprendi* and its descendant cases had, until recently, been confined to the sentencing context. But in 2019, the Court in *United States v. Haymond* considered a potential expansion of *Apprendi* to judicial revocations of federal supervised release. The Court ultimately handed down a 4-1-4 decision with minimal precedential value, but since then, there has been a swell of scholarship discussing the applicability of the jury right to this new context. Much of this discussion has centered around the questions of constitutional interpretation raised by *Haymond*, and whether a revocation proceeding is part of a “criminal prosecution” as specified by the text of the Sixth Amendment.

This Note argues for a different approach. Revisiting the *Apprendi* cases and their contemporary scholarly treatment reveals that the doctrine was rooted not in novel methods of textual interpretation, but in fundamental principles of substantive criminal law: what constitutes “crime” and “punishment.” Existing scholarship has not provided an answer to how these principles might apply to a function that takes place *after* sentencing and final judgment, like revocation of supervised release. I therefore introduce a retroactive theory of revocation that rationalizes *Apprendi*’s definition of crime and punishment within this context. Under this theory, revocation proceedings are unconstitutional not because they are directly covered by the Sixth Amendment right to a jury trial, but because they *circumvent* a person’s original jury trial by allowing them to be “punished” for a different “crime.” This means that *every* revocation of supervised release violates *Apprendi*. Moreover, the retroactive theory suggests that other forms of post-judgment penalties, like extensions of probation and criminal fees, can similarly run afoul of the Sixth Amendment’s protections.

AUTHOR. Yale Law School, J.D. 2024; Princeton University, B.A. 2018. Special thanks to Jenny E. Carroll for her guidance and support, and without whom this Note would never have been written. I am also indebted to Eric Fish, Pragma Malik, and Yixuan Liu for comments on earlier drafts, and to Kenneth P. Coleman and the editors of the *Yale Law Journal* for greatly improving this Note through their thoughtful feedback.



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INTRODUCTION

The role of the criminal jury as the ultimate arbiter of guilt is a notion that is deeply embedded in the American psyche. Even today, as the frequency of criminal jury trials remains at historic lows,¹ televised, high-profile criminal trials like those of Ted Bundy,² O.J. Simpson,³ and more recently Derek Chauvin⁴ have maintained Americans' familiarity with the drama and suspense of waiting for a foreperson to utter those fateful words: "guilty" or "not guilty."

But in a series of twenty-first-century cases, the Supreme Court seemed to suggest that the jury had a similarly significant role to play in criminal sentencing, the determination of appropriate punishment for an offense.⁵ In *Apprendi v.*

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1. See Emanuella Evans, *Jury Trials Are Disappearing. Here's Why*, INJUSTICE WATCH (Feb. 17, 2021), <https://www.injusticewatch.org/news/2021/disappearing-jury-trials-study> [<https://perma.cc/5E9N-TBSH>] (noting that less than two percent of federal criminal cases proceeded to a jury trial in the twelve-month period ending in March 2020); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, JUDICATURE (2017), <https://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter> [<https://perma.cc/L89V-N375>] (same).
 2. See generally POLLY NELSON, *DEFENDING THE DEVIL: MY STORY AS TED BUNDY'S LAST LAWYER* (2019) (recounting the story of "[r]epresenting Ted Bundy . . . [in] the case of a lifetime").
 3. See Jim Newton, *Simpson Not Guilty: Drama Ends 474 Days After Arrest*, L.A. TIMES (Oct. 4, 1995, 12:00 AM), <https://www.latimes.com/local/la-oj-anniv-verdict-story.html> [<https://perma.cc/35P3-JBRX>] (recounting the conclusion of "one of history's most riveting courtroom dramas").
 4. See Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (Apr. 21, 2021, 12:13 PM), <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations> [<https://perma.cc/C92D-WZWL>] (recounting the conclusion of "one of the most consequential trials of the Black Lives Matter era").
 5. See Nancy Gertner, *Apprendi/Booker and Anemic Appellate Review*, 99 N.C. L. REV. 1369, 1370 (2021) ("Beginning with *Apprendi*, the U.S. Supreme Court ruled that the Constitution required what appeared to be a new role for the twentieth-century jury—namely a role in sentencing."). In fairness, criminal juries had long played an important role in sentencing in *capital* cases, which often involved bifurcated criminal proceedings with separate "guilt" and "penalty" stages. See Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 356–57 (2010) (noting that following the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), many states modeled their capital procedures on the Model Penal Code, which required "a bifurcated procedure in which the determination of guilt and the determination of the appropriate penalty were to be considered in two separate proceedings"). Notably, the Supreme Court has explicitly spoken on the matter in this context, prohibiting "mandatory" death penalty procedures, see *Woodson v. North Carolina*, 428 U.S. 280, 280 (1976), and instituting a variety of constitutional requirements for sentencing in capital cases, see, e.g.,

New Jersey, Charles C. Apprendi, Jr. was convicted of an offense carrying a statutory maximum of ten years of imprisonment.⁶ During sentencing proceedings, a state judge found that his crime was racially motivated and, as a result, sentenced Mr. Apprendi to twelve years in prison.⁷ The Supreme Court reversed, famously holding that except for the fact of prior conviction, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁸

Apprendi was, by all accounts, a seminal decision in the law of criminal procedure.⁹ It appeared to declare for the first time that the criminal jury had a constitutional role to play not only in deciding between guilt and innocence, but in sentencing—determining how severe a guilty person’s penalty should be.¹⁰ While *Apprendi* is often described as establishing strict, formalist rules for sentencing, the doctrine is based on the functionalist idea that a judge’s sentencing decision can encroach upon the province of the jury by imposing a penalty greater than what was authorized by the jury’s verdict.¹¹ In the ensuing decades, the Court continued to build on this principle, extending *Apprendi* to the capital context,¹² invalidating enhancements under state sentencing schemes,¹³ and

Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that the Eighth Amendment requires that juries “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” (emphasis omitted)). See generally Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (noting the significant differences in constitutional standards for sentencing in capital and noncapital cases and arguing for an abandonment of this two-tiered approach).

6. Apprendi v. New Jersey, 530 U.S. 466, 469-70 (2000).

7. *Id.* at 470-71.

8. *Id.* at 490.

9. See, e.g., Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 388 (2002) (“*Apprendi* is by any measure a landmark case . . .”); Douglas A. Berman, *Appraising and Appreciating Apprendi*, 12 FED. SENT’G REP. 303, 303 (2000) (“*Apprendi* is indisputably a significant decision for modern sentencing reforms.”); Erwin Chemerinsky, *Supreme Court Review: A Dramatic Change in Sentencing Practices*, 36 TRIAL 102, 102 (2000) (“*Apprendi v. New Jersey* is one of the most important U.S. Supreme Court decisions in years.”).

10. See Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 622 (2004) (“[*Apprendi* uprooted] the usual practice . . . for juries to decide guilt and for judges to decide punishment”); Carissa Byrne Hessick, *The Sixth Amendment Sentencing Right and Its Remedy*, 99 N.C. L. REV. 1195, 1196 (2021) (“*Apprendi v. New Jersey* ushered in a new doctrine of constitutional criminal procedure: the right to a jury trial of facts that increase criminal sentences.”).

11. See *infra* Section I.A.

12. See Ring v. Arizona, 536 U.S. 584, 588-89 (2002).

13. See Blakely v. Washington, 542 U.S. 296, 303-05 (2004).

rendering the Federal Sentencing Guidelines advisory.¹⁴ At the 2004 Ninth Circuit conference, Justice Sandra Day O'Connor remarked that the *Apprendi* expansion to state sentencing guidelines had caused a “[n]umber 10 earthquake” in criminal sentencing.¹⁵

Today, the next potential candidate for *Apprendi*'s expansion is the institution of federal supervised release, the dominant form of criminal supervision in the federal system.¹⁶ While commonly spoken of in the same breath as probation and parole,¹⁷ federal supervised release is a unique system of criminal supervision because it is imposed *in addition* to a term of imprisonment, rather than as a form of relief from an existing prison term.¹⁸ For example, in a traditional state parole system, a person may be granted parole after serving one-half of their prison sentence.¹⁹ If their parole is revoked, they would return to prison to serve at most the remainder of that original term of imprisonment.²⁰ On the other hand, an individual on federal supervised release has by definition already served their term of imprisonment imposed by the sentencing court. When a judge revokes a term of supervised release, she thus necessarily imposes new prison time on top of what was previously administered. Notably, this means that revocation of supervised release imposes additional punishment without the protection of

14. See *United States v. Booker*, 543 U.S. 220, 243-44 (2005).
15. Douglas A. Berman & Steven L. Chanenson, *State Sentencing in the Post-Blakely Era*, 4 OHIO ST. J. CRIM. L. 27, 27 & n.2 (2006).
16. See generally *United States v. Haymond*, 139 S. Ct. 2369 (2019) (evaluating the constitutionality of a federal supervised-release statute under *Apprendi* and returning a split 4-1-4 decision).
17. See Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 615 n.200 (2020) (collecting cases from appellate courts that have treated supervised release as constitutionally indistinguishable from other forms of criminal supervision). This Note was partially inspired by my experience at a federal public defender's office, where the attorneys and judges in federal court not only consistently referred to supervised release as “parole,” but argued motions and briefings that relied on precedents about federal parole, an institution that was replaced by supervised release in 1987. See *infra* Section II.A.
18. See U.S. SENT'G GUIDELINES MANUAL § 5D1.1 (U.S. SENT'G COMM'N 2021); Eric S. Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL L. REV. 1375, 1392 (2023); see also *Haymond*, 139 S. Ct. at 2382 (“Where parole and probation violations . . . expose[] a defendant only to the *remaining* prison term authorized for his crime of conviction, . . . supervised release violations . . . can . . . expose a defendant to an additional . . . prison term well *beyond* that authorized by the jury's verdict . . .”). Some states like Colorado have a similar system of “determinate” parole, in which individuals are sentenced to a determinate term of imprisonment followed by a term of parole. See Edward E. Rhine, Alexis Watts & Kevin R. Reitz, *Levers of Change in Parole Release and Revocation*, ROBINA INST. CRIM. L. & CRIM. JUST. 22 (2018), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/parole_landscape_report.pdf [<https://perma.cc/972S-THA2>].
19. See Schuman, *supra* note 17, at 599.
20. See *id.*

a jury trial²¹ — a concern quite similar to that expressed in the *Apprendi* line of cases.

In 2019, the Supreme Court weighed in on the potential constitutionality of this procedure in the case *United States v. Haymond*.²² At issue was a particular provision of the supervised-release statute that mandated a minimum revocation penalty of five years' imprisonment for enumerated violations.²³ The *Haymond* Court ultimately failed to reach a consensus, handing down a divided 4-1-4 decision that left supervised release in "constitutional limbo."²⁴ The plurality opinion, authored by Justice Gorsuch, found that *Apprendi* and its progeny applied in this new context for the supervised-release provision in question.²⁵ Notably, Gorsuch also contemplated the potential consequences of applying *Apprendi* to the entirety of the federal revocation statute.²⁶ Perhaps in an attempt to assuage the concerns of the concurrence and dissent, he suggested that even in a world in which *Apprendi* applied in full, only a small fraction of revocations would be implicated, thereby leaving much of the supervised-release system intact.²⁷ Nevertheless, Justice Breyer concurred in the judgment only, declining to "transplant the *Apprendi* line of cases to the supervised-release context" "in light of the potentially destabilizing consequences."²⁸ Similarly, in his dissent, Justice Alito decried the "potentially revolutionary implications" of the plurality's reasoning and accused the plurality of "laying the groundwork for later decisions of *much* broader scope."²⁹

While Justices Gorsuch and Alito were bitterly divided in their conclusions, both engaged heavily in textual interpretation of the Sixth Amendment, particularly around the meaning of the term "criminal prosecution."³⁰ Alito argued that because revocation occurred after a criminal prosecution, it fell outside the scope of the constitutional right to a jury trial.³¹ He further emphasized that because there was no Founding Era analog to a revocation proceeding that a jury would

21. See Jacob Schuman, *America's Shadow Criminal Justice System*, NEW REPUBLIC (May 30, 2018), <https://newrepublic.com/article/148592/americas-shadow-criminal-justice-system> [<https://perma.cc/5A4N-EDCZ>].

22. 139 S. Ct. 2369 (2019).

23. *Id.* at 2373 (plurality opinion).

24. Fish, *supra* note 18, at 1381.

25. *Haymond*, 139 S. Ct. at 2378-79, 2383-84.

26. See *id.* at 2383-84.

27. See *id.* at 2384-85.

28. *Id.* at 2385 (Breyer, J., concurring in the judgment).

29. *Id.* at 2386 (Alito, J., dissenting).

30. See *infra* Section II.C.

31. *Haymond*, 139 S. Ct. at 2391, 2393-95 (Alito, J., dissenting).

have adjudicated, a revocation hearing was not captured by the original meaning of the Sixth Amendment.³² Gorsuch, too, spent considerable time mustering up historical support to explicate the traditional role of the criminal jury.³³ But in interpreting the text of the Sixth Amendment, he adopted a highly functionalist understanding of “criminal prosecution” that accommodated the various developments to the criminal legal system since the Founding, including supervised-release revocations.³⁴

Since *Haymond*, there has been a considerable swell of scholarship surrounding the applicability of the Sixth Amendment jury right to supervised release and criminal supervision more broadly.³⁵ While scholars have reached differing conclusions on the question, many have similarly centered their discussions on determining whether a revocation proceeding is properly contained within the meaning of “criminal prosecution.”³⁶ Modern discourse has thus left the distinct impression that the fate of supervised release rests on a question of textual interpretation. More simply, the Justices and scholars both seem to ask whether

32. *Id.* at 2396-98 (Alito, J., dissenting).

33. *See id.* at 2375-77 (plurality opinion).

34. *See id.* at 2379-80.

35. *See generally, e.g.*, Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. (forthcoming 2024), <https://ssrn.com/abstract=4370440> [<https://perma.cc/WDW2-MZCM>] (discussing the constitutionality of community supervision by reference to Founding Era evidence); Fish, *supra* note 18 (proposing a “conditional sentencing theory” by which supervision might be squared with Sixth Amendment protections); Nancy J. King, *Constitutional Limits on the Imposition and Revocation of Probation, Parole, and Supervised Release After Haymond*, 76 VAND. L. REV. 83 (2023) (analyzing *Haymond*’s prospective role in and over state law); Fiona Doherty, “Breach of Trust” and *United States v. Haymond*, 34 FED. SENT’G REP. 274 (2022) (analyzing *Haymond*’s invocation of a defendant’s “breach of trust”); Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297 (2022) (analyzing *Haymond* in light of, not only the Sixth, but also the Fifth Amendment); Kate Stith, *Apprendi’s Two Constitutional Rights*, 99 N.C. L. REV. 1299 (2021) (same); Stephen A. Simon, *Re-Imprisonment Without a Jury Trial: Supervised Release and the Problem of Second-Class Status*, 69 CLEVELAND ST. L. REV. 569 (2021) (arguing, in light of *Haymond*, against the justifiability of re-imprisonment without a jury trial); Jacob Horner, *Haymond’s Riddles: Supervised Release, the Jury Trial Right, and the Government’s Path Forward*, 57 AM. CRIM. L. REV. 275 (2020) (discussing issues left “unresolved in *Haymond*’s wake”).

36. *See* Schuman, *supra* note 35 (manuscript at 50-51) (noting that the original meaning of “prosecution” could accommodate certain historical procedures that resemble modern-day revocation hearings); Underhill & Powell, *supra* note 35, at 306-08 (arguing that the constitutional differences between supervised release and federal parole suggest that supervised-release revocation proceedings more closely resemble traditional criminal prosecutions); Stith, *supra* note 35, at 1300 (framing the issue in *Haymond* as asking when the “criminal prosecution” ends).

individuals facing revocation have been denied a right that the Sixth Amendment directly confers.

This Note argues for a different approach. The constitutional problem with revocation of supervised release is not that it involves the kind of proceeding contemplated within the meaning of the Sixth Amendment.³⁷ It is that revocation *circumvents* the protections offered by the Sixth Amendment by allowing a government to punish someone without initiating or executing a criminal prosecution. Individuals who are sent back to prison following a revocation have not technically been denied the right to a jury trial. After all, a person facing revocation of supervised release is serving a term of supervision due to a criminal conviction. By virtue of that conviction, they have either already received a jury trial or waived their right to one via a guilty plea. The constitutional violation thus arises from the *erosion* of the jury trial that was already granted, for revocation imposes punishment beyond what was authorized by the jury's guilty verdict.³⁸

This formulation is, in fact, the very approach used by the *Apprendi* line of cases before *Haymond*. *Apprendi* did not rely on any novel textual interpretation of the Sixth Amendment to reach its primary holding. It instead advanced principles of substantive criminal law, using the historical link between crime and punishment to establish a functionalist definition of a "crime."³⁹ Under this conception, a sentencing enhancement that exposed a criminal defendant to greater punishment constituted an "element" of a new, more serious offense.⁴⁰ Punishment based on such an enhancement therefore could not be said to be genuinely based on the original "crime" of conviction. Despite *Apprendi*'s unmistakable significance in the world of criminal sentencing, then, the decision should not be understood as "extending" the right to a jury trial to sentencing proceedings. Rather, *Apprendi* and its descendant cases recognized that the jury's traditional role in determining guilt could not be circumvented by sentencing judges who imposed punishment in excess of the jury's implicit authorization.⁴¹ *Apprendi* thus doubled down on the criminal jury's historic role as the ultimate arbiter of

37. I do not mean to suggest, however, that this cannot *also* be the case. The theory advanced by this Note can thus work in conjunction with existing strategies to extend the Sixth Amendment jury right into the revocation context. See *infra* Section III.C.

38. Cf. *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000) ("We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'" (quoting *Jones v. United States*, 526 U.S. 227, 247-48 (1999))).

39. See W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 957 (2009) ("*Apprendi* . . . relies on a functional definition of 'crime.' . . . [by] look[ing] to what statutes do, not what they say they do, in order to determine whether a given fact is an element of a crime.").

40. See *Apprendi*, 530 U.S. at 493-94.

41. See *infra* Section I.C.

guilt, zealously guarding the right to a jury trial at conviction against potential erosion.

Today, preoccupation with the effects and mechanics of *Apprendi*'s formalist rule in sentencing procedures has largely sidelined this aspect of the doctrine. But early scholarly treatment of *Apprendi* highlighted the significance of the Court wading into the territory of substantive criminal law,⁴² an area that it has historically been quite reluctant to approach.⁴³ This much-needed intervention provided important clarity for understanding the relationship between crime and punishment, which in turn has had important consequences for how criminal sentencing procedures are to be structured. Judge Stephanos Bibas recently remarked that in this way, *Apprendi* "linked criminal procedure to substantive criminal law."⁴⁴

I contend that the lack of engagement with these aforementioned substantive criminal law principles has left a significant gap in the literature for properly understanding revocation within the context of *Apprendi* and the Sixth Amendment. For one, arguing solely on the grounds that a revocation proceeding is captured by the text of the Sixth Amendment leaves one vulnerable to originalist reasoning like that of Justice Alito's *Haymond* dissent and his formalist argument that the jury right simply has no applicability after the conclusion of a "criminal prosecution." But additionally, a failure to grapple with how *Apprendi*'s understanding of "crime" and "punishment" might fit into the modern federal criminal system and its invention of the revocation function have led even proponents of *Apprendi*'s expansion to endorse only a tepid application of the Sixth Amendment with narrow implications for the constitutionality of revocations.⁴⁵

This Note thus presents a new conception of revocation under what I call the "retroactive theory" of revocation, which takes seriously the substantive criminal law principles of *Apprendi* and how it might be imported into the supervised-release context. It also takes into account the nonconcurrent nature of initial sentencing and revocation, which I argue is crucial to understanding the relationship between the punishment imposed by revocation and the factual basis for that punishment. The retroactive theory will have important implications for the two questions left open by *Haymond*: *whether* the Sixth Amendment applies in the context of revocation, and if so, *how* it applies. First, because revocation functions as an imposition of punishment, just as sentencing does, it plainly

42. See *infra* note 112 and accompanying text.

43. See Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1269 (1998); Daniel Suleiman, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 426 (2004).

44. Stephanos Bibas, *Apprendi at 20: Reviving the Jury's Role in Sentencing*, 99 N.C. L. REV. 1189, 1192 (2021).

45. See *infra* Sections II.C, III.B.1.

implicates the Sixth Amendment, no matter the kind of proceeding in which it takes place. Second, because revocation of supervised release *retroactively* aggravates the punishment to which a person is exposed for a criminal offense, it violates that person's jury right under *Apprendi* regardless of the severity of the resulting penalty. Hence, the retroactive theory of revocation: revocation of supervised release imposes unconstitutional punishment under *Apprendi* by retroactively increasing the range of penalties to which a person is exposed.

The retroactive theory has far-reaching consequences for those entangled in the federal criminal legal system. In June 2021, over 110,000 individuals were serving terms of supervised release, making supervised release by far the dominant form of criminal supervision imposed by federal courts.⁴⁶ This is unsurprising, as federal courts impose a period of supervised release to follow incarceration in over ninety-nine percent of eligible cases.⁴⁷ About one-third of those on supervised release will be reimprisoned based on a revocation,⁴⁸ which means that every year, tens of thousands of individuals are sent to prison based on a finding made only by a judge on a preponderance of the evidence. More broadly, revocations of criminal supervision are so frequent and widespread that they now comprise almost half of all admissions into the American prison system.⁴⁹ And although the primary focus of this Note is on the federal system, its proposed understanding of revocation may have implications for similarly determinate systems of state supervision.⁵⁰

The retroactive theory and its revival of *Apprendi*'s substantive criminal law principles also have significance beyond the setting of revocation. Until

46. Table E-2—Federal Probation System Statistical Tables for the Federal Judiciary (June 30, 2021), U.S. CTS. (2021), <https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2021/06/30> [<https://perma.cc/KB6N-BPCK>] (documenting the number of persons under post-conviction supervision). At the same time, there were around 12,000 individuals on probation and 1,000 on parole or in Bureau of Prisons custody, for a total of 124,000 individuals under federal supervision. *Id.*

47. *Federal Offenders Sentenced to Supervised Release*, U.S. SENT'G COMM'N 52 (July 2010), <https://www.ussc.gov/research/research-publications/federal-offenders-sentenced-supervised-release> [<https://perma.cc/VF8A-MHB3>].

48. See Schuman, *supra* note 21 (noting that in the “best-case scenario, two-thirds of people successfully complete their term of supervised release”).

49. See Just. Ctr., *National Report*, COUNCIL STATE GOV'TS, <https://csgjusticecenter.org/publications/more-community-less-confinement/national-report> [<https://perma.cc/GG76-ZYRL>].

50. See Fish, *supra* note 18, at 1392 n.94 (noting that some states have determinate parole systems that are structured like federal supervised release “in having fixed supervision terms that happen after the full prison sentence”). As I will explore in greater depth, the “determinacy” of supervision terms is crucial in evaluating the constitutionality of revocations. See *infra* notes 165-172 and accompanying text.

Haymond, the Court—as well as most scholars⁵¹—never contemplated the possibility that *Apprendi* could be relevant outside of the criminal sentencing context. Indeed, *Apprendi* has been treated by courts, scholars, and textbooks as a “sentencing” decision.⁵² Because of this, there has been close to no discussion of how *Apprendi*’s functionalist understanding of crime and punishment might be helpful in challenging other excesses of the criminal legal system. This Note starts this conversation in the literature by denaturalizing the *Apprendi* doctrine from its natural habitat of criminal sentencing and demonstrating how it can be applied to other contexts. I suggest that *Apprendi* may have relevance for other forms of “post-judgment” penalties like extensions of supervision terms, criminal fees, and collateral consequences.⁵³ Like revocation, such penalties aggravate a person’s punishment based on findings made long after initial sentencing has been completed. Under the retroactive theory, they may similarly be understood as circumventing the Sixth Amendment’s protections. The broader ambition of this Note is therefore to use revocation as a valuable test case that can guide scholars, litigants, and judges toward a more creative understanding of the constitutional right to a jury trial.

Part I reviews the development of the *Apprendi* doctrine through some of its most important cases. It describes the complex mechanics underlying *Apprendi*’s rule, that any fact that increases the range of penalties to which a person is exposed must be found by a jury and proved beyond a reasonable doubt. I then highlight *Apprendi*’s focus on the substantive criminal law and its exploration of the historical linkage between crime and punishment to arrive at a principle underlying the decision that is divorced from the particular setting of sentencing. This Part also previews the significance of *Apprendi*’s substantive criminal law approach and how it differs from more traditional means of Sixth Amendment interpretation.

Part II introduces the institution of federal supervised release and the potential constitutional problems raised by the system. I then discuss the *Haymond* decision and the reasoning adopted by the Justices who authored the three opinions in the case. Each opinion sounds in a different modality of constitutional analysis and a corresponding theory of revocation. What is common to all three opinions, however, is that they do not take to heart the teachings of the *Apprendi*

51. The one exception is from Professor W. David Ball, who argued that *Apprendi*’s functional understanding of the substantive criminal law meant that the doctrine had application in adjudications of state parole. See Ball, *supra* note 39, at 895-902.

52. See, e.g., *Alleyne v. United States*, 570 U.S. 99, 124-25 (2013) (Roberts, J., dissenting); Hessick, *supra* note 10, at 1196; CYNTHIA LEE & L. SONG RICHARDSON, *CRIMINAL PROCEDURE: ADJUDICATION, CASES AND MATERIALS* (2023); ERWIN CHEMERINSKY, *CRIMINAL PROCEDURE: ADJUDICATION* 354, 358-64 (2022).

53. See *infra* Part III.C.

doctrine in evaluating revocation's constitutionality. I analyze the opinions in turn, both to shed light on the limitations of the approach endorsed by each and to provide the necessary historical and doctrinal context for my own.

In Part III, I introduce the retroactive theory of revocation, which focuses not on textual interpretation, but on the meaning of “crime” and “punishment” advanced by *Apprendi* and its progeny. I first demonstrate that revocation functions as an imposition of criminal punishment and thus falls within the ambit of the Sixth Amendment. Then, I explain why the factual basis for all revocations of supervised release constitutes a criminal “element” under *Apprendi* by harmonizing the formalist principles of the *Apprendi* rule with the peculiar reality that revocation punishes conduct that takes place long after initial sentencing. The retroactive theory ultimately finds that *all* revocations of supervised release violate *Apprendi* and the jury right, regardless of the length of the resulting sentence. Finally, the Part contemplates how the retroactive theory might apply to other forms of post-judgment penalties imposed by the state.

Part IV concludes the Note by envisioning a supervised-release system without revocation, and why such a system would be preferable to the status quo. While many have expressed concerns over the potentially “revolutionary” effects of applying the Sixth Amendment to revocation, I argue that such a revolution is welcome and necessary to protect the rights of those who have served their time, and to restore the original conception of federal supervised release as a tool of rehabilitation, not further punishment.

I. REVISITING THE APPRENDI LEGACY

Discussion around the *Apprendi* line of cases has taken place almost exclusively in the sentencing context. This is unsurprising, as each of the controversies in these cases arose from judicial sentencing decisions, most commonly with various forms of sentencing “enhancements.”⁵⁴ As a result, scholars often explain the doctrine in terms that are endogenous to the world of criminal sentencing. *Apprendi* has been described, for example, as establishing: “the right to a jury trial of facts that increase criminal sentences”;⁵⁵ “that a sentencing enhancement [is] acceptable, as long as it [does] not become the ‘tail that wags the dog’”;⁵⁶ and of course, that “any fact that increases the penalty for a crime beyond the

54. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 584 (2002); *Blakely v. Washington*, 542 U.S. 296, 300 (2004); *Cunningham v. California*, 549 U.S. 270, 270 (2007).

55. Hessick, *supra* note 10, at 1196.

56. Nila Bala, *Judicial Fact-Finding in the Wake of Alleyne*, 39 N.Y.U. REV. L. & SOC. CHANGE 1, 3 (2015). *But see Blakely*, 542 U.S. at 311 n.13 (criticizing this articulation of *Apprendi*'s fundamental prohibition and suggesting that the doctrine does not rely on such a characterization).

prescribed statutory maximum must be submitted to a jury.”⁵⁷ The focus on sentencing is not a deficiency of these characterizations given the context in which they have arisen, but it suggests that in order to understand whether and how *Apprendi* might apply to other settings like revocation, further investigation into the underlying principles is necessary.

This Part provides an overview of *Apprendi* and its descendant cases, with two goals in mind. The first is to lay out the basic mechanics of the *Apprendi* rule. Section I.A recounts some of the cases that fleshed out the contours of this rule and how it was applied in the face of various sentencing decisions. In Section I.B, I highlight the 2013 case *Alleyne v. United States* to discuss an aspect of the *Apprendi* rule that is often overlooked, which is that a constitutional violation under *Apprendi* occurs not when a sentence exceeds the prescribed range of penalties for an offense, but when that range of penalties itself is aggravated.

The second goal of this Part is to highlight the significance of *Apprendi* as a case about the substantive criminal law and the linkage between the notions of “crime” and “punishment.” Section I.C revisits the reasoning of the *Apprendi* decisions and early scholarly treatment of the doctrine to suggest that *Apprendi* is best understood as standing for a slightly modified version of a proposition once endorsed by Professor Erwin Chemerinsky: it is unconstitutional to find an individual guilty of one crime but punish them for another.⁵⁸ Characterizing *Apprendi* using the language of substantive criminal law helps to demonstrate how the doctrine differs from more traditional means of Sixth Amendment analysis, a distinction that will become crucial in determining the applicability of the constitutional jury right to the revocation context and beyond.

A. *Apprendi*, Ring, and Blakely: The Jury Verdict’s “Authorization”

In *Apprendi v. New Jersey*, Charles C. Apprendi, Jr. was arrested after firing several bullets into the home of an African-American family that had recently moved into an all-white neighborhood.⁵⁹ Following indictment, Mr. Apprendi signed a plea agreement in which he waived his right to a jury trial and pled guilty to three counts of unlawful possession of a firearm.⁶⁰ One count in particular, related to the actual shooting of the firearm, was an offense punishable by

57. See, e.g., Lillquist, *supra* note 10, at 622 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

58. See Erwin Chemerinsky, *Making Sense of Apprendi and Its Progeny*, 37 MCGEORGE L. REV. 531, 532 (2006) (“I suggest that *Apprendi* and its progeny should be seen as establishing a simple proposition: under the Sixth Amendment, it is wrong to convict a person of one crime and sentence that person for another.”); *infra* text accompanying notes 124-126.

59. *Apprendi*, 530 U.S. at 469.

60. *Id.* at 469-70.

imprisonment of five to ten years.⁶¹ But the plea agreement reserved the State's right to seek a sentencing enhancement if the judge could find that the offense was a hate crime under the meaning of that statute, which would increase the maximum possible sentence to twenty years.⁶² The State moved for an extended sentence based on this provision, and the trial judge granted an evidentiary hearing at which he found by a preponderance of the evidence that Mr. Apprendi's actions were racially motivated.⁶³ Mr. Apprendi was thus sentenced to twelve years' imprisonment, two years beyond the statutory maximum of the original count to which he pled.⁶⁴ In a 5-4 decision, the Supreme Court reversed the sentence, holding that any fact that increases the penalty for an offense beyond the statutory maximum must be found by a jury and proved beyond a reasonable doubt.⁶⁵

The *Apprendi* majority devoted a considerable portion of its analysis to delineating the proper role of the various actors in a criminal case. Through its legislative power, New Jersey could outlaw certain conduct and establish that particular penalties be inflicted in response.⁶⁶ Only the jury, however, could make the factual findings to determine that an individual had indeed engaged in such conduct—that they were guilty of the crime in question.⁶⁷ Once a person was found guilty of a crime, the State could mete out the requisite punishment. But modern criminal statutes generally prescribed a *range* of penalties for a particular crime, rather than an exact unit of punishment.⁶⁸ Therefore, the judge's role was to decide the appropriate sentence based on various factors surrounding the offense and offender.⁶⁹ The central question in *Apprendi* was how to distinguish these “sentencing factors”—which a judge could lawfully rely on in

61. *Id.* at 468-70.

62. *Id.* at 470.

63. *Id.*

64. *Id.* at 471.

65. *Id.* at 475-76, 490.

66. *See id.* at 476 (“In his 1881 lecture on the criminal law, Oliver Wendall Holmes, Jr., observed: ‘The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them . . .’ New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race.”).

67. *Id.* at 476-77. Note in this case, however, that there was no jury verdict, as Mr. Apprendi waived his right to a jury trial. *Id.* at 469. In such cases, the plea waiver functions as the jury verdict, as it contains the facts admitted by the defendant.

68. *See id.* at 481 (noting that the Court has recognized a “shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range”).

69. *Id.* at 481-82.

deciding a sentence – from “elements” of an offense, which were those facts essential to finding a person guilty of said offense.

New Jersey argued that the structure of the relevant criminal statutes in the case offered a simple answer. The hate crime enhancement statute was, after all, explicitly written by the legislature to be applied by a judge at sentencing,⁷⁰ and not as a separate offense of which a person could be found guilty. But the Court noted that if the distinction between sentencing factors and elements could be resolved simply by looking to the legislature’s own designation, the state could always, in theory, “define away” facts that might otherwise be essential to a criminal offense.⁷¹ The Court thus suggested that “the relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”⁷² Because the finding of racial bias here increased the statutory maximum sentence from ten to twenty years, it was to be treated as an “element” of a new, more serious offense, and thus had to be found by a jury beyond a reasonable doubt.

The *Apprendi* Court’s exaltation of effect over form established a functionalist definition of a “crime” and its “elements,” one that granted little significance to legislative labels or statutory structure.⁷³ Although the judge did not literally convict Mr. Apprendi of a new offense, the factual finding authorizing the enhanced punishment was, according to the Court, “the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict” (or in this case, the plea waiver).⁷⁴ Because Mr. Apprendi had pled guilty only to the facts of second-degree possession, which prescribed under statute a range of prison sentences from five to ten years, the judge could only lawfully exercise his sentencing discretion within that range.⁷⁵ In short, then, *Apprendi* determined that a finding that merely supported a sentence within the statutory range was properly a “sentencing factor,” while any finding that authorized an increase in that range was an “element,” to be found only by a jury beyond a reasonable doubt.⁷⁶

The next installments in the *Apprendi* line of cases clarified what could properly be deemed punishment that was “authorized” by a jury verdict. In *Ring v. Arizona*, the Court applied the *Apprendi* doctrine in the capital sentencing

70. *Id.* at 491-92.

71. *Id.* at 486 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 85-88 (1986)).

72. *Id.* at 494.

73. See *supra* note 39 and accompanying text.

74. *Apprendi*, 530 U.S. at 494 n.19.

75. See *id.* at 468, 476, 490.

76. See *id.* at 494 n.19.

context.⁷⁷ A jury convicted defendant Timothy Ring of felony murder in the course of an armed robbery, which carried a statutory maximum of death.⁷⁸ Under Arizona law, however, the death penalty could not be imposed absent a further finding of an “aggravating factor” by the judge.⁷⁹ In this case, the judge made the requisite finding and sentenced Mr. Ring to death.⁸⁰ Mr. Ring challenged the sentence on *Apprendi* grounds, claiming that a jury, not the judge, ought to have made the finding of the aggravating factor.

The Court agreed with Mr. Ring in a 7-2 decision, striking down his death sentence as a straightforward violation of *Apprendi*.⁸¹ But the decision highlighted a peculiarity of the Court’s articulation of the *Apprendi* doctrine. The statutory maximum for Mr. Ring’s offense, first-degree felony murder, was death.⁸² As such, the aggravating factor found by the sentencing judge did not authorize a punishment *beyond* the statutory maximum – it merely authorized the statutory maximum itself. Invoking *Apprendi*’s emphasis on effect over form, the *Ring* Court clarified that the scope of authorized punishment could be limited not only by an explicit statutory maximum, but by any factfinding condition placed by the state.⁸³ Here, because the Arizona legislature had chosen to condition the imposition of death on the finding of an aggravating factor subsequent to a guilty verdict, the jury verdict alone could not be said to “authorize” the punishment of death.

77. 536 U.S. 584, 588-89 (2002).

78. *See id.* at 591.

79. *Id.* at 592-93.

80. *Id.* In Mr. Ring’s case, the aggravating factor before the sentencing court was whether he had been a “major participant” in the felony committed. *Id.* at 594 (first citing *Enmund v. Florida*, 458 U.S. 782 (1982); and then citing *Tison v. Arizona*, 481 U.S. 137, 158 (1987)).

81. *Ring*, 536 U.S. at 585. Although *Ring* overruled a prior case, *Walton v. Arizona*, 497 U.S. 639 (1990), the ultimate decision was relatively uncontroversial, with the two dissenters conceding that *Walton* was indeed inconsistent with *Apprendi* but disagreeing instead with the majority’s decision to uphold *Apprendi*. *See Ring*, 536 U.S. at 619 (O’Connor, J., dissenting) (“I understand why the Court holds that the reasoning of *Apprendi v. New Jersey* is irreconcilable with *Walton v. Arizona*. Yet in choosing which to overrule, I would choose *Apprendi* . . .” (internal citations omitted)). Then-Chief Justice William Rehnquist joined in the dissent.

82. *See Ring*, 536 U.S. at 591.

83. *See id.* at 602. Notably, this was an explicit rejection of the Court’s earlier characterization of this statute in *Apprendi*. The *Apprendi* Court had suggested that once a jury found a capital defendant guilty of their crime, the decision to impose the “maximum penalty” of death was an appropriate exercise of discretion. *Apprendi v. New Jersey*, 530 U.S. 466, 496-97 (quoting *Almandarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)); *see also Hessick, supra* note 10, at 1203 (“*Ring* expanded Sixth Amendment sentencing doctrine beyond statutory maxima – and in doing so, ensured that the doctrine would have a much broader effect.”).

Blakely v. Washington built further on this clarification.⁸⁴ In *Blakely*, the defendant Ralph Howard Blakely, Jr. waived his right to a jury trial and pled guilty to second-degree kidnapping, an offense carrying a statutory maximum of ten years.⁸⁵ The Washington sentencing guidelines further prescribed a series of standard ranges within the offense, allowing for departures to an “exceptional” sentence upon finding “substantial and compelling reasons” justifying such punishment.⁸⁶ The “standard range” for Mr. Blakely, based on the facts to which he pled, was forty-nine to fifty-three months.⁸⁷ The trial judge, however, sentenced him to ninety months, finding that he had committed the offense with “deliberate cruelty,” one of the enumerated aggravating factors in the kidnapping statute.⁸⁸

Washington predictably argued that although Mr. Blakely’s sentence exceeded the presumptive range, it nonetheless did not violate *Apprendi* because it remained below the ten-year statutory maximum.⁸⁹ The Court disagreed, reiterating that the “‘statutory maximum’ for *Apprendi* purposes” was a sentence that could be imposed “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”⁹⁰ Because the facts that Mr. Blakely conceded in his guilty plea did not include the “deliberate cruelty” factor which the trial judge relied upon for his ultimate sentence, the court had exceeded the “authorized” maximum of fifty-three months.⁹¹ *Blakely* demonstrated the extent to which the Court’s promise in *Apprendi* to prioritize effect over form had taken root.⁹² Whether a person carried out an offense with “deliberate cruelty” intuitively seems like a classic example of a sentencing factor, not an element. The *Blakely* Court, however, focused solely on the effect of the factual determination to conclude that the aggravating factor was an element of the offense for which Blakely was ultimately sentenced.

84. 542 U.S. 296, 299–304 (2004); see JOHN F. PFAFF, SENTENCING LAW AND POLICY 322 (2016) (describing *Ring* as the “intellectual forebear of *Blakely*”); Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 456 (2019) (noting that *Ring* “dramatically expanded the scope of the [*Apprendi*] doctrine” and that *Blakely* “acknowledged this expansion”).

85. *Blakely*, 542 US. at 299.

86. *Id.*

87. *Id.*

88. *Id.* at 300.

89. *Id.* at 303.

90. *Id.* (emphasis omitted).

91. See *id.* at 304.

92. See *id.* at 328 (Breyer, J., dissenting) (“The Court makes clear that it means what it said in *Apprendi v. New Jersey*.”); see also Hessick, *supra* note 10, at 1204 (describing *Blakely* as being “arguably the high-water mark of the Sixth Amendment sentencing doctrine”).

Apprendi, *Ring*, and *Blakely* thus defined what was meant by the “authorization” of the jury verdict. If a sentencing enhancement hinged on a factfinding condition, such a finding would be considered an “element” of the offense. This was true regardless of how the sentencing enhancement was labeled, or what function it was supposed to serve – indeed, even if it was designed precisely for the purposes of guiding judicial discretion.⁹³ Yet at this point, it may appear that the nuances of the *Apprendi* cases can be boiled down into a simple test: could the defendant’s sentence have been imposed based on “the facts reflected in the jury verdict alone”?⁹⁴ If so, it seemed that *Apprendi* could well be described simply as a prohibition on excessive sentences. Indeed, this continued to hold true for other *Apprendi* decisions in the ensuing years.⁹⁵ The exception was *Alleyne v. United States*.⁹⁶

B. *Alleyne v. United States and a Defendant’s Sentencing Exposure*

In *Alleyne*, defendant Allen Ryan Alleyne was convicted by jury trial for the use of a firearm in the course of a robbery.⁹⁷ The relevant federal criminal statute contained three different statutory minimums, with increases in the minimum for “brandishing” and “discharging” the firearm.⁹⁸ Although the jury had not found that Mr. Alleyne brandished or discharged the firearm during the offense, the sentencing judge independently found that Mr. Alleyne had brandished his weapon and recommended the corresponding minimum sentence of seven years.⁹⁹ At dispute was whether an increase in the mandatory minimum constituted the kind of increased punishment that the *Apprendi* line of cases considered relevant in distinguishing between elements and sentencing factors.

The Court ruled that a fact that increased the mandatory minimum of a crime was an element of an offense, and, as such, had to be found by a jury beyond a reasonable doubt.¹⁰⁰ *Alleyne* never garnered the kind of scholarly attention that

93. This seems to have been the case, for example, for the state sentencing guidelines in *Blakely*. See *Blakely*, 542 U.S. at 308–09.

94. *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)).

95. See, e.g., *Cunningham v. California*, 549 U.S. 270, 293 (2007); *S. Union Co. v. United States*, 567 U.S. 343, 346 (2012).

96. 570 U.S. 99 (2013).

97. *Id.* at 103–04. The term “use” here is rather loose, as the statute considered even merely carrying a firearm during the commission of a crime of violence to qualify for the offense. *Id.* at 103.

98. *Id.*

99. *Id.* at 104.

100. *Id.* at 103.

other *Apprendi* cases did,¹⁰¹ and was seen by many as a simple extension of the logic in *Apprendi*, only to statutory minimums instead of maximums.¹⁰² But the *Allelyne* decision and its reasoning highlight an important, undertheorized aspect of the *Apprendi* doctrine.

In the decisions thus far discussed, the Court had only evaluated sentences that plainly exceeded the range authorized by the facts found by a jury. In a sense, then, they were sentences that were simply not *possible* based on the jury verdict alone. By contrast, while the finding of brandishing here increased the mandatory minimum of Mr. Allelyne's offense, the resulting seven-year sentence was conceivable even absent such a finding, given that the statutory maximum was life in prison.¹⁰³ As Chief Justice Roberts noted in dissent, the jury verdict seemed to "fully authorize[]" the sentence because "[n]o additional finding of fact was 'essential'" to the ultimate punishment.¹⁰⁴ Consider this line from *Apprendi*: "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion . . . in imposing a judgment *within the range prescribed by statute*."¹⁰⁵ While the sentencing judge in *Allelyne* made a finding not made by the jury, it was only used to impose a seven-year sentence, well within the original range of five years to life. Why, then, was the sentence here unconstitutional under *Apprendi*?

Writing for the majority, Justice Thomas explained that although Mr. Allelyne's eventual sentence was within the lawful boundaries set by the jury verdict, the finding of brandishing nevertheless constituted an "element" that needed to be found by a jury. He wrote: "*Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts *alter the prescribed range of sentences to which a defendant is exposed* and do so in a manner that aggravates the punishment."¹⁰⁶ We can call the "prescribed range of penalties to which a defendant is exposed" the "sentencing exposure" associated with a particular set of facts, a term I will

101. For example, as of January 7, 2024, a HeinOnline search in the Law Journal Library for the term "Allelyne v. United States" returns 367 results, while a search for "Apprendi v. New Jersey" returns 2,825 results; "Blakely v. Washington" returns 2,032 results; and "United States v. Booker" returns 4,408 results.

102. See, e.g., Robert McClendon, *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, 196 (2018) ("It is not obvious why a fact that increases the sentence a judge *may* impose is deserving of more consideration than a fact that increases the sentence a judge *must* impose."); *Allelyne*, 570 U.S. at 122.

103. *Allelyne*, 570 U.S. at 112.

104. *Id.* at 127 (Roberts, C.J., dissenting).

105. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (emphasis added).

106. *Allelyne*, 570 U.S. at 108 (opinion of Thomas, J.).

use frequently throughout this Note. While the statutory minimum and maximum in the text of a criminal statute often set the sentencing exposure for an offense, note that any kind of legally prescribed range – whether by statute, sentencing guidelines, or otherwise – for a particular set of facts falls within this definition.

Justice Thomas noted that “because the fact of brandishing aggravate[d] the legally prescribed range of allowable sentences, it constitute[d] an element of a separate, aggravated offense that must be found by the jury.”¹⁰⁷ In other words, Mr. Alleyne had been found guilty of “use of a firearm,” but ultimately punished for “use *and brandishing* of a firearm,” which constituted a “separate, aggravated offense.” Regardless of the severity of the sentence eventually rendered, then, the constitutional problem was that the finding of brandishing was outside the proper purview of the judge. Instead of making findings that allowed him to choose a sentence within the legal limits reflected in the guilty verdict, the judge had made a finding that changed those legal limits themselves. *Alleyne* thus clarified that the relevant focus for *Apprendi* purposes was not whether the sentence imposed on a defendant fell outside the sentencing exposure of the facts found by the jury, but whether the sentencing exposure itself was altered.¹⁰⁸

While this may seem to be an unnecessarily cumbersome characterization, *Apprendi* itself had actually couched its test in a similar fashion: “does the required finding *expose* the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”¹⁰⁹ So the *Apprendi* Court, too, had asked not whether the defendant’s final punishment exceeded the authorization of the jury’s verdict, but whether the defendant was *exposed* to punishment that exceeded said authorization. And although *Apprendi* had of course involved a sentence that did in fact exceed the statutory maximum of the original offense, Justice Thomas clarified that “if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range.”¹¹⁰ As will be explained in Part III, this subtle distinction will have important implications for how the *Apprendi* rule should be applied in the context of supervised-release revocations.

107. *Id.* at 115.

108. *See id.* at 112 (“[B]ecause the legally prescribed range *is* the penalty affixed to the crime, . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.”).

109. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (emphasis added).

110. *Alleyne*, 570 U.S. at 115.

C. *Apprendi and the Substantive Criminal Law*

While *Apprendi* was undoubtedly a decision of surpassing importance in constitutional criminal procedure, scholars have highlighted the fact that the case's reasoning was largely about principles of the *substantive* criminal law¹¹¹ – specifically, the question of what constituted “crime” and “punishment.”¹¹² By the time of *Apprendi*, the Sixth Amendment jury right had long been incorporated against the states.¹¹³ There was thus no question that a person facing accusation of criminal wrongdoing had the constitutional right to a jury trial. Moreover, in each of the cases discussed above, the defendant either waived his right to a jury by pleading guilty, or was in fact convicted via jury trial.¹¹⁴ It therefore could not be said that any of them were *denied* the right to a jury trial.

But *Apprendi* recognized “that the jury right could be lost not only by gross denial, but by erosion.”¹¹⁵ Even if a person was nominally granted the right to a jury trial, that right could be circumvented by “moving” certain elements of a crime away from the conviction stage and into the sentencing stage, where many of the constitutional rights protecting defendants were thought not to apply.¹¹⁶ The Supreme Court ultimately decided that facts that increased a defendant's sentencing exposure were essential to the definition of a “crime,” such that the punishment associated with those facts could only be imposed if the traditional

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111. As Professor Kate Stith explains, substantive criminal law “refers to the set of laws within a jurisdiction that define and punish the acts and mental states that together constitute crimes.” Kate Stith, *Justice Alito on Criminal Law*, HARV. J.L. & PUB. POL'Y PER CURIAM, Spring 2023, at 1. It is distinct from the law of criminal *procedure*, which governs “the machinery by which the government can apprehend alleged violators of the criminal law.” *Id.*
112. See, e.g., Huigens, *supra* note 9, at 392-93 (noting that the Court in *Apprendi* nonetheless “missed” the considerable substantive criminal law implications of its decision); Derek S. Bentsen, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 VA. L. REV. 645, 645-46 (2004); Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking Apprendi*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501, 520 (2007); Bibas, *supra* note 44, at 1192.
113. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).
114. See *supra* Sections I.A-B.
115. *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 247-48 (1999)).
116. See Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221, 221 (Under *Apprendi*, “legislatures cannot accomplish an end run around the rights that the Constitution guarantees ‘[i]n all criminal prosecutions’ by moving part of the ‘prosecution’ from the trial phase to the sentencing phase.” (quoting U.S. CONST. amend. VI)); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 195 (2005) (noting that “judicial fact-finding during sentencing had circumvented” the constitutional right to a jury trial and that “*Apprendi* and *Blakely* promised to stop this erosion”).

procedural protections governed the finding of those facts.¹¹⁷ Importantly, then, *Apprendi* did not find that a person had a right to a jury trial at sentencing and that such a right had been denied. Rather, it found that sentencing could circumvent or *erode* the jury right that had already been granted at the conviction stage by allowing for punishment in excess of the jury's authorization.

To further clarify the significance of this doctrinal distinction, consider cases that rely on more traditional methods of Sixth Amendment analysis. For example, in *McKeiver v. Pennsylvania*, the Court held that juveniles in delinquency proceedings did not have a constitutional right to a jury trial to adjudicate their guilt.¹¹⁸ It found that because “juvenile court proceedings ha[d] not yet been held to be a ‘criminal prosecution[.]’ within the meaning and reach of the Sixth Amendment,” the Amendment did not directly confer the jury right onto individuals in such settings.¹¹⁹ Similarly, in *Ex parte Milligan*, the Court held that the jury right did not apply to military tribunals, noting that the Framers “meant to limit the right of trial by jury, in the [S]ixth [A]mendment, to those persons who were subject to indictment or presentment in the [F]ifth.”¹²⁰ In both of these cases, the Court analyzed the text and meaning of the Sixth Amendment to determine whether the jury right applied to a particular setting or proceeding. Moving forward, we can call this the “textual interpretation” approach of Sixth Amendment analysis.

By contrast, consider a case that identified a Sixth Amendment violation without relying on such reasoning. In *Kennedy v. Mendoza-Martinez*, the Court held that a law that stripped draft evaders of citizenship was unconstitutional because it imposed “punishment [] for the offense of . . . evad[ing] military service [] without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments” – including, naturally, the right to a jury trial.¹²¹ The *Mendoza-Martinez* Court drew this conclusion based on an analysis of what constituted “punishment,” ultimately finding that “the statute’s primary function [wa]s to serve as an additional penalty.”¹²² In so holding, the Court surely did not mean to suggest that the jury right applied to the legislative proceeding that resulted in the unconstitutional law in question. Moreover, the case involved no textual analysis whatsoever of the Fifth or Sixth Amendments. Instead, the

117. See Stith, *supra* note 116, at 221 (“[W]hen a legislature decides that certain conduct warrants an increase in criminal punishment, such conduct . . . must be charged and proven in accordance with the requirements of the Fifth, Sixth, and Fourteenth Amendments of the Constitution.”).

118. 403 U.S. 528, 545 (1971).

119. *Id.* at 540-41.

120. 71 U.S. (4 Wall.) 2, 77-78 (1866).

121. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963).

122. *Id.* at 169-70.

Court found that because the law in question constituted “punishment,” it could not be imposed without the safeguards traditionally afforded to a criminal prosecution.¹²³ In other words, the law *circumvented* the constitutional protections normally granted to a criminal defendant by moving the function of punishment outside of a traditional criminal prosecution and into the legislative process. We can call this the “substantive criminal law” approach.

Apprendi is more akin to this second class of cases. Importantly, this suggests that disputes over the *Apprendi* doctrine and its application are not really disagreements about the scope or interpretation of the jury right – they are disagreements about the proper understanding of “crime” and “punishment.” For example, even the most ardent opponents of *Apprendi* would agree that a legislature cannot write its first-degree murder statute in such a way that a person need only be found guilty of homicide, with the sentencing judge independently determining whether the homicide constitutes manslaughter, second-degree murder, or first-degree murder. Imagine that a person under such a regime was convicted of homicide by jury trial, then sentenced based on first-degree murder. That person has clearly suffered a Sixth Amendment violation under *Apprendi*, but it is not because they were “denied” the right to a jury trial, or because the jury right “applies” at sentencing. They suffered a constitutional violation because they were punished based on a crime of which they were never found guilty.

In 2006, Professor Chemerinsky offered a pithy proposition summarizing this intuitive prescription: “under the Sixth Amendment, it is wrong to convict a person of one crime and sentence that person for another.”¹²⁴ For example, in *Apprendi* itself, Mr. Apprendi had been convicted of one crime – unlawful possession and shooting of a firearm – and sentenced for another – *racially motivated* possession and shooting of a firearm.¹²⁵ I now propose a slight modification to Professor Chemerinsky’s principle: under the Sixth Amendment, it is wrong to convict a person of one crime, and to *punish* that person for another. In some sense, this is hardly a modification at all, given that in the American criminal legal system, a person’s sentence is often synonymous with their legal punishment. But this rearticulation more closely mirrors the Court’s substantive criminal law principles as outlined in *Apprendi*. And more importantly, it is more

123. *Id.* at 184.

124. Chemerinsky, *supra* note 58, at 532.

125. See *Apprendi v. New Jersey*, 530 U.S. 466, 493 (2000) (“A second *mens rea* requirement hardly defeats the reality that the enhancement statute imposes of its own force an intent requirement necessary for the imposition of sentence. On the contrary, the fact that the language and structure of the ‘purpose to use’ criminal offense is identical in relevant respects to the language and structure of the ‘purpose to intimidate’ provision demonstrates to us that it is precisely a particular criminal *mens rea* that the hate crime enhancement statute seeks to target.”).

sensitive to the ways that the process of imposing punishment has evolved over time, including the increased reliance on criminal supervision.¹²⁶

In *Apprendi*, Justice Stevens and the majority looked to indictment practices at common law to elucidate the proper role of the jury. The Court principally relied on John Frederick Archbold's treatise on criminal practice, which noted that "all the facts and circumstances which constitute the offence" should be "stated with such certainty and precision" in the indictment so "*that there may be no doubt as to the judgment which should be given*, if the defendant be convicted."¹²⁷ Whatever final punishment a defendant received was thus "invariably linked" to the facts found by the jury.¹²⁸ The Court bolstered this understanding with references to English criminal trial practices of the eighteenth century, which treated the imposition of punishment following a trial as a pronouncement of law, and not a judicial determination.¹²⁹

Justice Stevens then noted that a statute that "annexe[d] a higher degree of punishment to a common-law felony . . . under particular circumstances" required a prosecutor to "expressly charge . . . [those] circumstances" in the indictment "in order to bring the defendant within that higher degree of punishment."¹³⁰ And accordingly, failure to prove those circumstances at trial would mean that "the defendant [would] be convicted of the common-law felony only."¹³¹ Stevens analogized these "circumstances mandating a particular punishment" to the hate crime enhancement in the case.¹³² He concluded:

If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of

126. See *infra* Section III.C.

127. *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (quoting JOHN JERVIS, ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (London, Henry Sweet, 15th ed. 1862)).

128. *Id.* at 478.

129. *Id.* at 479-80 (first quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *369-70; then quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 36-37 (Antonio Padoa Schioppa ed., 1987)).

130. *Id.* at 480 (quoting JOHN JERVIS, ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES 51 (London, Henry Sweet, 15th ed. 1862)).

131. *Id.* at 480-81.

132. *Id.* at 480-83.

protections that have, until that point, unquestionably attached.¹³³

An apparent difficulty with these historical comparisons was that at common law, the “linkage” between crime and punishment was far more obvious and straightforward. Because common-law criminal offenses were sanction-specific, a particular criminal penalty naturally flowed from finding a person guilty of a particular crime.¹³⁴ Today, however, a criminal statute lays out a range of penalties from which a final sentence is chosen. Guilt and punishment are therefore separated into two distinct stages of the criminal process, with the jury making the determination of guilt, and the judge pronouncing the ultimate punishment to be imposed based on the crime of conviction. *Apprendi* bridged this distinction by suggesting that just as at common law, where a judge was constrained to pronounce only the punishment annexed to the crime of conviction, a judge today was constrained to pronounce only a sentence within the *range of penalties* annexed to the crime of conviction. As explained by Justice Thomas in *Alleyne*, “[t]his linkage of facts with particular sentence ranges . . . reflects the intimate connection between crime and punishment.”¹³⁵ Thus, when a judge makes a finding that increases a defendant’s sentencing exposure, she vitiates this link between the crime of conviction and the appropriate punishment for that crime.

Revisiting the *Apprendi* cases’ historical analyses about the substantive criminal law reveals that Chemerinsky’s principle can quite easily accommodate the proposed modification. These cases were, first and foremost, concerned with the connection between crime and “punishment,” not crime and “sentencing.” Indeed, the very notion of sentencing, let alone the kind of sentence “enhancements” contemplated in these cases, was foreign to the common law, where judges rarely exercised any discretion at all in pronouncing the punishment due to a person found guilty of a crime.¹³⁶ The Court thus used the historical linkage between crime and punishment to conclude that certain sentencing enhancements allowed judges to impose punishment that was based not on the crime of conviction, but on a new, more serious offense.¹³⁷ Hence: under the Sixth Amendment, it is wrong to convict a person of one crime and *punish* that person for another.

133. *Id.* at 484.

134. *Alleyne v. United States*, 570 U.S. 99, 108 (2013).

135. *Id.* at 109; *see also id.* at 112 (“[T]he legally prescribed range is the penalty affixed to the crime . . .”).

136. *See id.* at 108.

137. *See Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) (citing *id.* at 500-03 (Thomas, J., joined by Scalia, J., concurring)).

As will be demonstrated in Part III, this version of Chemerinsky's proposition is more sensitive to further developments in the imposition of criminal punishment.¹³⁸ *Apprendi* was necessary in the first instance because the administration of punishment within the criminal legal system had evolved from the time of the Founding. As just discussed, while the linkage between crime and punishment used to be plainly apparent, the creation of a distinct sentencing stage in a criminal case complicated that connection. This Note suggests that sentencing is but one example of a new development within the criminal legal system that attenuates this connection between crime and punishment. The administration of criminal punishment is far more complex today than it was in the past, with the state frequently aggravating a person's punishment long after the completion of a jury trial or guilty plea.¹³⁹

Revocation of supervised release is one such invention. Revocation adds new prison time to a person's sentence; it imposes and aggravates punishment. It is therefore important to ask whether the government, when revoking a term of supervised release, has convicted a person of one crime and punished them for another. Before turning to this Note's answer to that question, the next Part introduces the institution of federal supervised release and the Court's treatment of its constitutionality.

II. SUPERVISED RELEASE AND *UNITED STATES V. HAYMOND*

Federal supervised release is the newest candidate for *Apprendi*'s expansion. While *Apprendi* has hardly remained dormant over the past two decades,¹⁴⁰ its application into a setting outside of sentencing would no doubt constitute a substantial development to the doctrine. This Part begins with an introduction to the institution of federal supervised release and its unique features. It then provides an overview of *United States v. Haymond* and the questions left unresolved by the case. While *Haymond* purported to consider an application of *Apprendi* to the revocation context, I argue that the Justices largely failed to grapple with the substantive criminal law principles undergirding the *Apprendi* doctrine. Instead, the reasoning in *Haymond* reflects more traditional methods of Sixth Amendment analysis that do not take advantage of the new doctrinal tools provided by *Apprendi* and its progeny. Finally, I take a closer look at the theories advanced by

138. See *infra* Sections III.A, III.C.

139. See *infra* Section III.C.

140. See generally, e.g., *Cunningham v. California* 549 U.S. 270 (2007) (using *Apprendi* to strike down California's determinate sentencing law); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (applying the *Apprendi* rule to facts that aggravate criminal fines); *Alleyne*, 570 U.S. 99 (finding that facts that increase the mandatory minimum of an offense must similarly be found by a jury under *Apprendi*).

each of the three *Haymond* opinions to evaluate the limitations of their reasoning and to provide additional historical and doctrinal context necessary for understanding my proposed solution.

A. Enter Supervised Release

Supervised release, the predominant form of criminal supervision within the federal system, was introduced in 1987 under the Sentencing Reform Act (SRA) as a replacement for the system of federal parole.¹⁴¹ As Professor Fiona Doherty has outlined in great detail, one of the primary goals of the new supervised release system was to eliminate the indeterminate nature of sentences under the old system.¹⁴² Previously, incarcerated persons in the federal system were often eligible for release after serving just a fraction of their full prison sentence.¹⁴³ So while some individuals served the entirety of their promised term, others with identical sentences could theoretically see freedom in just one third or one half of that time. Moreover, because almost all decisions surrounding the granting, modification, and revocation of parole were under the purview of the U.S. Parole Commission, a federal agency, many were troubled by the notion of an unelected body exercising so much control over an individual's punishment.¹⁴⁴

The drafters of the SRA thus determined that supervised release should be imposed not as a form of relief from an existing prison sentence, but as a way to help individuals transition back into the free world subsequent to a determinate prison term.¹⁴⁵ Accordingly, under 18 U.S.C. § 3583, federal supervised release is administered by a judge, and can be imposed only as a separate term following

141. Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266 (codified as amended in scattered sections of 18 U.S.C.).

142. See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 959-60 (2013).

143. See Underhill & Powell, *supra* note 35, at 299.

144. This indeterminacy drew bipartisan criticism. As explained by Professor Schuman:

Critics on the left questioned the moral authority of parole boards to decide whether a person was ready to leave prison and criticized socio-economic disparities in who was granted parole. Critics on the right argued that criminal offenders deserved to be punished for their crimes, not released early or coddled with attempts at reform.

Schuman, *supra* note 17, at 600; see also Doherty, *supra* note 142, at 991-95 (describing the “new orthodoxy, uniting right and left”).

145. See Doherty, *supra* note 142, at 996-97 (noting that supervised release was designed to provide “conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community”) (quoting S. REP. NO. 98-225, at 57 (1983)); *Primer on Supervised Release*, U.S. SENT’G COMM’N (2021), https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Supervised_Release.pdf [<https://perma.cc/CX4E-GSHX>].

the completion of the entire term of imprisonment.¹⁴⁶ In keeping with the “determinate” nature of the system, the initial version of the SRA did not even include a provision for supervised release to be revoked, such that a person finishing their prison term was guaranteed not to return absent a brand-new criminal prosecution for another criminal offense.¹⁴⁷ But modifications to the bill and additional pieces of legislation appended a mechanism for revocation that ultimately resulted in a supervision system not quite so different from its predecessor.¹⁴⁸ As with parole, then, supervised release can be modified, extended, terminated, or revoked after consideration of various statutory factors.¹⁴⁹

While certain statutory offenses require terms of supervised release on top of incarceration penalties, most supervised-release terms are imposed on a discretionary basis under § 3583(e).¹⁵⁰ Professor Christine S. Scott-Hayward has demonstrated, however, that judges do not exercise this discretion in any meaningful sense, and as a result, impose supervised release in nearly all eligible cases.¹⁵¹ Moreover, because so much of the focus of sentencing is on incarceration, judges rarely provide any explanation for why supervised release is deemed necessary in a given case.¹⁵² With this backdrop, the number of individuals on supervised release has grown enormously since its inception, nearly tripling from the period between 1995 to 2015.¹⁵³

In 2021, over 110,000 people were serving terms of supervised release.¹⁵⁴ These individuals are subject to a host of onerous conditions, similar to those faced by parolees and probationers.¹⁵⁵ And under § 3583(e), a judge can revoke

146. See 18 U.S.C. § 3583(a) (2018).

147. See Doherty, *supra* note 142, at 999-1000 (“Supervised release could not be revoked in favor of prison, because it was not an alternative to prison.”).

148. See *id.* at 1000-04.

149. See 18 U.S.C. § 3583(e) (2018).

150. See Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 192-93 (2013).

151. See *id.* at 185-86, 199; see also Schuman, *supra* note 21 (“Federal judges now impose supervised release in 99 percent of qualifying cases”).

152. See Scott-Hayward, *supra* note 150 at 208-10.

153. *Number of Offenders on Federal Supervised Release Hits All-Time High*, PEW CHARITABLE TRS. (Jan. 2017), https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf [<https://perma.cc/6E9J-W4H9>].

154. See Table E-2, *supra* note 46.

155. See Scott-Hayward, *supra* note 150, at 196 (“Similar to probation and parole, supervised release subjects people to an extensive list of conditions with which they must comply or risk revocation and reimprisonment.”). These conditions range in type and severity, and judges exercise varying degrees of discretion over their imposition. Here is Professor Scott-Hayward:

a person's term of supervised release if she "finds by a preponderance of the evidence that the defendant violated a condition" of supervision,¹⁵⁶ a fate awaiting about a third of all individuals on supervised release.¹⁵⁷ Importantly, although a person serving a term of supervised release has, by definition, completed their full prison sentence, revocation sends a person back to prison and imposes an entirely new term of imprisonment. This new term is limited by two facts arising from sentencing for the original offense of conviction: (1) the maximum term of supervised release for the original offense; and (2) the severity of that offense as classified by § 3583(e)(3).¹⁵⁸

Scholars have pointed out several disturbing features of revocation and the supervised-release system. First, a judge who revokes a term of supervised release and hands down a new prison sentence can also impose an additional term of supervised release to follow the completion of that new term of imprisonment.¹⁵⁹ And because the maximum prison sentence under the statute resets each time that a term of supervision is revoked, federal defendants can find themselves in a never-ending loop of imprisonment and supervision.¹⁶⁰ While some jurisdictions limit the length of this cycle based on the maximum term of supervised release allowed by statute, others have expressed no such restriction.¹⁶¹ Moreover, Professor Eric S. Fish has noted that because drug-, sex-, and terrorism-related crimes – the first two categories comprising nearly half of

The Sentencing Guidelines contain an expansive list of conditions that may be imposed on defendants. As well as the "mandatory conditions" . . . , there is a list of 15 "standard" conditions that the Commission recommends be imposed. These include reporting requirements, employment requirements, and association restrictions. The Guidelines also set out seven "special" conditions that are "recommended" under certain specified circumstances but may also be imposed in other cases "where appropriate." For example, in all felony cases, a condition prohibiting the defendant from possessing a weapon should be imposed. Finally, there are six "additional" conditions that "may be appropriate on a case-by-case basis." These include a curfew and occupational restrictions.

Scott-Hayward, *supra*, at 196-97 (footnotes omitted).

156. 18 U.S.C. § 3583(e)(3) (2018).

157. See Schuman, *supra* note 21.

158. See 18 U.S.C. § 3583(e)(3) (2018).

159. See Scott-Hayward, *supra* note 150, at 198; Doherty, *supra* note 142, at 1004; Fish, *supra* note 18, at 1394.

160. See Doherty, *supra* note 142, at 1004-11; Fish, *supra* note 18, at 1394-95.

161. See Fish, *supra* note 18, at 1394 & nn.110-11 ("Some" but not all "federal circuit courts have interpreted the supervised release statute to create an indirect limit on aggregate prison time . . . for crimes where the supervised release term is subject to a statutory maximum . . .").

all non-immigration cases in the federal criminal docket¹⁶²—lack statutory maximums for terms of supervised release, individuals convicted of such offenses simply have no hope of ever escaping the surveillance and restrictions of the criminal system.¹⁶³ Finally, Professor Jacob Schuman, the most prolific modern scholar on the federal system of supervision, has recently written on the role of supervised-release revocations as tools of federal drug policy and immigration enforcement.¹⁶⁴

A point of discussion that has been gaining prominence amidst these concerns is revocation's similarity to traditional punishment and prosecution.¹⁶⁵ First, a person suspected of violating a condition of supervised release has the right to a preliminary hearing to determine whether there is probable cause that said violation occurred.¹⁶⁶ Once probable cause is found, the court must hold a revocation hearing, at which the defendant has many of the rights familiar to a trial—notice, opportunity to present evidence and cross-examine witnesses, appointed counsel, and so on.¹⁶⁷ Moreover, the proceeding is adversarial in nature, with the government responsible for presenting evidence in favor of guilt.¹⁶⁸ Perhaps most crucially, revocations of supervised release, like standard criminal prosecutions, impose new terms of imprisonment. Under federal parole, since a term of supervision effectively *replaced* a portion of the original prison sentence, revocation could only result in the defendant serving the remainder of that original sentence.¹⁶⁹ By contrast, as just discussed, supervisees under federal supervised release have necessarily already served the entirety of their original prison sentence—any additional time in prison is thus akin to a brand-new sentence of imprisonment.¹⁷⁰

These similarities between revocation and traditional prosecution are striking precisely because of how differently courts treat them. Individuals facing

162. Doherty, *supra* note 35, at 275 & n.25.

163. See Fish, *supra* note 18, at 1395 (noting that this particular feature of federal supervised release makes it “a uniquely powerful tool for keeping people trapped in a cycle of supervision and incarceration”).

164. Jacob Schuman, *Drug Supervision*, 19 OHIO ST. J. CRIM. L. 431 (2021) [hereinafter Schuman, *Drug Supervision*]; Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817 (2022) [hereinafter Schuman, *Criminal Violations*].

165. See, e.g., Underhill & Powell, *supra* note 35, at 316.

166. See FED. R. CRIM. P. 32.1(b)(1).

167. See FED. R. CRIM. P. 32.1(b)(2).

168. See Underhill & Powell, *supra* note 35, at 316.

169. See Schuman, *supra* note 17, at 598–99.

170. See Underhill & Powell, *supra* note 35, at 306–07 (noting that by revoking a term of supervised release, a judge “is imposing a *new and additional* term of imprisonment, distinct from the original term of imprisonment imposed as punishment for the underlying crime”).

revocation of their supervised-release terms enjoy only a fraction of the procedural protections normally offered to criminal defendants. For example, they are not protected by the exclusionary rule or the federal rules of evidence.¹⁷¹ And of course, there is a much lower burden of proof for the prosecution, with a single judge able to sustain a violation only by a preponderance of the evidence.¹⁷² So although these aspects of supervised-release revocation have evaded constitutional scrutiny for the better part of the last thirty-five years, it is easy to see in hindsight why criticisms are now being raised about the propriety of the system.

This Note raises an additional concern about the likeness between revocations of supervised release and traditional criminal prosecutions, which is that this similarity may lead us to view the constitutionality of revocation solely through the traditional lens of textual interpretation of the Sixth Amendment. That is, instead of asking whether revocation circumvents a defendant's original criminal prosecution by imposing punishment beyond the authorization of that person's verdict, we may be led to ask whether a revocation simply *is* a criminal prosecution under the meaning of the Sixth Amendment. My goal is not to suggest that the former conception is the only way to evaluate the constitutionality of revocation. But an exclusive focus on the latter question threatens to sideline the teachings of the *Apprendi* doctrine and limit the reach and significance of the jury right. And as will be shown, the Court's treatment of these issues in *United States v. Haymond*¹⁷³ suggests that such a concern is not merely hypothetical.

B. *United States v. Haymond*

In *Haymond*, defendant Andre Haymond was convicted of possessing child pornography under 18 U.S.C. § 2252(b)(2), an offense carrying a prison term of zero to ten years with a period of supervised release between five years and life.¹⁷⁴ He was ultimately sentenced to a prison term of thirty-eight months, followed by ten years of supervised release.¹⁷⁵ Mr. Haymond served his full prison sentence, but two years afterwards, the government sought to revoke his term of

171. See Scott-Hayward, *supra* note 150, at 203.

172. See 18 U.S.C. § 3583(e)(3) (2018).

173. 139 S. Ct. 2369 (2019). *Haymond* was seen as a particularly important case given the Court's near-complete silence on the constitutional issues surrounding federal supervised release. See Doherty, *supra* note 35, at 274 (describing *Haymond* as "the most consequential decision on federal supervised release in two decades"); Schuman, *supra* note 17, at 590 ("Until *Haymond*, supervised release had received scant attention from either scholars or courts.").

174. See *Haymond*, 139 S. Ct. at 2373.

175. See *id.*

supervised release, alleging that he again possessed and viewed child pornography in violation of his supervision conditions.¹⁷⁶

As just discussed, revocations of supervised release are normally governed by § 3583(e), the default provision covering revocations in the federal code.¹⁷⁷ But Mr. Haymond's alleged violation was listed under § 3583(k), a provision added to the supervised-release statute in 2003.¹⁷⁸ Under that provision, revocation resulting from the possession of child pornography carried its own mandatory minimum of five years' imprisonment.¹⁷⁹ The district court judge admonished both the government's failure to bring robust evidence in defense of its allegation as well as the extraordinarily punitive nature of § 3583(k), but nevertheless sentenced Mr. Haymond to an additional five years of imprisonment, the minimum under that provision.¹⁸⁰ Mr. Haymond challenged this sentence as a violation of his Sixth Amendment right to a jury trial.

The Supreme Court ruled 4-1-4 in favor of Mr. Haymond in a decision reached by unusually close margins.¹⁸¹ The four-Justice plurality opinion, written by Justice Gorsuch, stated that as applied here, § 3583(k) was unconstitutional under *Alleyne* because it carried a mandatory minimum higher than the one associated with the original offense for which Mr. Haymond was convicted.¹⁸² Gorsuch's opinion initially looks to be a relatively straightforward application of *Apprendi* despite the entirely novel setting in which the case took place.¹⁸³ In just thirteen pages, he traced the development of Sixth Amendment doctrine as it had been applied through the *Apprendi* line of cases, noting that the extension to the supervised-release context meant "merely acknowledg[ing] that an accused's final sentence includes any supervised release sentence [they]

176. See *United States v. Haymond*, No. 08-CR-201, 2016 WL 4094886, at *2 (N.D. Okla. Aug. 2, 2016).

177. 18 U.S.C. § 3583(e)(3) (2018).

178. *Haymond*, 139 S. Ct. at 2374.

179. See 18 U.S.C. § 3583(k) (2018).

180. See *Haymond*, 2016 WL 4094886, at *13 ("The United States failed to call its own forensic expert, failed to assist the Court in applying Tenth Circuit law . . . to its evidence, and failed to prove Haymond knowingly possessed [child pornography] beyond a reasonable doubt."); *Haymond*, 139 S. Ct. at 2375. For details on the facts surrounding Mr. Haymond's case not covered in the Court's opinion, see Doherty, *supra* note 35, at 276-77.

181. *Haymond*, 139 S. Ct. at 2369.

182. See *id.* at 2378-79. Interestingly, while Breyer's concurrence is commonly understood to be the narrower holding, his concurrence would likely support a facial challenge to § 3583(k) given that his reasoning does not rely on § 3583(k)'s mandatory minimum being higher than that of the original offense. See *id.* at 2385-86 (Breyer, J., concurring in the judgment).

183. See Fish, *supra* note 18, at 1403-04 (noting that "Justice Gorsuch's plurality opinion applied the logic of *Apprendi* and *Alleyne* in straightforward fashion").

may receive.”¹⁸⁴ Therefore, he argued, the court’s imposition of § 3583(k)’s five-year mandatory minimum increased the penalty for Mr. Haymond’s original offense in contravention of *Alleyne*.¹⁸⁵

While the question before the Court involved only the provision of § 3583(k), Justice Gorsuch also offered his thoughts on the implications of applying *Apprendi* to the general supervised-release revocation provision. This preview was motivated by Justice Alito’s accusation that the plurality opinion carried “potentially revolutionary implications” for the institution of federal supervision.¹⁸⁶ Alito’s principal concern was that while the plurality holding was technically limited to § 3583(k), its attendant reasoning suggested that “the entire system of supervised release . . . [wa]s fundamentally flawed.”¹⁸⁷ Gorsuch responded by suggesting that even if his reasoning were applied to the full system of supervised release, *Apprendi* would only be implicated in two situations: (1) when the revocation imposed a mandatory minimum higher than the one imposed for the initial offense (as here); and (2) when the total term of imprisonment resulting from the revocation exceeded the statutory maximum of the original offense.¹⁸⁸ Because revocations generally do not carry mandatory minimums,¹⁸⁹ and offenders are rarely sentenced close to the initial statutory maximum, this would mean that only a modest fraction of supervised-release revocations would violate *Apprendi*.¹⁹⁰ Enough to raise some concerns, potentially, but a far cry from Alito’s suggestion that the plurality’s reasoning would entail that “the Sixth Amendment right to a jury trial applies to *any* supervised-release revocation proceeding.”¹⁹¹

Nevertheless, Justice Breyer largely endorsed the dissent’s reasoning and concurred in the judgment only, declining to “transplant the *Apprendi* line of cases to the supervised-release context” given the “potentially destabilizing consequences.”¹⁹² He found instead that § 3583(k) was itself so unusual that

184. *Haymond*, 139 S. Ct. at 2379.

185. *See id.* at 2378-79.

186. *Haymond*, 139 S. Ct. at 2386 (Alito, J., dissenting); *see id.* at 2386-91.

187. *Id.* at 2386-87.

188. *See id.* at 2383-84 (plurality opinion).

189. *See* 18 U.S.C. § 3583(e) (2018).

190. *See Haymond*, 139 S. Ct. at 2384.

191. *Id.* at 2387 (Alito, J., dissenting).

192. *Id.* at 2385 (Breyer, J., concurring in the judgment). Similar concerns regarding not the doctrinal coherency of the decision, but rather its harmful consequences, were expressed by dissenters in *United States v. Booker*, 543 U.S. 220 (2005), a case that applied the *Apprendi* doctrine to render the Federal Sentencing Guidelines advisory. *See id.* at 313 (Scalia, J., dissenting in part) (accusing the majority of “wreak[ing] havoc on federal district and appellate courts

revocations under that provision constituted entirely new criminal prosecutions for an independent offense.¹⁹³ That is, they could no longer be considered revocations of supervised release at all and should instead be treated as full-fledged prosecutions for a new criminal offense, which of course required all the constitutional protections that normally attended the imposition of criminal punishment. By distinguishing § 3583(k) from the rest of the statute, Breyer held fast to the constitutionality of revocation even while ruling in favor of Mr. Haymond.¹⁹⁴ Importantly, his refusal to adopt the plurality's reasoning meant that Justice Gorsuch's opinion applying *Apprendi* to the supervised-release setting did not constitute binding precedent.¹⁹⁵

Finally, Justice Alito authored a strident dissent raising those aforementioned concerns and roundly rejecting the application of the jury right to the revocation context. In arguing that the meaning of the Sixth Amendment could not accommodate this new setting, Alito relied heavily on an equivalence between supervised release and its predecessor, federal parole.¹⁹⁶ He argued that supervised release “[wa]s not fundamentally different” from parole and “therefore should not be treated any differently for Sixth Amendment purposes.”¹⁹⁷ Crucial to Alito's analysis was the fact that the text of the Sixth Amendment limited its application to “criminal prosecutions.”¹⁹⁸ And both parole and supervised-release revocation proceedings, he argued, arose after a criminal prosecution had already been completed.¹⁹⁹

Haymond has left the law of supervised release in “constitutional limbo.”²⁰⁰ The 4-1-4 split of the decision resulted in little precedential value and limited

quite needlessly, and for the indefinite future”); *id.* at 329 (Breyer, J., dissenting in part) (noting that the decision risked “unwieldy trials, a two-tier jury system, a return to judicial sentencing discretion, or the replacement of sentencing ranges with specific mandatory sentences”).

193. See *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment).

194. See *id.*

195. While it is generally accepted that Justice Breyer's concurrence is the controlling opinion of the case, see *id.* at 2386 (Alito, J., dissenting), at least one court has suggested that it is possible to view the plurality opinion as constituting a “logical subset” of Breyer's approach of treating § 3583(k) as a separate criminal offense. See *United States v. Shakespeare*, 32 F.4th 1228, 1238 (10th Cir. 2022). For extensive analysis of the potential significance of Breyer's short concurrence, see King, *supra* note 35, at 123-35.

196. See *Haymond*, 139 S. Ct. at 2389-95 (Alito, J., dissenting).

197. *Id.* at 2391.

198. U.S. CONST. amend. VI.

199. See *Haymond*, 139 S. Ct. at 2391 (Alito, J., dissenting).

200. Fish, *supra* note 18, at 1381.

guidance for lower courts.²⁰¹ Moreover, despite the case's recency, the Court's composition since *Haymond* has already changed significantly, with Justices Ginsburg and Breyer being replaced by Justices Barrett and Jackson, respectively. The uncertainty surrounding how the new Justices would rule suggests that there is space for reconsideration of these issues in a future case. And indeed, this Note joins a chorus of scholarship on the constitutionality of supervised release that has emerged since the *Haymond* decision.²⁰²

In Part III, I will argue that reconsideration of the Sixth Amendment reasoning in *Haymond* is both welcome and necessary. The following Section therefore looks more closely at the three *Haymond* opinions and their respective reasoning to identify their limitations. Along the way, I highlight some important aspects of the law of supervised release and explain the context necessary to understanding my own proposal.

C. *The Haymond Court and the "Criminal Prosecution": Three Theories of Revocation*

While *Haymond*'s limited precedential value means that the reasoning employed by the Justices do not directly hold significant practical consequences, I choose to highlight them here for two reasons. First, the three *Haymond* opinions are largely emblematic of the kinds of approaches that have been taken by scholars and commentators who have similarly contemplated the constitutionality of revocation. Second, each opinion offers an opportunity to provide helpful context on the development of the law of criminal supervision and Sixth Amendment doctrine. In what follows, I take the opinions in reverse, from the dissent to the plurality, as this will better flow into my own theory and understanding of revocation under the *Apprendi* doctrine. Despite substantial disagreements among the three Justices who authored the *Haymond* opinions, all three demonstrated a noticeable concern about the nature and scope of a "criminal prosecution." In so doing, they largely elided the substantive criminal law principles that were crucial to *Apprendi*'s holding. The result, I argue, is a crimped view of the Sixth Amendment jury right that limits both its reach and impact.

201. For the most part, however, lower courts have largely maintained a narrow view of the decision, declining to take even Justice Gorsuch's modest suggestions as to *Apprendi* expansion. See, e.g., *United States v. Seighman*, 966 F.3d 237, 244 (3d Cir. 2020) (declining to expand *Haymond* to a drug revocation statute with a mandatory minimum); *United States v. Henderson*, 998 F.3d 1071, 1072 (9th Cir. 2021) (declining to expand *Haymond* to a revocation resulting in a sentence exceeding the statutory maximum of the original offense); *United States v. Childs*, 17 F.4th 790, 792 (8th Cir. 2021) (declining to expand *Haymond* to all supervised-release revocations).

202. See *supra* note 35.

1. *The Dissent's Originalism: Revocation as Post-Prosecution*

Of the three opinions in *Haymond*, Justice Alito's dissent undoubtedly contained the most extensive textual analysis of the Sixth Amendment. His reasoning adopted a familiar originalist lens, inquiring into the historical meaning of the Amendment's text along three separate axes: *to whom* the right applied, *when* the right applied, and *what* the right guaranteed.²⁰³ First, Alito noted that the Sixth Amendment applied only to the "accused," which "[a]t the founding, . . . described a status preceding 'convicted.'"²⁰⁴ And while Mr. Haymond "was *formerly* the accused[,] . . . after a jury convicted him and authorized the judge to sentence him[,] . . . [he] was transformed into the convicted."²⁰⁵ Then, relying on a series of nineteenth-century sources, Alito argued that "a 'prosecution' concludes when a court enters final judgment."²⁰⁶ Violations of supervised release arose due to "postjudgment conduct" and thus "necessarily occur[red]" following the completion of the original criminal prosecution.²⁰⁷ Finally, Alito inquired into historical practices surrounding the jury to discern the content of the Sixth Amendment's guarantee. His analysis here largely involved a search for "historical analogs" to revocation proceedings, surveying a variety of historical postconviction practices that did not require juries for their imposition.²⁰⁸ He concluded from these examples that "a clear historical fact emerges: American juries have simply played 'no role' in the administration of previously imposed sentences."²⁰⁹

The straightforward formalism of Justice Alito's originalist reading of the Sixth Amendment has earned at least some support among scholars.²¹⁰ But not yet acknowledged is the fact that his opinion involved almost no engagement with the substantive criminal law principles undergirding the *Apprendi* doctrine. Indeed, much of Alito's dissent is mired in the kind of textual interpretation designed to determine whether a person facing revocation has been *denied* the right to a jury. But as discussed in Part I, *Apprendi* and its progeny were concerned

203. *Haymond*, 139 S. Ct. at 2392 (Alito, J., dissenting) (citing *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008)).

204. *Id.* (quoting *Betterman v. Montana*, 578 U.S. 437, 443 (2016)) (internal quotations omitted).

205. *Id.*

206. *Id.* at 2393.

207. *Id.* at 2395.

208. *See id.* at 2396-98 (considering historical practices like recognizances contingent on good behavior, corporal punishment, and the administration of probation and parole).

209. *Id.* at 2398 (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009)).

210. *See, e.g.*, Stith, *supra* note 35, at 1306 ("Likewise, it seems to me, the revocation hearing is clearly *after* the 'criminal prosecution' has ended.").

with whether the jury right had been *eroded* by imposing punishment beyond the authorization of a person's original guilty verdict.²¹¹ My criticism of Alito's approach is therefore not regarding the fidelity of his textual analysis, but what I argue is his failure to consider the alternative approach to Sixth Amendment interpretation offered by *Apprendi*.²¹²

At almost every turn, the dissent's reasoning is reflective of its omission of *Apprendi* principles. First, the observation that a person on supervised release is no longer "the accused" is quite plainly emblematic of the traditional textual interpretation approach. After all, past *Apprendi* cases involved violations of the jury right taking place at *sentencing*, by which time a person has already been "transformed into the convicted," just as in revocation.²¹³ Naturally, this fact did not prevent the Court from applying the Sixth Amendment in those decisions. Justice Alito's discussion of *when* the jury right applies is similarly revealing. As with the start of his opinion, he emphasized the similarity between supervised release and its predecessor, parole, pointing to prior precedent that found that "[p]arole arises *after* the end of the criminal prosecution."²¹⁴ And whatever differences existed between supervised release and parole, supervised release, too, necessarily took place after final judgment.²¹⁵

Notably, Justice Alito is not alone in drawing this comparison. The Supreme Court indeed decided long ago in *Morrissey v. Brewer* that the "full panoply of rights" normally due to a criminal defendant did not apply to those facing revocation of parole, given that revocation was not a part of a "criminal prosecution."²¹⁶ After the passage of the SRA, lower courts continued to rely on *Morrissey* to apply the same rights to those facing revocations of supervised release.²¹⁷ Even following the *Haymond* decision, commentators have continued to frame the

211. See *supra* Section I.C.

212. This is not to suggest, however, that Justice Alito is correct in finding that the original meaning of the Sixth Amendment cannot accommodate revocation proceedings. In his forthcoming article, Professor Schuman presents a compelling case for understanding revocation as the modern equivalent of "forfeiting" a recognizance, which required a jury trial at the time of the Founding. See Schuman, *supra* note 35 (manuscript at 4).

213. *Haymond*, 139 S. Ct. at 2392 (Alito, J., dissenting).

214. See *id.* at 2394 (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

215. See *id.*

216. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Prior to this case, parolees and probationers were not guaranteed any proceeding at all for revocations of their supervision terms. When the Court took up the question for the first time in *Morrissey*, the defendants did not even bother trying to argue that their revocations should be covered under the jury-trial right. See Simon, *supra* note 35, at 579.

217. See, e.g., *United States v. Gomez-Gonzalez*, 277 F.3d 1108, 1111 (9th Cir. 2002); *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005); *United States v. Sistrunk*, 612 F.3d 988, 991 (8th Cir. 2010).

question of the rights due at revocation by reference to those rights established in *Morrissey*, asking whether the difference between federal parole and supervised release merited a reconsideration of those principles.²¹⁸ It is perhaps unsurprising, then, that Alito believed *Morrissey* to be controlling precedent, even excoriating the *Haymond* plurality for its “inexcusable” failure to “own up to attempting to overrule” it.²¹⁹

But although there are no doubt similarities between the questions raised by *Morrissey* and *Haymond*, these parallels end where *Apprendi* begins. After all, *Morrissey* was decided in 1972, almost three decades prior to *Apprendi*.²²⁰ It therefore could not possibly have relied on the principles advanced by the *Apprendi* line of cases. In focusing on the changes to federal criminal supervision (or lack thereof) between *Morrissey* and *Haymond*, then, Justice Alito failed to take into account the parallel development in Sixth Amendment jurisprudence brought by the *Apprendi* doctrine. Alito may ultimately be correct to note that a person facing revocation of supervised release has not been denied the right to a jury trial, just as *Morrissey* found for federal parolees. But such a conclusion should pose no obstacle for those using *Apprendi* to argue that revocation impermissibly erodes the jury right that was already granted at the conviction stage of the criminal proceedings.

Finally, the third prong of Justice Alito’s analysis — “*what the right guarantees*”²²¹ — at last directly reckoned with the *Apprendi* line of cases.²²² Ironically, however, this explicit engagement provides further evidence that his dissent did

218. See *supra* note 36. Other than the aforementioned fact regarding the criminal prosecution, the *Morrissey* Court provided two additional reasons for its denial of rights to parolees facing revocation: (1) supervision was administered by an agency, not a court; and (2) revocation deprived an individual only of “conditional liberty.” See *Morrissey*, 408 U.S. at 480. The first rationale plainly no longer applies — unlike federal parole, supervised release is administered by a court, not the parole commission. See 18 U.S.C. § 3583 (2018). The invocation of “conditional liberty” is also similarly inapt given the transformation of supervision from parole to supervised release. As others have noted, while individuals on supervised release are subject to terms of release, their liberty is not “conditional” in the same sense as someone on parole, who is granted freedom from imprisonment in exchange for the promise of good behavior. See Schuman, *supra* note 17, at 624 (“Because the defendant is no longer granted early release from prison, the term of post-release supervision no longer reflects an exchange between him and the government.”); Underhill & Powell, *supra* note 35, at 323 (“[A] judge who imposes a term of supervised release is not granting a defendant a reprieve from imprisonment in exchange for the defendant’s promise to comply with the conditions the judge sets.”). For a response to Justice Alito’s treatment of this point, see *infra* note 266.

219. *Haymond*, 139 S. Ct. at 2394 (Alito, J., dissenting).

220. *Morrissey*, 408 U.S. 471; *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

221. *Haymond*, 139 S. Ct. at 2392 (Alito, J., dissenting) (quoting *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 214 (2008) (Alito, J., concurring)).

222. See *id.* at 2395-99.

not grapple with the substantive criminal law principles of those decisions. After affirming the well-established rationale that a fact triggering an increase in sentencing exposure constituted an “element” of a “new, aggravated crime,”²²³ Alito argued that “no reasonable person would describe [violations of supervised release] as . . . ‘elements’ of the [original] offense.”²²⁴ I agree with Alito that describing supervision conduct as an “element” of an offense lacks immediate intuitive appeal. But *Apprendi* unambiguously rejected an understanding of a “crime” and its “elements” based on such a smell test.²²⁵ Instead, it drew a clear line to define elements based on whether a factual finding exposed a person to greater punishment.²²⁶ Whether violations of supervised release pass *that* test will be addressed in Part III.²²⁷

2. *The Concurrence’s Pragmatism: Revocation as New Prosecution*

Justice Breyer foregrounded another potential understanding of revocation—as an entirely new, separate prosecution for an offense. His short concurrence sounded in concerns characteristic of his own jurisprudence of pragmatism.²²⁸ Deferring to the purported congressional intent of § 3583, Breyer declined to extend *Apprendi* “in light of the potentially destabilizing consequences.”²²⁹ He found, however, that the particular supervised-release provision in question was so unique from standard revocations that it was really punishment for a new criminal offense, one that did not “grant[] a defendant the rights, including the jury right, that attend a new criminal prosecution.”²³⁰ Breyer thus ruled for Mr. Haymond on Sixth Amendment grounds, but with minimal constitutional reasoning, choosing to analyze the nature of revocation itself to find

223. *Id.* at 2398 (quoting *Alleyn v. United States*, 570 U.S. 99, 113 (2013)).

224. *Id.* at 2398-99.

225. See *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (“Despite what appears to us the clear ‘elemental’ nature of the factor here, *the relevant inquiry is one not of form, but of effect*—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”) (emphasis added).

226. See *id.*; *supra* Section I.A.

227. See *infra* Section III.B.2.

228. See Fish, *supra* note 18, at 1405-06; see also Mark S. Kende, *Constitutional Pragmatism, the Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635, 651-53 (2012) (outlining the history of democratic pragmatism on the Court).

229. *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring in the judgment).

230. *Id.* at 2386.

that the provision in question simply did not constitute a supervised-release revocation at all.²³¹

While Justice Breyer's conception of revocation as articulated in his opinion is specific to the particular provision in *Haymond*, the general idea that revocation might constitute a new and separate prosecution has clear intuitive appeal given the aforementioned similarity between revocations and traditional prosecutions. Judge Stefan Underhill of the District of Connecticut and Grace E. Powell have recently used this basis to argue in an online essay that revocation proceedings should be covered by the full range of constitutional protections governing criminal prosecutions, including the right to a jury trial.²³² They note that because supervised-release revocations impose new and additional terms of imprisonment, they are meaningfully different from revocations of parole and constitutionally indistinguishable from traditional prosecutions.²³³ Underhill and Powell thus advance a straightforward and powerful case of applying the Sixth Amendment to this setting by conceiving of revocation as a full-fledged criminal prosecution for a new criminal offense, the supervised-release violation.²³⁴

Such an argument naturally does not rely on *Apprendi* or its substantive criminal law principles, but one might still reasonably wonder why Justice Gorsuch — or any of the other Justices, for that matter — did not adopt such a strategy, which not only would have directly addressed Justice Alito's concerns that revocation takes place after the original criminal prosecution, but also seems to propose a more intuitive understanding of revocation. The answer is that this “new criminal prosecution” approach explicitly relies on a rejection of *Johnson v. United*

231. As noted by Professor Nancy J. King, Justice Breyer's approach actually appears to harken back to the test used in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to determine whether a given law constitutes punishment. See King, *supra* note 35, at 108–09. Breyer's concurrence thus could be read to engage in principles of substantive criminal law, and more specifically the appropriate understanding of “punishment.” Unfortunately, his thirteen-sentence opinion offers little analysis on these actual principles and seems mostly focused on demonstrating that § 3583 is *not* revocation, rather than on showing that it *is* punishment. So while Breyer's approach is in fact one that is technically based in the substantive criminal law, it does not rely on or utilize the functionalist understanding of “crime” and “punishment” as developed by *Apprendi* and its progeny. And accordingly, it provides no guidance on how such principles might be used to evaluate the broader system of supervised-release revocations.

232. Underhill & Powell, *supra* note 35, at 297–98.

233. *Id.* at 307–08.

234. See *id.*

States, in which the Court found that the imprisonment resulting from revocation is a “part of the penalty for the initial offense.”²³⁵

Johnson v. United States arose thirteen years after the SRA had taken effect.²³⁶ The case presented the Court with a choice between two understandings of supervised-release revocations.²³⁷ It could treat the imprisonment resulting from revocations as punishment for a new offense,²³⁸ or as part of the penalty for the original crime of conviction. Although the Court acknowledged the intuitive appeal of the former characterization, it was concerned that declaring revocation to constitute a new criminal punishment would mean that it would have to be governed by the traditional protections attending criminal prosecutions—the very argument made by Underhill and Powell.²³⁹ The Court thus chose, in no uncertain terms, the latter approach: “postrevocation sanctions” were to be considered “as part of the penalty for the initial offense.”²⁴⁰

This principle arising from *Johnson*, which Professor Schuman has dubbed the “original offense” doctrine, has understandably created deep tensions in our conception of revocations.²⁴¹ It suggests that a supervised-release revocation, which is evaluated based on conduct occurring during supervised release, is really punishment for the supervisee’s *original* criminal offense. This poses a challenge for those arguing that a revocation constitutes a new criminal prosecution, since the resulting penalty is supposed to be understood as an aggravation of the original sentence, rather than as an imposition of a new one. Of course, Underhill and Powell may be correct to reject the sensibility of this holding. As they note, *Johnson* appears to represent a deliberately fabricated distinction between revocations and criminal prosecutions, rather than a difference rooted in doctrine or reason.²⁴² But whatever the genuine merits of the case, *Johnson* remains good precedent that is unlikely to be overruled in practice. All three of the *Haymond* opinions cited *Johnson*, and both Justices Gorsuch and Breyer directly

235. 529 U.S. 694, 700 (2000). Indeed, Underhill and Powell’s essay appears to have been inspired by Judge Underhill’s dissent in *United States v. Peguero*, 34 F.4th 143 (2d Cir. 2022), in which he argued for this very conclusion while candidly conceding that the majority—which relied on *Johnson* to reject any constitutional distinction between supervised release and parole, see *id.* at 160–61—“acted consistently with existing precedent of this Court,” *id.* at 166 (Underhill, J., dissenting).

236. *Johnson*, 529 U.S. 694.

237. See *id.* at 699–700.

238. This was the rationale of the Sixth Circuit Court of Appeals in an earlier case, *United States v. Reese*, 71 F.3d 582, 590 (6th Cir. 1995).

239. See *Johnson*, 529 U.S. at 700.

240. *Id.*

241. Schuman, *Criminal Violations*, *supra* note 164, at 1841.

242. See Underhill & Powell, *supra* note 35, at 318–19.

quoted the line in question.²⁴³ Lower courts have similarly relied on the decision, which has now been on the books for over two decades.²⁴⁴ The new criminal prosecution approach is thus unlikely to see success without a substantial change to existing doctrine.

3. *The Plurality's Functionalism: Revocation as Extended Prosecution*

Finally, Justice Gorsuch's plurality opinion similarly sought to identify the boundaries of a criminal prosecution, beginning his analysis by asking, "[W]hen does a 'criminal prosecution' arise implicating the right to trial by jury beyond a reasonable doubt?"²⁴⁵ Conceding that the Founding Era conception of "prosecution" concluded at final judgment, Gorsuch instead engaged in a more functionalist reading of the Sixth Amendment, centering his discussion around the historical role of the jury in "exercis[ing] supervisory authority over the judicial function by limiting the judge's power to punish."²⁴⁶ He noted that "recent legislative innovations" such as sentencing enhancements and sentencing guidelines had complicated the application of this function, and argued that the *Apprendi* precedents established that "a 'criminal prosecution' continues and the defendant remains an 'accused' . . . until a final sentence is imposed."²⁴⁷ And because revocation sanctions were considered part of the penalty for the original offense,²⁴⁸ the extension of *Apprendi* to the supervised-release context involved "merely acknowledg[ing] that an accused's final sentence includes any supervised release sentence he may receive."²⁴⁹

Justice Gorsuch's novel understanding of the nature of the criminal prosecution is a welcome response to the ever-changing nature of our criminal institutions. Notably, the functionalism of his analysis is reminiscent of the kind employed in *Apprendi*. But Gorsuch's focus on the meaning of the term "criminal prosecution" still leaves his opinion vulnerable to textualist attacks like that of Justice Alito's dissent. More importantly, it suggests that he, too, did not fully

243. See *United States v. Haymond*, 139 S. Ct. 2369, 2380 (2019) (plurality opinion); *id.* at 2386 (Breyer, J., concurring); *id.* at 2394 (Alito, J., dissenting).

244. See *id.* at 2394 n.5 (Alito, J., dissenting) (collecting cases); see also Schuman, *Criminal Violations*, *supra* note 164, at 1841 (calling the original offense doctrine "a cornerstone of revocation law").

245. *Haymond*, 139 S. Ct. at 2376 (plurality opinion).

246. *Id.*

247. *Id.* at 2379 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481-82 (2000)).

248. See *supra* notes 236-240 and accompanying text.

249. *Haymond*, 139 S. Ct. at 2379 (plurality opinion).

embrace the substantive criminal law approach,²⁵⁰ which would not require any unique conception of the criminal prosecution to find the Sixth Amendment to be applicable.²⁵¹

This omission is most glaring when looking to Justice Gorsuch's juxtaposition of the application of the *Apprendi* rule in *Allelyne* with its application to the case in *Haymond*. For example, he noted that "just like the facts the judge found . . . in *Allelyne*, the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation" of the Sixth Amendment.²⁵² But unlike the fact in *Allelyne*, the supervised-release violation in *Haymond* was found long after sentencing had already concluded. It thus cannot reasonably be said to have "increased" the mandatory minimum of the original offense.²⁵³ The implications of this disconnect will be explored in much greater depth in the subsequent Part. For now, it suffices to say that the plurality opinion, too, did not fully reckon with an application of *Apprendi*'s principles to this new context.

In conceiving of revocation as part of the original criminal prosecution, Justice Gorsuch attempted to fit a sentencing peg into a revocation-shaped hole. And crucially, this awkward maneuver led him to suggest that even a full application of the *Apprendi* doctrine to the broader system of supervised release would have only tepid results, with the "vast majority of supervised release revocation proceedings . . . [remaining] unaffected."²⁵⁴ As I will argue next, however, a full-throated application of *Apprendi* and its substantive criminal law approach leads

250. Ironically, Justice Alito noted this very fact:

It is telling that the plurality never brings itself to acknowledge this clear departure from the *Apprendi* line of cases. For nearly two decades now, the Court has insisted that these cases turn on "a specific statutory offense," and its "ingredients" and "elements." Yet today we learn that—at least as far as the plurality is concerned—none of that really mattered.

Id. at 2399 (Alito, J., dissenting).

251. This conception is also not without problems. For one, if a "criminal prosecution" concludes once a final sentence—including any penalties stemming from revocation—is rendered, it is unclear how we ought to evaluate the status of a person currently serving a term of supervised release. That is, it is fully possible for such a person to complete their term of supervision without facing revocation, in which their final sentence was the one handed down at initial sentencing. Yet, if they *do* find their term of supervised release revoked, it would turn out that the criminal prosecution was ongoing all along, only concluding once the revocation penalty is appended to the person's original sentence. *Cf. id.* at 2395 (Alito, J., dissenting) ("And the Court's precedents emphatically say that a sentence is 'imposed' at final judgment . . . not again and again every time a convicted criminal wakes up to serve a day of supervised release and violates a condition of his release." (citation omitted)).

252. *Haymond*, 139 S. Ct. at 2378 (plurality opinion) (quoting *Allelyne v. United States*, 570 U.S. 99, 115 (2013)).

253. *See infra* Section III.B.1.

254. *Haymond*, 139 S. Ct. at 2384 (plurality opinion).

to a much more far-reaching conclusion about the constitutionality of revocations. A new theory of revocation is in order.

III. THE RETROACTIVE THEORY OF REVOCATION

Imagine that you are convicted by jury trial of a crime x , which carries a sentencing exposure of five to ten years. At your sentencing hearing, the judge decides based on your personal circumstances that an eight-year prison term is an appropriate penalty for your offense. But at this proceeding, the prosecutor tells your judge that in fact, you have committed another crime, y , entirely separate and distinct from the offense found by the jury. The judge finds by a preponderance of the evidence that you did indeed commit y , and believes that a two-year prison term would be an appropriate punishment for that offense. But of course, you were never charged with—let alone convicted of— y . But no matter: the judge simply decides to add this extra two years onto your eight-year sentence for x , for a total sentence of ten years imprisonment.

Naturally, you protest that this is a violation of your rights; you were never properly prosecuted for y , and only a jury should be able to find you guilty of it. But the judge and prosecutor argue that this is immaterial. They say that because your final sentence is still within the prescribed range of penalties for your original offense, x , the factual finding of y was simply a sentencing factor. After all, it merely allowed for a sentence within the sentencing exposure for your offense of conviction, which is exactly how *Apprendi* defined a sentencing factor.²⁵⁵ Satisfied with the propriety of this process, the judge hands down the ten-year sentence of imprisonment.

There is surely something constitutionally troubling about this picture. In plain terms, what has happened is exactly what is forbidden by the *Apprendi* principle: you were convicted of one crime but punished for another. Moreover, this conclusion does not seem to depend on the length of the resulting final sentence. That is, any concern over whether the final punishment imposed happens to fall within the sentencing exposure of the original offense is secondary to the more pressing problem, which is that the judge has circumvented the entire criminal prosecution process by punishing you for y under the guise of sentencing you for x .

This hypothetical scenario is almost exactly analogous to revocation. When a person is convicted of a crime in federal court, the judge imposes a prison sentence in accordance with the Sentencing Guidelines and that person's individual circumstances. If that person later violates a condition of their supervised release, the same judge can revoke the term of supervision, exercising her discretion over

255. See *supra* note 76 and accompanying text.

how much additional prison time is merited by the violation. Recent research by Professor Schuman suggests that most supervised-release revocations are imposed for new criminal conduct, rather than for technical violations of supervision terms.²⁵⁶ And just like in the above case, the penalty for this conduct is added to the sentence for the initial crime of conviction, thanks to *Johnson* and the original offense doctrine.²⁵⁷ The only marked difference between revocation and this hypothetical, then, is that the additional term of imprisonment is appended not concurrently with the initial sentence but at some time after that sentence has been imposed.

Hence the retroactive theory of revocation: revocation of supervised release imposes unconstitutional punishment under *Apprendi* by retroactively increasing the range of penalties to which a person is exposed. As just stated, revocation takes place long after a person's original conviction, by which time the initial sentence has been imposed and served in its entirety. The conduct punished by revocation is therefore necessarily a new offense, unrelated to the original crime of conviction. And yet the penalty arising from revocation is considered punishment for that original crime all the same. The retroactive theory reconciles this doctrinal tension by conceptualizing revocation as having a retroactive effect on a person's received sentence. While a person's punishment for a crime could be said to be determined at initial sentencing, it is *retroactively modified* at revocation, where additional imprisonment is added for that crime. As I will explain, this simple recharacterization will have important implications for the revocation context and beyond.

The following two Sections lay out my retroactive theory, relying on the functional understandings of "crime" and "punishment" presented in the *Apprendi* cases. The theory answers two questions: *whether* the *Apprendi* doctrine applies to revocation, and if so, *how* it applies. Accordingly, it will be explained in two steps. In Section III.A, I will demonstrate how revocation functions as "punishment," in just the same way as the process of sentencing was understood as an evolution of punishment in *Apprendi*. Section III.B then explains why the factual basis for revocation is the kind of finding that *Apprendi* understood as being an element of a new crime. Taken together, these propositions lead to the conclusion that all revocations of supervised release impose punishment based on a crime for which the defendant was never found guilty, a clear violation of the jury right under *Apprendi*. The Part concludes by contemplating how the retroactive theory might have application for settings beyond revocation, and how it can help motivate a more expansive understanding of the Sixth Amendment's protections.

256. See Schuman, *Criminal Violations*, *supra* note 164, at 1844.

257. See *supra* notes 236-240 and accompanying text.

A. *The Function of Revocation as “Punishment”*

Recall the modified version of Professor Chemerinsky’s proposition in Section I.C, summarizing the command of the *Apprendi* doctrine: under the Sixth Amendment, it is wrong to convict a person of one crime and punish that person for another.²⁵⁸ I argue that revocation functions in precisely this way. Revocation, just like sentencing, is but another development in the criminal legal system’s imposition of punishment. We therefore need not be concerned with whether a revocation hearing is part of a “criminal prosecution.” Under the substantive criminal law approach, if revocation constitutes criminal punishment, it is beholden to the Sixth Amendment jury right—namely, it cannot *circumvent* that right—no matter the kind of proceeding in which it takes place.²⁵⁹

Apprendi took the modern phenomenon of sentencing enhancements and placed it in the historical context of the legal determination of punishment. As discussed in Part I, the sanction-specific nature of crimes at the Founding meant that jury-right violations could only take place at the conviction stage.²⁶⁰ Because conviction itself determined the requisite punishment, the resulting sentence would be lawful as long as the conviction was obtained without constitutional defect. But the creation of a distinct sentencing stage and all its accompanying features meant that the determination of punishment was no longer governed by conviction alone. The *Apprendi* Court accordingly cautioned that sentencing enhancements could allow judges to usurp the role of the jury by using new factual findings to aggravate the legal boundaries of punishment.²⁶¹

Note, then, that *Apprendi* itself dealt with a kind of retrospectivity in interpreting the Sixth Amendment. The right to a jury trial is one reserved for “the accused.”²⁶² It therefore applies to the conviction stage of a criminal prosecution. When a person is lawfully convicted by jury trial, they naturally cannot contend that they have not been granted their Sixth Amendment jury right. But *Apprendi* found that a judge can later erode this right by handing down a sentence not authorized by the facts in the jury verdict.²⁶³ In other words, a right that is

258. See *supra* Section I.C.

259. See *id.*

260. See *supra* note 134 and accompanying text.

261. See *supra* notes 115-117 and accompanying text.

262. U.S. CONST. amend. VI.

263. See *supra* notes 115-117 and accompanying text. Consider *Apprendi*’s mandate that “any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). Such a prescription is naturally backwards-looking, suggesting that the fact of Mr. *Apprendi*’s alleged

reserved for the conviction stage can be later violated in a different, future stage of the criminal process.

Revocation of supervised release is yet another stage of this kind. Like sentencing, revocation results in a penalty that is attributed to a criminal offense. It therefore further disaggregates the imposition of punishment for a crime into *three* distinct stages: conviction, sentencing, and revocation. That revocation occurs only conditionally, and long after the other two stages, should make no meaningful difference. If, for example, a state occasionally allowed for a resentencing hearing in which a person's sentence could be aggravated years after the initial sentence had been passed down, such a process would surely implicate the constitutional issues contemplated at initial sentencing.

Revocation therefore invites the same concerns as those expressed by the *Apprendi* Court with regards to sentencing. Of course, as with the punishment meted out at sentencing, whether the additional punishment from revocation is unconstitutional under *Apprendi* depends on whether the factual basis of that punishment constitutes an element of a new crime, which will be discussed in the subsequent Section. The important point for the time being is that understanding the function of revocation as part of the broader imposition of criminal punishment means that it is plainly within the ambit of the Sixth Amendment and the jury right. Accordingly, an application of *Apprendi* to the revocation context does not require any novel interpretation of the Amendment's text. The question is not whether a revocation proceeding occurs within the confines of the Sixth Amendment, but whether it functions as the kind of state action that the Amendment was designed to guard against – criminal punishment.

One potential objection to understanding revocation as punishment merits consideration. In his *Haymond* dissent, Justice Alito argued that supervised-release revocations did not genuinely authorize any new or additional punishment, and instead were better characterized as “administration[s]” of previously imposed sentences.²⁶⁴ This was because “a defendant sentenced to x years of imprisonment followed by y years of supervised release is really sentenced to a maximum punishment of x + y years of confinement”²⁶⁵ Similarly, “the maximum term reflected in the jury's verdict” is not the maximum term of imprisonment for the criminal offense but that term “plus the maximum period of

racial animus *should have been* charged in the indictment and proven to a jury to properly authorize his eventual sentence.

264. See *United States v. Haymond*, 139 S. Ct. 2369, 2394, 2398 (2019) (Alito, J., dissenting).

265. *Id.* at 2390.

supervised release that the statute authorize[s].”²⁶⁶ Alito’s suggestion is that both the jury verdict and subsequent sentence already account for the potential terms of imprisonment added by revocation.²⁶⁷ And indeed, a defendant in federal court who is sentenced to both a term of imprisonment and a term of supervised release is, at least in theory, fully aware that they may serve more time in prison if their term of supervision is revoked down the line. In essence, then, revocation does not meaningfully “punish” a person beyond what was already imposed by

266. *Id.* Justice Alito used this argument to suggest that the change from federal parole to supervised release was “purely formal” and carried “no constitutional consequences.” *Id.* at 2388. He gave the following example to illustrate his case:

A pre-SRA sentence of nine years’ imprisonment meant three years of certain confinement and six years of possible confinement depending on the defendant’s conduct in the outside world after release from prison . . . [S]uch a sentence is the substantive equivalent of a post-SRA sentence of three years’ imprisonment followed by six years of supervised release. In both situations, the period of certain confinement (three years) and the maximum term of possible confinement (nine years) are the same.

Id. at 2390. From this, he concluded that a sentence of “x years of imprisonment followed by y years of supervised release” was actually a sentence of “x + y years of confinement, with the proviso that any time beyond x years will be excused if the defendant abides by the terms of supervised release.” *Id.* There are three problems with this argument. First, it amounts to a mere assertion that a term of supervised release is really the same as a term of imprisonment under parole. But as Alito himself points out, a defendant on parole, unlike someone on supervised release, is not guaranteed release after the “x years in confinement” — their freedom is contingent on a decision by the parole board. *See id.* Alito’s analysis relies on an extreme abstraction of the concept of criminal supervision, in which any discretionary process governing release and revocation is simply characterized by the same label of “conditional liberty” based on adherence to the terms of supervision. *See id.* at 2397. But using that logic, one could even argue that a free citizen is *really* serving a term of confinement, just with the “proviso” that their time is excused as long as they do not violate any criminal statutes. *See id.* at 2390. Second, this equivalency ignores the fact that the Sentencing Reform Act (SRA) designed supervised release with the purpose of making it distinct from parole. In particular, the original conception of supervised release in the SRA did not even include a mechanism for revocation. Doherty, *supra* note 142, at 999. And courts today are still instructed not to rely on punitive considerations in determining sentences of supervised release, unlike when considering terms of imprisonment. *See id.* at 1024. Third, if sentences of imprisonment followed by supervised release are indeed supposed to be meaningfully similar to terms of imprisonment under parole, we would expect to see sentencing courts decrease the length of prison terms in accordance with the length of supervised release, so as to correspond with the kind of “x + y” sentencing structure Justice Alito envisioned. Instead, the opposite has been true — the average length of imprisonment in federal prisons has *doubled* in the period from 1986 to 2021 — from 26 to 52 months. *See* U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 46 (2004); U.S. SENTENCING COMM’N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 65 tbl.15 (2021).

267. *Cf.* Horner, *supra* note 35, at 291 (“However, it is not clear why the jury’s verdict authorizes that result. After all, a jury’s verdict authorizes whatever Congress wants it to, provided that punishment comports with the requirements of the Constitution.”).

the jury, but merely “administers” that person’s sentence by determining whether their period of supervised release is spent in confinement or in the free world.²⁶⁸

This objection ultimately amounts to a flat rejection of *Apprendi*’s admonition. First, note that whatever one might decide to call the function of revocation, the fact remains that a person on supervised release cannot be sent back to prison without a determination made by a judge.²⁶⁹ For example, a jury verdict for a crime carrying a statutory maximum of ten years’ imprisonment and ten years of supervised release does not *alone* authorize a maximum of twenty years’ imprisonment; the additional ten years are conditional on the adjudication of a judge at revocation.

Compare this to the facts of *Apprendi* itself. New Jersey’s criminal code provided a statutory range of five to ten years for the firearm offense in question, but also provided that an “extended term” of ten to twenty years could be imposed upon a determination by the sentencing judge.²⁷⁰ Moreover, Mr. Apprendi’s guilty plea, in which he waived his right to a jury, specified that the prosecution would be able to request that the court impose this extended term.²⁷¹ The *Apprendi* Court found that Mr. Apprendi’s eventual prison sentence of twelve years was unconstitutional, for it exceeded the ten-year statutory maximum for his original crime of conviction. But to apply Justice Alito’s reasoning, it might be said that here, too, the *true* statutory maximum for Mr. Apprendi was twenty years, given that his plea agreement allowed for the judge to authorize an extended term.

Such a characterization would ignore *Apprendi*’s central concern. Certainly, a person convicted of a crime carrying a statutory maximum of ten years’ imprisonment and ten years’ supervised release can end up serving a total of twenty years in prison, just as a person convicted of a crime carrying a statutory maximum of ten years’ imprisonment with the potential for an extended term of twenty years might. In both cases, the statutory maximum term of imprisonment can be functionally overridden by a judge’s discretion, either at revocation or at sentencing. But the very problem identified by the *Apprendi* Court was that a statutory scheme allowing a judge to authorize such additional imprisonment beyond the statutory maximum of the original offense violated the Sixth

268. See *Haymond*, 139 S. Ct. at 2391 (Alito, J., dissenting) (“If a prisoner does not end up spending this full period in confinement, that is because service of part of the period is excused due to satisfactory conduct during the period of supervised release.”).

269. Additionally, much of Justice Alito’s argument is dependent on conflating the kind of “conditional” liberty granted to supervisees on federal parole versus supervised release, which is at best a tenuous comparison. See *supra* note 218.

270. *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000).

271. *Id.* at 469-70.

Amendment. It is therefore no answer to say that a federal sentence comprising of a term of imprisonment and a term of supervised release has already accounted for the additional imprisonment that may result from a revocation of supervised release. That very statutory structure – one that allows for the juryless authorization of additional imprisonment – is what is unconstitutional under the *Apprendi* doctrine.

I have thus far shown that *Apprendi* and the Sixth Amendment have clear applicability in the revocation setting. We now turn to the question of which revocations involve the type of factual findings that are “elemental” under the *Apprendi* doctrine.

B. The Factual Basis of Revocation as an “Element” of a “Crime”

If revocation functions as punishment, how can we know when such punishment violates the Sixth Amendment jury right? *Apprendi* instructs that the aggravation of punishment is unconstitutional when it is based on a factual finding that “increase[s] the prescribed range of penalties to which a criminal defendant is exposed.”²⁷² If so, that finding is the functional equivalent of an element of a new, more serious crime.²⁷³ Here, the parallels between sentencing and revocation begin to fade. When a judge at sentencing makes a factual finding that raises the statutory minimum or maximum of an offense, it is intelligible to suggest that she has exposed the person to greater punishment. On the other hand, a judge at revocation is no longer concerned with the statutory range of penalties for the original offense and cannot now alter that range.

In what follows, I address this discrepancy and develop the case for understanding the factual basis of revocation as an “element” or “crime” as defined by *Apprendi* and its progeny. First, I describe the dominant view, as explained by Justice Gorsuch in the *Haymond* plurality opinion and adopted by other commentators, under which revocations only violate *Apprendi* in two narrow circumstances. This approach conceptualizes revocation as taking place concurrently with initial sentencing, so that its findings are treated like ordinary sentencing factors. I argue that this leads to an unworkable, inconsistent application of *Apprendi*’s definition of a crime and its elements. I then propose my own view under the retroactive theory of revocation. When the retroactive nature of revocation and its effects are taken seriously, it follows that any factual finding that triggers revocation necessarily increases the range of penalties to which a person is exposed. The formalist rule established by the *Apprendi* cases thus compels the

272. *Id.* at 490.

273. *Id.* at 494 n.19.

conclusion that all revocations of supervised release violate the Sixth Amendment.

1. *Revisiting the Haymond Plurality: Revocation as Concurrent with Initial Sentencing*

In *Haymond*, Justice Gorsuch attempted to assuage the concerns expressed by the dissent by suggesting that even if *Apprendi* were to apply to the supervised-release system more broadly, revocations would only violate the Sixth Amendment in two instances: (1) when the mandatory minimum for the supervised-release violation exceeds the mandatory minimum of the original offense; and (2) when the sum-total sentence resulting from the initial and post-revocation sentences exceeds the statutory maximum of the original offense.²⁷⁴ This is undoubtedly the dominant view of how *Apprendi* would apply to the revocation context. At last count, every commentator who has agreed that supervised-release revocations implicate *Apprendi* has adopted the plurality's test, suggesting that revocations only raise constitutional concerns in those aforementioned narrow circumstances.²⁷⁵ And while federal circuit courts have generally avoided the issue entirely by narrowing *Haymond*'s precedential value to Justice Breyer's concurrence,²⁷⁶ the ones that have reached the question have endorsed the same

274. See *United States v. Haymond*, 139 S. Ct. 2369, 2383-84 (2019) (plurality opinion).

275. See Danny Zemel, *Enforcing Statutory Maximums: How Federal Supervised Release Violates the Sixth Amendment Rights Defined in Apprendi v. New Jersey*, 52 U. RICH. L. REV. 965, 987-88 (2018) (arguing that reimprisonment from revocation of supervised release should not lead to a total prison sentence exceeding the statutory maximum of the original offense); McClen-don, *supra* note 102, at 202-03 (same); Fish, *supra* note 18, at 1403-04 (finding that the *Haymond* plurality applied the *Apprendi* rule in "straightforward fashion"). There have been, of course, those who have suggested that revocation hearings might more broadly violate the Fifth and Sixth Amendments due to their similarity to traditional criminal prosecutions or other jury-empaneled proceedings. See Underhill & Powell, *supra* note 35, at 304-08; Schuman, *supra* note 35. But such arguments rely on a textual interpretation approach of Sixth Amendment analysis, not the substantive criminal law approach used by *Apprendi* and its progeny. By contrast, it has been those *opposed* to an application of *Apprendi* to this context that have suggested that such an application would invalidate all revocations of supervised release. See, e.g., *Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting) ("The intimation in [the plurality's] statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment—which means that the defendant is entitled to a jury trial, which means that as a practical matter supervised-release revocation proceedings cannot be held."); Stith, *supra* note 35, at 1304 ("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.").

276. See, e.g., *United States v. Henderson*, 998 F.3d 1071, 1075-76 (9th Cir. 2021) (declining to answer whether the aggregate imprisonment sentence resulting from revocation must be

test.²⁷⁷ We therefore revisit the reasoning of the *Haymond* plurality to understand how it arrived at this view.

Recall the facts of *Haymond*. A jury convicted Mr. Haymond of possession of child pornography under 18 U.S.C. § 2252(b)(2), an offense carrying a penalty of zero to ten years in prison and a period of supervised release between five years and life.²⁷⁸ The judge sentenced him to three years' imprisonment followed by ten years of supervised release.²⁷⁹ Two years after completing his full term of imprisonment and beginning his term of supervised release, Mr. Haymond was again accused of possessing and viewing child pornography, a violation of his supervision conditions.²⁸⁰ At the revocation hearing, Mr. Haymond's judge found, by a preponderance of the evidence, that Mr. Haymond violated one of the enumerated conditions of supervision under § 3583(k).²⁸¹ Ultimately, Mr. Haymond was sentenced to another five years in prison, bringing the imprisonment sentence for his original offense to a total of eight years.²⁸²

The *Haymond* plurality found that this revocation of supervised release violated *Apprendi* because § 3583(k) required a mandatory minimum prison sentence of five years upon a finding of a violation. It pointed to the holding in *Alleyme* that a factual finding triggering an increase in the mandatory minimum of an offense violated the jury right.²⁸³ And because Mr. Haymond's original offense did not carry a mandatory minimum, Justice Gorsuch reasoned that "just like the facts" found in *Alleyme*, "the facts the judge found [at revocation] increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments."²⁸⁴

lower than the statutory maximum of the original offense given that *Haymond* plurality's view was not endorsed by a majority of the Supreme Court); *United States v. Ewing*, 829 F. App'x 325, 329-30 (10th Cir. 2020) (same); *United States v. Doka*, 955 F.3d 290, 295-96 (2d Cir. 2020) (same).

277. See, e.g., *United States v. Robinson*, 63 F.4th 530, 539 (6th Cir. 2023) (suggesting that an aggregate sentence of 120 months posed no *Apprendi* problems because the "total number did not exceed the maximum that [the defendant] could have received for either his original felon-in-possession conviction . . . or his original drug conviction"); see also *Henderson*, 998 F.3d at 1078 (Rakoff, J., dissenting) (endorsing the *Haymond* plurality's view that a revocation penalty cannot lead to an aggregate sentence in excess of the statutory maximum of the original offense).

278. See *Haymond*, 139 S. Ct. at 2373.

279. *Id.*

280. *Id.* at 2374.

281. *Id.* at 2374-75.

282. *Id.* at 2375.

283. *Id.* at 2378.

284. *Id.* (quoting *Alleyme v. United States*, 570 U.S. 99, 115 (2013)).

As noted earlier, this may look to be a simple application of the *Apprendi* and *Alleyne* principle regarding the change in sentencing exposure. It is of course true that at initial sentencing, Mr. Haymond faced no mandatory minimum, and then was faced with a five-year mandatory minimum upon revocation of his supervised release. But the *Haymond* plurality claimed that the finding made by the judge presiding over Mr. Haymond's revocation "increased" the mandatory minimum of Mr. Haymond's offense.²⁸⁵ It then stated: "In this case, that meant Mr. Haymond faced a minimum of five years in prison *instead of as little as none*."²⁸⁶ This statement, however, expresses a metaphysical impossibility. Mr. Haymond did not risk "a minimum of five years in prison instead of as little as none" at his revocation hearing because he had by that time *already faced* his old mandatory minimum and been sentenced to three years of prison based on his initial offense. That is, he faced a *new* mandatory minimum at revocation—it was not somehow imposed *instead of* the old mandatory minimum at sentencing.²⁸⁷

A charitable reader might interpret the plurality to be suggesting that because Mr. Haymond faced a mandatory minimum of five years at revocation, his original promise of a mandatory minimum of zero years was violated. But that is unlikely to be the plurality's view, as that argument would apply regardless of whether the revocation carried a mandatory minimum at all, since *any* additional sentence of imprisonment would be greater than the mandatory minimum of zero from initial sentencing. In any case, the plurality was clear throughout the opinion that it believed the Sixth Amendment violation here arose specifically as a result of § 3583(k)'s unique mandatory-minimum provision.²⁸⁸

Consider also the second scenario that Justice Gorsuch found to be violative of *Apprendi*: when "combining a defendant's initial and post-revocation sentences . . . yield[s] a term of imprisonment that exceeds the statutory maximum term of imprisonment . . . for the original crime of conviction."²⁸⁹ For revocations under § 3583(e)—which does not prescribe any mandatory minimums—Gorsuch characterized this as a *necessary* condition for violating *Apprendi*, such

285. *Id.* (emphasis added).

286. *Id.* (emphasis added).

287. The Sixth Circuit recently raised a similar point about this analysis, *see* *United States v. Robinson*, 63 F.4th 530, 539-40 (6th Cir. 2023), and concluded that "[g]iven these complexities, we opt not to decide how the [*Haymond*] plurality's *Apprendi*-based logic applies in this case." *Id.* at 540.

288. *See Haymond*, 139 S. Ct. at 2383-84 ("As we have emphasized, our decision is limited to § 3583(k) . . . and the *Alleyne* problem raised by its 5-year mandatory minimum Section § 3583(e) . . . does not contain any similar mandatory minimum triggered by judge-found facts."); *see also id.* at 2384-85 ("[T]he application of § 3583(k)'s mandatory minimum in this case violated Mr. Haymond's right to trial by jury.").

289. *Id.* at 2384.

that no constitutional concerns would be raised as long as the resulting total sentence fell within the sentencing range for the original offense. But notably, such a principle is in direct contradiction with the Court's clarification just six years prior in *Alleyne*: "[I]f a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, *even if the defendant ultimately received a sentence falling within the original sentencing range.*"²⁹⁰ Indeed, as emphasized in Part I, it is not an excessive *sentence* that is violative of *Apprendi*, but an increase in the sentencing exposure itself.²⁹¹

What is particularly curious about this aspect of Justice Gorsuch's approach is that in the earlier portions of his opinion, he seems to recognize this very principle with respect to mandatory minimums. In stating that the judge's finding "increased 'the legally prescribed range of allowable sentences'" and that Mr. Haymond "*faced a minimum of five years in prison,*" Gorsuch implicitly acknowledged that the unconstitutionality of Mr. Haymond's revocation was due to an increase in his sentencing exposure, not the length of his final sentence.²⁹² But here, the maximum allowable sentence under the supervised-release statute was life in prison, as compared to the statutory maximum of ten years under Mr. Haymond's original offense of conviction.²⁹³ So, using Gorsuch's logic with respect to mandatory minimums, this should have meant that Mr. Haymond's statutory maximum, too, was "increased" by the finding made at revocation. To borrow Gorsuch's own words, the judge-made finding at revocation would have meant that "Mr. Haymond faced a [maximum] of [life] in prison instead of as little as [ten years]."²⁹⁴

It appears, then, that the plurality applied the *Apprendi* doctrine so literally as to treat revocation as if it took place concurrent with initial sentencing, leading to the puzzling language that the revocation's mandatory minimum was used "instead of" the mandatory minimum of Mr. Haymond's original offense, and that Mr. Haymond's mandatory minimum was "increased" at revocation.²⁹⁵ But of course, revocation does not occur concurrently with sentencing; it happens long after sentencing is complete. Moreover, because a person facing revocation is being penalized for conduct that takes place after that person's term of imprisonment has been served, revocation adds additional prison time based on facts *completely irrespective* of those relied on for the initial sentence. The dominant approach does not take these differences into account.

290. *Alleyne v. United States*, 570 U.S. 99, 115 (2013) (emphasis added).

291. See *supra* Section I.B.

292. *Haymond*, 139 S. Ct. at 2378 (emphasis added).

293. *Id.* at 2374.

294. *Id.* at 2378.

295. See *id.*

But even these doctrinal issues aside, there are other reasons to favor a new theory of extending *Apprendi* to the revocation context. As Justice Gorsuch himself noted, the above test would only invalidate a small fraction of revocations in the current system, given that most supervised-release violations do not carry their own mandatory minimums, and courts rarely hand down initial sentences high enough to meaningfully risk the potential that a revocation penalty would result in a total sentence exceeding the original statutory maximum.²⁹⁶ If a court were to adopt this test, then, even a full application of *Apprendi* to the full supervised-release statute would not have the kind of far-reaching consequences that might be desired by those opposed to revocations more broadly.

Most importantly, the plurality's way of thinking about *Apprendi* and revocation is unsatisfactory because it simply does not capture what is constitutionally concerning about revocation. The *Apprendi* cases establish that it is wrong to convict a person of one crime and to punish that person for another. On its face, revocation does exactly this. A revocation judge is authorized to impose additional punishment based on a person's original conviction, yet the resulting penalty is based on finding a legal violation that is completely unrelated to the original offense of conviction. And such is true regardless of whether the violation carries a mandatory minimum or whether the resulting total sentence exceeds the original statutory maximum. We are thus in need of an explanation that can better address these concerns.

2. *The Retroactive Theory, Finalized: Revocation as Retroactive Exposure*

The retroactive theory takes seriously the nonconcurrency of initial sentencing and revocation by conceiving of revocation as having a retroactive impact on a person's sentencing exposure, an understanding that helps to reconcile this peculiarity with *Johnson's* original-offense doctrine. The goal of this Section is to apply *Apprendi's* bright-line rule for distinguishing between "elements" and "sentencing factors" to determine whether the factual basis of revocation constitutes an "element" of a new "crime." Accordingly, I adopt the formalist lens of the *Apprendi* principle in the following analysis. Under *Apprendi*, a factual finding that increases the range of penalties to which a person is exposed constitutes an element of a new, more aggravated offense and therefore should have been found by a jury beyond a reasonable doubt.²⁹⁷ The question is therefore how such a test operates in the revocation context. That is, how does a factual finding that triggers additional punishment *after* initial sentencing affect the range of penalties to which a criminal defendant *was* exposed at initial sentencing?

296. See *id.* at 2384.

297. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Consider a new hypothetical. You are back in sentencing court, having just been convicted by a jury of an offense, x , carrying a sentencing exposure of five to ten years in prison. The judge considers your individual circumstances and imposes a sentence within that five-to-ten-year range, to be followed by five years of supervised release. You finish serving your term of imprisonment, but soon after commencing your term of supervised release, the prosecutor accuses you of engaging in new criminal conduct and initiates revocation proceedings. At the revocation hearing, the judge makes an independent finding that you have indeed engaged in criminal conduct and revokes your term of supervised release, requiring you to spend an additional year in prison. Fast forward now to the day of your ultimate release, assuming that, this time, you successfully complete your supervision. What is known about your total punishment for x ? What is the possible range of years that you could have served in prison?

Mathematically, the answer is simple: six to eleven years. Because the judge at the initial sentencing hearing could have imposed a sentence anywhere from five to ten years, then imposed an additional year of imprisonment through revocation, the final aggregate prison sentence must have been at least six years, and at most eleven years. Functionally, then, the judge's finding *retroactively* increased the range of possible penalties to which you were exposed for x . The moment that the judge made the finding triggering revocation and the corresponding additional year of imprisonment, it suddenly became impossible for you to have faced a sentence of less than six years, even though the jury found you guilty of an offense that should have allowed for a minimum of five years. Similarly, it became possible for you to have faced a sentence of more than ten years, despite x 's statutory maximum of ten years. Therefore, under the *Apprendi* rule, the factual basis of your revocation constitutes an "element" of a new, aggravated offense.

It may seem odd to conclude that the finding here constitutes an element under *Apprendi* without knowing the length of the resulting final sentence. In past *Apprendi* cases, such mathematical accounting seemed crucial to the eventual holdings.²⁹⁸ This sentiment likely motivates the dominant approach just discussed, which found that a revocation under § 3583(e) only violates *Apprendi* if the resulting sentence exceeds the statutory maximum of the original offense. And after all, even post-*Apprendi*, judges are permitted to rely on a host of factual findings in determining a final sentence, as long as those findings are only used to select a sentence within the sentencing exposure of the original offense. One might therefore argue that a finding triggering revocation is a sort of delayed

298. Cf. Ball, *supra* note 39, at 898 ("All that seems to matter after *Blakely*—and, to an even greater extent, after *Booker*—is an almost mathematical focus on the structure and phrasing of sentencing guidelines themselves.").

sentencing factor, so long as the revocation penalty allows the judge to remain within the sentencing exposure of the original offense.

The problem with this kind of characterization, however, is that it ignores a crucial difference between a traditional sentencing factor and a factual basis for revocation. The former is a finding that a judge considers in selecting a sentence from within a particular range, while the latter is a finding that leads to a separate penalty that is added to a sentence *already selected* from that range. It could, of course, turn out that the sum-total sentence resulting from revocation remains within the original statutory range, but such a result would be purely coincidental. Revocation initiates a new sentencing process with its own minimums and maximums, and even a separate set of factors to consider under the Guidelines.²⁹⁹ The resulting penalty is thus completely agnostic to the prescribed range of penalties for the original offense. Whether the initial sentencing judge rendered a sentence that was close to the statutory minimum, maximum, or something in between, the additional prison sentence from revocation attaches all the same. By the time of revocation, the range of penalties associated with the original offense has already played its part at initial sentencing; it is no longer relevant.

Instead, there is a new relevant range of penalties: the statutory range associated with the supervised-release violation. Another way to understand how the factual basis of revocation fits into *Apprendi's* definition of an "element," therefore, is to consider how the finding of a supervision violation affects a person's sentencing exposure. Consider that the range of penalties for a person's original offense of conviction, x , is a to b , where a reflects the mandatory minimum term of imprisonment and b reflects the statutory maximum. We can then let c to d reflect a similar statutory range for a supervised-release violation, y . When a judge at revocation makes the requisite finding for y , she exposes the defendant to a possible penalty of c to d years in prison. But crucially, although the factual basis for revocation might be a finding of y , the penalty is considered part of the punishment for x .³⁰⁰ The new minimum possible punishment to which the person is exposed for x thus becomes the sum of the minimums of the original offense and the supervised-release violation. Similarly, the new maximum possible punishment to which the person is exposed for x becomes the sum of the maximums. In other words, if a person was previously exposed to a range of a to b years in prison for the offense x , the moment a judge makes the finding triggering revocation, that same person is now retroactively exposed to an increased range of $a + c$ to $b + d$ years in prison for that same offense.

299. See Fish, *supra* note 18, at 1393-94.

300. See *supra* notes 236-240 and accompanying text.

Finally, all of this is true regardless of whether the revocation statute in question has its own mandatory minimum. Revocation, by definition, always ends a term of supervised release and commences a period of imprisonment³⁰¹—whether that be one month, one year, five years, or more. Revocation thus comes with a built-in mandatory minimum in the sense that it never adds *zero* additional time in prison. Any factual finding that triggers revocation results in an increase in imprisonment on top of whatever was imposed at initial sentencing. Hence, the retroactive theory of revocation: every revocation of supervised release imposes unconstitutional punishment under *Apprendi* by retroactively increasing the range of penalties to which a person is exposed.

In the end, any awkwardness of the retroactive theory can largely be attributed to the Court's own awkward holding in *Johnson* and the resulting peculiar relationship between revocation and a person's original crime of conviction. What is important, however, is the undeniable practical reality created by revocation, in which judges can independently impose punishment based on findings never made by a jury. In the world of supervised release, it is almost meaningless to tell someone that they were convicted of an offense carrying a statutory maximum of ten years' imprisonment. For their final sentence may be eleven years, twelve years, even *life in prison*³⁰²—all as a result of judicial findings made only by a preponderance of the evidence. It should thus matter little that the application of the doctrine here relies on an unusual conception of the punishment imposed in the federal system. For as those of us in "*Apprendi*-land"³⁰³ like to say: "the relevant inquiry is not one of form, but of effect."³⁰⁴

C. *Beyond Revocation: Toward a Retroactive Theory of the Sixth Amendment*

The retroactive theory of revocation carries on *Apprendi*'s mission of ensuring that the vitality of the Sixth Amendment is not diminished by new legislative inventions that threaten to skirt its intended protections. *Apprendi* recognized that the Sixth Amendment promised more than the simple requirement that a conviction be secured through a jury trial. It elevated "the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion'"—by allowing the state to convict a person for one crime and punish that person for another.³⁰⁵ Just as the *Apprendi* Court acknowledged that the sentencing process

301. See 18 U.S.C. § 3583(e)(3) (2018).

302. See *supra* notes 159-163 and accompanying text.

303. This is a term coined by Justice Scalia in his concurrence in *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (Scalia, J., concurring).

304. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

305. *Id.* at 483 (quoting *Jones v. United States*, 526 U.S. 227, 247-48 (1999)).

reflected an evolution in the legal determination of punishment, this Note cautions that revocation of supervised release constitutes a further development that merits similar constitutional protections.

But of course, sentencing and revocation are but two additions to the criminal legal system since the ratification of the Sixth Amendment and the jury right. Modern criminal punishment is complex and multifaceted. Today, while those convicted of crimes face the undoubtedly severe penalty of incarceration, many experience the most painful aspects of their punishment long after serving their initial prison sentence. Judges and probation officers wield significant control over the terms and conditions faced by the millions of Americans on criminal supervision.³⁰⁶ Courts pile on criminal fines and orders of victim restitution, saddling already economically destitute individuals with debt that can even lead to reincarceration.³⁰⁷ Legislatures impose onerous statutory penalties—sometimes numbering in the tens of thousands³⁰⁸—to all those with prior criminal convictions.³⁰⁹ Like revocation, these measures are often exacted after the completion of a “criminal prosecution” and have thus largely escaped Sixth Amendment scrutiny. But by further dispersing and disaggregating the administration

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306. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 323-27 (2016) (describing the powers held by probation and supervision officers to sanction violations); Fish, *supra* note 18, at 1427-28 (describing state systems of supervision that allow judges to extend or add conditions to supervision terms); Justin C. Medina, *Making the Decision to Extend Probation Supervision at a Local Agency*, 63 CRIME & DELINQ. 1712, 1725 (2017) (describing the cooperation between probation officers and judges needed to produce violation or sanction proceedings).
307. See Alexandra Shookhoff, Robert Constantino & Evan Elkin, *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENT'G REP. 62, 62-64 (2011) (“Financial penalties often turn into unmanageable debts that interfere with reentry and rehabilitation . . .”); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 491-92 (2015) (“Monetary charges now exist at all stages of the criminal justice system, including pre-conviction, sentencing, incarceration, probation, and parole.”); Cortney E. Lollar, *What Is Criminal Restitution*, 100 IOWA L. REV. 93, 94 (2014) (“Restitution imposed as part of a criminal sentence has become a core component of criminal punishment.”). See generally James M. Bertucci, *Apprendi-Land Opens Its Borders: Will the Supreme Court’s Decision in Southern Union Co. v. United States Extend Apprendi’s Reach to Restitution?*, 58 ST. LOUIS U. L.J. 565 (2013) (arguing *Apprendi* should be applied to criminal restitution).
308. See *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184-85 (E.D.N.Y. 2016); *Collateral Consequences Inventory*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [<https://perma.cc/2W7A-KDG9>].
309. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 145 (2008); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15-17 (Marc Mauer & Meda Chesney-Lind eds., 2002).

of punishment beyond conviction and sentencing, such penalties threaten the Sixth Amendment's ability to check the state's power and cabin its excesses.

The workings of the retroactive theory of revocation suggest that these penalties can be challenged under *Apprendi* and the jury right. This Section will outline two implications of the principles developed in this Part. First, the retroactive theory's reliance on *Apprendi*'s substantive criminal-law approach provides an alternative strategy for implicating the jury-trial right in settings that resist application of the Sixth Amendment through traditional means of textual interpretation. Second, the retroactive theory demonstrates that punishment that is imposed on the basis of factual findings made subsequent to final judgment can be understood as retroactively exposing a person to greater punishment, thereby violating *Apprendi* no matter the resulting aggregate penalty. Together, these principles show that the constitutional right to a jury trial may have more reach and more bite than has previously been understood.

First, the retroactive theory offers a useful roadmap for how *Apprendi*'s functional understanding of the substantive criminal law can be used to apply the jury right to various post-judgment penalties. In determining whether a particular penalty implicates the Sixth Amendment, the substantive criminal-law approach shifts the focus from the proceeding in which that penalty is imposed to its function. If the penalty functions as punishment for a crime, *Apprendi* makes clear that it must not result in an erosion of the Sixth Amendment jury right granted at the conviction stage.³¹⁰

The most substantial barrier to this approach, then, is determining whether a given post-judgment penalty constitutes the kind of "punishment" contemplated by the *Apprendi* doctrine. In both the sentencing and revocation contexts, we have been exclusively concerned with the penalty of imprisonment, the hallmark of American criminal punishment. But thankfully, the Supreme Court has already clarified that *Apprendi* never "distinguished one form of punishment from another," holding that factual findings that exposed a person to greater *financial* penalties were similarly subject to the *Apprendi* rule.³¹¹ Moreover, scholars have long discussed the punitive nature of some of these post-judgment sanctions.³¹² And while the Court has historically been reticent to engage in questions

310. See *supra* Section I.C.

311. *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012); see *id.* ("Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]'—terms that each undeniably embrace fines.")

312. See, e.g., Schuman, *Drug Supervision*, *supra* note 164, at 442 (finding that supervised release is "a security network designed to incarcerate people with drug addiction who relapse"); Doherty, *supra* note 306, at 354 (arguing that criminal supervision should be "analyzed as part of the continuum of excessive penal control"); Beth A. Colgan, *Reviving the Excessive Fines*

of substantive criminal law,³¹³ Justice Gorsuch and Justice Jackson have recently evinced a desire to adopt a more capacious understanding of punishment under the Constitution.³¹⁴

That said, resolving individual questions of a penalty's status as "punishment" is beyond the scope of this Note. But focusing on this particular question and the principles of substantive criminal law allows us to sidestep the far more formidable doctrinal obstacles erected by the textual interpretation approach to implicating the Sixth Amendment. Modern constitutional jurisprudence has involved very significant developments to the Sixth Amendment and the jury-trial right in particular. A notable aspect of these developments is that they have often been driven by originalist reasoning from the Supreme Court's Justices, even in their defendant-friendly decisions.³¹⁵ Recent Sixth Amendment cases like *Southern Union Co. v. United States*,³¹⁶ *Ramos v. Louisiana*,³¹⁷ and of course, *United States v. Haymond* have all involved detailed investigations into the original understanding of the jury right and its corresponding modern scope.³¹⁸ Recent changes to the Court seem unlikely to disrupt this trend, as even then-Judge

Clause, 102 CALIF. L. REV. 277, 313-17 (2014) (presenting novel historical research to demonstrate that even financial sanctions that were remedial in nature were used as punishment); Lollar, *supra* note 307, at 94; Travis, *supra* note 309, at 15-17 (arguing that collateral consequences of criminal convictions constitute an "invisible" form of punishment that should be openly considered in the broader process of criminal punishment and sentencing). See generally Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J. F. 365 (2020) (exploring and consolidating different lines of cases in the Court's punishment jurisprudence from their "doctrinal silos").

313. See *supra* note 43 and accompanying text.

314. See *Tyler v. Hennepin County*, 598 U.S. 631, 648-50 (2023) (Gorsuch, J., concurring) (arguing that a civil-forfeiture scheme constitutes punishment under the Eighth Amendment).

315. Bibas, *supra* note 44, at 1192 (noting that the "*Apprendi* line of decisions was grounded in originalism and formalism"); Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53, 54-57 (2011) (observing that originalist reasoning at the Supreme Court has surprisingly led to expansion of the Sixth Amendment right to a jury trial).

316. 567 U.S. 343 (2012).

317. 140 S. Ct. 1390 (2020).

318. See, e.g., *Southern Union*, 567 U.S. at 352-58 (noting that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law" (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009))); *Ramos*, 140 S. Ct. at 1395-97 (finding a requirement of jury unanimity by looking to "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward"); *United States v. Haymond*, 139 S. Ct. 2369, 2379-80 (plurality opinion) (finding that the application of *Apprendi* to the supervised-release setting "respects not only our precedents, but the original meaning of the jury trial right").

Jackson, undoubtedly a staunch liberal, professed herself to be an originalist, at least in name.³¹⁹

The *Haymond* opinions, and Justice Alito's dissent in particular, help demonstrate why originalist textual interpretation of the Sixth Amendment is likely to stymie potential expansions of the jury right into new settings. As already discussed, the *Haymond* Justices revealed an apparent preoccupation with the text of the Sixth Amendment and the meaning of a "criminal prosecution."³²⁰ This led to Justice Alito's historical analysis of the site of the jury right—that is, the types of *proceedings* to which the right historically attached.³²¹ He criticized the plurality's failure to make any "real effort to show that the Sixth Amendment was originally understood to require a jury trial in a proceeding like a supervised-release revocation proceeding,"³²² then embarked on a lengthy expedition into potential historical analogues to a revocation hearing, only to conclude that no such analogue existed.³²³ Although Alito characterized this survey of historical sites as the predominant exercise in Sixth Amendment analysis "[s]ince *Apprendi* itself,"³²⁴ such a proposition is at best a strained reading of *Apprendi*, which was predominantly concerned with the historical understanding of "crime" and "punishment."³²⁵

This turn toward originalist analysis of the Sixth Amendment and a search for historical analogues is a concerning trend for proponents of jury-right expansion. While revocation may yet find a sufficient analogue with Professor Schuman's recent proposal regarding Founding Era "forfeit[ures] of 'recognition,'"³²⁶ it is unlikely that such a helpful example will exist for every candidate for *Apprendi*-land. Moreover, in the wake of another landmark constitutional decision, *New York State Rifle & Pistol Ass'n v. Bruen*,³²⁷ many scholars have chimed

319. See Andrew Koppelman, *Ketanji Brown Jackson's Originalism*, HILL (Apr. 10, 2022, 12:00 PM ET), <https://thehill.com/opinion/judiciary/3263173-kejanji-brown-jacksons-originalism> [<https://perma.cc/RF8M-MUPH>]; see also Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 223 (2023) (noting that "[t]he Justices of the Supreme Court are increasingly originalist").

320. See *supra* Section II.B.

321. See *Haymond*, 139 S. Ct. at 2396–98 (Alito, J., dissenting).

322. *Id.* at 2392.

323. See *id.* at 2396–98.

324. *Id.* at 2396.

325. See *supra* Section I.C.

326. See Schuman, *supra* note 35 (manuscript at 4); *supra* note 212.

327. 597 U.S. 1 (2022).

in regarding the volatility of a constitutional strategy that relies on a search for historical analogues.³²⁸

I should here clarify that I do not mean to imply that originalist arguments identifying historical analogues are not productive or helpful. Indeed, the argument that a particular postconviction proceeding would be directly covered by the original meaning of the Sixth Amendment can be made in *conjunction* with an argument in the alternative, as this Note proposes, that a function may nevertheless violate the jury right because it punishes a person for a crime for which they were never convicted. This is therefore all the more reason for litigants and scholars to acknowledge the substantive criminal-law approach advanced by *Apprendi*. Doing so provides an additional route for expanding the Sixth Amendment on top of those already being developed by scholars and jurists.

But like the case of revocation, finding that the Sixth Amendment is implicated by a post-judgment penalty does not alone prove that that penalty is unconstitutional. Under the *Apprendi* doctrine, the penalty is only unconstitutional if it is based on a factual finding that exposes a person to greater punishment than what is authorized by the jury verdict.³²⁹ Again, the retroactive theory here is instructive, providing a method of understanding the factual basis of punishment when that basis arises subsequent to conviction and sentencing.

Take, for example, what is likely the most obvious next candidate for *Apprendi*-land: criminal supervision.³³⁰ I here do not mean *revocation* of supervision, but supervision *itself* as a form of punishment. Criminal statutes often lay out not only a range of possible prison sentences for a crime but the possible terms of supervision.³³¹ A sentencing judge thus exercises discretion in determining the appropriate length of supervision for a person's offense from that statutory range. But even after sentencing, many jurisdictions allow judges to modify or extend a term of supervision based on future conduct.³³² This means

328. See, e.g., Patrick J. Charles, *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623 (2023); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023); Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821 (2023); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023).

329. See *supra* Section I.B.

330. Both Professors King and Fish have addressed the constitutionality of extending terms of supervision terms in their recent articles. See King, *supra* note 35, at 100-04; Fish, *supra* note 18, at 1414-21.

331. For example, in the federal system, 18 U.S.C. § 3583(b) (2018) lays out the authorized terms of supervised release based on different classes of offenses.

332. See Fish, *supra* note 18, at 1426-29. In the federal system, modifications and extensions of supervised-release terms are governed by the same factors as revocations. See 18 U.S.C. § 3583(e) (2018).

that courts can order additional punishment—in this case, an aggravation of the supervision term—based on a new factual finding found by a preponderance of the evidence. Professor Fish has recently discussed this constitutional problem by advancing a “conditional sentencing” theory, which would place new constitutional limits on sentences involving supervision, including a restriction on extending a term of supervision after initial sentencing.³³³ The lessons of this Note, however, may suggest that the *Apprendi* doctrine as it exists today already demands such a prohibition.

The basic argument is straightforward and almost exactly analogous to that applied to revocation. When a person is convicted of a crime, the corresponding jury verdict or plea waiver exposes that person to a range of penalties, including the acceptable sentences of supervision. When in a subsequent proceeding, a judge decides to extend that term of supervision, she naturally relies on a fact that was never found by a jury.³³⁴ Such a finding retroactively increases the range of sentences—this time, sentences of *supervision*—to which the person was exposed. And as with revocation, this is true regardless of the length of the resulting aggregate penalty, such that the factual basis for the extension always constitutes an “element” of a new, more serious offense. Therefore, the extension of supervision—like revocation—imposes unconstitutional punishment under *Apprendi* by retroactively increasing the range of penalties to which a person is exposed.

The arguments in this Section no doubt represent substantially new applications of the jury right from its modern understanding. But *Apprendi* itself was seen as an extraordinary statement regarding the Sixth Amendment,³³⁵ and two decades later, it is still seeing further expansion. While these foregoing claims may not see acceptance in the near future, they continue to chart an ambitious and aspirational path for what the Sixth Amendment could become under the ongoing *Apprendi* revolution.

IV. SUPERVISED RELEASE AFTER REVOCATION

We now return to the heart of this Note: the institution of federal supervised release. The retroactive theory of revocation attempts to prove the exact proposition that Justice Alito feared was implied by the plurality’s reasoning: *any* revocation of supervised release violates the Sixth Amendment. Alito warned that in such a world, “the whole system of supervised release would be like a 40-ton

333. See Fish, *supra* note 18, at 1383.

334. See *supra* note 332.

335. See *supra* note 9 and accompanying text.

truck speeding down a steep mountain road with no brakes.”³³⁶ It is notable that so much of the opposition to the *Haymond* plurality’s application of *Apprendi* to the supervised-release setting is centered not around the consistency or coherency of the doctrine, but around the potential practical implications that such an application would have.³³⁷ Justice Breyer, too, bought into these concerns, summing up his rationale for not joining the plurality’s reasoning as the need to avoid “the potentially destabilizing consequences” of applying *Apprendi* to this new context.³³⁸

This Part addresses two issues. First, I directly respond to the claim that applying *Apprendi* to the revocation context would have disastrous implications for the administration of federal criminal supervision. Such a concern appears to assume that the practical result of such doctrinal application is that full-blown jury trials must be held for all revocations. I argue that this assumption is likely overstated, and that even if it is not, that the appropriate solution would be to work to accommodate the results, not shy away from them. Then, in Section IV.B, I make the affirmative case for reimagining the institution of supervised release and doing away with revocation entirely. That is, I embrace the so-called “destabilizing consequences” of rendering revocations unconstitutional and argue that such a move in fact serves to restabilize federal supervision by restoring the original goals and aspirations of the SRA. Under that conception, judges could not revoke terms of supervised release, but instead could charge supervisees with criminal contempt for willful, repeated violations of supervision conditions. More importantly, the goal of supervision was a genuine focus on rehabilitation and transition, not on the penalization of violations. I propose a return to such a system. The Supreme Court has shown an unusual appetite in this area to hold onto doctrine, even in light of potentially enormous impacts on existing criminal institutions.³³⁹ So too here, in this new frontier, it should stay the course.

A. *Administrability Concerns: The Destabilizing Consequences of Apprendi?*

It is surprisingly difficult to pinpoint the exact concerns of those who reject *Apprendi*’s application in the revocation setting. This flavor of opposition to the *Haymond* plurality’s reasoning has rarely gone further than simply characterizing

336. *United States v. Haymond*, 139 S. Ct. 2369, 2391 (2019) (Alito, J., dissenting).

337. See, e.g., Stith, *supra* note 35, at 1303-04; King, *supra* note 35, at 128-35.

338. *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring in the judgment).

339. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004) (applying *Apprendi* to a deliberate-cruelty enhancement); *United States v. Booker*, 543 U.S. 220 (2005) (applying *Blakely* to the Federal Sentencing Guidelines).

the potential consequences as “radical,”³⁴⁰ “revolutionary,”³⁴¹ or a “blunderbuss.”³⁴² Of course, it goes without saying that deeming all supervised-release revocations to be unconstitutional would have a significant impact on federal courts and the institution of supervised release – indeed, for supporters of *Apprendi* expansion, this should be a positive feature of this Note’s primary thesis. Even so, I believe that concerns over administrability have been undertheorized and overblown.

The *Haymond* dissent stated quite plainly that applying *Apprendi* in this context would mean “that as a practical matter[,] supervised-release revocation proceedings cannot be held.”³⁴³ Justice Alito reached this conclusion by pointing out that while there were only 1,809 criminal jury trials in federal courts in 2018, there were 16,946 revocation proceedings the same year.³⁴⁴ As such, he argued, there would be “no way that the federal courts could empanel enough juries to adjudicate all those proceedings”³⁴⁵ Two preliminary observations are worth noting. First, Alito raises this point specifically in response to the plurality opinion, which is a peculiar rebuttal given that the plurality explicitly endorsed an understanding of *Apprendi* that would only implicate a small percentage of those revocation proceedings.³⁴⁶ Second, Alito instantly disregarded the possibility that in a world where revocations violate the Sixth Amendment, the optimal solution may be to simply do away with revocations altogether, rather than attempting to remedy the constitutional problem by having juries directly adjudicate such proceedings.

Nevertheless, we can directly respond to Justice Alito’s contention, assuming *arguendo* that applying *Apprendi* to supervised-release revocation would require jury-empaneled revocation hearings as the constitutional solution. Alito seems to claim that in such a world, *every* revocation occurring today would continue to proceed as a full-blown jury proceeding.³⁴⁷ After all, he directly juxtaposed the number of federal criminal jury trials in 2018 to the total number of

340. Stith, *supra* note 35, at 1304.

341. *Haymond*, 139 S. Ct. at 2386 (Alito, J., dissenting).

342. See King, *supra* note 35, at 131.

343. *Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting).

344. See *id.* (first citing *Table T-1 – U.S. District Courts – Trials Judicial Business*, U.S. CTS. (Sept. 30, 2018), <https://www.uscourts.gov/statistics/table/t-1/judicial-business/2018/09/30> [<https://perma.cc/X7YJ-EM72>]; and then citing *Table E-7A – Federal Probation System Judicial Business*, U.S. CTS. (Sept. 30, 2018), <https://www.uscourts.gov/statistics/table/e-7a/judicial-business/2018/09/30> [<https://perma.cc/WF54-D8UY>]).

345. *Id.*

346. See *id.* at 2384 (plurality opinion) (“Indeed, the vast majority of supervised release revocation proceedings under subsection (e)(3) would likely be unaffected.”).

347. See *id.* at 2388 (Alito, J., dissenting).

revocation adjudications in that year.³⁴⁸ But this is surely a disingenuous comparison. In fiscal year 2018, only two percent of criminal defendants prosecuted in federal court had a jury trial.³⁴⁹ So looking at apples to apples, the 16,946 revocation adjudications should be compared against the 79,704 total criminal cases, of which only a minuscule fraction proceeded via jury trial.³⁵⁰ If a similar portion of the revocation candidates in 2018 proceeded to trial, it would result in just 339 additional empaneled juries, representing less than a 20% increase in the total number of federal criminal jury trials.

Such a change is unlikely to be unsustainable given that supervised-release revocations already operate as adversarial proceedings before a federal judge, unlike in other forms of criminal supervision.³⁵¹ Moreover, while it is not possible to predict exactly how plea-bargaining dynamics would transfer to the supervision context, there is good reason to believe that even a 20% increase is likely to be an overestimate.³⁵² First, because individuals on supervised release have significantly diminished Fourth Amendment rights and are regularly subject to suspicion-less searches,³⁵³ revocations are less likely to involve the kind of contentious factual or evidentiary issues that motivate and complicate trials. Second, although revocations of criminal violations constitute the most significant driver of reincarceration in the federal supervision system,³⁵⁴ a substantial portion of revocations are still of noncriminal, “technical” violations of supervised release.³⁵⁵ Given that even the U.S. Sentencing Commission has recently expressed skepticism over the wisdom of punishing such minor violations, it is doubtful that the government would choose to pursue them via jury trial in a post-*Apprendi* system.³⁵⁶ Finally, revocations generally sanction more minor conduct when compared to traditional criminal prosecutions, because of both the aforementioned technical violations and the much lower statutory maximums placed

348. See *supra* note 344 and accompanying text.

349. Table D-4—U.S. District Courts—Criminal Judicial Business, U.S. CTS. (Sept. 30, 2018), <https://www.uscourts.gov/statistics/table/d-4/judicial-business/2018/09/30> [https://perma.cc/3HUF-CK65].

350. See *id.*

351. See *supra* notes 166-168 and accompanying text.

352. Professor Fish has considered how the dynamics of plea negotiations would carry over in a supervision setting. See Fish, *supra* note 18, at 1422-23.

353. See Tonja Jacobi & Addie Maguire, *Searches Without Suspicion: Avoiding a Four Million Person Underclass*, 48 B.Y.U. L. REV. 1769, 1771-73 (2023); 18 U.S.C. § 3583(d) (2018); U.S. SENT’G GUIDELINES MANUAL § 5D1.3(d) (U.S. SENT’G COMM’N 2021).

354. See Schuman, *Criminal Violations*, *supra* note 164, at 1844-45 (finding that criminal violations account for two-thirds of the prison time imposed via revocations of supervised release).

355. See *id.* at 1820.

356. See *id.* at 1819-21.

on most revocation penalties.³⁵⁷ So even the revocations that *do* proceed to jury trials are likely to place less of a strain on resources when compared to the average federal criminal case.³⁵⁸

Most importantly, if the Constitution indeed demands that revocations be covered by the jury right, it simply should not matter how difficult it is to bring existing procedures in line. The preceding discussion suggests that extending *Apprendi* to the supervised-release setting will not lead to an unsustainable burden on the federal courts. But even if it did, our concerns should be directed toward addressing the system's lack of preparedness, not toward compromising its fundamental fairness. It is the government's duty to provide the full array of constitutional rights to criminal defendants. If that is not practically feasible, the answer is not to deny or skirt those rights but to invest the necessary resources to confer them.

As Justice Gorsuch noted in *Haymond*, fears around administrability ultimately reflect an “age-old criticism” that the constitutional right to a jury trial is “inconvenient for the government.”³⁵⁹ In response to this insinuation, Justice Alito remarked, “Not at all. My only point is to say that if a questionable interpretation of the Sixth Amendment would potentially lead to absurd results, that is an additional reason to suspect that something has gone awry.”³⁶⁰ Alito is exactly right—for exactly the wrong reasons. The fact that applying *Apprendi* in supervised-release revocations would have such far-reaching impacts would indeed be a reason to suspect that something has gone awry. But what is absurd is not the potential magnitude of the decision's institutional impacts—rather, it is the very real possibility that we have been denying a fundamental right to hundreds of thousands of individuals for the past thirty-five years. Dismissing that possibility is to admit that the preservation of the status quo is more important than ensuring the vitality of the Sixth Amendment and its right to a jury trial. Ultimately, concerns over the administrability of a post-*Apprendi* system of revocation are both overblown and outweighed by the constitutional interests of supervisees.

357. See 18 U.S.C. § 3583(e)(3) (2018).

358. It is a well-documented fact that the length of a criminal trial is strongly correlated to the seriousness and complexity of the offense(s) at issue. See, e.g., Dale Anne Sipes & Mary Elsner Oram, *On Trial: The Length of Civil and Criminal Trials*, NAT'L CTR. FOR STATE CTS. 10-11 (1988), <https://www.ojp.gov/pdffiles1/Digitization/115768NCJRS.pdf> [<https://perma.cc/QV2X-588D>].

359. *United States v. Haymond*, 139 S. Ct. 2369, 2384 (2019) (plurality opinion).

360. *Id.* at 2388 n.2 (Alito, J., dissenting) (internal citation omitted).

B. *Supervised Release Redux: The Restabilizing Consequences of Appendi*

Still, if we are to live in a world in which supervised release “speed[s] down a steep mountain road” to its demise, it is worth asking: what does that world look like? For if the application of *Appendi* to supervised release is to be the end of that institution, it would only be the end of a supervised-release system *with* revocation. Many would, no doubt, balk at the idea of a system of criminal supervision that does not include a mechanism for reimprisonment.³⁶¹ But a look into the legislative history of supervised release suggests that such a notion is not at all far-fetched. In fact, this historical understanding, coupled with a reckoning of the ways that federal supervision has mutated into its current form, helps form a compelling case for reimagining the system of supervised release as one genuinely committed to its original goal of transition and rehabilitation.³⁶²

I thus propose that the federal system do away with revocation entirely. If a person on supervised release is believed to have engaged in the kind of conduct that merits reimprisonment, the government is free to charge, try, and convict that person through traditional means. But my suggestion is not that revocations should be replaced with prosecutions. Rather, the government should cease viewing supervision violations as offenses that invariably merit punishment and deprioritize the investigation and penalization of federal supervisees. If—as the Court,³⁶³ the Sentencing Guidelines,³⁶⁴ and the legislature³⁶⁵ all suggest—the goal of supervised release is not further punishment, but rehabilitation, the administration of the system should reflect such priorities.

Supervised release was initially introduced under the SRA as a way of establishing “truth in sentencing” in the federal system.³⁶⁶ As already previewed in Part II, the SRA arose in response to prolonged criticism of the indeterminate

361. See Doherty, *supra* note 142, at 1002 (“For those accustomed to parole and probation, the absence of a revocation mechanism for supervised release seemed like an ‘impractical oddit[y].’” (citing Harry B. Wooten, *Violation of Supervised Release: Erosion of a Promising Congressional Idea into Troubled Policy and Practice*, 6 FED. SENT’G REP. 183, 183 (1994))).

362. See S. REP. NO. 98-225, at 124 (1983) (noting that the “primary goal” of supervised release is to “ease the defendant’s transition into the community” or to “provide rehabilitation”).

363. See, e.g., *Haymond*, 139 S. Ct. at 2382 (plurality opinion) (noting that the evolution of parole meant that “supervised release wasn’t introduced to replace a portion of the defendant’s prison term, only to encourage rehabilitation after the completion of his prison term”); *United States v. Johnson*, 529 U.S. 53, 59 (2000) (noting that supervised release was intended to “assist individuals in their transition to community life” and that “[s]upervised release fulfills rehabilitative ends, distinct from those served by incarceration”).

364. See *Primer on Supervised Release*, *supra* note 145, at 3.

365. See Doherty, *supra* note 142, at 997-1000.

366. See *id.* at 960.

nature of the federal parole system.³⁶⁷ Under parole, incarcerated persons were often eligible for release after serving just one-third of their full sentence, with final discretion given to a parole board.³⁶⁸ It was thus very difficult to predict the true impact of any prison sentence imposed. The lack of transparency and determinacy bred deep mistrust in the system, creating a “new orthodoxy” that united critics on both sides of the political spectrum.³⁶⁹ Supervised release was accordingly designed to avoid parole’s primary sin of indeterminacy, and any period of supervision was to commence only after the assured completion of the entire prison sentence.³⁷⁰ Congress thus did away with the reviled creature that was federal parole and replaced it with what was to be an entirely new system, supervised release.

Chief among the opponents of the federal parole system was the late Marvin Earle Frankel, a federal judge in the Southern District of New York.³⁷¹ Many of his ideas played a pivotal role in guiding the ultimate construction and passage of the SRA,³⁷² and in particular, Judge Frankel railed against the long-prevailing notion that a coercive system such as parole could play a meaningful rehabilitative role for those in the criminal system.³⁷³ Therefore, when supervised release was first conceived in the SRA, it notably included no mechanism for revocation.³⁷⁴ Rather than being a continuing threat looming over former offenders, supervision was to be appropriately geared toward helping them transition back into the community.³⁷⁵ In accordance with those principles, sentencing judges were – and still are – not instructed to rely on punitive or retributive considerations when determining the terms of supervised release.³⁷⁶

Armed with this historical knowledge, the “radical” conclusion advanced by this Note – that all revocations of supervised release are unconstitutional – harkens merely to the initial conception of federal supervision under the SRA. Years of piecemeal legislation have slowly grafted coercive procedures onto this

367. See *id.* at 991-95.

368. See Underhill & Powell, *supra* note 35, at 299.

369. See Doherty, *supra* note 142, at 995.

370. See *id.* at 997.

371. See, e.g., William H. Pryor, Jr., *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, 29 FED. SENT’G REP. 95, 96-98 (2016); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 98 (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 12-13 (1972).

372. See Doherty, *supra* note 142, at 992-93.

373. See FRANKEL, *supra* note 371, at 98.

374. See Doherty, *supra* note 142, at 999.

375. See *id.*

376. See *Supervised Release Primer*, *supra* note 145, at 3.

original vision,³⁷⁷ and today, supervised release is once more widely criticized for its web of burdensome conditions that serve as forms of punitive control and impede proper rehabilitation.³⁷⁸ Nearly four decades after the passage of the SRA, the administration of federal supervision has become almost indistinguishable from the once universally criticized system of federal parole,³⁷⁹ so much so that a sitting Justice of the Supreme Court – who was a U.S. Attorney during the installment of supervised release – remarked sarcastically that supervised release is “entirely different” from the system it replaced.³⁸⁰

These similarities extend beyond the function of revocation. As with other forms of criminal supervision, individuals on supervised release face a wide array of restrictive conditions in addition to the requirement that they not commit any additional crimes.³⁸¹ Professor Schuman has noted that a “typical” set of supervised-release conditions requires supervisees to (1) stay in contact with your probation officer; (2) live in a place approved by your probation officer; (3) maintain a full-time job; (4) report any changes in your employment, residence, or finances; (5) participate in drug or mental-health counseling; (6) pass periodic drug tests; (7) avoid places where drugs are used or sold; (8) avoid anyone with a felony conviction; (9) obtain your probation officer’s permission before leaving the district; and (10) complete a community-service project.³⁸²

Furthermore, these conditions are often vague, conflicting, and constantly subject to change, making them nearly impossible to uphold for even the most

377. See Doherty, *supra* note 142, at 1000-04.

378. See, e.g., Igor V. Bykov, *Criminal Law – Give Me Freedom!: How Ambiguous Federal Supervised Release Conditions Undermine the Purpose of the Sentencing Reform Act*, 43 W. NEW ENG. L. REV. 189, 200-12 (2022); Pete Heidepriem, *Recalibrate Revocations of Supervised Release*, 51 U. BALT. L. REV. 329, 337-46 (2022); Schuman, *supra* note 35 (manuscript at 46-53); Doherty, *supra* note 142, at 997-1017; Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT’G REP. 204, 205-06 (1994).

379. See Doherty, *supra* note 142, at 960-62.

380. See *United States v. Haymond*, 139 S. Ct. 2369, 2388 (2019) (Alito, J., dissenting) (“But for now the important point is the plain implication of what the plurality says: Parole was constitutional, but supervised release . . . well, that is an entirely different animal.”).

381. See Scott-Hayward, *supra* note 150, at 201-02.

382. Schuman, *supra* note 21.

responsible individuals.³⁸³ And just like in any other area of the criminal system, those on supervised release are disproportionately Black, poor, or mentally ill.³⁸⁴

I raise this point because often sidelined by discussions of revocation and incarceration is the simple fact that criminal supervision is extraordinarily onerous, even absent any threat of reimprisonment. The hope is that moving past revocation will naturally turn our focus onto the phenomenon of supervision itself, which scholars are now recognizing as a deeply punitive arm of the carceral state in its own right.³⁸⁵ Removing the leverage of revocation from supervised release dissolves some of the political pressure to continually add more resources to investigating and discovering supervision violations, a focus that has no doubt contributed to the hundreds of millions of dollars that supervised release costs the federal government each year.³⁸⁶ Instead, the federal system should consider both the imposition of supervised release and its conditions on a more individualized basis, tailoring the system to the offender's personal circumstances with an eye toward rehabilitation.³⁸⁷

The gauntlet of conditions that follow those on supervised release raises another point, which is that punitive leverage does not need to come in the form of revocation. First, the threat of imposing more demanding conditions like electronic monitoring, DNA extraction, and compelled disclosure of financial information could provide substantial leverage over supervisees.³⁸⁸ Second, even under the original, revocation-less understanding of supervised release, judges were to have a tool to handle violations of supervised release by charging them with contempt of court, or "criminal contempt."³⁸⁹ Crucially, however, it was "intended that contempt of court proceedings [would] only be used after *repeated*

383. See *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, ACLU & HUM. RTS. WATCH 45-50 (July 2020), <https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states> [https://perma.cc/8Q2S-GBHX].

384. See *id.* at 38-39; *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW CHARITABLE TRS. 1 (Sept. 2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf [https://perma.cc/66S3-FG2E]; Seth Jacob Prins & Laura Draper, *Improving Outcomes for People with Mental Illnesses Under Community Corrections Supervision: A Guide to Research-Informed Policy and Practice*, COUNCIL OF STATE GOV'TS JUST. CTR. 11 (2009), <https://csgjusticecenter.org/wp-content/uploads/2020/02/Community-Corrections-Research-Guide.pdf> [https://perma.cc/CR92-CW2P].

385. See the first two sources cited *supra* note 312.

386. See Schuman, *supra* note 21.

387. Professor Doherty has offered a suggestion to this effect. See Doherty, *supra* note 142, at 1025-26.

388. See Scott-Hayward, *supra* note 150, at 201.

389. See Doherty, *supra* note 142, at 999-1000.

or serious violations of the conditions of supervised release . . . because . . . a minor violation of a condition of supervised release should [not] result in resentencing of the defendant.”³⁹⁰ Criminal contempt thus differs significantly from revocation as a tool of accountability, reserved only for severe cases of misconduct and not as a catch-all for any and all violations of supervision terms. Moreover, research has consistently found that frequent reincarceration of individuals on supervision via revocation does not lead to genuine rehabilitation nor a reduction in recidivism.³⁹¹ These aforementioned measures thus offer an alternative to the needlessly punitive approach of revocation, which has been shown to be ineffective even by its own lights.

One might yet protest that a more stringent check on supervisees is necessary for particularly serious cases. Indeed, conversations around the constitutionality of revocation often take place as if the alternative to revocation is a complete lack of criminal accountability for people who commit serious crimes while on supervision. But in reality, there is nothing stopping such individuals from being prosecuted through traditional means. That was in fact the very issue prompting the peculiar decision in *Johnson*, in which the Court quite openly tailored its ruling to allow prosecutors to seek re prosecution of federal supervisees.³⁹² And crucially, individuals on supervised release are subject to a host of conditions that make the threat of fresh criminal prosecutions much more salient—most notably, a significantly diminished expectation of privacy under the Fourth Amendment.³⁹³ So while a supervisee in a post-*Apprendi* world would certainly gain some leverage in avoiding reimprisonment, the same prosecutors who would have sought revocation can continue to threaten their liberty through traditional prosecution. There is already a significant risk today that prosecutors may view revocation as an easy, convenient alternative to a full-blown criminal prosecution.³⁹⁴

Finally, the most meaningful benefit of a revocation-less system of supervised release is also the most obvious—that it will stem the flow of mass

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

391. See *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, *supra* note 383, at 202 n.904 (collecting sources).

392. See *supra* text accompanying notes 238-239.

393. See *supra* note 353.

394. See *United States v. Haymond*, 139 S. Ct. 2369, 2381 (2019) (plurality opinion) (“[W]hy 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?”); Underhill & Powell, *supra* note 35, at 298 (“Although dodging the demands of the Fifth and Sixth Amendments surely offers a more expedient route to imprisonment, prosecutors and probation officers should not have the discretion to choose a route to imprisonment that bypasses the Constitution.”); Zemel, *supra* note 275, at 973-74 (reasoning that the considerable time and resources saved in pursuing a revocation makes revocation a superior option for prosecutors).

incarceration. Reimprisonment from revocations of supervision now constitutes nearly half of all admissions into prisons across the country.³⁹⁵ And while the federal prison population has seen a modest decrease in the past decade, current numbers still reflect an incredible surge from the 1970s and 1980s,³⁹⁶ in no small part due to the fact that the length of an average federal prison sentence has doubled since the days of federal parole.³⁹⁷ If opponents of *Apprendi* expansion are concerned with the administrability costs of expanding jury trials, they should similarly be alarmed by the nearly forty thousand dollars spent annually for each additional person incarcerated in federal prison, and the astronomical eighty billion dollars spent annually on American prisons and jails overall.³⁹⁸

In short, the alarm over *Haymond*'s potentially "revolutionary implications" is misplaced. Indeed, we should not fear that a supervised-release revolution may be imminent—we should fear that it may never come.

CONCLUSION

This Note is a response to the current commentary around *Apprendi* and supervised release, which has largely focused on questions of textual interpretation of the Sixth Amendment and a direct denial of the jury right. In *Haymond* in particular, the Justices demonstrated a sharp emphasis on defining the "criminal prosecution" as it appears in the Sixth Amendment to determine whether a revocation proceeding falls within that definition. I have suggested, however, that the *Apprendi* doctrine requires no such analysis. Instead, *Apprendi*'s answer to substantive criminal-law questions of what constitutes "crime" and "punishment" offers a path to understanding revocations as violating the Sixth Amendment regardless of whether they take place during or after a traditional prosecution.

Using these principles, this Note has introduced a novel theory of revocation that helps make sense of how a revocation could function as an *Apprendi* violation by retroactively exposing a defendant to an increased range of penalties. Under this theory, revocations as they currently function in the federal system always violate the jury right. While the focus of this Note has been on the

395. See *supra* note 49.

396. Ashley Nellis, *Mass Incarceration Trends*, SENT'G PROJECT (Jan. 25, 2023), <https://www.sentencingproject.org/reports/mass-incarceration-trends> [<https://perma.cc/A8EG-YW9Y>].

397. See U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 46 (2004); U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.15 (2021).

398. Peter J. Tomasek, *Annual Prison Costs Going Into 2023*, INTERROGATING JUST. (Dec. 28, 2022), <https://interrogatingjustice.org/ending-mass-incarceration/annual-prison-costs-going-into-2023> [<https://perma.cc/PBE8-EXNR>].

institution of federal supervised release and the function of revocation, this revived understanding of *Apprendi* has important implications for the imposition of criminal punishment more broadly, particularly when it takes place subsequent to final judgment. As the criminal legal system grows more complex and develops new ways to impose legal burdens and disabilities on those trapped within its grasp, our understanding of the Sixth Amendment's protections should be similarly flexible. My hope is that this Note and its arguments represent only the start of a potential conversation on how to think more creatively about crime and punishment to preserve the promise of the Sixth Amendment in an age of the disappearing jury trial. The *Apprendi* revolution, which started over two decades ago, is only just beginning.