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Supervising Supervised Release: Where the Courts Went Wrong on Revocation and How United States v. Haymond Finally Got it Right

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SUPERVISING SUPERVISED RELEASE: WHERE THE COURTS WENT WRONG ON REVOCATION AND HOW *UNITED STATES V. HAYMOND* FINALLY GOT IT RIGHT

I. INTRODUCTION

When Congress scrapped parole in 1984,[1] the move eliminated a highly criticized source of uncertainty and disparity in federal sentencing,[2] but the decision to replace it with the supervised release system has created problems of its own. On the surface, the two systems are virtually indistinguishable. Both permit the government to impose a period of conditional freedom on defendants as they return to the community, and both provide for revocation of that freedom when the conditions are violated. A subtle structural difference, however, makes revocation of supervised release reliant on a legal fiction not required to justify revocation of parole. This fiction may have been justifiable at one time, but several provisions in the supervised release statute as it exists today, including one recently invalidated by the Tenth Circuit in *United States v. Haymond*,[3] have stretched the legal sleight of hand beyond constitutionally permissible limits.

The narrow question in *Haymond* is whether a statute providing for mandatory revocation and a five-year minimum term of imprisonment violates the Fifth and Sixth amendments when the defendant's underlying offense has no mandatory term of imprisonment and the fact triggering revocation has not been presented to a jury or proven beyond a reasonable doubt. However, the case implicates a broader issue: whether a judge's factual determinations at revocation can mandate or make available punishment beyond that otherwise mandated or available based on the defendant's original conviction alone. In order to bring clarity to the confused body of law surrounding supervised release and to establish constitutional constraints on a currently boundless system, the Supreme Court should grant certiorari in *Haymond* and affirm the Tenth Circuit's decision.

The nature of supervised release, and the leap of legal logic on which it relies, can best be explained by way of a brief illustration. Consider the following hypothetical: Park rangers catch a hiker selling marijuana to campers in a national park, and a jury later convicts him of distribution of marijuana substance, leading to a sentence of five years in prison, the maximum available under the law, to be followed by two years of supervised release.[4] Shortly after completing his prison term, the hiker is arrested again, this time for possession of cocaine, leading his probation officer to petition the court for revocation of

1. *See* Sentencing Reform Act of 1984 Pub. L. No. 98-473, 98 Stat. 1987. Congress adopted the supervised release system in 1984 as part of a larger sentencing reform that also established the current system of sentencing guidelines. The principle statute establishing the rules for supervised release was codified at 18 U.S.C. § 3583. The parole system that it replaced had been codified at 18 U.S.C. §§ 4201–4218.

2. S. REP. No. 98-223, at 35 (1983).

3. *See* United States v. Haymond, 869 F.3d 1153 (10th Cir. 2017), *petition for cert. filed* (U.S. June 15, 2018) (No. 17-1672).

4. *See* 21 U.S.C. § 841(b)(1)(D).

the hiker's release. At the hiker's revocation hearing, the judge serves as factfinder,[5] permits hearsay testimony,[6] determines the hiker's guilt based on a preponderance of the evidence,[7] and sentences the him to two years in prison. When the hiker protests, the judge explains that defendants facing revocation do not enjoy the full panoply of procedural rights due during a criminal prosecution. Rest assured, the judge says, had the government chosen to send the hiker to prison in the traditional way, the constitution would have protected his rights to a jury trial,[8] confrontation of witnesses,[9] and proof beyond a reasonable doubt.[10]

The hypothetical, though admittedly absurd, raises serious questions. If certain conduct by a defendant renders him subject to revocation, and the same conduct renders him subject to criminal prosecution, what accounts for the differing procedural protections with respect to the manner in which the government is allowed to prove that conduct?

Herein lies the legal fiction underpinning supervised release: the law considers revocation to punish a defendant's original offense even though a defendant free on supervised has served his original prison sentence to completion.[11] In other words, the judge's determination that the cocaine belonged to the hiker made the prison term possible, but the prison term itself was additional punishment for the sale of marijuana to campers on federal property. Because the hiker presumably enjoyed full constitutional protections when he was prosecuted on the marijuana charge, the judge was not required to afford those protections again as he considered whether to impose additional punishment related to that conviction.[12]

This rationale raises another question, though. If the law treats revocation as punishment for a defendant's original offense, and the maximum penalty for the hiker's original offense was five years in prison, how could the judge impose a revocation term that resulted in a total prison sentence of seven years? Circuit courts have yet to provide a satisfactory answer to this question despite universally holding such revocation terms to be permissible.

Courts never had to consider this issue during the parole era. Under the parole system, a defendant was released before he had completed his original sentence. If he violated his parole conditions, revocation merely resulted in the re-imposition of his remaining prison term. Because the revocation sanction was, quite literally, the punishment for his original offense, revocation of parole could expose a defendant to no

5. *See* Johnson v. United States, 529 U.S. 694, 700 (2000) (noting that defendants are not entitled to a jury trial when supervise release is revoked because the defendant engaged in new criminal conduct).

6. *See* United States v. Mosley, 759 F.3d 664, 667–68 (7th Cir. 2014) (holding that hearsay is admissible in a revocation hearing when the out of court statement is sufficiently reliable).

7. *See Johnson*, 529 U.S. at 700 (noting that violations of supervised release need only be proven by a preponderance of the evidence).

8. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

9. *See* Fed. R. Evid. 802 ("Hearsay is not admissible . . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

10. *See In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

11. *Johnson*, 529 U.S. at 701.

12. For a discussion of the case law relevant to this point, see *infra* notes 77–90 and accompanying text.

more punishment than he faced the day he was sentenced.

If revocation of supervised release were similarly constrained, the legal fiction that revocation punishes a defendant's original offense would arguably be justified. The threat of revocation allows judges to efficiently enforce the conditions they impose on defendants as they are reintegrated into civil society. Were courts obliged to empanel a jury and the government to present proof beyond a reasonable doubt, the system would almost certainly grind to a halt. Moreover, supervised release has several advantages over parole. Whereas parole was managed by prison bureaucrats rather than the courts, supervised release gives judges direct control over a defendant's punishment from start to finish, fostering certainty and transparency in sentencing.[13]

Under the current statute, however, the claim that revocation punishes a defendant's original offense strains credulity. Rather than tying post-revocation sanctions to a defendant's underlying conviction, several provisions prescribe additional revocation penalties for specific kinds of violations.[14] Moreover, courts have repeatedly held that revocation is permissible even when the additional term of incarceration would result in a cumulative prison sentence that exceeds the maximum provided for in the statute under which the defendant was originally convicted.[15]

These provisions are at odds with the Supreme Court's sentencing jurisprudence and the Constitution. The Framers, wary of government overreach, sought to protect defendants by establishing certain procedural bulwarks such as the Sixth Amendment right to a jury trial and Fifth Amendment right to due process of law, which, in the criminal context, has long been understood to require proof beyond a reasonable doubt.[16] Because these protections are only in place during the conviction phase of the defendant's trial, the Supreme Court requires his punishment to be limited to that made available by the facts proven during that phase alone. Revocation of supervised release, therefore, is unconstitutional when it would alter the boundaries of the penalty range to which the defendant was originally subject at sentencing.

Haymond, a 2017 case that was pending certiorari as of this note's publication, represents the first time that a court has invalidated a revocation provision on the grounds that it altered the boundaries of a defendant's available sentencing range based on facts never presented to a jury, violating his rights under the Fifth and Sixth Amendments.[17] The Tenth Circuit's decision was limited to a relatively narrow provision in the supervised release statute, but the court's reasoning has broad implications for the supervised release program as a whole, breathing new life into an argument that courts have largely ignored,[18]

13. Part II of this note discusses the reasons why Congress adopted supervised release in lieu of parole as well as the structural differences between the two systems.

14. *See infra* notes 52–63 and accompanying text.

15. *See infra* Part V.

16. *See In re* Winship, 397 U.S. 358, 361 (1970).

17. 869 F.3d 1153 (10th Cir. 2017).

18. *See* Brett M. Shockley, Note, *Protecting Due Process from the Protect Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 WASH. & LEE L. REV. 353 (2010). Mr. Shockley's note was prescient. Examining the same statute as the one at issue in *Haymond*, he identified many of the constitutional defects that the Tenth Circuit later cited in *Haymond*. *See id.* at 359. However, the law has evolved significantly since 2010, and Mr. Shockley's work did not thoroughly address the legal reasoning employed by the circuit courts on this issue. *See id.* at 377–78. This note advances the scholarship in two ways. First, it offers a more

often as a result of poorly argued or meritless challenges.[19]

This note presents a roadmap of the law underpinning *Haymond* and argues that the Tenth Circuit got right what so many other circuit courts have gotten wrong. Part II, which follows this introduction, traces the historical trends that led Congress to abandon parole in favor of supervised release and explains the structural difference between the two systems. Part III examines the Supreme Court cases that form the constitutional boundaries within which supervised release should be contained. In *Johnson v. United States*, the Court held that post-revocation sanctions must be attributed to the original offense.[20] This mandate is in tension with the sentencing principles articulated in *Apprendi v. New Jersey* and its progeny, a line of cases in which the Court defined the limits of judicial fact-finding in sentencing.[21] Part IV analyzes the manner in which the Tenth Circuit attempted to resolve that tension in *Haymond*.

Finally, Part V of this note explains the principles underpinning *Haymond* and argues that, under the Court's precedents in *Johnson* and *Apprendi*, revocation of supervised release is unconstitutional in all cases where revocation is mandatory and in any case where revocation exposes the defendant to punishment beyond the statutory maximum authorized by his original conviction. With the exception of *Haymond*, the circuit courts have consistently refused to impose these constitutional limits, but, as Part V explains, the uniformity masks an underlying weakness in the courts' understanding of the applicable Supreme Court precedent.

The government has a legitimate interest in maintaining a system of supervised release, but that interest does not extend to the use of revocation as a vehicle for extraconstitutional punishment. Reduced procedural protections are permissible when revocation punishes a defendant's original offense, but revocation cannot reasonably be said to punish a defendant's original offense if the revocation results in punishment that would not have been permitted or required upon his conviction at trial. If the government wishes to punish a defendant's subsequent conduct, rather than his original offense, it must prove that conduct to a jury and beyond a reasonable doubt.

II. FROM PAROLE TO SUPERVISED RELEASE

Much of the confusion regarding the constitutional limits of revocation can be attributed to the courts' failure to properly recognize and account for the structural difference between supervised release and parole. This distinction—the ultimate source of the supervise release system's constitutional vulnerability—arose as a byproduct of a larger shift in sentencing practices.

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comprehensive analysis of the key precedents, including an important Supreme Court decision that post-dates Mr. Shockley's work. *See infra* Part III. Second, the note provides a thorough rebuttal of the arguments on which the circuit courts have relied to reject supervised release challenges. *See infra* Part V.

19. *See infra* Part V.

20. 529 U.S. 694 (2000).

21. *See* Alleyne v. United States, 570 U.S. 99 (2013); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

A. Sentencing: Determinate to Indeterminate and Back Again

Parole emerged in the late nineteenth century as a progressive penal reform premised on the idea that the primary purpose of punishment should be rehabilitation rather than retribution.[22] In the early days of the Republic, when incarceration was a relatively novel alternative to hanging or whipping in the town square, the structure of sentencing laws reflected their retributive purpose. The punishment was supposed to fit the crime, not the criminal, so the law provided a specific term of confinement for each offense.[23] With limited exceptions, defendants served these terms in their entirety.[24] These norms began to change, however, as reformation of the offender supplanted retribution as the primary justification for punishing him.[25] By the late 1800s, penal theory viewed incarceration as an evil to be imposed no longer than was necessary to turn the offender from his evil ways.[26]

Sentencing statutes soon began to reflect this philosophical shift, as lawmakers adopted mechanisms meant to tailor punishment to the needs of individual defendants. First, because a judge was in a better position to evaluate the defendant, legislators delegated their sentencing authority, the specific absolute prison terms with broad penalty ranges.[27] Second, because each offender's progress toward rehabilitation would be different and could not be known at the time of conviction, lawmakers began establishing parole boards, quasi-judicial arms of the prisons, to decide when a defendant was suitable for release back into society.[28] This had the effect of rendering prison sentences partially indeterminate. As a practical matter, the judicial sentence served only to establish the boundaries of the board's discretion, setting the date of a defendant's parole eligibility and the date after which he could no longer be held in custody.[29]Although a defendant's actual prison term had to fall within the range established by the judicial sentence, the precise magnitude of his punishment remained unknown at the time of sentencing.[30] Advocates for this model viewed the system's inherent uncertainty as a feature, not a bug.[31] The prospect of early release, they argued, provided inmates with an incentive to reform, and the threat of revocation provided an incentive to stay reformed.

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22. ARTHUR W. CAMPBELL, LAW OF SENTENCING §4.2 (3d ed. 2004), Westlaw (database updated September 2017).

23. United States v. Grayson, 438 U.S. 41, 45 (1978).

24. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990).

25. *See* Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 8 (2015).

26. Charlton T. Lewis, *Indeterminate Sentence*, 9 YALE L.J. 17, 17 (1899) ("Since every man's liberty is a sacred right, as far as it is consistent with the rights of his fellows, it would direct that no man be imprisoned unless it is clear that his freedom is dangerous to others, and that, when once imprisoned, no man be freed until the danger has ceased. This is the principle of what is inexactly called the indeterminate sentence.").

27. *See* Schuman, *supra* note 25, at 8.

28. Hellen Leland Witmer, *The History Theory and Results of Parole*, 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 24, 53 (1927).

29. Under a truly indeterminate sentencing system, judges impose neither a minimum nor a maximum sentence, and defendants are released unconditionally when determined to be reformed. *See* Paul Tappan, *Sentencing Under the Model Penal Code*, 23 L. & CONTEMP. PROBS. 528, 529–31 (1958).

30. *See* CAMPBELL, *supra* note 22, §4.2.

~~note 27, at 48–49.~~

The system gained popularity quickly. By the time Congress adopted parole in 1910, more than half the states already had similar systems in place.[32] A congressional report declared approvingly that parole had "come to be regarded as humane, in the interests of sound policy and highly beneficial to the welfare of society."[33] By the mid-1940s, some form of parole had been universally adopted in every jurisdiction in the United States.[34]

In the 1960s, however, the tide began to turn, as a growing chorus began to question the wisdom and fairness of indeterminate sentencing.[35] Many of the arguments against it undermined the basic assumptions that had led to its adoption in the first place. Data cast doubt on the supposed rehabilitative properties of incarceration.[36] Even if prisons did rehabilitate some inmates, many, including former parole officials, doubted it was possible to accurately identify them.[37] Moreover, critics decried the disparity that parole bred in sentencing, noting that some judges attempted to retain control over a defendant's punishment by anticipating his parole date and attempting to adjust his sentence accordingly.[38]

By the 1980s, Senator Edward Kennedy, the chief advocate for reform in Congress, had finally gained traction in his decade-long quest to abandon indeterminate sentencing at the federal level.[39] Introducing his reform bill to Congress, Kennedy denounced the status quo: "The current system is actually a nonsystem. It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served."[40]

Kennedy's proposal sought to bring consistency and predictability to the penal system by making sentences determinate and reducing judicial discretion.[41] Under the new system, a Sentencing Commission would formulate binding sentencing guidelines that systematically factored in the circumstances of a defendant's crime and background.[42] Although the law did not change the broad sentencing ranges already in place for individual offenses, it restricted a judge's discretion by requiring her to select a sentence within a narrow band computed by the guidelines. Because the nature of the defendant's crime, not his rehabilitative progress, was to determine his prison sentence, the new system scrapped parole entirely.[43] Congress approved the sentencing reforms in 1984 as part of a

32. Act of June 25, 1910, ch. 387, Pub. L. No. 61-269, 36 Stat. 819.

33. SYSTEM OF PAROLE FOR UNITED STATES PRISONERS, H.R. Rep. No. 61-1341, at 4. (2d Sess. 1910).

34. SOL RUBIN, LAW OF CRIMINAL CORRECTION, 622 (2d ed. 1973).

35. Nagel, *supra* note 24, at 895.

36. *Id.* at 896.

37. *Corrections: Federal and State Parole System: Hearing on H.R. 13118 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 695–96 (2d Sess. 1972) (statement of Leonard Orland, former member of the Connecticut Parole Board).

38. S. REP. No. 98-223, at 43 (1983).

39. For a history of sentencing reform, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

40. S. REP. No. 98-223, at 34.

41. Stith & Koh, *supra* note 39, at 261.

42. S. REP. No. 98-223, at 51.

43. The bill directed the Sentencing Commission, in establishing the sentencing guidelines, to take into account the absence of parole by using the average sentence that defendants actually served for specific offenses as a starting point for its guideline range. However, the commission was not bound to adhere to this average.

larger crime bill backed by influential law-and-order Republicans.[44]

B. The Structure of Supervised Release

1. Distinguishing Between Parole and Supervised Release

Kennedy and others on the Senate Committee on the Judiciary saw utility in supervising an inmate's transition back into the community but found parole's mechanism for providing that supervision inefficient.[45] Because the availability and duration of parole were tied to a defendant's remaining prison sentence, an unreformed inmate who served his full prison term could not be supervised upon his release since he had no prison time left to parole, while an exemplary inmate who earned parole at the earliest date possible would be subject to years of unnecessary supervision.[46] Members of the committee found this structure to be perverse.[47] Post-release supervision, they argued, should be based on the needs of each defendant rather than the existence of unserved prison time, which, in any case, could not exist without preserving the indeterminacy that the reform was meant to abolish.[48]

The new system, which they dubbed "supervised release," avoided these problems by decoupling the availability and duration of the supervision period from the defendant's initial prison term. Rather than release prisoners early so they could be supervised on parole, the new system empowered judges to order a period of post-release supervision along with a defendant's initial prison sentence, which she would have to serve in full.[49] This innovation gave rise to the key structural difference between parole and supervised release. Whereas parole granted a period of conditional freedom *in lieu of* a defendant's *remaining* prison sentence, supervised release imposed a period of conditional freedom *in addition to* a defendant's *already completed* prison sentence.

2. The Punitive Drift of Supervised Release

Today's supervised release statute bears little resemblance to the one Congress originally adopted.[50] In its initial form, supervised release not only eliminated the parole system's "carrot" (early release), it also did away with the parole system's "stick" (revocation).[51] To the extent that a defendant was to be sanctioned for violating the conditions of his release, the supervised release statute provided only that she be held in contempt of court.[52] Violations constituting criminal conduct in their own right were to be

Comprehensive Crime Control Act of 1984, Tit. II, Ch. 58, Sec. 994, Pub. L. No. 98–473 (codified at 28 U.S.C. § 994(m)).

44. *See* Stith & Koh, *supra* note 39, at 261.
45. *See* S. REP. No. 98-225, at 122–23.
46. *Id*. at 125
47. *Id.*
48. *Id.*
49. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §3583.
50. *Compare* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §3583, *with* 18 U.S.C. § 3583.
51. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §3583(e).
52. S. REP. No. 98-225, at 125.

prosecuted in the traditional manner.[53] The Senate Committee on the Judiciary, reporting Kennedy's bill to the Senate floor, explicitly rejected parole's punitive approach:

> The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide re-habilitation to a defendant who has spent a fairly short period in prison. . . but still needs supervision and training programs after release.[54]

This model of supervised release, with its focus on reintegration, was signed into law but never implemented.[55] In 1985, two years before the supervised release program was to go into effect, President Reagan's Department of Justice asked Congress to amend the statute to allow for revocation.[56] Congress approved the amendment the following year as part of sweeping anti-drug legislation.[57]

The reintroduction of revocation gave the unique structure of supervised release a new significance. Under parole, both the supervision period and the revocation penalty were determined by the amount of time remaining on a defendant's prison sentence when he was granted parole. Under supervised release, however, the term of supervision was limited in absolute terms. Although certain criminal statutes specified particular terms of supervision, the supervised release statute set a default term of three years for defendants convicted of serious felonies and two years for lesser felonies.[58] By making these terms revocable, the amendment made it possible to add time to a defendant's prison sentence, even if it exposed him to a total prison term exceeding the statutory maximum for his underlying offense.[59] Subsequent amendments to the statute have invited routine exploitation of this structural loophole.

In the thirty years since supervised release was first adopted, Congress has repeatedly amended the statute in ways that rendered it more punitive. During the crack epidemic of the 1980s, Congress made revocation of supervised release mandatory for violations stemming from possession of a controlled substance or a firearm.[60] In 2001,

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53. *Id*.

54. *Id.* at 124.

55. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235(B)(ii) (tying the effective date of the act to the adoption of the sentencing guidelines); Drug Abuse Act of 1986. Pub. L. No. 99-570, § 1006 (1986) (amending the supervised release statute to provide for revocation); U.S. SENTENCING GUIDELINES MANUAL § 1.2 (U.S. Sentencing Comm'n 1987) (establishing effective date of guidelines as Nov. 1, 1987).

56. *See* 131 CONG. REC. S 7399 (June 4, 1985) (Statement of Sen. Strom Thurmond introducing amendments on behalf of the Regan administration). Although the introduction of revocation substantially altered the nature of supervised release, Thurmond, in proposing the change, described the amendment as one of many "technical and minor changes" to the Comprehensive Crime Control Act. *Id.*

57. Drug Abuse Act of 1986. Pub. L. No. 99-570, § 1006 (1986) (amending the supervised release statute to provide for revocation).

58. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §3583(b). These terms were expanded in 1987 to five years for serious felonies and three years for lessor felonies. Sentencing Reform Act of 1987, Pub. L. No. 100-182, Sec. 8.

59. Congress again amended the statute in 1994 to limit revocation terms to five years for class A felonies, three years for class B felonies, two years for class C or D felonies, and one year for misdemeanors. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, Sec. 110505 (codified at 18 U.S.C. § 3583(e)).

60. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, Sec. 7303 (1988) (codified at 18 U.S.C. § 3583(g)(1) (requiring judges to revoke the release of defendants who possess a controlled substance); Violent Crime Control

after the September 11 terror attacks, Congress amended the statute to allow lifetime supervision of individuals convicted of terror-related crimes.[61] In 2003, Congress did the same for sex offenders.[62] Three years later, it added a provision that made revocation mandatory for sex offenders in certain circumstances and required sex offenders on supervised release to submit to warrantless searches.[63] Several of these amendments are irreconcilable with the Supreme Court's interpretation of the Fifth and Sixth Amendments. At a more fundamental level, they are at odds with the notion that revocation punishes the original offense rather than a defendant's violative conduct.

III. THE LEGAL LANDSCAPE

A. Johnson*: Why Revocation Must Punish the Original Offense*

Courts initially disagreed on what revocation of supervised release was meant to punish. The conceptual conflict bubbled up in the wake of a 1988 amendment to the supervised release statute that provided for mandatory revocation. Whereas judges previously had discretion to decide when revocation was appropriate, the amendment rendered revocation obligatory when a defendant's violation stemmed from the possession of a controlled substance.[64]

A string of offenders challenged the provision, arguing that its application to their cases was ex post facto. Although the law was in place when they violated supervised release, it had not been at the time they committed their original offenses.[65]

The Constitution's Ex Post Facto Clause forbids "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."[66] Application of a law is ex post facto if it exhibits two qualities: first, "it must be retrospective, that is, it must apply to events occurring before its enactment;" and second, "it must disadvantage the offender affected by it."[67] Courts considering the mandatory-revocation challenges concluded that the law clearly disadvantaged the defendants because the trial judges presiding over their cases would otherwise have had discretion to forgo revocation.[68] Whether the law was retrospective turned on what revocation was meant to punish.

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and Enforcement Act of 1994, Pub. L. No. 103–322, Sec. 110505 (codified at 18 U.S.C. § 3583(g)(2) (requiring judges to revoke the release of defendants who possess a firearm).

61. USA PATRIOT Act, Pub. L. No. 107-56, § 812, (2001) (codified at § 3583(j)).

62. PROTECT Act, Pub. L. No. 108-21, § 101 (2003).

63. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 109B, 210.

64. Anti–Drug Abuse Act of 1988, Pub. L. No. 100-690, Sec. 7303. Revocation for possession of a controlled substance remains mandatory, but Congress eliminated a requirement that re-imprisonment term run at least one-third the length of the authorized term of supervised release. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, Sec. 110505.

65. *See* United. States v. Reese, 71 F.3d 582 (6th Cir. 1995); United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994; United States v. Paskow, 11 F.3d 873 (9th Cir. 1993); United States v. Parriett, 974 F.2d 523 (4th Cir. 1992); United States v. Flora, 810 F. Supp. 841 (W.D. Ky. 1993).

66. Weaver v. Graham, 450 U.S. 24, 28 (1981) (internal quotations omitted) (interpreting U.S. Const., art. 1, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.") and U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law. . . .")).

67. *Weaver*, 450 U.S. at 29 (1981) (footnotes omitted).

68. *See, e.g.*, *Paskow*, 11 F.3d at 877.

The defendants argued that their original sentences included terms of supervised release, so revocation of that release must have been punishment for their original offenses.[69] Viewed this way, application of the mandatory minimum to their cases was necessarily retrospective because it served to aggravate punishment for conduct that occurred before the law was in place. The government, on the other hand, argued that the law was not retrospective because the defendants had engaged in the conduct leading to revocation after the amendment was in effect.[70] Most of the circuit courts to consider the issue sided with the defendants,[71] but the Sixth Circuit ruled for the government, concluding that revocation was punishment for the conduct leading to the revocation.[72]

The Supreme Court initially declined to resolve the conflicting conceptions of supervised release,[73] but the issue arose again after Congress further amended the statute in 1994, this time adding a provision that explicitly authorized judges to impose an additional term of supervision along with a prison term when revoking a defendant's initial term of supervised release.[74] As with the mandatory-revocation amendment, a series of ex post facto challenges ensued.[75] This time, the Court decided the conflict had to be resolved and granted certiorari in *Johnson v. United States*.[76]

1. The Stakes

As the Court took up *Johnson*, more hung in the balance than the fate of the ex post facto challengers. Several aspects of the supervised release system could only be justified if the law viewed revocation as punishment for a defendant's original offense.[77]

First, the statute provided that conduct need not be criminal in order to constitute a violation of a defendant's supervised release.[78] This would not be possible if post-

69. *See Reese*, 71 F.3d at 585–86; *Paskow*, 11 F.3d at 880; *Meeks*, 25 F.3d at 1118.

70. *See Reese*, 71 F.3d at 585–86; *Paskow*, 11 F.3d at 880; *Meeks*, 25 F.3d at 1122.

71. *See Meeks*, 25 F.3d at 1121; *Paskow*, 11 F.3d at 880; United States v. Parriett, 974 F.2d 523, 526–27 (4th Cir. 1992).

72. *Reese*, 71 F.3d at 590.

73. *See* Reese v. United States, 518 U.S. 1007 (1996) (denying certiorari).

74. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 110505. Prior to the 1994 amendment, the parameters of a revocation sentence were limited to § 3583(e). At the time, § 3583(e) provided that, after finding a defendant to have violated his terms of release, a judge could "revoke [the] term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision . . . ." 18 US.C. § 3583(e) (1994). Courts were split as to whether this authorized the imposition of an additional term of supervision after the defendant's re-release. Nine circuits held that it did not. *See* United States v. Koehler, 973 F.2d 132 (2d Cir. 1992); United States v. Malesic, 18 F.3d 205 (3d Cir. 1994); United States v. Cooper, 962 F.2d 339 (4th Cir. 1992); United States v. Holmes, 954 F.2d 270 (5th Cir. 1992); United States v. Truss, 4 F.3d 437 (6th Cir. 1993); United States v. McGee, 981 F.2d 271 (7th Cir. 1992); United States v. Behnezhad, 907 F.2d 896 (9th Cir. 1990); United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993); United States v. Tatum, 998 F.2d 893 (11th 1993). Two, the First and the Eighth, found that § 3583(e) did authorize an additional period of supervision. *See* United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993); United States v. Schrader, 973 F.2d 623 (8th Cir. 1992).

75. *See* United States v. Page, 131 F.3d 1173 (6th Cir. 1997); United States v. Collins, 118 F.3d 1394 (9th Cir.1997); United States v. Beals, 87 F.3d 854 (7th Cir.1996).

76. 529 U.S. 694 (2000).

77. *See, e.g.*, United States v. Meeks, 25 F.3d 1117, 1123 (2d Cir. 1994).

78. *See* 18 U.S.C. § 3583(d) (1994) ("The court may order, as a further condition of supervised release . . . any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate . . . ."). Section 3563(b) lists a number of discretionary conditions that judges may

revocation imprisonment were punishment merely for the conduct leading to the revocation.[79] The Second Circuit reasoned that, "[i]f the individual may be punished for an action that is not of itself a crime, the rationale must be that the punishment is part of the sanction for the original conduct that was a crime."[80]

Second, when the violative conduct was itself criminal, a defendant could both have his release revoked and be prosecuted separately for the offense constituting the violation.[81] If revocation were punishment for the violative conduct, that conduct could not be prosecuted later as a separate offense without resulting in double jeopardy.[82]

Finally, defendants facing revocation of supervised release had no right to a jury trial or proof beyond a reasonable doubt.[83] Courts justified this practice by pointing to a pair of parole-era Supreme Court cases in which the Court held that defendants facing revocation were not entitled to the full slate of constitutional protections normally due a defendant facing criminal prosecution.[84] In *Morrissey v. Brewer*, the Court noted that parole occurred after the criminal prosecution, when the imposition of a sentence had already taken place.[85] Because revocation was not part of a criminal prosecution, "the full panoply of rights due a defendant in such a proceeding," including the right to a jury trial, did not apply.[86] The Court concluded that the Fourteenth Amendment guaranteed some level of process because a defendant had a liberty interest in not seeing his parole revoked unjustly, but that interest, given the many restrictions parole imposed upon a parolee's freedom, was diminished compared to that of a pre-conviction defendant.[87] Because his liberty interest was diminished, he was entitled to diminished procedural protections.[88] In *Gagnon v. Scarpelli*, the Supreme Court extended *Morrissey*'s holding to probation proceedings, noting that a probationer, like a parolee, has already been prosecuted.[89] Although the Court has never explicitly extended *Morrissey-Gagnon* to the revocation of supervised release, the circuit courts have done so uniformly.[90]

If the Court were to hold in *Johnson* that revocation was punishment for violating supervised release, the rationale for these constitutional forbearances would fall apart.

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impose, such as forbidding a defendant "from frequenting specified kinds of places or from associating unnecessarily with specified persons."

79. *Meeks*, 25 F.3d at 1122.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See, e.g.*, *Meeks*, 25 F.3d at 1123.

84. *Id.*

85. 408 U.S. 471, 480 (1972).

86. *Id.* at 480.

87. *Id*.

88. *Id.* at 482–83; *see id.* at 489 (holding that a revocation hearing required only "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.").

89. 411 U.S. 778, 782 (1973).

90. *See, e.g.*, United States v. Meeks, 25 F.3d 1117 (2d. Cir. 1994).

2. The Decision

The defendant in *Johnson* was convicted for his participation in a conspiracy to commit credit card fraud.[91] In addition to a prison sentence, the district court ordered Johnson to serve a three-year term of supervised release.[92] While serving that release term, authorities arrested Johnson again, this time for forgery.[93] The district court revoked and ordered Johnson to submit to another twelve months of supervision upon his release.[94]

Johnson appealed the trial court's imposition of the additional supervision term, arguing that the 1994 amendment, which provided for such terms, had not been in place when he committed the credit card offense in 1993.[95] The Sixth Circuit affirmed the additional term, holding that its application was not ex post facto because the term was punishment for the forgery, which Johnson committed after Congress added the 1994 amendment.[96]

On appeal, the Supreme Court unanimously rejected the Sixth Circuit's ex post facto ruling,[97] reasoning that, although it had "some intuitive appeal," the Sixth Circuit's holding raised "serious constitutional questions" with respect to the issues mentioned above—imprisonment for noncriminal conduct, reduced procedural rights for defendants, and double jeopardy.[98] Treating revocation as punishment for the original crime, the approach followed by the majority of lower courts, "avoid[ed] these difficulties."[99]

The Court's reasoning was almost entirely negative, focusing on the consequences that would arise should it hold revocation to be punishment for a defendant's violative conduct. Its affirmative argument for treating revocation as punishment for the original offense was limited to a single reference to the Court's summary affirmance of a 1969 case called *Greenfield v. Scafati*,[100] which several of the circuit courts had similarly relied on for guidance.[101] In *Greenfield*, a three-judge panel barred the application of an amended parole statute to a defendant whose original offense occurred before the amendment was enacted, reasoning that the timing of parole eligibility was part of a defendant's

91. Johnson v. United States, 529 U.S. 694, 697 (2000).

92. *Id*.

93. *Id.*

94. *Id.* at 698.

95. *Id*.

96. *Johnson*, 529 U.S. at 698–99.

97. *See id.* at 700. The Court unanimously rejected the Sixth Court's holding with respect to the ex post facto challenge. However, a divided Court held that that a judge already had authority under the pre-1994 statute to impose an additional term of supervised release following the reimprisonment of a defendant who violated the conditions of his initial term. *Id*. at 713.

98. *Id*. at 700.

99. *Id.* (citing United States v. Wyatt, 102 F.3d 241, 244–45 (7th Cir. 1996); United States v. Beals, 87 F.3d 854, 859–60 (7th Cir. 1996); United States v. Meeks, 25 F.3d 1117, 1123 (2d Cir. 1994)).

100. *Id.* at 701 (citing Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), *summarily aff'd*, 390 U.S. 713 (1968)). In *Greenfield*, the statute at issue delayed the point at which re-imprisoned parole violators could begin earning good-time credit, which had the effect of delaying their presumptive release dates. 277 F. Supp. 644, 645. Under the ex post facto Clause, a change in the law cannot extend a defendant's sentence beyond that which was permitted under the law as it existed on the date of his offense. *Id.* The court reasoned that, because the right to accumulate good time was part of the sentence for the defendant's original offense, and he committed that offense before the law was enacted, the law could not apply to him. *Id*.

101. *See Beals*, 87 F.3d at 859; *Meeks*, 25 F.3d at 1120; United States v. Paskow, 11 F.3d 873, 878 (9th Cir. 1993).

sentence.[102]

Curiously, neither the *Johnson* Court nor the circuits it followed looked to the structure of the supervised release statute for clues as to what revocation was actually punishing. The Sixth Circuit had done so, however, in *United States v. Reese*, the ex post facto case that created the circuit split ultimately resolved in *Johnson*.[103] In *Reese*, the court noted that, under a parole system, revocation never results in prison time that exceeds the penalty handed down in the original sentence.[104] If someone is sentenced to nine years in prison and released on parole after three, the court reasoned, revocation can result in no more than six years of re-imprisonment. By contrast, revocation of supervised release can result in a longer prison term than the one originally imposed or a cumulative punishment that exceeds the maximum sentence otherwise allowed by law.[105] The Sixth Circuit reasoned that, because the revocation term could exceed "the maximum incarceration period that attaches to the original offense," revocation could not be said to punish that same offense.[106] Put another way, if revocation punished the original offense, then the ensuing prison term would be limited according to the maximum term authorized for that offense. Since that did not appear to be the case, revocation had to be punishment for the violation.[107]

Despite the logical coherence of that argument, it had one flaw: the Sixth Circuit cited no authority to support the proposition that the "maximum" penalty for an offense attaches when a jury returns its verdict and cannot be subsequently increased based on a later factual determination made by the judge. The court may have deemed such a citation unnecessary, given that, for many years, it was taken for granted that it was the jury's findings, not the judge's, that determined the scope of a defendant's potential punishment.[108] However, by the time the Sixth Circuit decided *Reese* in the mid 1990s, increasingly aggressive sentencing statutes had begun to call that assumption into question. These laws forced the Supreme Court to define the constitutional limits of judicial fact-finding during sentencing.

B. The Apprendi *Line: Judicial Fact-Finding and the Boundaries of Sentencing Discretion*

One of the hallmarks of penal theory's rehabilitation era, broad judicial discretion in

102. Greenfield v. Scafati, 277 F. Supp. 644, 646 (D. Mass. 1967), *summarily aff'd*, 390 U.S. 713 (1968)).

103. United. States v. Reese, 71 F.3d 582, 587–88 (6th Cir. 1995).

104. *Id.* (citing 18 U.S.C. § 3565 United States v. Dillard, 910 F.2d 461, 466–67 (7th Cir. 1990)). The court's discussion of this issue alternately refers to "parole" and "probation," but the court's illustration is clearly a reference to parole.

105. *Id.* (citing 18 U.S.C. § 3583(e); United States v. Smeathers, 930 F.2d 18, 19 (8th Cir. 1991); *Dillard*, 910 F.2d at 466-67 (7th Cir.1990)). When the Sixth Circuit decided *Reese*, the United States Sentencing Guidelines confined the available sentence to a narrow range within the wider range allowed under the code section defining an offense. In *United States v. Booker*, the Court held that the guidelines could not be binding. 543 U.S. 220, 220 (2005). After *Booker*, judges could impose any sentence within the broad range established by Congress for each offense.

106. *Reese*, 71 F.3d at 588.

107. *Id.*

108. *See* Apprendi v. New Jersey, 530 U.S. 466, 482–83 (2000) (noting the historic link between the "elements" of a crime and the punishment made available to a judge).

sentencing, had the secondary effect of establishing sentencing as a truly distinct procedural phase of criminal proceedings.[109] During the retributive era, when the law tended to prescribe a particular punishment for each offense, the judge's imposition of the sentence was little more than a ministerial act.[110] However, as the rehabilitative theory of punishment gained prominence, and a defendant's rehabilitative potential rather than his offense became the primary basis for sentencing, judges were expected to diagnose each defendant's prospects individually.[111] This presented a problem. Some facts relevant to a defendant's rehabilitative potential—ties to the community, character evidence, prior criminal history, etc.—were not admissible at trial. In order to facilitate the necessary fact-finding, jurisdictions developed a bifurcated system consisting of the traditional prosecution phase, which served to attach guilt, and a separate sentencing phase, which served to guide the judge's discretion in selecting the appropriate punishment. [112]

Although the facts presented during the sentencing phase could substantially affect the magnitude of a defendant's punishment, his procedural rights were minimal.[113] He had no right to confront witnesses providing information to the court,[114] no right to submit disputed facts to a jury, and no right to demand proof beyond a reasonable doubt.[115] Moreover, the judge's sentence was practically unreviewable. So long as it fell within the broad range provided for in the applicable statute, a sentence would stand on appeal.[116]

The power exerted by judges in this context garnered little scrutiny, in part due to the way in which "crimes" were defined and adjudicated.[117] Each crime was defined by a set of elements—facts that, once proven, subjected a defendant to criminal liability and set the outer limits of his possible sentence.[118] Because proof of these elements established guilt, rendering him subject to punishment, a defendant enjoyed full constitutional protection as to their proof.[119] By contrast, because facts alleged at sentencing had no

109. Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302 (1992).

110. *See Apprendi*, 530 U.S. at 479 (tracing the historical development of American sentencing). "The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." *Id.*

111. United States v. Grayson, 438 U.S. 41, 48 (1978).

112. *See* Herman, *supra* note 109, at 303 n.56.

113. *See, e.g.*, Williams v. People of State of N.Y., 337 U.S. 241, 251 (1949) ("[W]e do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.").

114. *Id.* at 251. *See also* United States v. Tucker, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

115. McMillan v. Pennsylvania, 477 U.S. 79, 92, 93 (1986).

116. *See* CAMPBELL, *supra* note 22, §9.3 ("Where sentences are determined by trial judges, as they are in the vast majority of cases, they ride upon one of the most powerful and pervasive doctrines in the law of sentencing: any sentence within constitutional and statutory limits will be upheld on appeal as long as it was selected by the proper exercise of judicial discretion.") (internal citations omitted).

117. *See* Apprendi v. New Jersey, 530 U.S. 466, 499–501, 518–20 (2000) (Thomas, J., concurring) (describing the historic link between legislatively defined elements and the penalties available upon proof of those elements).

118. *See id.* at 519–20 (describing the historic link between legislatively defined elements and the penalties available upon proof of those elements).

119. *See id.* at 499–500 (2000) (describing the constitutional protections during the trial phase where elements

binding effect, a defendant was not entitled to demand those facts be proven to a jury beyond a reasonable doubt.[120]

The distinction between the nature of the facts relevant to each phase of the trial began to blur in the 1980s, however, as legislators began to attach legally binding consequences to facts found during sentencing.[121] Whereas such facts had previously served merely as a rationale to guide a judge's discretion within the statutory range, "sentencing enhancements" served to move the boundaries of the range itself, either by imposing a mandatory minimum or by increasing the maximum available penalty.[122] These statutes seemed to be at odds with the traditional way crimes were defined. If a jury convicts a defendant based on proof of certain facts during the trial phase, but a judge finds additional facts during sentencing that aggravate the defendant's potential punishment, has not the judge effectively convicted him of a new crime? Confronted with the question for the first time in *McMillan v. Pennsylvania*, the Court's answer was "no."[123]

1. Elements and Sentencing Factors: *McMillan*'s False Start

In *McMillan*, the defendant challenged a 1982 Pennsylvania statute that attached a mandatory minimum of five years to certain felonies if the sentencing judge concluded that a perpetrator "visibly possessed a firearm" during the commission of the underlying offense.[124] The Court upheld the statute, leaning heavily on statute's language, which explicitly described visible possession of a firearm as a sentencing factor that came into play only after a defendant had been found guilty of the underlying offense beyond a reasonable doubt.[125] The Court reasoned that, in determining what facts qualified as "elements" that had to be proven beyond a reasonable doubt, states were generally free to decide for themselves.[126]

The Court cautioned that there were limits to how far a state might stretch the definition of a sentencing factor before running afoul of the Constitution.[127] Due process would require certain facts to be proven beyond a reasonable doubt, regardless of the state's chosen label for them.[128] The Court reasoned that Pennsylvania's law was permissible because it sought neither to establish a separate offense nor raise the statutory

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of a crime must be proven); U.S. Const. amends. V, VI; *id.* art. III, § 2, cl. 3; *In re* Winship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause requires the government to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged.").

120. *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring).

121. *See* United States v. Booker, 543 U.S. 220, 236 (2005) (describing the birth of the legislative trend toward limiting judicial discretion based on certain facts found at sentencing). For a detailed—and highly critical—evaluation of the Supreme Court's response to this trend, see generally Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010).

122. *Booker*, 543 U.S. at 236.

123. 477 U.S. 79 (1986).

124. *Id.* at 81.

125. *Id.* at 85–86.

126. *Id.* at 85.

127. *Id.* at 86.

128. *McMillan*, 477 U.S. at 86 (referencing *Winship*'s holding that the Due Process Clause requires the government to prove beyond a reasonable doubt every fact necessary to constitute the crime with which he is charged).

maximum for the underlying offense.[129] The sentencing enhancement, therefore, had not become the "tail which wags the dog."[130]

Justice Marshall, in a sternly worded dissent, accused the majority of abdicating its responsibility by deferring to the Pennsylvania legislature's definition of what constituted an element of the crime.[131] The Court's failure to articulate a test for determining which facts were elements and which were sentencing factors left states free to define away elements of crimes in order to obviate procedural safeguards meant to protect the defendant.[132] In subsequent years, legislatures did just that.[133]

2. *Apprendi:* When It Comes to Sentencing, It Is All Elementary

In *Apprendi v. New Jersey*, the Court finally drew a bright line between elements, which had to be found by a jury, and sentencing factors, which could be found by a judge.[134] The defendant in *Apprendi* fired a gun at the house of a black family that had recently moved into his all-white neighborhood, leading to his guilty plea on several charges, including possession of a firearm for an unlawful purpose, which carried a possible prison sentence of five to ten years.[135] At sentencing, the trial court found that the defendant's motive was racist intimidation, triggering New Jersey's hate-crime sentencing enhancement, which increased the basic sentencing range of five to ten years to an enhanced range of ten to twenty years.[136]

On appeal, a divided Court overturned the sentence, holding that the statute violated the defendant's Fifth and Sixth Amendment rights.[137] The Court reasoned that New Jersey's statutory scheme attached one penalty to unlawful possession of a firearm and an additional penalty if done so for the purpose of racially motivated intimidation.[138] Fairness seemed to dictate that the procedural safeguards protecting the defendant with respect to the first allegation ought to protect him with respect to the second.[139] In a clear disavowal of the deference it had shown the statutory language in *McMillan*, the Court said that New Jersey's choice to call one fact an "element" and the other a "sentence enhancement" was not a principled way to distinguish one from the other.[140]

The Court pointed to the "historic link" between the facts proven to the jury and the limits placed on the penalties available to a judge.[141] In the early days of the Republic, the link was direct: each offense carried a specific sentence.[142] If a statute attached a "higher degree of punishment" to a common-law felony when committed under particular

129. *Id.* at 88.
130. *Id.*
131. *Id.* at 93 (Marshall, J., dissenting).
132. *Id.*
133. *See* United States v. Booker, 543 U.S. 220, 236 (2005).
134. 530 U.S. 466, 525 (2000).
135. *Id.* at 469.
136. *Id.* at 470.
137. *Id.* at 476.
138. *Id.* at 476.
139. *Apprendi*, 530 U.S at 476.
140. *Id.*.
141. *Id.* at 482–83.
142. *Id.* at 479.

circumstances, the government was required to allege the existence of those aggravating circumstances in the indictment and prove them at trial.[143] The trouble with New Jersey's statute was its attempt to extend the judge's sentencing discretion beyond the boundaries established by the facts reflected in the jury verdict, converting an offense that would normally carry a ten-year maximum into one with a twenty-year maximum.[144] While a judge had discretion to impose a sentence within the range established by the legislature, his role in sentencing was constrained at its outer limits by the facts alleged in the indictment and found by the jury.[145] The Court held that, "[o]ther than the fact of a 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."[146]

3. *Apprendi*'s Long Shadow

Apprendi resulted in some odd voting coalitions. The majority consisted of Justices Stevens, Souter, Ginsburg, Scalia, and Thomas, a mix of conventionally liberal and conservative thinkers,[147] and a similarly odd collection of allies joined together in dissent.[148] *Apprendi*'s implications for sentencing reform may help to explain the unlikely alliances. Although the majority's holding favored the defendant in the narrow sense, its reasoning threatened to undermine structured-sentencing reforms like the federal sentencing guidelines,[149] making *Apprendi* a referendum on the reform movement as much as a case about sentencing enhancements.

Judicial fact-finding was central to the structured-sentencing schemes that began to proliferate in the 1970s as the rehabilitation theory of punishment fell out of fashion.[150] These systems, including the one Congress adopted as part of Senator Kennedy's sweeping 1984 reform package, sought to normalize sentencing by guiding judicial discretion within the broad statutory ranges that had become the norm when punishment was meant to be tailored to the individual defendant rather than his crime.[151] Rather than leave judges to determine which aggravating or mitigating circumstances to consider, structured sentencing sought to systematize the role these facts played in determining a defendant's punishment. The schemes differed in their particulars, notably as to the degree judges retained discretion, but all placed new importance on the role of judicial fact-finding at sentencing.[152]

Under the federal system, binding sentencing guidelines codified an array of

143. *Id.* at 480.

144. *Apprendi*, 530 U.S at 474.

145. *Id.* at 483 n.10.

146. *Id.* at 490.

147. *Id.* at 468.

148. Justice O'Connor wrote the case's first dissent, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. *See Apprendi*, 530 U.S. at 523–55 (O'Connor, J., dissenting). Justice Breyer filed a second dissent, which Chief Justice Rehnquist also joined. *See id.* at 555–66 (Breyer, J., dissenting).

149. *See id.* at 565 (Breyer, J., dissenting); *id.* at 549 (O'Connor, J., dissenting).

150. *See* Bowman, *supra* note 121, at 375–76.

151. *Id.* at 375.

152. *Id.* at 376. Note that, although structured sentencing arose at the same time determinate-sentencing regained currency among penal theorists, the two are not synonymous. A structured-sentencing system could limit judicial discretion but also incorporate the use of parole. *Id*. at 376 n.37.

variables relevant to a defendant's relative culpability—e.g. his role in the crime, use of a weapon, etc.—and set up a formula dictating their effect on a defendant's sentence.[153] The elements comprising the defendant's offense of conviction served as a starting point, but judges were to consider all the relevant facts, many of which would not have been formally alleged at trial.[154] The judge's factual determinations, as applied under the guidelines formula, produced a narrow presumptive sentencing range within the broader statutory range available for the defendant's actual crime of conviction.[155] Although a judge could depart from that presumptive range, she could do so only under limited circumstances, and such departures rendered her sentence subject to appellate review.[156]

With that in mind, recall the Court's central holding in *Apprendi*: "Other than the fact of a 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."[157] As Justice O'Connor noted in her dissent, everything depends on how one defines "statutory maximum."[158] A formalist reading—interpreting "statutory maximum" to mean nothing more than the maximum penalty authorized by statute for the underlying crime—would render the holding meaningless. Justice O'Connor observed that, were the holding taken at face value in this way, New Jersey could have moved its hate-crime enhancement outside the *Apprendi* majority's rule simply by reformulating the statute's structure.[159] Under the existing scheme, the underlying firearms charge carried a penalty of five to ten years, which the hate-crime statute provided could be enhanced to a range of ten to twenty years upon the judge's finding of the requisite racist motive. The state could just as easily have inverted the structure so that violation of the relevant enumerated offense carried a base range of five to twenty years, while a separate sentencing statute forbid the imposition of anything more than ten years unless the sentencing judge found that the necessary motive. This scheme, despite leaving the same pivotal factual determination to the judge, would have satisfied a formalist reading of the majority's holding in *Apprendi* because the judicial finding would not raise the "statutory maximum" for the substantive offense. Instead, the finding would only limit the judge's discretion to select a sentence within that range.

Given the implausibility of such a formalistic understanding of the holding, Justice O'Connor reasoned that "statutory maximum" clearly meant something more than the maximum penalty as described by legislative fiat.[160] After all, the very purpose of the holding was to establish a principled means by which one could distinguish an "element" from a "sentencing factor,"[161] and the majority had explicitly renounced a formalistic

153. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1 (U.S. SENTENCING COMM'N 2000).

154. *See Id.*

155. *See* United States v. Booker, 543 U.S. 220, 227 (2004) (discussing the application of the guidelines to a defendant accused of possessing a controlled substance).

156. *Id.* at 261.

157. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

158. *Id.* at 539–41(O'Connor, J., dissenting).

159. *Id.* at 541.

160. *Id.* at 543–44.

161. *See Id.* at 476 (majority opinion) (reasoning that a legislature's decision to call a fact a "sentence enhancement" rather than an element was not a principled basis for distinguishing them with respect to a defendant's constitutional protections).

approach to distinguishing the two, declaring that "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?"[162] Justice O'Connor concluded, therefore, that it wasn't the "statutory maximum" that mattered, but the maximum a court could impose absent the judge's additional factual finding.[163] Read this way, the Court's holding would not just undermine systems like New Jersey's, where a judge's factual determination exposed a defendant to punishment beyond a clearly defined statutory maximum. It would also undermine structured sentencing schemes like the federal sentencing guidelines, which operated like a more complicated version of the hypothetical workaround for New Jersey's hate-crime enhancement. In both schemes, the jury's findings established guilt, subjecting the defendant to punishment within the broad statutory range for his "crime," but additional findings by the judge bound his sentencing discretion within that range. Justice O'Connor predicted that, if her understanding of the Court's rule in *Apprendi* were correct, it would "have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades."[164] She did not have to wait long to be proven right.

4. *Blakely-Booker*: When the 'Statutory Maximum' Is Not the Maximum in the Statute

Four years after *Apprendi*, the Court extended its holding to strike down Washington's structured sentencing scheme.[165] In *Blakely v. Washington*, the defendant abducted his estranged wife from their rural home, leading him to plead guilty to second-degree kidnapping involving domestic violence and use of a firearm.[166] Although he stipulated to the elements of the kidnapping charge and to his use of the firearm, he admitted to no other facts.[167]

The constitutional issue arose from the trial judge's decision to depart from the state's sentencing guidelines. The state's criminal code classified second-degree kidnapping as a class B felony punishable by up to ten years in prison, but binding sentencing guidlines computed a presumptive range of forty-nine to fifty-three months (about four and one-half years) based on the relative seriousness of the kidnapping charge, Blakely's criminal history, and his use of the firearm.[168] Rather than select a sentence within that range, the judge imposed a sentence of ninety months, three years longer than the presumptive range called for by the guidelines.[169] The judge concluded that the sentence was permissible because testimony offered at sentencing showed the defendant had acted with "deliberate cruelty," a statutory ground for departure from the presumptive range.[170]

162. *Apprendi*, 530 U.S. at 494.
163. *Id.* at 543 (O'Connor, J., dissenting).
164. *Id.* 549.
165. Blakely v. Washington, 542 U.S. 296 (2004).
166. *Id.* at 298.
167. *Id.* at 299.
168. *Id.*
169. *Id.*
170. *Blakely*, 542 U.S. at 300.

On appeal, the Court overturned the defendant's sentence, holding that it violated *Apprendi*.[171] The state had argued that there could be no *Apprendi* violation because, although the defendant's sentence departed from the range prescribed by the guidelines, it remained within the statutory range for his crime. The Court rejected this reasoning,[172] interpreting *Apprendi*'s holding exactly as O'Connor had predicted. For *Apprendi* purposes, the Court explained, "the 'statutory maximum' is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[173] The relevant "maximum," in other words, was not the maximum sentence a judge could impose *after* finding additional facts, but the maximum he could impose *without* any additional findings.[174] The *Apprendi* maximum in this case was therefore fifty-three months, the maximum the judge was authorized to impose based on the stipulated facts alone.[175] Because the judge's finding of deliberate cruelty increased the amount of punishment to which the defendant would otherwise have been subject, the state's sentencing scheme violated the defendant's Sixth Amendment rights.[176]

In *United States v. Booker*, decided just a year after *Blakely*, the Court extended its holding to partially invalidate the federal sentencing guidelines, which were similar to those in Washington.[177] Rather than strike the system down in its entirety, the Court opted to excise the provisions making the guidelines mandatory, reasoning that it was their binding nature that had rendered them unconstitutional.[178]

To understand why it was the binding nature of the guidelines that caused the conflict with *Apprendi*, consider the case of the first defendant in *Booker*, who was convicted of possession with intent to distribute crack cocaine.[179] The possession statute that Booker violated set a sentencing range of ten years to life for any quantity exceeding fifty grams, but the sentencing guidelines computed a narrower range based on the specific quantity that the defendant actually possessed. At trial, prosecutors had presented evidence that Booker possessed 92.5 grams, setting the maximum under the guidelines at 262 months. At sentencing, however, prosecutors alleged that he had actually possessed an additional 566 grams of crack and obstructed justice during the investigation.[180] Based on the judge's finding that the allegations were supported by a preponderance of the evidence presented during sentencing, the guidelines computed a new range of thirty years to life.[181]

This shift rendered Booker's sentence unconstitutional. The jury verdict alone, which reflected his possession of 92.5 grams of crack, authorized a prison term of no more than 262 months. But for the judge's subsequent findings at sentencing, the mandatory

171. *Id.* at 301 (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). "Other than the fact of a 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." *Apprendi*, 530 U.S., 490.

172. *Blakely*, 542 U.S. at 305.

173. *Id.* at 303.

174. *Id.* 303–04.

175. *Id.* at 304.

176. *Id.* at 305.

177. 543 U.S. 220, 226–27 (2005).

178. *Id.* at 245.

179. *Id.* at 227.

180. *Id.*

181. *Id.*

guidelines would have obliged him to select a sentence falling under that limit. By making one sentence available based on the jury's findings and another based on the judge's findings, the guidelines violated Booker's Sixth Amendment right to a jury trial.[182]

Had the guidelines been discretionary, the judge's thirty-year sentence would have presented no such constitutional problem.[183] The generic statutory range for possession with intent to distribute more than fifty grams of crack cocaine was, after all, between ten years and life in prison. [184] In selecting a sentence within that range, the judge would have been free to consider whatever facts he felt relevant, including evidence that the defendant had actually possessed another 556 grams of crack and obstructed justice.[185]

5. Bringing Up the Rear: *Alleyne* Addresses *Apprendi*'s Mandatory Minimum Problem

Although the Court in *Apprendi* finally announced a clear rule defining which facts had to be presented to a jury, the rule was logically unsatisfying. The Court's principal distinction between a sentencing fact and an element was the effect of that fact on the boundaries of the judge's sentencing discretion[186]: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed *range* of penalties to which a criminal defendant is exposed. It is . . . clear that such facts must be established by proof beyond a reasonable doubt."[187] This would seem to endorse the proposition that a fact's effect at the low end of the sentencing range is just as important as its effect at the high end. Yet, in announcing its holding, the Court concluded that only a fact that impacts the "statutory maximum" had to be presented to a jury.[188] This formulation preserved *McMillan*, which involved a mandatory minimum, but did so at the cost of logical consistency.[189] 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.

In *Apprendi*, Justice Thomas had argued in a concurring opinion that facts triggering a mandatory minimum were also elements that had to be presented to the jury.[190] He

182. *Booker*, 543 U.S. at 235.

183. *Id.* at 234.

184. *See* 21 U.S.C. 841(b)(1)(A)(iii) (2000 & Supp. II 2002).

185. *See Booker*, 543 U.S. at 233 ("When a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

186. *See* Apprendi v. New Jersey, 530 U.S. 466, 483 n.10 (2000) ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense.").

187. *Id.* at 490 (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 252–53 (1999)).

188. *Id.* at 489.

189. *See id.* at 487 n.13 ("Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*, we reserve for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding."). It is possible that Justice Stevens, who wrote the opinion in *Apprendi*, needed to preserve *McMillan* in order to secure the vote of Justice Scalia, who had previously embraced the Court's holding in that case. *See* Bowman, *supra* note 121, at 401–02; *Almendarez-Torres v. United States*, 523 U.S. 224, 252–53 (1998) (Scalia, J., dissenting) (endorsing *McMillan*'s reasoning that a fact triggering a mandatory minimum need not be presented to a jury because it did not alter the maximum available penalty).

190. *Apprendi*, 530 U.S. at 521–22 (2000) (Thomas, J., concurring).

reasoned that, although a mandatory minimum necessarily falls within the range prescribed for the underlying offense, it narrows the scope of the sentencing judge's discretion.[191] Because a fact triggering a mandatory minimum effectively eliminates the opportunity for a defendant to benefit from judicial discretion, the fact must be viewed as among those that the government seeks to punish, and facts that the government seeks to punish are elements of the crime.[192]

Justice Thomas apparently lacked the votes necessary to win the day in *Apprendi*, but thirteen years later he found a coalition of justices willing to extend its holding to mandatory minimums, effectively overturning *McMillan*.[193] In *Alleyne v. United States*, the Court held that, because mandatory minimum sentences also increase the penalty for a crime, any fact that increases the mandatory minimum is also an "element" that must be submitted to the jury.[194]

IV. *HAYMOND*: *JOHNSON* AND *APPRENDI* COLLIDE

In 2015, federal officials raided the Tulsa home of eighteen-year-old Andre Ralph Haymond, who was free on supervised release after serving time for possession of child pornography.[195] When a subsequent forensic search of the data on his smartphone uncovered fifty-nine images of child pornography, Haymond's probation officer petitioned for revocation on the grounds that renewed possession of child pornography violated the terms of Haymond's release.[196]

The possession allegation rendered Haymond's position particularly precarious. A judge is usually free to decide whether revocation is appropriate,[197] and revocation terms are generally capped at five years, even for the most serious offenses,[198] but, as a sex offender, Haymond was eligible for revocation under 18 U.S.C. § 3583(k), which provides for mandatory revocation and a minimum revocation sentence of five years when the violation stems from an enumerated sex offense. Because the provision places no upper limit on the term of re-imprisonment, Haymond was facing potential lifetime imprisonment based on an allegation that the government needed only prove to a judge by a preponderance of the evidence. [199]

The district court judge presiding over the revocation hearing found the potential consequences troubling in the light of the relatively weak evidence against Haymond.[200]

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191. *See id*.

192. *See id*.

193. Alleyne v. United States, 570 U.S. 99, 102 (2013) (overturning Harris v. United States, 536 U.S. 545 (2002), a more recent mandatory minimum case that had upheld *McMillan*).

194. *Id.*

195. United States v. Haymond, No. 08-CR-201-TCK, 2016 WL 4094886, at *1–2 (N.D. Okla. 2016).

196. *Id.*

197. *See* 18 U.S.C. § 3583(e) (2012) ("The court *may* . . . revoke a term of supervised release . . . .") (emphasis added).

198. *See id*. ("[A] defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.").

199. 18 U.S.C. § 3583(k).

200. *See* United States v. Haymond, No. 08-CR-201-TCK, 2016 WL 4094886, at *10, *13 (N.D. Okla. Aug.

Although the government had shown that the images were stored on Haymond's phone, the phone was infected with a virus that may have downloaded the images surreptitiously. The government had not proven definitively that Haymond had ever viewed them or that he even knew they were there. "If this were a criminal trial and the Court were the jury, the United States would have lost," the court stated in a lengthy opinion accompanying its order. "This highlights the Court's concerns with § 3583(k) and the mandatory penalties it carries."[201] Nevertheless, the judge revoked Haymond's release. Although the government had not proven beyond a reasonable doubt that Haymond had viewed any of the images, a preponderance of the evidence supported a finding that he had viewed at least *some* of them.[202]

On appeal, a divided Tenth Circuit panel vacated Haymond's revocation sentence, holding § 3583(k) to be facially unconstitutional because (1) it changes the mandatory sentencing range to which a defendant is subject based on facts found by a judge rather than a jury, and (2) it punishes a defendant for subsequent conduct rather than for his original offense.[203]

A. Changing the Mandatory Range

The court held that, by imposing a mandatory minimum revocation term, § 3583(k) violated *Alleyne*, which forbids a judge's factual determinations from altering a defendant's mandatory sentencing range.[204] A judge can make factual findings that influence her discretion to choose a sentence within the range, but those findings cannot serve to narrow the range itself.[205]

The majority reasoned that, by mandating a term of reimprisonment, § 3583(k) increases the minimum sentence to which a defendant would otherwise be subject based solely on his original offense.[206] Haymond's original conviction authorized a term of zero to ten years,[207] but the mandatory minimum in § 3583(k) required a revocation term of no less than five years.[208] Therefore, the court reasoned, § 3583(k) "unquestionably" increased the minimum sentence to which Haymond was exposed from zero to five years.[209] The court concluded that, because § 3583(k) imposes a mandatory minimum on a crime that would not otherwise have one, and does so based on a factual determination made by a judge rather than a jury, the provision violates the Sixth Amendment.[210]

2, 2016) (discussing the various ways in which the government had failed to properly support its claims that Haymond knowingly possessed many of the images on his phone). For a detailed discussion on the problem of proving possession of child pornography in the digital age, see generally Jane McBath, *Trashing Our System of Justice? Overturning Jury Verdicts Where Evidence Is Found in the Computer's Cache*, 39 AM. J. CRIM. L. 381 (2012).

201. United States v. Haymond, No. 08-CR-201-TCK, 2016 WL 4094886, at *13 (N.D. Okla. Aug. 2, 2016).
202. *Id.* at *12–14.
203. United States v. Haymond, 869 F.3d 1153, 1160 (10th Cir. 2017).
204. *Id.* (citing Alleyne v. United States, 570 U.S. 99, 103 (2013)).
205. *Id.* (citing United States v. Booker , 543 U.S. 220, 233 (2005)).
206. *Id.* at 1164.
207. *Id.* at 1164 (citing 18 U.S.C. § 2252(b)(2)).
208. *Haymond*, 869 F.3d at 1164–65.
209. *Id.*
210. *Id.* at (citing *Booker*, 543 U.S at 244).

B. Punishing Violative Conduct

The court further held that § 3583(k) violates "the Fifth and Sixth Amendments by expressly imposing an increased punishment for specific subsequent conduct."[211] Citing *Johnson*, the court noted that, in order to avoid constitutional concerns, revocation of supervised release had to punish the original offense rather than the conduct leading to revocation.[212] The structure of § 3583(k) ran against that edict.[213] Under § 3583(k), only the commission of one of the enumerated sex offenses triggers mandatory revocation.[214] Had Haymond violated the terms of his release by committing a crime not included in § 3583(k) or by committing a technical violation, such as missing an appointment with his probation officer, he would have been subject to the statute's general revocation provision, set out in § 3583(e).[215] Under that provision, revocation would have been discretionary, with an absolute maximum penalty of two years, regardless of the reason for revocation.[216] By contrast, § 3583(k) tied the magnitude of the available punishment "directly to the nature of the new conduct that serves as the basis for the revocation."[217] The court reasoned that a penalty linked to the commission of a particular set of crimes must be viewed at least in part as punishment for the commission of those crimes.[218] "[I]f we wish to maintain the premise that revocation of supervised release is a punishment for the original crime of conviction, Congress must set the authorized term of reimprisonment based on the severity of that original crime."[219]

The dissent objected to this interpretation of *Johnson*, chastising the majority for "fail[ing] to take the [*Johnson*] Court at its word."[220] Under *Johnson*, the dissent argued, courts must view revocation as punishing the original offense, even if the revocation provision in question provides specific penalties for specific kinds of violations. To support this reading of *Johnson*, the dissent cited the Sentencing Commission's Guidelines Manual, which describes revocation as punishment for the defendant's "breach of trust" and permits a sentencing judge to consider the nature of the violative conduct when measuring the extent of that breach.[221] Congress, the dissent argued, was free to view the commission of certain crimes as especially serious breaches of trust warranting lengthier revocation.[222]

This attack on the majority's reasoning is fatally flawed. First, when assessing the constitutionality of a statute, it is not at all clear why courts should give any deference to the Sentencing Commission's interpretation of that statute. Second, to the extent the Commission's guidance is relevant, the dissent flatly mischaracterized it. Two paragraphs

211. *Id.* at 1165.
212. *Id.* at 1165 (citing Johnson v. United States, 529 U.S. 694, 700 (2000)).
213. *Haymond*, 869 F.3d at 1165.
214. *Id.* at 1165 (citing 18 U.S.C. § 3583(k)).
215. *Id.* at 1162.
216. *Id.* at (citing 18 U.S.C. § 3583(e)).
217. *Id.* at 1166.
218. *Haymond*, 869 F.3d at 1166.
219. *Id.*
220. *Id.* at 1170 (Kelly, J., dissenting).
221. *Id.* at 1170–71.
222. *Haymond*, 869 F.3d at 1170.

after the passage cited by the dissent, the Commission instructs a sentencing judge to "sanction primarily the defendant's breach of trust, while taking into account, *to a limited degree*, the seriousness of the underlying violation . . . ."[223] The Commission had considered tying revocation penalties to the offense constituting the violation but ultimately rejected that approach, concluding that "the court with jurisdiction over the criminal conduct leading to revocation is the more appropriate body to impose punishment for that new criminal conduct . . . ."[224] Section 3583 ignores this guidance. By tying the availability of mandatory minimums and potential lifetime imprisonment to violations stemming from specific kinds of criminal conduct, the statute clearly seeks to punish that conduct.

Finally, the dissent reads *Johnson* as establishing a per se rule that any post-revocation penalty is attributable to the original offense, even if the penalty's magnitude and availability is contingent on proof of subsequent conduct. This reading not only misconstrues *Johnson*,[225] it would open the door to truly absurd results. Congress would be free to annex every offense from robbery to wire fraud into the supervised release statute, reclassifying each crime as a unique "breach of trust" meriting its own revocation penalty. Such a scheme could not reasonably be said to punish a defendant's original offense, yet it would be perfectly permissible under the dissent's understanding of *Johnson*. The *Haymond* majority's reasoning, by contrast, establishes a clear limiting principle.

V. FOLLOWING *HAYMOND*'S LEAD

Haymond represents a necessary first step toward establishing constitutional limits on the supervised release system. A reckoning with the Supreme Court's holdings in *Johnson* and the *Apprendi* line of cases was long overdue. However, the Tenth Circuit's holding in *Haymond* was narrow, leaving intact other provisions and applications of supervised release that violate the same principles implicated by § 3583(k). Moreover, the Tenth Circuit's reasoning is, in parts, unnecessarily complicated, which may lead other courts to mistakenly reject future challenges to the supervised release system. A defendant has the right under the Fifth and Sixth amendments to see the government prove, to a jury and beyond a reasonable doubt, each and every element of the crime he is alleged to have committed.[226] If that right is to retain its vitality, the supervised release system must be reconciled with the principles established by the Court in *Johnson* and the *Apprendi* line.

A. The Constitutional Limits of Supervised Release

In *Apprendi*, the Court recognized that the Fifth and Sixth Amendments depend for

223. U.S. SENTENCING GUIDELINES MANUAL §7A3B(b) (U.S. SENTENCING COMM'N 2016) (emphasis added)

224. *Id.*

225. The dissent's faulty reading, which other circuits have similarly espoused, is rebutted at length below. *See infra* notes 259 to 264 and accompanying text.

226. *See* United States v. Gaudin, 515 U.S. 506, 510 (1995) ("We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

their salience on the link between the facts proven during the prosecution phase and the scope of the punishment available during the sentencing phase.[227] *Apprendi*'s rule, refined and expounded over the course of *Blakely*, *Booker*, and *Alleyne*, preserves this link by limiting judges' ability make factual findings that increase the punishment to which defendants are exposed. The combined effect of these rules is to constrain a judge's role in sentencing to the exercise of discretion within the range authorized by the facts admitted in a guilty plea or proven to a jury beyond a reasonable doubt.[228] When a finding of fact aggravates the legally prescribed punishment by raising either boundary of the available sentencing range, that fact "forms a constituent part of a new offense and must be submitted to the jury."[229]

This principle is just as applicable in the context of revocation as it is in the context of a defendant's initial sentencing. A revocation hearing consists of judicial fact-finding and the imposition of a penalty.[230] Because that penalty, under *Johnson*, must be treated "as part of the penalty for the initial offense,"[231] the revocation must not raise either boundary of the sentencing range authorized by the facts proven during the defendant's original conviction. [232] Therefore, *Johnson* and the *Apprendi* line of cases, read together, necessarily prohibit (1) any provision making revocation of supervised release mandatory, and (2) any revocation provision that, as applied, would expose the defendant to punishment exceeding that authorized by the facts reflected in the jury's verdict or his guilty plea.

1. Why Mandatory Revocation is Unconstitutional

As the court explained in *Haymond*, mandatory revocation of supervised release results in a de facto increase to the defendant's otherwise applicable mandatory minimum sentence. The mandatory revocation provision in § 3853(k) required the judge to sentence Haymond to no less than five years, yet the jury's guilty verdict on the initial possession charge prescribed a range of zero to ten years. By transforming a crime that had no

227. *See* Apprendi v. New Jersey, 530 U.S. 466, 483–84 (2000) (discussing the need to keep fact-finding in the hands of the jury when proof of those facts exposes the defendant to the loss of liberty).

228. *See id.* at 490 ("Other than the fact of a 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."); Blakely v. Washington, 542 U.S. 296, 303–04 (2004) ("[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant . . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.") (internal citations and quotations omitted); Alleyne v. United States, 570 U.S. 99, 116 (2013) (reasoning that "there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum[]" for the purposes of an Apprendi analysis).

229. *Alleyne*, 570 U.S. at 114–15.

230. 18 U.S.C. § 3583(e) ("The court may . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release . . . *if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release*. . . .") (emphasis added).

231. Johnson v. United States, 529 U.S. 694, 700 (2000).

232. *See id.* at 700–01 (holding that post-revocation penalties must be attributed to the original offense); *Alleyne*, 570 U.S. at 114–15 (holding that, when a finding of fact aggravates the legally prescribed punishment by raising either boundary of the available sentencing range, that fact necessarily forms a constituent part of a new offense and must be submitted to the jury).

mandatory minimum into one that had a minimum of five years, § 3853(k) aggravated Haymond's sentence based on a fact not found by the jury.[233]

The same dynamic plays out in any scenario where a provision calls for mandatory revocation. Imagine that Haymond had been convicted of selling child pornography, which carries a mandatory minimum of five years in prison, [234] and was subsequently revoked under a hypothetical provision providing for a mandatory revocation term of one day. The revocation would still increase the underlying offense's mandatory minimum sentence—extending it from five years to five years and a day. Thus, even when a defendant's original conviction authorizes a mandatory minimum, a subsequent mandatory revocation aggravates the sentence by increasing that minimum.

It is irrelevant that a defendant's total prison sentence, including the mandatory revocation term, may fall under the *Apprendi* maximum set by his original conviction. In Haymond's case, he was initially sentenced to thirty-eight months in prison. Together with his mandatory five-year revocation term, his total prison sentence was just over eight years, well short of the ten-year maximum authorized by the child pornography statute under which he was originally convicted. The revocation was still unconstitutional because the statute narrowed the range within which the district judge could exercise his discretion based on a fact not found by the jury. As Justice Thomas explained in *Alleyne*, "It is no answer to say that the defendant could have received the same sentence with or without that [judicially found] fact."[235] "The essential point is that the aggravating fact produced a higher range . . . ."[236]

2. Why the Available Revocation Term Must Not Exceed the Statutory Maximum

A defendant's prison sentence may consist of one or more segments: his initial prison term and any subsequent terms imposed after revocation of supervised release. Because any revocation term must be attributed to a defendant's original offense, and the penalty available for that offense cannot be aggravated based on a fact found by the judge, any revocation that would expose the defendant to punishment beyond the statutory maximum for the original offense is unconstitutional.

This principle may best be illustrated by a brief return to the hapless hiker hypothetical.[237] After the hiker's marijuana conviction, the judge imposed a sentence of five years in prison, the maximum allowed under the statute. Under a proper understanding of *Johnson* and *Apprendi*, the judge's subsequent revocation term, imposed after the hiker's cocaine arrest, would be unconstitutional. Although the hiker's conviction on the marijuana charge authorized a term of supervised release, the judge was not free to revoke that release without first making a factual finding that the defendant had violated the conditions of his release.[238] Recall that, for *Apprendi* purposes, "the relevant 'statutory

233. *See Alleyne*, 570 U.S. at 113 ("[I]t is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment.").

234. 18 U.S.C. § 2252(a)(3)(B).

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

236. *Id.* at 115–16.

237. *See supra* notes 4–10 and accompanying text.

238. *See* 18 U.S.C. § 3583(e) ("The court may . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that

maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[239] The hiker's *Apprendi* maximum was therefore five years, which was exhausted over the course of his original prison term. By imposing an additional two years based on a fact not presented to the jury, the judge violated the hiker's rights under the Due Process Clause and the Sixth Amendment.

The *Haymond* court sidestepped the *Apprendi* maximum issue by analyzing § 3583's mandatory-minimum provision under *Alleyne*,[240] a clear punt, and one that could muddy the waters. Section 3583(k) quite obviously exposed Haymond to punishment beyond the range authorized by the facts reflected in his conviction for possession of child pornography. The provision would have allowed the judge to revoke Haymond's release for life even though the facts proven to the jury authorized a maximum penalty of only ten years. Because a judge's finding of fact must not expose a defendant to punishment beyond that made available by the facts proven during the prosecution phase, the trial court's application of § 3583(k) was unconstitutional. Again, it is irrelevant that Haymond's *actual* sentence fell within the authorized range. The constitutional problem arose from the factual finding's effect on his *potential* sentence, i.e. the boundaries of the available sentencing range.[241] Any fact that aggravates the penalty for a crime by exposing a defendant to punishment beyond the maximum authorized by the facts reflected in a defendant's conviction must be submitted to a jury and proved beyond a reasonable doubt.[242]

B. The Faulty Reasoning of the Circuit Courts' Apprendi *Rejections*

The Tenth Circuit's imposition of constitutional limits on supervised release makes *Haymond* an outlier. Courts have universally declined to apply the principles espoused in *Apprendi* and its progeny to the supervised release context.[243] Even the Tenth Circuit had

resulted in such term of supervised release . . . *if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release*.") (emphasis added).

239. Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (emphasis original).

240. The court's discussion of a potential Apprendi maximum violation was relegated to a footnote. "It is enough for our purposes that the mandatory minimum is increased. Thus, we need not address whether this provision also increased the statutory maximum sentence to which Haymond was exposed." United States v. Haymond, 869 F.3d 1153, 1164 n.2 (10th Cir. 2017).

241. *See* Alleyne v. United States, 570 U.S. 99, 115 (2013) ("[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 (i.e., the range applicable without that aggravating fact).").

242. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000) ("Other than the fact of a 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.").

243. *See* United States v. McIntosh, 630 F.3d 699 (7th Cir. 2011); United States v. Cunningham, 607 F.3d 1264 (11th Cir. 2010); United States v. Johnson, 356 F. App'x 785 (6th Cir. 2009); United States v. Cordova, 461 F.3d 1184 (10th Cir. 2006); United States v. Dees, 467 F.3d 847 (3d Cir. 2006); United States v. Carlton, 442 F.3d 802 (2d Cir. 2006); United States v. Huerta-Pimental, 445 F.3d 1220 (9th Cir. 2006); United States v. Hinson United, 429 F.3d 114 (5th Cir. 2005); United States v. Work, 409 F.3d 484 (1st Cir. 2005); United States v. Coleman, 404 F.3d 1103 (8th Cir. 2005); *cf.* United States v. Ward, 770 F.3d 1090 (4th Cir. 2014) (rejecting a defendant's argument that *Alleyne* rendered his mandatory revocation unconstitutional).

previously declined to extend the *Apprendi* line to supervised release.[244] The apparent uniformity is something of a mirage, however, as many of the underlying claims in those cases did not cleanly present the *Apprendi* issue, either because the defendant failed to properly frame his argument or because he did not have a valid *Apprendi* claim to begin with.[245] Moreover, those circuits that have rejected genuine, properly argued *Apprendi* challenges often did so relying on pre-*Apprendi* authority or cases involving dubious arguments.[246] To the extent that the circuits have squarely addressed the *Apprendi* issue, they have relied on one or more of the arguments described below. None are particularly convincing.

1. Argument One: Re-Imprisonment Is a Distinct Aspect of the Sentence

Five circuits have reasoned, to varying degrees of explicitness, that a defendant's revocation term does not stack on top of his initial prison term because the two form distinct components of the defendant's original sentence.[247] The First Circuit's decision in *United States v. Work* provides the most thoroughly argued example of this position.[248]

In *Work*, the court claimed that the defendant, in arguing that his revocation term should be limited by the term he had already served, mistakenly equated two "statutorily distinct modes of punishment."[249] The court reasoned that a term of supervised release is one of "several different forms of punishment," such as a fine or mandatory payment to the federal Victims Compensation Fund, that a judge may impose in addition to prison time.[250] Because supervised release is merely one of several independent elements of the defendant's sentence, "any term of incarceration authorized under the supervised release statute is not limited by reference to the actual term of incarceration served by a defendant

244. *See Cordova*, 461 F.3d at 1186. In *Haymond*, the Tenth Circuit attempted, somewhat unconvincingly, to reconcile its decision in that case with its decision in *Cordova*, where it held that *Apprendi* did not forbid judge-found facts at revocation, even when the determination extended the defendant's prison sentence beyond the statutory maximum. *See Haymond*, 869 F.3d at 1163 (citing *Cordova*, 461 F.3d at 1186–88)). The court reasoned that, although *Apprendi* applied to the prosecution phase of the criminal proceeding, *Booker* applied to sentencing and required judges to retain discretion within the statutory range. *Haymond*, 869 F.3d at 1163–64. This is pure confusion. All the cases in the *Apprendi* line apply to both the prosecution phase and the sentencing phase in that they serve to fix the punishment available during sentencing to that authorized by the facts proven during the prosecution phase. *See* Part III.B of this note.

245. *See, e.g.*, *Johnson*, 356 F. App'x at 792 (6th Cir. 2009) (revocation term of eighteen months did not exceed the thirty-year maximum authorized by his conviction for bank fraud); Appellant's Brief at 11–13, United States v. Cordova, 461 F.3d 1184 (10th Cir. 2006) (No. 05-6094), 2005 WL 2481779 (rather than argue that *Apprendi* forbids only those additional terms that exceed the maximum prison term authorized by the original conviction, defendant argued that *Apprendi* forbids any additional prison term based on a fact found by a judge); *Huerta-Pimental*, 445 F.3d at 1222 (9th Cir. 2006) (defendant argued that the sentencing judge was not authorized to impose supervised release in the first place and that *Booker* made *Apprendi*'s reasonable doubt requirement apply to revocations generally); Brief for Defendant-Appellant at 13–14, United States v. Carlton, 442 F.3d 802 (2d Cir. 2006) (defendant made only a policy argument that his revocation term violated the principles established in *Apprendi* and *Booker* because the government chose to prosecute his role in a bank robbery as a revocation rather than a traditional prosecution).

246. *See, e.g.*, *McIntosh*, 630 F.3d at 703 (citing faulty challenges lodged in *Carlton*, *Johnson*, *Huerta-Pimental*); *Work*, 409 F.3d. at 489 (citing a string of pre-*Apprendi* cases).

247. *See McIntosh*, 630 F.3d at 703; *Dees*, 467 F.3d at 854; *Work*, 409 F.3d at 489; *Huerta-Pimental*, 445 F.3d at 1225; *Johnson*, 356 F. App'x at 791.

248. *See Work*, 409 F.3d at 489.

249. *Id.*

250. *Id.*

pursuant to the substantive criminal statute applicable to the crime of conviction."[251] The court reasoned that supervised release, as a distinct element of the sentence authorized by the defendant's original conviction, carries its own statutory maximum for *Apprendi* purposes (i.e. the maximum revocation term provided for in the revocation statute).[252]

This argument is untenable. A fine is, by its very nature, different than a prison term. One causes a financial loss, the other a loss of liberty. Because a fine bears no relationship to imprisonment, one need not torture logic in order to conclude that the imposition of a fine need not be "limited by reference to the actual term of incarceration served by a defendant."[253] This cannot be said of post-revocation incarceration. There is no principled distinction to be made between an initial prison term and a revocation term; the clang of a prison door rings no less loudly when slammed for the second time.[254]

Even if one were to concede that supervised release is a distinct mode of punishment, subject to its own *Apprendi* maximum, the First Circuit's argument would still fall flat. As the Court explained in *Blakely*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[255] A jury's guilty verdict authorizes the judge to impose a period of supervised release, but the defendant's conviction alone does not authorize subsequent revocation.[256] That authority exists exclusively upon a subsequent finding by the court that the defendant violated the conditions of his release.[257] Consequently, to the extent that supervised release is subject to its own *Apprendi* maximum, that maximum applies to the supervision term, not the revocation penalty.

Unlike most circuits making this argument, the First Circuit recognized the distinction between a supervised release term, which is authorized by a defendant's conviction alone, and the revocation, which is not.[258] However, in an attempt to defang the legal significance of this distinction, the First Circuit turned to another frequently invoked argument. It too is unavailing.

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251. *Id.* at 490.

252. *Id.*

253. *See Work*, 409 F.3d at 490.

254. In order to bolster the argument that post-revocation imprisonment is a distinct form of punishment, other circuits make much of the fact that supervised release is governed by its own statute, apart from the statute establishing the criminal offense. *See, e.g.*, United States v. McNeil, 415 F.3d 273, 277 (2d Cir. 2005) ("[T]he imposition of supervised release and the sanctions for violation are authorized by a statute and Guidelines scheme that is separate from the regime that governs incarceration for the original offense."). *Apprendi*, however, made clear that such a formalistic distinction is spurious when assessing the constitutionality of a defendant's punishment. The hate-crime enhancement at issue in *Apprendi* was also established in a statute separate from the one providing for the predicate offense. Apprendi v. New Jersey, 530 U.S. 466, 468–69 (2000). "[T]he 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?" *Id.* at 494.

255. Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (emphasis original) (internal citations and quotation marks omitted).

256. *See* 18 U.S.C. § 3583(a), (e).

257. *See* 18 U.S.C. § 3583(e).

258. *See* United States v. Work, 409 F.3d 484, 491 (1st Cir. 2005) ("The appellant, ably represented, attempts to blunt the force of [the distinct-aspect] reasoning by shifting the focus to the revocation proceeding. He remarks that the court alone found the facts confirming the supervised release violations and notes that, absent those facts, the court would not have been authorized to revoke supervised release.").

2. Argument Two: The *Morrissey* Parole Analogy

The First Circuit argued that revocation based on judicial fact-finding did not offend the Constitution because the Sixth Amendment does not apply to revocation hearings, where defendants are protected only by diminished due process rights.[259] Citing *Morrissey*, *Gagnon*, and *Johnson*, the court concluded that, "[t]he law is clear that once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence are not subject to Sixth Amendment protections."[260] Nearly every circuit to reject an *Apprendi* challenge has deployed a similar argument, citing *Morrissey*, *Gagnon*, *Johnson*, or a combination thereof.[261] Their reliance is misplaced.

Morrissey and *Gagnon* cannot be applied in the supervised release context without first accounting for the structural difference that distinguishes it from parole and probation, the systems at issue in those cases. Under *Apprendi*, when a factual determination exposes a defendant to punishment greater than that otherwise legally prescribed, the fact is an element of a separate legal offense.[262] Revocation of parole or probation results in the re-imposition of a defendant's original sentence, [263] so the factual determination leading to revocation can never expose the defendant to more punishment than he might have received when he was initially sentenced. Revocation of supervised release, however, results in the imposition of a new prison term, one that the statute limits in absolute terms rather than as a function of the defendant's initial prison sentence. Under this structure, a given revocation may or may not expose a defendant to a total prison sentence that exceeds the maximum allowed under the statute establishing his original offense. When the defendant's exposure does not exceed this maximum, the *Morrissey*-*Gagnon* justification for reduced procedural protections holds up because the defendant faces no more punishment than he did after his original prosecution ended in conviction. However, when the defendant's exposure does exceed the maximum penalty that was available upon his conviction, the fact triggering the additional exposure is, under *Apprendi*, an element of a separate legal offense, one for which the defendant cannot be punished but upon his admission of the fact or upon proof of its existence to a jury beyond a reasonable doubt.

Rather than grapple with the implications of these structural differences, the First Circuit and others have attempted to deploy *Johnson* as a bridge extending *Morrissey* and *Gagnon* to supervised release.[264] *Johnson*, the courts argued, held that revocation punishes

259. *Id.* at 491–92.

260. *Id.* at 491 (1st Cir. 2005) (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Johnson v. United States, 529 U.S. 694, 700 (2000); Gagnon v. Scarpelli, 411 U.S. 778 (1973)).

261. *See* United States v. Ward, 770 F.3d 1090, 1097 (4th Cir. 2014); United States v. Cunningham, 607 F.3d 1264, 1267 (11th Cir. 2010); United States v. Johnson, 356 F. App'x 785, 792 (6th Cir. 2009); United States v. Cordova, 461 F.3d 1184, 1186 (10th Cir. 2006); United States v. Carlton, 442 F.3d 802, 807, 809 (2d Cir. 2006); United States v. Huerta-Pimental, 445 F.3d 1220, 1225 (9th Cir. 2006); United States v. Hinson , 429 F.3d 114, 118 (5th Cir. 2005); *Work*, 409 F.3d 484, 491 (1st Cir. 2005).

262. Apprendi v. New Jersey, 530 U.S. 466, 483 n.10 (2000).

263. *See* CAMPBELL, *supra* note 22, §5.1 ("Offenders sentenced to probation serve their time in the community instead of behind bars."); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 677 (3d ed. 2007) ("[A] parolee continues to be subject to supervision for the remainder of his maximum term, and can be returned to prison if he violates his parole conditions . . . .").

264. *See* United States v. Work, 409 F.3d 484, 491 (1st Cir. 2005)*; see also, e.g.*, United States v. Hinson, 429 F.3d 114, 119 (5th Cir. 2005).

the original offense, so traditional procedural protections are not required.[265] This is untrue as a matter of formal logic, as it confuses the necessary and sufficient conditions of the syllogism at work in *Johnson*. *Johnson* reasoned that, if the absence of procedural protections at revocation is justified, revocation necessarily punishes the original offense.[266] It does not follow from this that, because revocation punishes the original offense, the absence of procedural protections is necessarily justified.

Ultimately, courts cite *Morrissey*, *Gagnon*, and *Johnson* in order to refute a claim that a proper *Apprendi* challenge does not make. *Apprendi* does not stand for the proposition that a defendant's rights to a jury trial and proof beyond a reasonable doubt attach at revocation. It stands only for the proposition that the boundaries of a defendant's potential punishment must be determined by the facts proven during the prosecution phase, where those rights do attach. When revocation respects those boundaries, the judge's factual determination is permissible because it does not alter the scope of his sentencing discretion. Instead, the determination provides grounds for the judge to reconsider the manner in which he initially wielded that discretion.

3. Argument Three: *Booker* Blessed the Constitutionality of Supervised Release

A number of courts concluded that that the Supreme Court had already spoken on the issue of revocation in *Booker*.[267] In striking those portions of the sentencing statute that made the guidelines binding, the Court declared that, "[m]ost of the statute is perfectly valid," citing several provisions in the larger prison reform statute, including supervised release, that the Court did not consider to be problematic.[268] Several circuits have reasoned that revocation could not violate *Apprendi*'s principles if, in announcing *Booker*, the apotheosis of those principles, the Court explicitly stamped its approval on the supervised release statute.[269]

This argument is hollow. *Booker*'s passing reference to the supervised release statute was nothing more than an obiter dictum. The case was the culmination of two decades of debate focused exclusively on the effect of fact-finding during the sentencing phase of a trial. The Court had never so much as discussed the issue of judicial fact-finding at revocation and did not do so in *Booker.* The mention of supervised release was strictly an aside, an example of a statute that need not be struck down because it was unrelated to the guidelines' binding nature, the source of their unconstitutionality.[270] Given its negligible

265. In *Johnson*, the Court does state that "treating post revocation sanctions as part of the punishment for the original offense" avoids "constitutional concerns," *id.*, but this cannot be read as a grant of permission for trial courts to impose punishment beyond the statutory maximum based on their own factual findings. The Court's point was that every revocation would be unconstitutional if it punished violative conduct, not that every revocation is necessarily constitutional because it punishes the original offense.

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

267. *See, e.g.*, United States v. Johnson, 356 F. App'x 785, 792 (6th Cir. 2009); United States v. Dees, 467 F.3d 847, 854 (3d Cir. 2006) (citing another court's interpretation of *Booker*); United States v. Hinson, 429 F.3d 114, 117 (5th Cir. 2005); United States v. Carlton, 442 F.3d 802, 808 (2d Cir. 2006); United States v. Coleman, 404 F.3d 1103, 1104 (8th Cir. 2005).

268. United States v. Booker, 543 U.S. 220, 258 (2005)

269. *See, e.g.*, Hinson, 429 F.3d at 117; United States v. Carlton, 442 F.3d 802, 808 (2d Cir. 2006); United States v. Coleman, 404 F.3d 1103, 1105 (8th Cir. 2005).

270. *See Booker*, 543 U.S. at 258. Along with supervised release, the Court listed other code sections unrelated to the binding nature of the guidelines such as provisions providing for various kinds of punishment, presentence

role in *Booker*'s reasoning, the dictum's weight as an authority in the revocation debate ranks somewhere between totally irrelevant and merely unpersuasive.

4. Argument Four: *Booker* Only Invalidated Mandatory Guidelines

Courts have often deployed the fourth and final argument in tandem with the third.[271] According to this argument, *Booker* only invalidated the mandatory guidelines, which did not apply to supervised release. The Ninth Circuit put it this way:

> Because the revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary, it is constitutional under *Booker*. *See* U.S.S.G. ch. 7 (promulgating advisory policy statements concerning violations of probation and supervised release) 18 U.S.C. § 3583(e)(3) (authorizing, but not requiring, revocation and subsequent imprisonment following a violation of supervised release conditions).[272]

This reasoning has several problems, not the least of which is its factual inaccuracy. While it is true that the sentencing guidelines were strictly advisory with respect to supervised release, the revocation statute itself is not "fully discretionary." Although the general revocation provision cited by the court leaves the decision to the judge, a number of other provisions in the same code section provided for mandatory revocation.[273]

Setting aside this misleading omission, the court's reasoning betrays a fundamental misunderstanding of principles at work in the *Apprendi* line. Whether a fact must be found by the jury turns on the impact that fact has on the boundaries of a judge's sentencing discretion. A sentencing provision violates *Apprendi* even when it permits, but does not require, the judge to impose a sentence beyond the range made available by the facts proven at trial. The statute at issue in *Booker* would have been unconstitutional even if it permitted but did not oblige the judge to depart from the presumptive range based on additional findings at sentencing.[274] Despite the Ninth Circuit's misunderstanding of *Booker* and its implication for the boundaries of sentencing discretion, five circuits have relied on essentially the same reasoning to reject *Apprendi* challenges.[275]

VI. CONCLUSION

The Supreme Court should grant certiorari in *Haymond* and affirm the Tenth Circuit's holding that § 3583(k)'s mandatory revocation provision is unconstitutional. Moreover, although the question is not presented in *Haymond*, the Court should make clear that a revocation also violates *Apprendi* when it exposes the defendant to punishment in

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reports, forfeiture, and the notification of victims. *Id.*

271. *See, e.g.*, United States v. Dees, 467 F.3d 847, 854 (3d Cir. 2006); *Hinson*, 429 F.3d at 117 (5th Cir. 2005); *Carlton*, 442 F.3d at 808; *Coleman*, 404 F.3d at 1104–05.

272. United States v. Huerta-Pimental, 445 F.3d 1220, 1224 (9th Cir. 2006)

273. *See, e.g.*, 18 U.S.C. § 3583(g) (making revocation mandatory for violations stemming from the possession of drugs or firearms).

274. This was the case in *Blakely*, where the sentencing provision permitted but did not require the judge to depart from the presumptive sentence upon his finding that a defendant acted with deliberate cruelty. Blakely v. Washington, 542 U.S. 296, 299 (2004).

275. *See Dees*, 467 F.3d at 854; *Carlton*, 442 F.3d at 808; *Huerta-Pimental*, 445 F.3d at 1224; *Hinson*, 429 F.3d at 117–18; *Coleman*, 404 F.3d at 1104; United States v. Work, 409 F.3d 484, 492 (1st Cir. 2005).

excess of the statutory maximum for his underlying offense. When a defendant can be sent to prison for life without the benefit of a jury or the requirement of proof beyond a reasonable doubt, revocation has become "the tail that wags the dog." The Court's ongoing countenance of such a statute is not only repugnant to due process and the Sixth Amendment, it invites Congress to adopt similarly draconian provisions in the future.

The interests advanced by supervised release arguably justify the legal fiction that revocation punishes a defendant's original offense, but this justification rings false when the available penalty is directly tied to his subsequent conduct. If the law allows revocation penalties to overrun the banks established by an offender's actual conviction, it is not a legal fiction to say that revocation punishes the original crime, it is a fiction *tout court*.

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