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Stephen A. Simon
University of Richmond

RE-IMPRISONMENT WITHOUT A JURY TRIAL: SUPERVISED RELEASE AND THE PROBLEM OF SECOND-CLASS STATUS

STEPHEN A. SIMON, J.D., PH.D.*

ABSTRACT

The Supreme Court's 2019 decision in United States v. Haymond shone a light on a practice that has not yet received attention commensurate with its significance: the re-imprisonment of individuals on supervised release without a jury trial. At first blush, the decision is most notable for setting bounds on the government's ability to re-imprison individuals on supervised release without observing the constitutional rights normally available to defendants in criminal prosecutions. However, examination of the opinions reveals that the decision's immediate doctrinal impact was quite limited. Moreover, although the three opinions issued in the case reflected disagreements among the Justices, all of the Justices nevertheless took for granted a proposition that ought to be recognized as remarkable: namely, that it is acceptable for individuals released from prison to be subjected for extended periods of time to a status of significantly diminished constitutional protection. This Article challenges the practice of re-imprisoning individuals on supervised release without the normal constitutional protections, contending that its current widespread acceptance is based on underlying assumptions that do not hold up to scrutiny.

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* Associate Professor of Political Science, and Coordinator of the Program in Philosophy, Politics, Economics, and Law (PPEL), University of Richmond.

I. INTRODUCTION

The Supreme Court's 2019 decision in *United States v. Haymond*[1] shone a light on an issue that has not yet received attention commensurate with its significance: the common practice of re-imprisoning individuals on supervised release without a jury trial. Although the decision's immediate doctrinal impact was quite limited, *Haymond* was notable for setting constraints on the government's ability to re-imprison individuals on supervised release without observing the constitutional rights normally available to defendants in criminal prosecutions.

In some respects, the three separate opinions issued in the case indicated substantial divisions among the Justices. In particular, Justice Neil Gorsuch's opinion for the four plurality Justices rested its reasoning on a precedent—*Apprendi v. New Jersey*[2]—that Justice Samuel Alito's opinion for the four dissenting Justices considered inapplicable.[3] Meanwhile, in providing a fifth vote for the majority, Justice Stephen Breyer's concurring opinion largely sided with the dissent, including its view that *Apprendi* was inapposite, but found other grounds to reach the same outcome as the plurality on the dispute at hand. Notwithstanding the significant disagreements between the plurality and dissenting Justices, however, all three of the opinions in *Haymond* took for granted a proposition that ought to be recognized as remarkable: namely, that it is acceptable for individuals released from prison to be subjected for extended periods of time to a status of significantly diminished constitutional protection.

After individuals convicted of crimes complete a term in prison, they are commonly subject to a period of "supervised release," which conditions their continued liberty on a variety of requirements, including that they do not commit additional crimes.[4] If the government believes that a person on supervised release has violated one or more of the requirements, it may seek a term of re-imprisonment. Although individuals in these circumstances are potentially subject to long terms of imprisonment, they are not entitled to the full set of constitutional rights normally afforded to defendants in criminal cases. Most notably, they are not provided a trial in which guilt must be demonstrated "beyond a reasonable doubt" to a jury.[5] Rather, their

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1 United States v. Haymond, 139 S. Ct. 2369, 2373 (2019).

2 Apprendi v. New Jersey, 530 U.S. 466, 468 (2006).

3 *Haymond*, 139 S. Ct. at 2379 (citing *Apprendi*, 530 U.S. at 468); *id.* at 2388–89 (Alito, J. dissenting). Justice Gorsuch's plurality opinion was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Justice Alito's dissenting opinion was joined by Chief Justice John Roberts, and Justices Clarence Thomas and Brett Kavanaugh.

4 *See, e.g.*, 18 U.S.C. § 3583(d). *See generally* ADMIN. OFF. OF THE U.S. CTS. PROB. & PRETRIAL SERVS. OFF., OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS (2016), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf [https://perma.cc/WZ92-ZJAB].

5 The Sixth Amendment of the U.S. Constitution guarantees that the accused in "all criminal prosecutions shall enjoy the right to a speedy and public trial, by an impartial jury," U.S CONST. amend. VI, and the Supreme Court has long held that due process requires that the guilt of

cases are decided by judges at evidentiary hearings in which the government must only demonstrate the defendant's guilt by "a preponderance of the evidence" (indicating that the government's allegations are more likely than not to be true).[6]

In 2019, in the federal system alone—this Article's principal focus—there were over 111,000 individuals on supervised release.[7] A 2010 study by the United States Sentencing Commission reported that the federal court system had by that point imposed terms of supervised release on nearly one million individuals.[8] Indeed, the vast majority of federal offenders who are sentenced to prison also serve terms of supervised release. Terms of supervised release do not merely represent brief stints while an individual freed from prison is getting settled into the logistical details of a new life. Rather, the average term of supervised release is nearly four years.[9] Throughout this entire period, individuals on supervised release may be re-imprisoned for up to five years without anything close to the constitutional protections that would normally be afforded to an individual facing the full force of the criminal law. Nor is the threat of revocation merely theoretical; roughly one-third of individuals sentenced to terms of supervised release are subjected to revocation and re-imprisonment for an average term of nearly a year, and, in some cases, for much longer terms.[10] In 2018 alone, the federal courts adjudicated almost 17,000 revocations of supervised release.[11]

This Article argues that the practice of re-imprisoning individuals on supervised release without the normal constitutional protections is not justified. Part II sets the context for the contemporary practice of supervised release by examining its background in the adoption of a parole system over a century ago. It is striking that the current system affords greatly diminished rights for large populations of people who are not imprisoned, and that the practice is so widely accepted. We might have expected the Supreme Court block this practice. To the contrary, however, the Justices have articulated justifications for it. Part III discusses those justifications, which pivot on the legal fiction that revocation of supervised release does not constitute the imposition of a new punishment. Instead, according to this line of reasoning, the revocation of supervised release should be understood simply as part of the ongoing

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criminal charges be established "beyond a reasonable doubt." *In re* Winship, 397 U.S. 358, 361 (1970).

6 18 U.S.C. § 3583(e)(3).

7 *Federal Judicial Caseload Statistics 2019*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 [https://perma.cc/URE3-H4Y9].

8 U. S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 3 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf [https://perma.cc/A6BA-2EQW].

9 *Number of Offenders on Federal Supervised Release Hits All-Time High*, PEW 1 (Jan. 24, 2017) https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf.

10 U. S. SENT'G COMM'N, *supra* note 8, at 63.

11 United States v. Haymond, 139 S. Ct. 2369, 2388 (2019) (Alito, J., dissenting).

administration of the original sentence of imprisonment. Part IV contends that the justifications for the current system do not hold up to scrutiny. Once the notion that revocation of supervised release does not constitute a new punishment is exposed as a fiction, the commonly repeated justifications for the diminished rights available at revocation hearings fall apart. We are left, then, with a system that unjustifiably deprives numerous individuals of the most cherished protections in our criminal justice system. Since these are individuals who have already completed their prison terms and resumed their lives, this practice has the effect of relegating a large population of individuals to a second-class status of rights protection. In the absence of a valid basis for the establishment of such an inferior status, the practice should be recognized as deeply problematic. Part V highlights how little *Haymond* altered the practice of re-imprisonment without a jury trial, and how much is at stake for individuals on supervised release.

II. HOW WE GOT HERE—FROM PAROLE TO SUPERVISED RELEASE

A. Parole and the Historical Background of Supervised Release

To put the contemporary practice of supervised release in context, it is necessary to consider its historical roots in the much earlier adoption of a parole system. In the period shortly after the Constitution's ratification, the predominant view of criminal penalties was that they served a retributive purpose: to mete out the punishment that criminals deserved based on the offenses committed.[12] This view about the aim of punishment had implications for the manner in which sentences were determined. If the penalty was intended as retribution for the offense committed, then it made sense to link the determination of the sentence tightly to the nature of the offense. The relevant variables were those differentiating one kind of *crime* from another. This conception of punishment's aim, then, did not focus attention on variables differentiating one *perpetrator* from another.[13] Since, unlike individual human beings, the facts of an act already committed cannot change, this view of punishment's aim did not require an updating of the time to be served in prison based on events transpiring after the sentencing. As a result, those sentenced to prison commonly served their terms in full.[14]

The emphasis on punishment's retributive aims made questions about when defendants enjoyed certain constitutional rights pertaining to criminal procedure relatively straightforward. Consider the Sixth Amendment's guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[15] Under the early model of criminal penalties as retribution, determining when the jury right applied was generally uncomplicated because

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12 Robert McClendon, Note, *Supervising Supervised Release: Where the Courts Went Wrong on Revocation and How* U.S. v. Haymond *Finally Got It Right*, 54 TULSA L. REV. 175, 180 (2018).

13 *Id.*

14 *Id.*

15 U.S CONST. amend. VI.

"criminal prosecution" for Sixth Amendment purposes meant simply the stage where the government brought formal accusations against the defendant.[16]

By the end of the nineteenth century, however, a major shift had occurred in attitudes regarding the principal aims of punishment. By this time, the prevailing view was that punishment should aim to rehabilitate criminals, reforming their character and reintegrating them into society.[17] This shift in attitudes regarding the aim of criminal penalties played a critical role in the adoption of parole as an overarching approach to punishment. The guiding idea behind parole was that sentences should be administered in a manner tailored to the circumstances of particular individuals in an effort to reintegrate them into society as law-abiding members of society.[18] Pursuing such a vision required responsiveness to each person's progress, and this meant an approach to sentencing that was individualized and flexible. Not all individuals convicted of crimes progress toward safe and productive reentry into society at the same pace. Sadly, some individuals never make any progress at all. Others, however, demonstrate signs of readiness for reintegration relatively soon after beginning to serve their prison terms.[19] Thus, the system had to allow for adjustment in the light of developments that took place after the initial announcement of a prison term. This was a change from the previous system. Since the earlier model that predominated in the nation's early history tied sentences to the nature of the crimes committed—which did not change after the fact—it did not require the same kind of flexibility in administering sentences.

To instill the requisite flexibility, the new model of criminal justice allowed for discretion in a number of ways. Through the establishment of broad penalty ranges, judges were afforded a good deal of discretion in determining the sentence for particular defendants at the outset. Within the sentencing range provided by legislation, judges could sentence defendants to a narrower range of time that they might have to serve. Moreover, once the minimum sentence was served, a parole board—an arm of the executive branch—exercised discretion in determining the actual release date. Within the prescribed range, parole boards could grant an earlier release based on good behavior and progress toward rehabilitation.[20] In some cases, individuals could be released from prison after serving as little as one-third of the original maximum range on their sentence.[21] While individuals in the parole system could be released early, such individuals—known as "parolees"—were subject to

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16 *Haymond*, 139 S. Ct. at 2376.

17 Morrisey v. Brewer, 408 U.S. 471, 477 (1972).

18 Helen Leland Witmer, *The History, Theory, and Results of Parole*, 18 J. CRIM. L. & CRIMINOLOGY 24, 51 (1927).

19 McClendon, *supra* note 12, at 180.

20 Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 188–89 (2013).

21 James Horner, Haymond*'s Riddles: Supervised Release, the Jury Trial Right, and the Government's Path Forward*, 57 AM. CRIM. L. REV. 275, 279 (2020).

certain requirements which they had to fulfill in order to retain their freedom.[22] In addition to reporting periodically to their parole officer, parolees were required to comply with a variety of other conditions, such as that they not consume alcohol or associate with certain persons, or that they not travel, marry, or change employment without the permission of their assigned parole officer.[23]

If the government believed that a parolee had violated the conditions of release, it could seek a determination from a parole board to revoke parole and return the individual to prison for part or all of the remaining time on the initial sentence. Parole boards did not have to afford parolees anything like the rights associated with a criminal trial before making a determination to revoke parole. In particular, parole could be revoked on nothing more than a finding by a preponderance of the evidence that individuals had violated the conditions of parole.[24] Especially since re-imprisoned parolees did not usually receive credit for the time while they were on parole, the stakes at a parole hearing could be very high if the parolees were found to have violated the conditions of release. Indeed, a parolee might face many years of additional time in prison if found to have violated the conditions of release. Nevertheless, despite the stakes, the determination was made by an executive body without affording the protections that the accused would face at a criminal trial. Nor was revocation of parole uncommon, as approximately 40% of parolees were returned to prison before completing the time on their period of parole.[25]

Parole became the dominant model of criminal justice during the twentieth century. Most states adopted some version of a parole system early in the century, and every state had adopted it by the middle of the century.[26] Congress adopted parole for the federal criminal system in 1910 in a form that was similar to the basic system commonly used at the state level.[27]

By the 1970s, however, the drumbeat of opposition to parole was growing louder. While criticism of parole took many forms, a particularly influential line of attack centered on two principal claims: that parole gave rise to excessive uncertainty and arbitrariness regarding the length of prison terms, and that it did not actually fulfill its rehabilitative aims in any event.[28] One reason these criticisms gained so much traction was that they appealed to both sides of the political spectrum. Regarding the indeterminacy of prison terms, for instance, liberals could stress the implications for fairness and racial equality, while conservatives could decry the possibility for criminals to evade adequate punishment.[29] Observers also charged that the parole

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22 Scott-Hayward, *supra* note 20, at 196.

23 Morrisey v. Brewer, 408 U.S. 471, 478 (1972).

24 Horner, *supra* note 21, at 279.

25 *Morrissey*, 408 U.S. at 479.

26 McClendon, *supra* note 12, at 181.

27 *Id.*

28 Scott-Hayward, *supra* note 20, at 189–90.

29 Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 991–95 (2013).

system needlessly tied the period of supervision to the original prison term.[30] That is, no matter how clearly individuals' behavior gave indications of rehabilitation, they had to remain within the parole system until the end of the maximum amount of time on the initial sentence. Conversely, individuals who showed no signs of rehabilitation whatsoever could not be kept under any kind of supervision beyond the expiration of the initial sentence.[31]

B. The Establishment of Supervised Release

Motivated in large part by the aim of addressing perceived drawbacks of the parole system, Congress in 1984 replaced it with a new model that incorporated supervised release as a means of maintaining official supervision over individuals after they were freed from prison.[32] Without abandoning the rehabilitative aspirations of parole, the new system sought to foster a greater level of predictability and consistency regarding the length of prison terms.[33]

To appreciate the distinctiveness of supervised release, it is helpful to recall the basic logic of the parole system that it replaced. In parole, the initial sentence included a maximum amount of time to be served in prison. An individual could be released from prison prior to the end of that maximum term, perhaps after serving as little as one third of that term. However, no matter when individuals were released from prison, they were necessarily kept within the parole system until the passage of the time remaining on their maximum sentence. To illustrate, suppose an individual was sentenced to a maximum of ten years, and a parole board later authorized release after five years. Assuming the parole was not later revoked, the individual would remain on parole for the next five years, until completion of the time remaining on the original sentence. In the parole system, then, while there was indeterminacy regarding how much of the original ten-year sentence the individual would actually serve in prison, there was certainty regarding the maximum amount of time that the individual could serve in prison. Moreover, except in cases where parole was revoked without credit for time served on parole, there was also certainty regarding the combined amount of time that the individual would remain either in prison or on parole.

There are, to be sure, important similarities between parole and supervised release. Like parole, supervised release applies only after individuals serve time in prison.[34] Thus, neither parole nor supervised release have functioned as freestanding sentences. In this respect, both parole and supervised release have been alternatives to probation, the institution used for subjecting individuals to supervision without their necessarily having first served time in confinement.[35] Also like parole, individuals on supervised release are subject to a variety of requirements upon which their continued freedom is conditioned. The basic structural difference is that in supervised release individuals

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30 *Id.* at 1017–18.

31 McClendon, *supra* note 12, at 182.

32 Sentencing Reform Act of 1984, § 212(a)(2), 18 U.S.C. § 3583(a).

33 Doherty, *supra* note 29, at 959–60, 995.

34 Scott-Hayward, *supra* note 20, at 196.

35 Doherty, *supra* note 29, at 998.

are subjected to a period of conditional liberty after completion of the initial prison term.[36] Apart from the possibility of relatively small reductions for good behavior, individuals serve the entire initial prison term. This is the feature of the new system that was supposed to address the excessive indeterminacy that plagued the parole system.[37] Moreover, since a term of supervised release is something that a judge may impose as an additional part of the sentence to follow completion of the prescribed prison term,[38] it may be tailored to the particular circumstances of the individual defendant rather than being tied simply to the length of the initial prison term.[39] In response to criticisms of parole's reliance on quasi-judicial bodies based in the executive branch, another change affected by the new system was that it moved oversight of released individuals to the judiciary.

The statutory provisions introducing supervised release at the federal level were part of a larger package of congressional legislation—the Comprehensive Crime Control Act of 1984—that instituted broader changes in criminal justice.[40] Those broader changes included the establishment of the United States Sentencing Commission, which was charged with producing guidelines to be used by judges in determining sentences in particular cases.[41] Within the outer ranges of penalties called for by existing criminal law, the guidelines produced by the Sentencing Commission provided criteria establishing narrower ranges for judges to use in fixing sentences.[42] Under this new sentencing system, along with setting the length of the prison term that an individual would serve, judges were also authorized to impose periods of supervised release to be served following release from prison.[43] For some offenses, a minimum term of supervised release is required by statute.[44] In other cases, judges have discretion to impose terms of supervised release up to the statutorily provided maximum.[45] In making a determination about supervised release, judges are instructed to consider a range of factors, including, for instance, the nature of the offense and the defendant's record.[46] However, one factor that judges are specifically prohibited from considering is the need to impose on defendants the just punishment they deserve for

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36 *Id.* at 997.

37 *Id.* at 996.

38 *See, e.g.*, 18 U.S.C. § 3583(a).

39 Scott-Hayward, *supra* note 20, at 190.

40 McClendon, *supra* note 12, at 181–82, 181 n.43.

41 Scott-Hayward, *supra* note 20, at 190.

42 *Id.* at 193.

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

44 Scott-Hayward, *supra* note 20, at 192.

45 *Id.*

46 *Id.* at 193.

having engaged in the criminal activity.[47] The rationale for this proscription is that the guiding aim of supervised release is not to punish perpetrators, but rather, to pave the way for their reintegration into society.[48]

Some of the conditions imposed on individuals during their supervised release are mandatory for particular offenses, while others may be imposed at the judge's discretion depending on the details of particular cases.[49] The Sentencing Guidelines established by the Sentencing Commission speak not only to terms of imprisonment but also to the imposition of supervised release. In cases involving felonies, for instance, the Guidelines call for at least one year of supervised release, and they recommend certain standard conditions governing matters such as the people with whom defendants may associate.[50] Judges also have discretion to impose a wide range of other conditions, ranging from the submission of DNA samples to travel restrictions, curfews, and limitations on the defendant's place of employment.[51]

A crucial similarity with parole is that individuals on supervised release may be re-imprisoned for violating the conditions of their liberty without being afforded the usual constitutional protections of a criminal trial. This was not the intention from the beginning. Since the purpose of supervised release was rehabilitation rather than punishment—and supervised release was supposed to operate very differently from parole—the language of the Sentencing Reform Act of 1984 required a conventional prosecution before re-imprisoning an individual on supervised release.[52] Thus, under the system as initially conceived, the government would have to use contempt of court as a remedy for individuals who violated the conditions of their release, which required the government to prove its allegations to a jury beyond a reasonable doubt.[53] Before the legislation took effect, however, intervening legislation (the Anti-Drug Abuse Act of 1986) made a critical change: individuals on supervised release could be re-imprisoned—potentially for longer periods of time than was remaining on their term of supervised release—based on nothing more than the finding of a judge by a preponderance of the evidence that the defendant had violated conditions of release.[54] Later legislation (in 1994) allowed judges upon revocation to add new terms of supervised release, in some cases even for the rest of the defendant's life.[55]

While defendants at revocation hearings enjoy some procedural protections, such as the rights to counsel, to testify on direct examination, and to be apprised of the evidence, they are deprived of many of the basic protections normally associated with

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47 *Id.*

48 *Id.*

49 Johnson v. United States, 529 U.S. 624, 696–97 (2000).

50 Scott-Hayward, *supra* note 20, at 192, 196–97.

51 *Id.* at 193, 197.

52 *Id.* at 190.

53 *Id.* at 191.

54 Doherty, *supra* note 29, at 1000–03.

55 *Id.* at 1003–04.

a criminal trial. Not only are they denied the right to a jury and the "beyond a reasonable doubt" evidentiary standard, defendants at revocation hearings also do not enjoy the protections of the exclusionary rule,[56] the privilege against self-incrimination,[57] or the Federal Rules of Evidence.[58] Moreover, they are denied the protection of the right not to be prosecuted twice for the same offense, which means that defendants who have their supervised release revoked for acts that constitute crimes may also be subject to a separate criminal prosecution.[59] The position of individuals in revocation hearings to mount a defense is also weakened by the deprivation of rights that would normally apply prior to the stage at which the prosecution presents its case. For instance, the conditions attached to supervised release often include provisions allowing supervising officers to conduct searches without procuring a warrant or establishing probable cause.[60]

III. JUSTIFICATIONS FOR THE DIMINISHED RIGHTS OF INDIVIDUALS ON SUPERVISED RELEASE

Despite the differences between parole and supervised release, we have seen that there are many similarities. An especially significant thread of continuity concerns the possibility that an individual may be re-imprisoned without anything close to the normal procedural protections associated with a criminal trial. While sending individuals to prison—potentially for long periods of time, and even up to terms of life—without a jury trial or other constitutional protections, might seem extraordinary, the practice has, in fact, long been sanctioned by the Supreme Court. In this Part, we consider the reasoning that the Court has used to uphold the practice.

As we will see, the crucial idea in the Court's reasoning has been the drawing of a distinction between the *imposition* of a sentence, on the one hand, and developments that are part of the *administration* of a sentence already imposed, on the other. It is uncontroversial that before the government imposes a new criminal sentence, it must provide defendants with the full panoply of procedural protections guaranteed by the U.S. Constitution. According to the Justices' reasoning, however, the revocation of supervised release does not amount to the imposition of a new criminal sentence. Rather, the Justices have reasoned, the revocation of supervised release should be understood as a stage in the carrying out of a sentence previously established. If a sentence is imposed only one time, then the government must afford the full panoply of constitutional protections only once.

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56 The Supreme Court has long held that evidence acquired in violation of the Constitution may not be used to convict defendants in criminal cases. Weeks v. United States, 282 U.S. 383, 398 (1914).

57 The Fifth Amendment of the U.S. Constitution provides that: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

58 Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267, 288 (1996).

59 The Fifth Amendment of the U.S. Constitution provides that: "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V; *see* Scott-Hayward, *supra* note 20, at 203–04.

60 Scott-Hayward, *supra* note 20, at 202–03.

A. Morrissey v. Brewer

Ironically, the most significant decision in which the Court articulated the justification underlying the diminished rights of parolees—*Morrissey v. Brewer*[61]—was one that set limits on the revocation of parole. By the time of that decision, the notion that parolees did not enjoy the constitutional rights normally associated with a criminal trial was so deeply entrenched that the defendants in the case did not even advance the argument that they should have been granted a jury trial.[62] Instead, the issue before the Court was whether parolees were entitled to any kind of hearing at all before being returned to prison for violating the conditions of their release.[63]

The named defendant, John Morrissey, had been convicted on charges of issuing fraudulent checks and sentenced to a maximum prison term of seven years.[64] The parole board released Morrissey during the second year of imprisonment, but revoked his parole seven months later.[65] The board's decision to revoke was based on the parole officer's report that Morrissey had violated the terms of his release in a number of ways, including: purchasing a car under an assumed name; operating the car without permission; giving false statements to police following a minor vehicular accident; and failing to disclose his place of residence to his parole officer.[66] The lower courts in the case held that there was no constitutional deficiency in the parole board's decision to revoke Morrissey's parole based on nothing more than the parole officer's report.[67] The Constitution, they held, did not entitle the defendant to any kind of hearing before his parole could be revoked.[68] The Supreme Court overturned the lower courts, declaring that parolees were entitled to a hearing before being returned to prison.[69] At the same time, the Justices had little difficulty in concluding that parolees were not entitled to the rights associated with a jury trial.

Courts often confront questions about which procedural rights apply in various contexts, since not every instance in which public officials render decisions impacting the liberty or interests of individuals brings into play the full panoply of procedural protections described in the Constitution. The Sixth Amendment guarantees that: "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 . . . ; to be confronted with the witnesses against him; . . . and to have the

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61 Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972).

62 *See* Brief for Petitioner at 8, *Morrissey*, 408 U.S. 471 (No. 71-5103).

63 *Morrissey*, 408 U.S. at 472.

64 *Id.*

65 *Id.*

66 *Id.* at 472–73.

67 *Id.* at 474.

68 *Id.* at 474–75.

69 *Id.* at 489.

Assistance of Counsel for his defense."[70] Not every encounter with government power implicates all of these rights because not every encounter with government power is a criminal prosecution. Even when not being criminally prosecuted, though, individuals may nevertheless be entitled to certain procedural protections. The basis of such rights is the Due Process Clause, which guarantees that: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."[71] To determine which procedural protections apply in a particular context, the Supreme Court has long held that courts must engage in a balancing analysis that takes into account the interests both of the individual and of the government.[72]

Morrissey is best known for the Court's application of a balancing analysis under the Due Process Clause to determine that parole could not be revoked without any kind of hearing at all.[73] In conducting that balancing analysis, Chief Justice Warren Burger's opinion for the Court acknowledged the considerable liberty interests at stake for the parolee:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked. We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others.[74]

Thus, the Court recognized that parolees have a strong interest in receiving some kind of process beyond the mere filing of a report by the parole officer. At the same time, the Court also stressed the government's interest in being able to revoke parole without having to provide parolees with overly burdensome procedural protections. In this vein, Chief Justice Burger wrote:

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70 U.S. CONST. amend. VI.

71 This is language of the Fifth Amendment's Due Process Clause. U.S. CONST. amend. V. The Fourteenth Amendment—applicable against the state governments rather than the federal government—similarly guarantees that: "No state . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

72 Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970).

73 *Morrissey*, 408 U.S. at 481–84.

74 *Id.* at 482.

> The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.[75]

Taking into account the interests of both the parolee and the government, the Court concluded that the parolee was entitled to an "effective but informal hearing."[76] More specifically, the Court held that parolees were entitled, first, to a preliminary hearing, and then to a revocation hearing.[77] The preliminary hearing would entail a minimal inquiry shortly after arrest "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions."[78] At the preliminary hearing, the defendant was entitled to notice of the basis for the government's pursuit of revocation and an opportunity to be heard.[79] The hearing officer—who could be a parole officer, though not the one directly involved in the case under litigation—was required to provide a summary of the information that was the basis for holding the individual until the revocation hearing.[80] Within a reasonable time following the preliminary hearing—the Court did not fix a minimum period but indicated that two months would normally be a reasonable time frame—the defendant was entitled to a revocation hearing at which he would be afforded such rights as "written notice of the claimed violations of parole"; "disclosure to the parolee of evidence against him"; an opportunity to present evidence; and "a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers."[81]

While the Court's refusal to allow the revocation of parole without a hearing was undoubtedly significant, the aspect of the decision with greatest salience for the present discussion was the ease with which the Court concluded that parolees were not entitled to a jury trial. The Court's detailed balancing analysis was sandwiched between insistences that parolees were clearly not entitled to jury trials before having their parole revoked. Before commencing its weighing of individual and government interests, Chief Justice Burger wrote: "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of

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75 *Id.* at 483.

76 *Id.* at 485.

77 *Id.* at 485, 488.

78 *Id.* at 485.

79 *Id.* at 486–87.

80 *Id.* at 485–87.

81 *Id.* at 488–89.

rights due a defendant in such a proceeding does not apply to parole revocations."[82] Although the Court's discussion on the point was brief, it made clear that the unavailability of the full panoply of rights to parolees rested on two critical distinctions. The first distinction was one already noted: that between the *imposition* of a sentence, and its *administration*. If the revocation of parole constituted the imposition of a new sentence, then it would bring with it the full panoply of procedural protections. In the Court's view, however, the revocation of parole merely represented one development among many in the long course of events amounting to the administration of a sentence already imposed.[83]

The second critical distinction was that between absolute and conditional liberty. Absolute liberty was the liberty "to which every citizen is entitled"; this was the kind of liberty enjoyed by all those who had not been convicted of crimes.[84] By contrast, parolees enjoyed only a "conditional liberty properly dependent on observance of special parole restrictions."[85] The two distinctions were interrelated. The first distinction meant that parolees had already been afforded the full panoply of rights, and, having been convicted, already had a sentence imposed. The second distinction meant that part of the sentence imposed entailed a loss of liberty. Consequently, parolees did not have as much at stake at a revocation hearing. The revocation of parole did not entail a deprivation of absolute liberty because parolees had already lost that kind of liberty when the sentencing court rendered its judgment.[86]

B. Johnson v. United States

Unlike parolees, individuals on supervised release have completed their prison terms. This means that defendants who have their supervised release revoked are not being returned to prison to complete a part of their initial prison term. Rather, supervised release constitutes a separate component of a criminal sentence. The maximum time that one may serve in prison following revocation of supervised release is not fixed by the initial prison term, since that initial prison term has already been fulfilled. In *Johnson v. United States*, however, the Court declined to find constitutional significance in this difference in the structure of parole and supervised release.[87] As in *Morrissey*, the Court in *Johnson* based its reasoning in the distinction between the imposition and administration of a sentence.[88] According to the Court, the revocation of supervised release—like the revocation of parole—was best understood

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82 *Id.* at 480.

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

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

88 *See generally id.*

not as the imposition of a new sentence, but as a later development arising in the course of administering a sentence already imposed.[89]

The immediate issue before the Court in *Johnson* concerned not the Sixth Amendment's right to a jury trial, but the Ex Post Facto Clause, set forth in Article I, Section 9 of the Constitution ("No . . . ex post facto Law shall be passed.").[90] Upon being convicted on charges of participating in a conspiracy to commit credit card fraud in 1993, Cornell Johnson was sentenced to a prison term to be followed by three years of supervised release.[91] In 1994, after completing the prison term, Johnson had his supervised release revoked based on allegations that he had engaged in acts of forgery.[92] In addition to a prison term, the district court imposed an additional term of twelve months of supervised release following Johnson's release from prison.[93] At the time of Johnson's original offense in 1993, the existing legislation did not explicitly authorize judges to impose new terms of supervised release when revoking an initial term of supervised release. On appeal, Johnson contended that this imposition of a new term of supervised release amounted to the unconstitutional application of an ex post facto law.[94]

However, between the time of Johnson's original sentence and the time of the acts for which his supervised release was revoked in 1994, Congress had enacted legislation unambiguously authorizing courts to impose new terms of supervised release upon revoking a previous term of supervised release. The Sixth Circuit Court of Appeals upheld the district court on the grounds that its revocation order imposed a new punishment on Johnson.[95] If the revocation order was a new punishment, then the imposition of an additional term of supervised release was authorized by the recently enacted congressional legislation, which took effect prior to the acts that were the cause for the revocation.[96]

With respect to the immediate dispute, the Sixth Circuit's ruling favored the government, since it rejected Johnson's challenge to the district court's imposition of a new term of supervised release.[97] Nevertheless, the Sixth Circuit's reasoning had far-reaching implications that the government did not view so favorably. The Supreme Court's earlier conclusion in *Morrissey* that parolees were not entitled to jury trials had hinged on the critical move of viewing the revocation of parole as nothing more than the administration of a sentence already imposed. This idea was pivotal because if the revocation of parole instead amounted to the imposition of a new prison term,

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89 *Id.* at 700.

90 *Id.* at 696.

91 *Id.* at 697.

92 *Id.*

93 *Id.* at 698.

94 *Id.*

95 *Id.* at 698–99.

96 *Id.*

97 United States v. Johnson, No. 98-5664, 1999 WL 282679, at *1 (6th Cir. Apr. 29, 1999).

then parolees would have to be recognized as the accused in a criminal prosecution, thereby bringing into play the complete array of constitutional protections. Now, in *Johnson*, if the Sixth Circuit was right that revocation should be viewed as punishment for actions that individuals committed while on supervised release—rather than as part of the administration of the initial sentence—then this would mean that defendants at revocation hearings would be entitled to the full panoply of rights associated with criminal trials. The Sixth Circuit's reasoning, if accepted, would block the Court from applying the reasoning it used in *Morrissey* to the context of supervised release. Aware of these implications, on appeal to the Supreme Court, the government disowned the Sixth Circuit's line of reasoning, arguing that the district court's ruling should be upheld on other grounds.[98]

In *Johnson*, the Supreme Court granted the government what it sought both with respect to Johnson's particular case and with respect to the larger issues raised by the case. It found alternative grounds for denying Johnson's Ex Post Facto Clause challenge (including that earlier congressional legislation, enacted prior even to Johnson's initial sentence, had already effectively authorized the imposition of new terms of supervised release).[99] Of much broader significance, the Justices also rejected the Sixth Circuit's understanding of supervised release. In his opinion for the Court, Justice David Souter focused on what the implications would be of accepting the Sixth Circuit's reasoning. Indeed, Justice Souter articulated a justification for treating the revocation of supervised release as punishment for the original offense that depended entirely on what it saw as the undesirable consequences of failing to do so.[100] In effect, the Court treated the diminished constitutional rights of individuals on supervised release as a fixed premise around which all other reasoning would have to be fitted. Thus, in a remarkably terse statement addressing the (diminished) procedural protections for individuals on supervised release at revocation hearings, Justice Souter wrote:

> While [the Sixth Circuit's] understanding of revocation of supervised release has some intuitive appeal, the Government disavows it, and wisely so in view of the serious constitutional questions that would be raised by construing revocation and re-imprisonment as punishment for the violation of the conditions of supervised release. Although such violations often lead to re-imprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.[101]

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98 *Johnson*, 529 U.S. at 700.

99 *Id.* at 704–07.

100 *Id.* at 700.

101 *Id.*

In other words, recognizing revocation of supervised release as the imposition of a new punishment would mean that the practice of affording dramatically diminished rights to individuals would violate numerous constitutional protections. The unstated premise driving Justice Souter's reasoning was that such a result was plainly unacceptable. Since adopting the Sixth Circuit's reasoning would lead to this (unacceptable) result, it had to be incorrect. Accordingly, the Court made explicit that individuals on supervised release could be re-imprisoned without being afforded the right to a jury trial and other rights normally provided at criminal trials.

C. United States v. Haymond

Following *Johnson*, almost two decades passed before the Court, in *United States v. Haymond*, revisited the question of whether individuals were entitled to a jury trial before having their supervised release revoked.[102] For two major reasons, the implications of *Haymond* for the rights of individuals on supervised release are less clear than they were in *Johnson*. First, *Haymond* did not yield a majority opinion, and second, *Haymond* set some (though, as we will see, quite limited) limitations on the government's ability to revoke supervised release without a jury trial.[103] Despite disagreements on the Court regarding certain issues in *Haymond*, however, all of the Justices accepted certain basic assumptions which have long undergirded the justification for according diminished rights to individuals convicted of crimes after they are freed from prison.

Upon being convicted on charges of possession of child pornography, Andre Haymond was sentenced to a 38-month prison term, to be followed by ten years of supervised release.[104] The crime for which Haymond was convicted provided for a range of prison time between zero and ten years and a term of supervised release between five years and life.[105] While Haymond was on supervised release, the government sought his re-imprisonment based on allegations that he had been found once again in the possession of child pornography.[106] After an evidentiary hearing, the district court judge found for the government.[107] On appeal, Haymond did not challenge the system of supervised release as a whole, but rather, a statutory provision that directly and significantly impacted his case: 18 U.S.C. § 3583(k).[108] In the absence of this provision, the district court judge would have exercised discretion in sentencing Haymond to a term of imprisonment between zero and two years. In 2006, however, as part of the Adam Walsh Child Protection and Safety Act, Congress enacted § 3583(k), requiring the judge in a case like Haymond's to impose a term of at least five

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102 United States v. Haymond, 139 S. Ct. 2369, 2375 (2019).

103 *Id.* at 2371, 2378–79.

104 *Id.* at 2373.

105 *Id.*

106 *Id.* at 2374.

107 *Id.*

108 *Id.* at 2375.

years (and up to a term of life).[109] The provision applied in cases where an individual who was required to register as a sex offender committed a crime punishable by more than one year in prison.[110] On appeal, Haymond claimed that § 3583(k) violated the Fifth and Sixth Amendments by subjecting him to a new sentence without a jury trial.[111] The Tenth Circuit Court of Appeals agreed, as did a majority of the Justices.[112]

By finding § 3583(k) unconstitutional as applied in Haymond's case, the Court set limitations on the extent to which individuals on supervised release could be re-imprisoned without a jury trial. Nevertheless, examination of the Court's reasoning reveals that, notwithstanding their disagreements, the Court as a whole kept intact the basic assumptions that have long justified the government in providing only second-tier rights to individuals who are under some kind of supervision following release from prison. Thus, it is vital to recognize the extent of the agreement among the Justices in *Haymond*. Most significantly, Justice Gorsuch's plurality opinion, like Justice Alito's dissenting opinion, accepted the basic approach that the Court had long used to uphold the extension of only second-tier rights to individuals on parole or supervised release. Indeed, the reasoning on which the plurality relied to invalidate § 3583(k) depended on that crucial distinction between the imposition and administration of a sentence.[113] As Justice Gorsuch wrote: "The defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime."[114]

In an opinion written by Justice Alito, the four dissenting Justices found it easy to conclude that Haymond's constitutional challenge lacked merit. [115] According to the dissent, nothing more was required to decide *Haymond* than a straightforward application of the same reasoning that earlier Justices had used to justify the affordance of only second-tier rights to parolees.[116] In Justice Alito's view, the Court's precedents in *Morrissey* and *Johnson* were enough to decide the case.[117] As discussed above, *Morrissey* employed the distinction between the imposition and administration of a sentence to explain why parolees were not entitled to jury trials before being re-imprisoned.[118] Justice Alito asserted that the same distinction applied to individuals

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109 *Id.* at 2374–75.

110 *Id.* at 2374 n.1.

111 *Id.* at 2375.

112 *Id.* at 2371, 2375, 2385 (Breyer, J., concurring).

113 *Id.* at 2380 (plurality opinion).

114 *Id.*

115 *Id.* at 2386–2400 (Alito, J., dissenting).

116 *Id.* at 2393–94.

117 *Id.* at 2394.

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

on supervised release.[119] Drawing on the Court's reasoning in *Morrissey*, Justice Alito maintained that revocation of supervised release had to be understood not as punishment for a new offense, but rather, as part of the ongoing administration of the punishment for the initial offense.[120] According to this line of reasoning, when individuals on supervised release received penalties following revocation hearings, they were not being punished for newly committed offenses. Instead, the "principal reason for assigning a penalty to a supervised-release violation is . . . that the violative act is a breach of trust."[121] Thus, even when the allegations leading to revocation of supervised release were criminal in nature, the defendant was "charged not with a crime, but with violating the terms of a jury-authorized sentence that flowed from his original conviction."[122] Justice Alito argued that this justification for re-imprisonment without a jury trial, transplanted from the context of parole, had no less force in the context of supervised release.[123] He also emphasized just how far this line of reasoning reached: even a defendant subjected to a relatively brief prison term at the initial sentence could be subjected to a long term of re-imprisonment without a jury trial.[124] As Justice Alito put the point: "No matter what penalties flow from the revocation of parole . . . the related proceedings are not part of the criminal prosecution."[125]

The central difference between the plurality and dissenting Justices concerned the former's view that a line of cases tracing to *Apprendi v. New Jersey*[126] applied to Haymond's case. *Apprendi* arose as a judicial response to an important development in sentencing policy that had been implemented in the 1980s. In particular, legislatures had adopted a bifurcated approach to sentencing.[127] Following the return of a guilty verdict, judges engaged in a second phase during which they considered factors bearing on an appropriate punishment before determining the sentence.[128] The practice was rendered potentially problematic when legislators began authorizing judges to increase sentences based on particular findings regarding the nature of the defendant's criminal behavior. These "sentencing enhancement" provisions raised constitutional questions because they increased the possible range of penalties based on findings that

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

120 *Id.* at 2393–94.

121 *Id.* at 2393.

122 *Id.*

123 *Id.* at 2394.

124 *Id.*

125 *Id.*

126 *Id.* at 2379; Apprendi v. New Jersey, 530 U.S. 466, 468 (2000).

127 McClendon, *supra* note 12, at 189.

128 *Id.*

did not have to be established in accordance with the same procedural protections associated with the phase of the trial aimed at determining guilt.[129]

The defendant in *Apprendi* was convicted on charges of unlawfully possessing a firearm.[130] In itself, that conviction subjected Charles Apprendi to a prison term of five to ten years.[131] However, under New Jersey's hate crime law, Apprendi would be subject to a term of ten to twenty years if he was found to have committed the underlying crime "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[132] Crucially, while the underlying offense had to be proven "beyond a reasonable doubt" to a jury, the facts giving rise to the sentencing enhancement only had to be demonstrated to a judge by a "preponderance of the evidence."[133] Finding that the sentencing enhancement applied, the judge in Apprendi's case sentenced him to a twelve-year prison term, which was more than the maximum to which he could have been subjected in the absence of the sentencing enhancement.[134] The Court invalidated the state's sentencing enhancement scheme, declaring: "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."[135] Courts had long held the prosecution to the burden of proving every element of a charged offense beyond a reasonable doubt.[136] What *Apprendi* declared was that this requirement also applied to features of a crime that had the effect of increasing the penalties to which a defendant was subjected.[137]

While *Apprendi* applied to features of a crime that increased the *maximum* sentence to which a defendant could be subjected, in *Alleyne v. United States*,[138] the Court applied the same reasoning 13 years later to features of a crime that increased the *minimum* sentence. Overruling its contrary conclusion in *Harris v. United States*,[139] *Alleyne* established that features of a crime that increased the floor of the punishment brought into play the same constitutional protections applicable to features of a crime raising the ceiling.[140] As Justice Thomas wrote in his opinion for the majority:

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129 *Id.* at 190.

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

131 *Id.* at 470.

132 *Id.* at 468–69.

133 *Id.*

134 *Id.* at 471.

135 *Id.* at 490.

136 *Id.* at 476–77.

137 *Id.* at 468–83.

138 Alleyne v. United States, 570 U.S. 99, 103 (2013).

139 Harris v. United States, 536 U.S. 545, 568–69 (2002).

140 *Alleyne*, 570 U.S. at 103.

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.[141]

The difference between facts increasing the maximum or the minimum did not make a constitutional difference because "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment."[142]

Because the statute at issue in *Haymond* imposed a mandatory minimum sentence, it was *Alleyne* in particular that the plurality stressed in defending its decision to invalidate § 3583(k).[143] To find *Alleyne* applicable, the plurality had to embrace the view of revocation as tying back to the initial sentence, rather than as imposing a new sentence. Justice Gorsuch's reasoning was that the minimum sentence mandated by § 3583(k) altered the range of penalties to which Haymond was subject.[144] Notwithstanding the passage of substantial time between the initial sentence and the revocation hearing, the analogy with a mandatory term imposed at the time of the initial sentence held firm.[145] In the plurality's view, the passage of time did not alter the essential nature of § 3583(k).[146] What it effected was clear: it altered the prescribed range of sentence to which Haymond was exposed, and it did so in a way that aggravated the punishment. In particular, instead of having the possibility of being sentenced to no prison time at all—which would have been the case in the absence of § 3583(k)—the statute subjected Haymond to a minimum sentence of five years. In light of this clear change in the prescribed range of penalties, the plurality reasoned, Haymond was entitled to have the facts supporting the finding of guilt proven to a jury beyond a reasonable doubt, as required by the Fifth and Sixth Amendments.[147]

In relying on *Alleyne* to invalidate § 3583(k), the plurality stressed that it was accepting the Court's longstanding view that the revocation of supervised release did not constitute punishment for a new offense.[148] Insisting that the opinion did nothing more than apply existing doctrines, Justice Gorsuch wrote that "an accused's final sentence includes any supervised release sentence he may receive."[149] Thus, the

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141 *Id.*

142 *Id.* at 108.

143 United States v. Haymond, 139 S. Ct. 2369, 2374, 2382 (2019).

144 *Id.* at 2378.

145 *Id.* at 2382.

146 *Id.* at 2379.

147 *Id.* at 2378.

148 *Id.* at 2379–80.

149 *Id.* at 2379.

plurality opinion was not "say[ing] anything new."[150] Crucially, the plurality and dissenting Justices were in agreement that revocation did not represent punishment for a new offense. The question on which they disagreed was whether revocation should be seen as an extension of the initial sentencing or merely a facet of the administration of a sentence that was already finally determined. Since the plurality saw revocation as an extension of the sentencing linked to the initial trial, it brought with it constitutional protections associated with that phase of the proceedings. By contrast, the dissent considered the determination of the initial sentence to be completed and closed at the time of the initial sentencing, which brought to an end the period when those constitutional protections applied.[151] Whether or not the dissenting Justices were right to fear the positions that the plurality Justices might adopt in future cases,[152] the plurality's reasoning did not overthrow the basic assumptions on which the Court's approach to revocation hearings have rested up to this point.

To be sure, in contrast to Justice Alito's dissenting opinion—which emphasized the similarities between parole and supervised release[153]—the plurality's reasoning noted a distinction between parole and supervised release. But the role that this distinction played in Justice Gorsuch's opinion was effectively to note that the particular issue before the Court in *Haymond* just could not have arisen in the context of parole. After all, in the parole system, the sentencing judge set the range of prison time that defendant might serve, leaving the possibility of early release up to the parole board. Consequently, parole revocation hearings simply did not entail the possibility that the range of possible penalties could be altered at the revocation hearing. By contrast, in the current system, the defendant completes the prison term imposed at the initial sentence before beginning the term of supervised release. This means that the revocation of supervised release can result in the defendant serving more prison time than was prescribed at the time of the initial sentence. What the plurality found unacceptable about § 3583(k) was that its mandatory minimum altered the range of prison time to which the defendant was subject, an outcome that would have been precluded under a parole system by its very structure.[154] The important point is that the distinction that the plurality drew between parole and supervised release did not upset the longstanding assumption that in both systems the government's attempt to re-imprison defendants did not amount to the imposition of a new sentence.

In his concurring opinion, Justice Breyer indicated that he largely agreed with the understanding of the revocation of supervised release adopted in Justice Alito's dissenting opinion.[155] In nevertheless deeming § 3583(k) unconstitutional, Justice Breyer identified two key problems with the provision's mandatory minimum sentence: it picked out specific crimes that triggered its application, and it interfered

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150 *Id.*

151 *Id.* at 2395 (Alito, J., dissenting).

152 *Id.*

153 *See id.* at 2391.

154 *Id.* at 2381–82 (plurality opinion).

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

with judicial discretion.[156] While Justice Breyer's brief opinion did not spell out the basis for its conclusion in the same detail as the plurality and dissenting opinions, we can best understand its reasoning by recalling the roots of the practice of re-imprisoning individuals without jury trials. As we have seen, that practice has depended on a rehabilitative conception of conditional liberty. The goal of overseeing individuals conditionally released from prison is to reform and reintegrate them into society. When individuals violate the conditions of release, they breach the trust that was placed in them. Re-imprisonment constitutes a response to that breach of trust, not a new punishment for the commission of a particular crime. It is this conception of supervised release that underlies the notion that re-imprisonment amounts to the administration of an existing sentence rather than the imposition of a new one. Justice Breyer's opinion seemed to express the view that § 3583(k) could not be made to plausibly fit with this model. A rehabilitative framework depends on the judge holding discretion to fit consequences to a particular defendant's situation, rather than imposing mandatory sentences. Moreover, § 3583(k)'s selection of particular crimes for mandatory minimum punishments suggested that its real focus was not so much on rehabilitation as it was on punishing crimes seen as presenting an especially pressing societal problem. It is notable in this respect that the provision challenged in *Haymond* was not enacted as part of a bill principally geared toward improving the system of supervised release. Rather, as stated in the legislation's preamble, the Adam Walsh Child Protection and Safety Act (of which § 3583(k) constituted only a relatively small portion) was designed to "protect children from sexual exploitation and violent crime" and "to prevent child abuse and child pornography . . . ."[157] Again, the most important point for our purposes is that Justice Breyer, like the rest of the Court, did not challenge the pivotal distinction between the imposition and administration of a sentence in justifying the practice of re-imprisonment without a jury trial. His objection was not to the general framework that the Court has long applied, but to the challenged statute's failure to fit neatly within that framework.

IV. THE UNJUSTIFIABILITY OF RE-IMPRISONMENT WITHOUT A JURY TRIAL

In this Part, we turn from description of the justification that the Court has offered for the practice of re-imprisonment without a jury trial to criticism of that justification. The linchpin of the justification has been to conceive of the revocation of supervised release as part of the punishment for the original offense, rather than as punishment for a new offense. If revocation does not constitute punishment for a new offense, then, under well-established constitutional doctrines, individuals on supervised release are not entitled to the full panoply of procedural protections associated with a criminal trial. But what if the claim that revocation does not constitute punishment for a new offense is exposed as an unwarranted legal fiction? If the claim is not valid, then we must recognize that a large population of individuals conducting full lives outside of prison are being systematically deprived of the most basic constitutional protections.

It is vital to recognize what is at stake in assessing the justification for re-imprisonment without a jury trial. The practice has been widely accepted for so long that it may be easy to overlook how remarkable it is. Ordinarily, we take it for granted

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156 *Id.* at 2386.

157 Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587 (2006).

that individuals are entitled to the full panoply of procedural rights guaranteed by the Constitution. One of the most cherished of these is the right to a jury trial for those accused of a crime. The Sixth Amendment's guarantee that the accused in "all criminal prosecutions shall enjoy the right to a speedy and public trial, by an impartial jury" embodies a commitment to liberty and self-government.[158] No exercise of governmental power more immediately restricts individual liberty than a prosecution resulting in imprisonment. One of the ways that the Constitution sets bounds on the exercise of that power is by placing the judgment of the people—in the form of a jury verdict—between the government and the individual charged with a crime.

Another one of the most familiar and cherished rights is that the government has the burden of proving every element of a charged offense "beyond a reasonable doubt."[159] Although this right is not stated explicitly in the Constitution, the Supreme Court has long recognized it as implicit in the Fifth Amendment's guarantee that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[160] In the 1968 decision declaring this as a firmly entrenched constitutional right—*In re Winship*—the Court explained the indispensability of this right in protecting individual liberty.[161] Justice William Brennan's opinion for the Court emphasized the stakes for a defendant in a criminal trial, the power differential between the defendant and the prosecution, and the role that the "beyond a reasonable doubt" standard has in protecting individuals from erroneous convictions.[162] As Justice Brennan noted, the defendant "has at stake interest[s] of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[163] Like all human institutions, criminal prosecutions are fallible. No one is immune from the possibility that one's liberty could be taken away due to an erroneous verdict. In Justice Brennan's words: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account."[164] However, while the defendant and the state both are affected by an erroneous verdict, the impact is not equivalent. Because a guilty verdict potentially takes individuals away from virtually every aspect of their normal lives, what the defendant has at stake is "an interest of transcending value."[165] Moreover, the resources of the two sides in the adversarial proceedings are hardly on

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158 U.S. CONST. amend. VI.

159 *See, e.g.*, *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.").

160 U.S. CONST. amend. V; *see also In re Winship*, 397 U.S. at 362–63.

161 *In re Winship*, 397 U.S. at 364.

162 *Id.* at 363–64.

163 *Id.* at 363.

164 *Id.* at 364.

165 *Id.*

a similar scale. The accused is "at a severe disadvantage."[166] For these reasons, it is crucial to protect the defendant by requiring the government to prove the elements of an offense beyond a reasonable doubt. In light of the power imbalance between the parties, it would "amount[] to a lack of fundamental fairness if [the defendant] could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."[167] The beyond a reasonable doubt evidentiary standard "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law."[168]

The Court's language in *Winship* stressed the fundamental nature of the reasonable doubt standard. For instance, Justice Brennan referred to the nation's longstanding commitment to this right as "reflect[ing] a profound judgment about the way in which law should be enforced and justice administered."[169] In a similar vein, he referred to the "vital role" that the reasonable doubt standard "plays . . . in the American scheme of criminal procedure,"[170] stating that "[i]t is a prime instrument for reducing the risk of convictions resting on factual error."[171] Indeed, the standard is "indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'"[172] Moreover, because of its importance to the balance of power between individuals and government, the reasonable doubt standard shapes the way that individuals conduct their lives, and their relationship with the instruments of official authority. As Justice Brennan wrote in *Winship*: "It is . . . important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."[173] Enforcing the guarantee reflects a judgment about the value that a society places on individuals' liberty, and their overriding interest in not being subjected to unjust treatment, as "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[174]

The recent case in which the Court addressed the practice of re-imprisonment without a jury trial—*United States v. Haymond*—provides an excellent example of the concrete impact that the applicable evidentiary burden has on individual cases. As discussed above, while Haymond was on supervised release, the government sought revocation and re-imprisonment based on allegations that he had knowingly been in

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166 *Id.* at 363.

167 *Id.*

168 *Id.*

169 *Id.* at 361–62.

170 *Id.* at 363.

171 *Id.*

172 *Id.* at 364.

173 *Id.*

174 *Id.* at 363–64.

possession of child pornography.[175] Employing the "preponderance of the evidence standard" that has long been applied in revocation hearings, the district court found against Haymond, and, thus, under § 3583(k), had no choice but to sentence him to at least five years in prison.[176] As described by the Tenth Circuit Court of Appeals in ruling on Haymond's appeal, the evidence validly admitted during the hearing showed that there were thirteen images of child pornography on Haymond's cell phone.[177] The dispute concerned whether Haymond had known about the images or had taken any intentional actions to acquire them. The only expert who testified at the hearing indicated that there were several plausible ways that the images could have ended up on Haymond's phone without his knowledge, and there was no definitive evidence regarding whether Haymond had ever viewed the images.[178] In the judgment of the Court of Appeals, the evidence against Haymond presented "a close case, even under a preponderance of the evidence standard," although it ultimately concluded that the evidence was sufficient under that standard.[179] The case strikingly illustrates the significance of the evidentiary burden, because the evidence would have been nowhere close to supporting a finding of guilt "beyond a reasonable doubt."

In light of the tremendous importance of the right to a jury trial, a reasonable doubt standard of evidence, and other basic constitutional protections, we should recognize the practice of re-imprisoning individuals without affording such protections as a remarkable departure that demands the strongest of justifications. We have seen that the justification, as explained by the Court, turns on the conception of revocation as punishment for the original offense. Unfortunately, that conception does not hold up to scrutiny.

Individuals on supervised release can be re-imprisoned based on a wide variety of allegations, ranging from failing to comply with reporting requirements to the commission of grave crimes. When the government seeks re-imprisonment, the outcome is decided through a process of adversarial litigation presided over by a judge. The revocation hearing is aimed at determining whether the defendant is guilty of the acts alleged by the government. Based on a finding of guilt, individuals previously freed from prison may be returned to prison, potentially for the rest of their lives. For defendants at revocation hearings, it is difficult to overstate how much rides on the outcome.

To highlight the potential stakes, consider the situation of an individual who is serving a period of supervised release following a short prison term for a relatively minor crime. While on supervised release, the individual has been living lawfully, but the supervising officer inaccurately comes to believe that the individual has engaged in serious criminal activity. Let us assume that the officer who makes the allegations has nothing but good intentions and has simply made observations that lend

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175 United States v. Haymond, 139 S. Ct. 2369, 2373 (2019).

176 United States v. Haymond, No. 08-CR-201, 2016 WL 4094886, at *7 (N.D. Okla. Aug. 2, 2016). The judge in fact imposed the minimum mandatory sentence of five years, to be followed by ten more years of supervised release. *Id.* at *1.

177 United States v. Haymond, 869 F.3d 1153, 1157 (10th Cir. 2017).

178 *Id.* at 1157–58.

179 *Id.* at 1159.

themselves to an erroneous interpretation of events. Of course, misimpressions, mistakes, and misjudgments happen all the time. In itself, there is nothing remarkable about a person in an official position arriving at a mistaken impression even with nothing but the intention to serve the demands of justice. Normally, however, an individual suspected of wrongdoing would be protected from error by the rigorous demands that the right to a jury trial and reasonable doubt standard place on the prosecution. Especially in a criminal justice system like that of the United States, which is centered around the model of adversarial proceedings between the government and the individual, protections for individuals depend on precisely how the rules of the game are configured. While no system designed and run by fallible human beings can be foolproof, the protections provided by the full panoply of constitutional rights are robust. Prosecutors have little incentive to bring charges in cases where the evidence suggests only a vague likelihood of the defendant's guilt. Even if they do choose to do so, the demands of proving every element of the charged offense beyond a reasonable doubt provide considerable protection from an unjust outcome. These protections are supposed to reassure individuals that they are very unlikely to end up in prison based on the bad luck of events producing a misimpression of their guilt. The system promises those not on supervised release that it will, in the most literal sense, give them the benefit of the doubt.

The situation is quite different for individuals on supervised release. To focus for the moment on just one of the basic rights not available to them, the difference between the "preponderance of the evidence" and "reasonable doubt" standards of evidence is enormous. An individual on supervised release faces a dramatically heightened risk of being unjustly prosecuted and re-imprisoned for acts that they did not commit. Just as the incentives built into the American adversarial system work in favor of individuals who enjoy the full panoply of constitutional rights, they work decisively against individuals on supervised release. As Justices have recognized both in the context of parole and supervised release, prosecutors have every incentive to take advantage of the opportunity to litigate cases without affording defendants the full panoply of rights.[180] As one commentator observes, given the professional guidelines bearing on the work of federal prosecutors, they "would be faithfully following directions were [they] to routinely choose revocations over trials."[181]

In light of the stakes for defendants, including the possibility of being imprisoned for long periods of time for acts they did not commit, the notion that revocation amounts to nothing more than "administration" of a sentence already imposed for the initial offense loses plausibility. It is worth emphasizing that individuals on supervised

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180 *See* Morrisey v. Brewer, 408 U.S. 471, 479 (1972) ("Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."); *Haymond*, 139 S. Ct. at 2381 ("Instead of seeking a revocation of supervised release, the government could have chosen to prosecute Mr. Haymond under a statute mandating a term of imprisonment of 10 to 20 years for repeat child-pornography offenders. But why bother with an old-fashioned jury trial for a new crime when a quick-and-easy 'supervised release revocation hearing' before a judge carries a penalty of five years to life?" (citation omitted)).

181 Danny Zemel, *Enforcing Statutory Maximums: How Federal Supervised Release Violates the Sixth Amendment Rights Defined in* Apprendi v. New Jersey, 52 U. RICH. L. REV. 965, 974 (2018).

release may be imprisoned not only for the commission of crimes, but also for violating conditions of their release that would not otherwise be wrongful, such as consuming alcohol, or traveling without authorization. Reflecting on circumstances that could more plausibly support the treatment of revocation as mere administration of a previously imposed sentence further highlights why the theory is flawed as presently applied. Let us consider a hypothetical program that will help us to recognize particularly problematic features of supervised release as presently constructed. In this imagined "afternoon release program," incarcerated individuals are allowed to spend brief intervals of time outside of prison. We can suppose that the program imposes certain conditions on individuals participating in it. For instance, continued involvement in the program depends on participants only going to places approved in advance, and on reporting back to prison by the scheduled time. Now, let us envisage a case in which the government alleges that a number of individuals violated the conditions of their participation in the program; according to a supervising official, these individuals visited unapproved locations and did not report back to prison in a timely manner. These individuals deny the allegations and contend that they are entitled to a jury trial with the full panoply of rights normally associated with such a trial. In the litigation, the government contends that it should not be required to prove the allegations beyond a reasonable doubt to a jury before removing individuals from the afternoon release program. In the government's view, it does not constitute a new criminal charge when individuals are removed from the program. It would be more appropriate, the government argues, to conceive of the afternoon release program as part of the administration of the individuals' initial sentence. Thus, the removal of individuals from the program, too, should be understood as part of the administration of the initial sentence.

With respect to the hypothetical afternoon release program just described, the government's position regarding the inapplicability of the right to a jury trial and all of the accompanying protections would be entirely reasonable. Of course, individuals in the release program would still enjoy the protection of the Due Process Clause. It may be that the requirements of due process would compel the government to provide some kind of hearing or other process before removing individuals from the program. But those kinds of questions would be governed by the balancing test endorsed by the Supreme Court in *Goldberg v. Kelly*[182] with the appropriate procedural requirements determined based on a weighing of the interests at stake for both the individuals involved and the government.

To continue with consideration of our hypothetical afternoon release program, suppose now that evidence surfaces indicating that an inmate participating in the program has committed a serious crime during one of the periods of release. If the government wanted to seek an additional prison term for the individual based on the newly committed crime, it clearly would not be appropriate for it to pursue this using the same procedural machinery that was in place for removing individuals from the afternoon release program. Instead, in such circumstances, it would be necessary for the government to bring criminal charges in a new case in which the defendant would unambiguously stand as the accused in a fresh criminal prosecution. As such, the

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182 Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970). As discussed above, in *Goldberg*, the Court held that the government was required to provide a pretermination hearing before cutting off the benefits of a welfare recipient. *Id*. at 263–64.

defendant would be entitled to the full panoply of constitutional protections that accompanies such a prosecution.

It is helpful to contrast the first hypothetical case discussed above—where the government seeks to diminish an individual's participation in the afternoon release program based on their failure to comply with the conditions—with cases in which the government seeks to re-imprison an individual on supervised release. In the hypothetical case, the government's allegations concern the defendant's participation in the afternoon release program, and it is the defendant's continued participation in the program which will be at stake in the proceedings. The individual has failed to comply with the requirements that comprise the administration of the program itself, and, as a result, access to that program may be limited or denied. This makes it more reasonable than in the context of supervised release to characterize the punishment involved ("revocation" of the individual's participation in the afternoon release program) merely as part of the "administration" of a sentence that was previously imposed. With respect to the revocation of supervised release, the potential punishment is not cabined in the same manner. A defendant at a supervised release revocation hearing potentially faces years of imprisonment—a punishment unrelated to the administration of supervised release—for actions unrelated to the administration of supervised release. To be sure, supervised release includes as a condition that individuals do not commit crimes. The difficulty, however, concerns the extraordinary breadth of this condition. It lacks a connection to the circumstances in which the particular individual is serving the period of supervised release. Indeed, we are all subject to the requirements of the criminal law. The difference, of course, is that most people are entitled to the full slate of constitutional protections if we are accused of crimes. It is one thing to withhold the usual constitutional protections in tweaking details of the manner in which one serves a sentence for actions directly related to those details (as in the case of disallowing individuals in the hypothetical to continue participating in the afternoon release program because they did not return at the appointed time). However, it is quite another to withhold the usual constitutional protections in trying individuals on supervised release for alleged crimes despite their having no connection to the manner in which the release is overseen.

Another significant difference between the hypothetical case and the revocation of supervised release concerns the implications on individuals' lives of depriving them of basic procedural protections. Knowing that one might be officially sanctioned without access to a reasonable doubt standard can have a chilling effect on one's behavior. People may alter their behavior to minimize the chances that they will be sanctioned for acts that they did not actually commit. In contrast with the stringent reasonable-doubt standard, the preponderance of the evidence standard requires the prosecution only to show that it is slightly more likely than not that the defendant committed the alleged acts. To cite just one illustrative example, suppose there is a protest organized by a social organization in the downtown area of a city. An individual who is sympathetic to the cause of the protesters and interested in political events is weighing whether to attend. To what extent should the fear of being wrongly accused of criminal acts relating to the protest be taken into account? The calculation may well be different for an individual on supervised release than for one not subject to the same deprivation of rights. The individual on supervised release knows that the prosecution would face a relatively low evidentiary standard in any resulting trial. This heightens the possibility of being convicted for a crime that the person did not commit. If there are allegations, say, of theft, or the intentional destruction of property, an individual on supervised release might choose to stay away from the protest for fear

of being spotted in the vicinity of alleged crimes, which could be enough to encourage prosecutors to pursue charges. However, an individual who enjoys the full slate of constitutional protections might have substantially less to worry about in this regard, since the prosecution would need much more convincing evidence to establish a winning case. The chilling effect of diminished rights protections is more concerning with respect to individuals on supervised release than it is with respect to individuals in the afternoon release program. To minimize any chance of false allegations, individuals in the afternoon release program might, say, return to the prison well before the prescribed time, or avoid going even to some of the locations on the approved list. While regrettable, the impact of this kind of behavioral self-censorship is relatively limited; it affects inmates only with respect to their behavior during brief periods of time during the course of their prison terms. By contrast, the impact of diminished rights on individuals on supervised release is pervasive, since it applies to their behavior at all times.

Focusing on stakes helps us to appreciate that the manner in which the term "punishment" has been used in justifying revocation without a jury trial rings hollow. The oft-repeated justification for the practice is that revocation is not meant as punishment for acts committed following the initial sentence; the only punishment that the individual is undergoing is that declared by the initial sentence. But it is worth pausing to reflect on what is supposed to be conveyed by the term "punishment" in this formulation. Is this supposed to be a reference to the purpose behind the harsh treatment—imprisonment—that the individual is being compelled to endure? Surely, individuals' access to the Constitution's protections cannot properly be thought to turn on the label attached to the policy reason behind why an individual is being imprisoned. Suppose the government announced at the initial prosecution that its aim in seeking to put the defendant behind bars was not punishment at all but was simply to offer the individual an opportunity for rehabilitation. This would not alter the individuals' access to constitutional protections. A new characterization of the same harsh treatment would not change the constitutional landscape. What entitles defendants to the full panoply of constitutional rights is the fact that the government is making a bid to deprive them of their liberty in such a far-reaching manner. At a revocation hearing, the government is seeking to do the same, and it is doing so on the basis of specified acts that the defendant has allegedly committed a substantial period of time after the initial sentence. That an individual on supervised release was afforded the full set of constitutional protections before being found guilty of earlier acts should not mean that they may be found guilty of entirely separate, later acts, without those protections. Referring to the defendant's potential re-imprisonment as "administration" or "punishment for an earlier offense" hardly changes the essential nature of the proceedings. The individual is being charged with having engaged in particular behaviors, and, if found to have committed them may be subjected to time in prison. Our system of criminal justice allows the government to put people in prison for periods of time based on their misdeeds. That much is not controversial. However, the Constitution provides a robust set of protections for individuals accused of crimes, recognizing the stakes for defendants and the tremendous power imbalance between defendants and the government within a system that pits parties against one another in an adversarial contest. Defendants at revocations hearings deserve no less.

In response to the line of argument just advanced for distinguishing the afternoon release program from supervised release, one might object that the supposed difference described is really no difference at all. That is, it might be argued, just like individuals in the afternoon release program, the liberty of individuals on supervised

release is subject to a number of conditions, including that they do not engage in unlawful activities. However, while it is true that an individual in the afternoon release program and an individual on supervised release both are subject to conditions, there is a tremendous difference with respect to the consequences for being found to have violated those conditions. What individuals in the afternoon release program have at stake is access to that program for the remainder of their prison term. To be sure, participation in the program may mean a good deal to individuals in the program. Nevertheless, even if they are found to have violated the conditions of the program, the worst consequences to which they are subject is that they will serve out the same prison term to which they were initially sentenced without access to program that makes completing the term somewhat less onerous. The difference between being in prison with or without access to the program pales in comparison to the difference between serving a prison term and being freed from prison. In contrast with individuals in the afternoon release program, individuals on supervised release are not subject only to the possibility of being denied access to a particular program during the course of their existing sentence. Instead, they face the possibility of being removed from their lives outside of prison and subjected to a newly prescribed prison term. These are individuals conducting lives outside of prison, embedded in all of the same kinds of aspects of a complete life as anyone else. What is at stake for them is not participation in a program that makes time in prison a little more bearable, but participation in a full life outside of prison. With stakes that high, to say that individuals on supervised release are not entitled to the usual constitutional protections because revocation constitutes mere "administration" of an existing sentence lacks plausibility.

The conventional justification for revocation and re-imprisonment without a jury trial emphasizes that individuals on supervised release enjoy only conditional liberty, rather than the unconditional liberty enjoyed by others. It is true, of course, that the criminal justice system is built on the idea that being convicted of a crime may result in individuals' loss of freedoms that they enjoyed prior to their conviction. Society itself depends on the notion that communities may impose consequences for violation of their established laws. It is also true that individuals on supervised release are subjected to certain conditions as part of the consequences for their criminal convictions. Just as serving time in prison is a pre-established possible consequence for breaking the law, so too is serving a term of supervised release. And supervised release, by its very nature, entails impositions on an individual's freedom that they would not incur had it not been for the criminal conviction that was the basis for their sentence. Nevertheless, noting that supervised release entails certain conditions that do not apply to the general population does not necessarily establish that any condition whatsoever may be imposed. There are limits on what kinds of conditions may be punitively imposed. A judge surely could not include as a condition of supervised release that an individual work twenty hours a day, or that they become practitioners of a religion they do not support. These might seem like silly examples because they are so extreme, but what they illustrate is that invocation of the idea of "conditional liberty" does not close off all possible questions regarding the acceptability of any particular conditions that might be imposed as part of supervised release.

While there is surely a sense in which everyone on supervised release could be said to enjoy only diminished rights as compared to others, not all states of diminished rights are equivalent. It is one thing, say, to require individuals to report to a supervising official at regular intervals, and it is quite another to deprive them of the constitutional rights that guard against unjust convictions. As we have seen, the

conventional justification for revocation without a jury trial works by emphasizing the distinction between administration of the initial sentence and the imposition of a new sentence. The pivotal move is to attribute new consequences imposed on defendants to old acts committed by the defendants. If an individual was initially sentenced to a year in prison at time zero, and then is re-imprisoned years later for a term of life, that re-imprisonment is supposed to be understood as a development arising in the course of administering the initial sentence. This way of framing supervised release has the effect of blurring the distinction between all of the different kinds of freedoms that individuals on supervised release find to be diminished or severely compromised. The idea is that individuals on supervised release enjoy only conditional liberty, and the unavailability of the right to a jury trial is just one more of the unfortunate but foreseeable consequences for violating the law. However, we should recognize the constitutional rights that protect us from unjust convictions as having a special importance which makes it inappropriate to withhold them from individuals on supervised release. The first reason is a theme we have already stressed: the stakes involved for a defendant charged with crimes. Other components of supervised release have limited scope and impact on the course of an individual's life. They intrude on one feature in the landscape of freedom while leaving others intact. For example, an individual on supervised release might not be permitted to visit specified places or may be required to notify authorities before changing one's employment status. While these and other conditions are not insubstantial, they leave large swaths of individuals' lives untouched. By contrast, the right to a jury trial—and the associated procedural protections—serve as a bulwark against being subjected unjustly to the most serious criminal sentences. If these rights are severely compromised, then an individual may be deprived of liberty in the most thoroughgoing manner through the imposition of an additional prison term.

A point that is not unrelated to the stakes, but is conceptually distinct, concerns the manner in which the current system reorders the relation between the most awesome powers of government and the protection of individuals from the inappropriate use of those powers. There is no aspect of government more fundamental to its role as the guardian of peace and order than its authority to impose negative consequences on individuals who violate the laws. This power may be indispensable to civilized society as we know it, but it is also breathtaking in its scope. It means not merely that the agencies of government have the capacity to deprive individuals of their liberty for the remainder of their lives, but that one would be committing another wrong by forcefully resisting. The law requires that those subject to it comply even with its directives to suffer the consequences for violating it. It is worth stressing such familiar and obvious ideas to highlight the fundamental importance of the procedural protections that limit the government's awesome power to imprison. These protections, which are extraordinarily important in their immediate, practical impact on individual lives, express the society's respect for individuals' liberty. By requiring the government to meet very substantial hurdles before exercising the power to imprison a person, we recognize the importance of that person's liberty. Something so precious must not be taken away lightly. We value it so highly that we make it difficult to destroy. Thus, in addition to its tangible force, access to the full panoply of constitutional rights assures individuals that the governmental institutions with power over them place the highest significance on their liberty.

Yet, despite the elemental significance that constitutional rights have in protecting us from inappropriate exercises of governmental power, the current system withholds such rights from individuals on supervised release. As a result, the practice of revoking

supervised release without a jury trial takes on far-reaching significance. To systematically deprive individuals of basic constitutional procedural protections for extended periods of time amounts to treating large populations of people as holding second-class status. Individuals on supervised release have completed their prison terms. They are free to resume their lives, to pursue employment, to form relationships, and to establish all of the other kinds of commitments and projects that all of us do. But there is one tremendous, unjustifiable difference between individuals on supervised release and those around them: they may be sent to prison for long periods of time based on nothing more than a showing to a judge that it is more likely than not that they have engaged in prohibited activity. That is a tremendous burden to bear, one that radically and unjustifiably alters the nature of one's relation to the institutions of power. Since a term of supervised release composes part of an initial sentence, it justifiably may impose certain restrictions on an individual's liberty that would not otherwise apply, such as refraining from the consumption of alcohol or traveling to particular locations. However, in enforcing those limitations, the government should either limit the consequences of violations to relatively minor matters, such as an adjustment in the details of the stated conditions or provide the normal panoply constitutional protections.

Individuals not on supervised release can expect and demand that they be granted the benefit of the doubt should circumstances produce a mistaken impression that they have engaged in wrongdoing. They enjoy sufficient procedural protections to provide them, at least in principle, with an excellent chance of avoiding an erroneous conviction.[183] But the preponderance of evidence standard is not nearly so forgiving. It is easy for it to appear "more likely than not" that a person has committed an act that they did not, in fact, commit. Yet, when that happens to individuals on supervised release, it can destroy lives. Consider a person on supervised release who is living in a lawful manner, and who has fully integrated into life outside of prison. The person has violated no conditions of release and has committed no crimes, but is, nevertheless, accused of having done so. The evidence is relatively weak. The government would have little to no hope of convincing a jury of guilt beyond a reasonable doubt. Precisely for this reason, no responsible prosecutor would seriously consider mounting a criminal prosecution in the case. In this instance, however, the government, knowing it need only show that the allegations are likely to be true, decides to pursue revocation. The literal benefit of the doubt available to the rest of us is not on offer. Despite being able to present only weak and mixed evidence, the judge finds that the government has met its burden under the "preponderance of the evidence" standard, and the individual is sentenced to a long prison term. The story of this person's life has been rewritten in a way that is sweeping and unjust. Instead of being a success story of rehabilitation—of turning one's life around—this now is a recidivist who just could not stay out of trouble. It is notable that nothing in this tale depends on malice. The government officials who make the choice to pursue revocation may genuinely

183 As I write this Article in the late Spring of 2020, the nation is roiling with anger and frustration regarding the death of George Floyd at the hands of police officers. That tragedy has focused attention on racial injustice in a particularly pointed manner. It is clearly not the case that everyone in America can enjoy the same kind of confidence that they will be treated justly by the institutions of official power. In referring to the benefit of the doubt that individuals not on supervised release receive, I am simply speaking of the applicability of basic procedural protections, in principle, as required by the Constitution.

believe in the individual's guilt and that they are acting to protect the public from an individual who has proven dangerous more than once. Indeed, instead of receiving a benefit of the doubt, people in this situation may suffer from the assumption of officials that they are even more likely to have committed the alleged acts in light of their criminal histories. Sadly, the people most in need of the benefit of the doubt are the ones systematically deprived of it.

The Supreme Court's justification for upholding the current system of supervised release depends on a legal fiction: that when the government seeks to re-imprison defendants based on the commission of crimes, those defendants do not stand as the accused in a criminal prosecution. By recognizing this justification as resting on a fiction, we can also recognize that the current system effectively establishes a second-class tier of rights protection, one that is assigned only to a subset of the population that is, in effect, assigned to a second-class status of personhood.

V. CONCLUSION

Since the Supreme Court has so recently handed down a decision limiting the government's power to re-imprison individuals on supervised release without a jury trial—in *United States v. Haymond*[184]—it might seem odd to claim that the issue has not received the attention it deserves, and that the Court itself has failed to recognize the injustice of the practice. However, attention to the three opinions in *Haymond* reveals that all of the Justices continued to endorse a conception of supervised release that justifies providing only diminished rights to individuals on supervised release. It was not only the four dissenting Justices who advocated such a conception. Justice Breyer's concurring opinion expressed agreement with the general approach expressed by Justice Alito's dissent.[185] His disagreement with the dissent was quite limited, as it applied only to certain aspects of the manner in which a particular provision was framed: 18 U.S.C. § 3583(k).[186] He fully agreed with the dissent, for instance, that "the role of the judge in a supervised-release proceeding is consistent with traditional parole," and that the *Apprendi* line of cases should not be applied in the context of supervised release.[187] Thus, Justice Breyer's views, even if adopted by the Court as a whole, would have little or no effect on most individuals on supervised release.

It might seem at first that Justice Gorsuch's plurality opinion went much further in reconceiving the nature of supervised release. But that impression is misleading. Not only did the plurality's reasoning not disrupt the longstanding justification for depriving individuals on supervised release of basic rights, it absolutely depended on that justification.[188] The key to the justification for the diminished rights of supervised release is the view that revocation does not constitute punishment for new offenses, but rather, punishment for the offenses that were the basis of the initial conviction. Far

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184 United States v. Haymond, 139 S. Ct. 2369, 2373 (2019).

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

186 *Id.* at 2386.

187 *Id*. at 2385.

188 *Id.* at 2376–77 (plurality opinion).

from overthrowing that view, the plurality relied on it in applying the *Apprendi*[189] line of cases to the context of revoking supervised release.[190] In *Alleyne*, one of the most significant cases building on *Apprendi*, the Court held that a "fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt," and it applied this principle to facts serving as the basis for mandatory minimum sentences.[191] *Alleyne* is pivotal to the plurality's reasoning in *Haymond*, and it takes as a premise that the enhancement applies to the penalty determined by the judge at the initial sentencing.[192]

While some legal fictions may be benign, the one that the Court has used to uphold re-imprisonment of individuals on supervised release without a jury trial is pernicious. Imagining the position of defendants at revocation hearings is illuminating. Consider the case of an individual serving a term of supervised release who is alleged to have committed a serious crime, carrying a potential sentence of decades in prison, or even a life term. As the individual walks into the courtroom, there is a possibility that the individual will be discharged with no repercussions, and there is a possibility that the individual will be returned to prison for a lengthy term. The actual outcome will hinge on whether the judge in that courtroom finds that the government has met its burden of showing that its allegations are true by a "preponderance of the evidence." Virtually the entire course of this individual's life hangs in the balance, and it turns on whether the government's allegations about the individual's behavior are found to be true. The individual protests: but how can you determine my fate based on such a thin margin of evidence, and without providing me with the normal constitutional protections that others take for granted? The answer that the Court's jurisprudence suggests is that the defendant's protest is meritless. After all, the reasoning goes, the term that might be handed down would not constitute a punishment for the offenses that the government demonstrated by a preponderance of the evidence at the hearing. It would just be part of the administration of the initial sentence. The question is whether we can say that with a straight face.

189 Apprendi v. New Jersey, 530 U.S. 466, 468 (2000).

190 *Haymond*, 139 S. Ct. at 2376–78.

191 Alleyne v. United States, 570 U.S. 99, 103 (2013).

192 *Haymond*, 139 S. Ct. at 2378.