Constitutional Limits on the Imposition and Revocation of Probation, Parole, and Supervised Release After *Haymond*

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In its Apprendi *line of cases, the Supreme Court has held that any fact found at sentencing (other than prior conviction) that aggravates the punishment range otherwise authorized by the conviction is an "element" that must be proved beyond a reasonable doubt to a jury. Whether* Apprendi *controls factfinding for the imposition and revocation of probation, parole, and supervised release is critically important. Seven of ten adults under correctional control in the United States are serving terms of state probation and post-confinement supervision, and roughly half of all prison admissions result from revocations of such terms. But scholars have yet to confront the effect of the Court's* Apprendi *rulings on the regulation of conditional release in the states. This Article takes on that project.*

The Article makes three contributions. First, it explains why and how the Apprendi *doctrine applies to judicial findings at initial sentencing that either lengthen the term of conditional release an offender must serve or mandate incarceration instead of conditional release. State courts continue to divide on these questions.*

Second, regarding factfinding at the revocation stage, the Article tackles the many questions left open by the Court's only effort to consider Apprendi *in the revocation context—*United States v. Haymond. *The Article defends two due process analyses, derived from past precedent and Justice Breyer's controlling concurrence in* Haymond*, that are better suited than the* Apprendi *doctrine to protect against legislative overreach in the revocation context. Scholarship discussing* Haymond *has barely mentioned Justice Breyer's analysis. This Article gives his controlling concurrence the attention it deserves. Combined, these due process analyses provide a sound middle ground between the rigid*

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application of Apprendi*'s rules to conditional release and the limitless use of revocation to punish new criminal conduct.*

Third, the Article applies these analyses to state statutes governing the imposition and revocation of probation and post-confinement supervision. This long-overdue state-centered focus provides needed guidance for policymakers designing conditional release policies that reserve more punitive sentences for more egregious cases.

INTRODUCTION

About seven of ten adults under correctional control in the United States today are not incarcerated.[1] They are serving terms of probation, parole, and supervised release imposed by state courts.[2] Nationwide, roughly half of all prison admissions result from revocations of these conditional release sentences, and roughly half of those recommitments are from "technical" violations.[3] Many states seeking to reduce incarceration's costs have adopted reforms that limit punishment options at initial sentencing as well as statutes regulating revocation and postrevocation sanctions.[4]

In 2019, an inconspicuous case involving the revocation of federal supervised release raised important questions about statutes like these that structure sentencing discretion when imposing and revoking terms of conditional release. In *United States v. Haymond*,[5] the Court addressed for the first time whether the principle that the Sixth Amendment right to a jury governs factfinding at sentencing that

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1. Todd D. Minton, Lauren G. Beatty & Zhen Zeng, *Correctional Populations in the United States, 2019 – Statistical Tables*, U.S. DEP'T OF JUST. 2 (July 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus19st.pdf [https://perma.cc/TU7C-N8MY].

2. *Id.*; *see also* Danielle Kaeble, *Probation and Parole in the United States, 2020*, U.S. DEP'T OF JUST.: BUREAU OF JUST. STAT. 1 (Dec. 2021), https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf [https://perma.cc/4VGU-DMZX] ("Among all adult U.S. residents, 1 in 66 were supervised in the community at yearend 2020.").

3. *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, COUNCIL OF STATE GOV'TS JUST. CTR. 1–2, 1 n.1 (June 2019), https://csgjusticecenter.org/publications/confined-costly/ [https://perma.cc/ZG2F-TWPU] (according to data from forty-nine states for 2017, forty-five percent of state prison admissions are due to violations of probation or parole for new offenses or technical violations and "[m]ost states do not consider a supervision violation to be the result of a new offense unless a new felony conviction is present, meaning technical violations may include misdemeanor convictions or new arrests").

4. *See, e.g.*, Nino Marchese, Lourdes Bautista, Matthew Grady & Michael Bosset, *Embracing Parole Reform Across the States*, AM. LEGIS. EXCH. COUNCIL (Oct. 5, 2021), https://alec.org/article/embracing-parole-reform-across-the-states/ [https://perma.cc/6967-YSQ3] (commenting that many new parole reforms could reduce recidivism rates and limit costs to taxpayers); *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*, PEW CHARITABLE TRS. 10 (July 16, 2019), https://www.pewtrusts.org/-/media/assets/2019/07/pspp_states_target_technical_violations_v1.pdf [https://perma.cc/K48Z-CUW9] ("Sixteen states have enacted legislation capping the length of time a person could be incarcerated for a technical revocation. . . . Some states also restrict the conditions under which a person could be incarcerated for technical violations . . . ."); Evangeline Lopoo, Vincent Schiraldi & Timothy Ittner, *How Little Supervision Can We Have?*, 6 ANN. REV. CRIMINOLOGY (forthcoming Jan. 2023), https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030521-102739. The National Conference of State Legislatures has launched a useful searchable database of significant state law enactments for the years 2019 forward related to community supervision, including laws impacting eligibility, length of supervision, violations, and revocations. *Community Supervision Significant Enactment Database*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 1, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/community-supervision-significant-enactment-database.aspx [https://perma.cc/M4QT-VAAU].

5. 139 S. Ct. 2369 (2019).

increases the punishment range, established in *Apprendi v. New Jersey*,[6] applies to revocation of conditional release as well as initial sentencing. The fractured 4-1-4 decision ultimately turned on a narrow concurrence by Justice Breyer, joined by no other Justice.[7] This Article is the first to examine the constitutional limits that *Haymond* suggests for state efforts to structure the imposition and revocation of terms of conditional release.

Part I provides a brief introduction to conditional release sentences and the *Apprendi* doctrine. Part II explains how *Apprendi*'s principles constrain state regulation of conditional release at initial sentencing, a topic that continues to divide state courts, and provides examples of state statutes at risk. Part III rejects the extension of *Apprendi* to factfinding at the revocation stage and argues that two long-standing due process tests are more appropriate for distinguishing between post-revocation punishments that may be imposed for the original crime of conviction and those that exceed constitutional limits. One of these due process analyses is grounded in past precedent requiring adequate notice to the accused of the maximum punishment—the "direct consequences"—that could follow conviction. The other, which Justice Breyer's narrow controlling concurrence in *Haymond* closely tracks, is the *Kennedy-Ward* test long used by the Court to identify when a provision purported to accomplish regulatory or administrative goals must be treated as new criminal punishment.

This Article's exposition and defense of *Haymond*'s narrow holding is new. So far, scholars discussing *Haymond* have focused on other issues—the effect that the plurality's position in *Haymond* would have on other federal statutes,[8] the theory underlying federal supervised release,[9] or why revocations require more procedural protections generally.[10] In these scholarly discussions, Justice Breyer's

6. 530 U.S. 466 (2000).

7. *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring).

8. James Horner, Haymond*'s Riddles: Supervised Release, the Jury Trial Right, and the Government's Path Forward*, 57 AM. CRIM. L. REV. 275, 290–91 (2020) (arguing application of *Apprendi* to federal supervised release would likely result in discretionary revocation with reasonableness review).

9. Fiona Doherty, *"Breach of Trust" and* U.S. v. Haymond, 34 FED. SENT'G REP. 274 (2022) (tracing and criticizing the embrace of the "breach of trust" theory for revocation of federal supervised release); Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 888 (2021) (arguing the "breach of trust" theory of revocation relies improperly on retribution).

10. *See* Stephen A. Simon, *Re-Imprisonment Without a Jury Trial: Supervised Release and the Problem of Second-Class Status*, 69 CLEV. ST. L. REV. 569, 572 (2021) ("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."); *see also* Kate Stith, Apprendi*'s Two Constitutional Rights*, 99 N.C. L. REV. 1299 (2021) (arguing that *Haymond* was a missed opportunity to apply to revocations the due process requirement of proof beyond a reasonable doubt).

controlling opinion is hardly mentioned, and its effect on *state* law ignored. I give Justice Breyer's concurrence the attention it deserves and explain why he and the four dissenting Justices in *Haymond* were right to resist the extension of *Apprendi* to the revocation context. Additionally, Part III provides the first examination of the questions that *Haymond* raises for the diverse regulation of conditional release in the states.

I. CONDITIONAL RELEASE AND THE *APPRENDI* DOCTRINE

A. Traditional Probation and Parole and Newer Alternatives

The short summary of the development of probation and parole in this Section provides essential context for the analysis that follows. It traces the differences between traditional probation and parole, which originated more than a century ago, and more recent variations.

Probation—the practice of releasing a convicted defendant into the community on conditions that if violated allowed incarceration—was unknown in the earliest decades of the United States.[11] States

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Prior commentary addressing the application of the *Apprendi* line of cases to revocation pursued similar themes. *See, e.g.*, Danny Zemel, Comment, *Enforcing Statutory Maximums: How Federal Supervised Release Violates the Sixth Amendment Rights Defined in* Apprendi v. New Jersey, 52 U. RICH. L. REV. 965, 987 (2018) ("If a defendant receives the statutory maximum sentence, then reimprisonment based on a supervised release violation should never be possible."); W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 929–32 (2009) (arguing that "[g]rounding *Apprendi* in a theory of retribution serves as a kind of compromise," standing "between the present system, where the parole board can encroach on the jury right at will, and an alternative where the parole board has no power").

Two pieces, both published prior to *Alleyne* and long before *Haymond* and the adoption of many of the state statutes discussed in this Article, argued that the Court's decision in *Blakely* should be applied to revocation in state courts as well. *See* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1368, 1376 (2007) (arguing that revocation of probation and parole increases the maximum sentence based on findings of fact in violation of *Blakely*); Elizabeth C. McBride, Note, *Policing Parole: The Constitutional Limits of Back-End Sentencing*, 20 STAN. L. & POL'Y REV. 597, 614–15 (2009) (arguing revocation of parole in California violates *Blakely* and proposing that "either the facts of the violation should be submitted to a jury and proved beyond a reasonable doubt, or the judge and jury should be given the opportunity at the original sentencing to consider facts that would support back-end sentencing enhancements," including the conditions of supervision).

11. It does share limited features of two common law practices: indefinitely suspending sentencing and judgment as an act of clemency, also termed "judicial reprieve," and, in misdemeanor cases, a recognizance for "keeping the peace," with forfeiture of the security pledged as the consequence of misbehavior. *See* N. S. TIMASHEFF, ONE HUNDRED YEARS OF PROBATION: 1841 – 1941, at 3–4 (1941) (recognizing a custom of indefinitely suspending sentencing); *see also Haymond*, 139 S. Ct. at 2396 (Alito, J., dissenting) (discussing surety procedure); DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 18 (2d ed. 1969) (describing judicial reprieve in England); Frank W. Grinnell, *The Common Law History of Probation—An Illustration of the Equitable Growth of Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 15, 19–20 (1941–1942) (describing the process of holding security for good behavior in misdemeanor cases during the late

began codifying authority for courts to order terms of probation in the 1870s, first for juveniles and then for adults,[12] as the rise of children's and prisoners' aid societies provided resources for supervision and Boston's early effort proved successful.[13] The goal of probation was to allow judges to keep lawbreakers with the promise of improvement out of prisons, considered by many in later decades of the nineteenth century and early 1900s to be "schools of crime."[14]

Traditionally, the decision to grant or deny probation after conviction was entirely discretionary, an act of grace by the sentencing judge. Indeed, the U.S. Supreme Court announced in 1916 that the federal judges who had been suspending indefinitely the imposition of sentences for the preceding sixty years had unlawfully exercised the pardon power of the executive without statutory authority to do so.[15] When legislatures limited eligibility for probation, they did so by offense or based on the prior criminal history of the defendant.[16] It was not common for statutes to bar probation if the judge at sentencing determined an aggravating fact not established by the conviction (other than a prior conviction).[17] As of 1967, only four states excluded from probation eligibility those "defendants armed when committing" their offense.[18] Ineligibility from probation based on nonconviction factfinding by the judge at sentencing is more common today and is the subject of Part II.C.

Two points about the revocation of traditional probation are important for the analysis that follows. First, the decision to revoke probation was entirely discretionary.[19] Second, under most early

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1700s). Neither procedure, however, allowed a judge to impose punishment for the conviction once the defendant was released.

12. TIMASHEFF, *supra* note 11, at 44–47, 59–60, 86–88 (noting twenty-four of the twenty-eight states that introduced probation in juvenile courts later enacted either adult probation or a general probation law, most by 1909); Grinnell, *supra* note 11, at 28–30 (noting that by 1967, all fifty states, the District of Columbia, and Puerto Rico authorized probation by statute); HARRY E. ALLEN, CHRIS W. ESKRIDGE, EDWARD J. LATESSA & GENNARO F. VITO, PROBATION AND PAROLE IN AMERICA 54 (1985) (providing a table with dates for adult probation laws in thirty-five states).

13. TIMASHEFF, *supra* note 11, at 45.

14. Grinnell, *supra* note 11, at 32.

15. *Probation and Pretrial Services History,* U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history (last visited Sept. 6, 2022) [https://perma.cc/9WEH-DUKR] (discussing *Ex parte* United States, 242 U.S. 27 (1916), and the development of the Probation Act of 1925).

16. TIMASHEFF, *supra* note 11, at 50–60.

17. In 1928, New York made those "who used deadly weapons in committing a crime" ineligible for probation. *Id.* at 55, 60.

18. DRESSLER, *supra* note 11, at 45 ("In four states defendants who were armed when committing the instant offense are excluded from consideration for probation.").

19. U.S. DEP'T OF JUST., 2 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PROBATION 332 (Wayne L. Morse, Ivar Peterson, Elizabeth Peterson & William Hurwitz eds., 1939) [hereinafter AG'S SURVEY: PROBATION] ("No probation statute specifies the amount of proof

statutes, a probationer who violated conditions faced the same potential punishment he risked upon conviction, as probation was an exercise of the common-law power of a court to adjourn the case and "postpone[ ] the judgment of the court temporarily or indefinitely."[20] So if the court determined the probationer had failed the experiment in leniency, the court could proceed with the case and impose any term of incarceration within the maximum incarceration term authorized for the offence by conviction.[21] A minority of the earliest state statutes either authorized courts to stay only "execution" of the sentence, with revocation reactivating the sentence previously pronounced by the judge,[22] or else allowed judges to choose whether to suspend imposition or suspend execution.[23] Some laws, such as the 1925 federal probation statute, abandoned the distinction between suspended imposition and suspended execution entirely; so that even when a term of incarceration was imposed at sentencing and execution suspended, a judge could, upon revocation, sentence the defendant to any punishment within the authorized range and was not limited to the initial sentence imposed.[24] Today, in many jurisdictions, judges continue to have the choice of suspending imposition or execution,[25] or need not adhere to the distinction when selecting post-revocation consequences.[26] Thus, from

necessary to support an order of revocation, but leaves the matter to the sound discretion of the court.").

20. TIMASHEFF, *supra* note 11, at 20 (citing People *ex rel.* Forsyth v. Ct. of Sessions, 141 N.Y. 288, 294 (1894)); *see also id.* at 61 (noting that the system of suspended imposition "clearly prevailed" through 1903).

21. *See* Grinnell, *supra* note 11, at 27 (describing the codification of the practice of laying the indictment on file as "a mere suspending of active proceedings in the case . . . and leav[ing] it within the power of the Court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein"); *see also* United States v. Haymond, 139 S. Ct. 2369, 2377 (plurality opinion) (noting that under early statutes, the prison sentence that a judge could impose for a probation violation normally could not exceed the remaining balance of the term of imprisonment already authorized by the jury's verdict).

22. TIMASHEFF, *supra* note 11, at 21–23, 49 (describing statutes in Missouri and Minnesota and noting the difference between the two options "in regard to the final disposition of the case in which the probationer failed to observe the conditions").

23. *Id.* at 54 (highlighting a 1918 statute which permitted either execution of sentence or imposition of sentence).

24. *See* AG'S SURVEY: PROBATION, *supra* note 19, at 333–34, 465 ("Practically all probation statutes specifically provide that upon revocation of probation the court may proceed to order commitment as if no probation had been granted. The usual provision is that the court may then impose any sentence which might originally have been imposed."); TIMASHEFF, *supra* note 11, at 61 (explaining that as of 1941, twelve states followed suspended imposition, eleven suspended execution, and eight provided the option).

25. *See, e.g.*, People v. Daniels, 130 Cal. Rptr. 2d 887, 891 (Ct. App. 2003) ("In granting probation, the court suspends imposition or execution of sentence and issues a revocable and conditional release as an act of clemency.").

26. *See* RICHARD S. FRASE, JULIAN V. ROBERTS, RHYS HESTER & KELLY LYN MITCHELL, ROBINA INST. OF CRIM. L. & CRIM. JUST., CRIMINAL HISTORY ENHANCEMENTS SOURCEBOOK (2015), https://www.issuelab.org/resources/28253/28253.pdf [https://perma.cc/4FPP-7SAQ] (reporting

probation's earliest appearance, the revocation decision was discretionary and exposed a probationer to any punishment within the maximum authorized for the offense. These points are referenced later in the discussion of the constitutional limits on the consequences of probation revocation in Section III.C.3.

Unlike probation, which is conditional release *instead of* incarceration, parole is conditional release *from* incarceration.[27] Parole statutes also began with programs for community supervision of juveniles in the 1870s.[28] By 1927 all but three states had adopted parole for adults.[29] In parole's early decades, if states limited its availability, they did so with statutes that denied or delayed eligibility for parole release for specified offenses or repeat offenders.[30] Minimum terms before eligibility for release generally were set by statute as a specified term or a fraction of the maximum sentence.[31] Although a minority of states allowed judges the discretion to decide if and when the prisoner would be eligible for parole,[32] only recently have statutes provided that judicial findings of fact at sentencing other than prior conviction would preclude or delay release on parole that was otherwise available.[33] Part II.A. discusses the application of *Apprendi* to such statutes.

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that the majority of states surveyed do not mandate imposition of the originally suspended sentence upon revocation but allow for resentencing, finding that sometimes the range of available sanctions depends on what kind of suspended sentence was used by the sentencing judge—e.g., suspended execution versus suspended imposition).

27. *See, e.g.*, U.S. DEP'T OF JUST., 4 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PAROLE 4 (Wayne L. Morse, Ivar Peterson, Elizabeth Peterson & William Hurwitz eds., 1939) [hereinafter AG'S SURVEY: PAROLE] (defining parole as "the release of an offender from a penal or correctional institution, after he has served a portion of his sentence, under the continued custody of the State and under conditions that permit his reincarceration in the event of misbehavior").

28. *See* DRESSLER, *supra* note 11, at 75–76. *See generally* Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9, 64 (1925) (tracing the origins of discretionary release on conditions from confinement in the United States).

29. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 489 (1999) (explaining that Florida, Mississippi, and Virginia adopted parole by 1942).

30. *See, e.g.*, Lindsey, *supra* note 28, at 64–68 (collecting state statutes through 1922); AG'S SURVEY: PAROLE, *supra* note 27, at 94–95, 107–10 (noting statutes excluding eligibility for parole by offense in twelve jurisdictions and collecting exclusions from parole based on criminal history).

31. AG'S SURVEY: PAROLE, *supra* note 27, at 99–105; DRESSLER, *supra* note 11, at 85; *see also* Lindsey, *supra* note 28, at 64, 69 (noting that American statutes differed from purely indeterminate sentencing in that they "always provided for a maximum period beyond which the prisoner could not be held, which was expressed in the statutes").

32. *See* AG'S SURVEY: PAROLE, *supra* note 27, at 97–98 (noting at least eight states as of 1939 where judges had discretion over how much of the maximum term imposed must be served before release).

33. *See infra* text accompanying notes 67–76.

Traditionally, the decision of the parole authority to revoke release was completely discretionary.[34] The maximum term of incarceration a parole violator could be ordered to serve upon revocation was the term already imposed at sentencing, from which he was released early (minus credit for time already spent in confinement). In most states, further eligibility for release after revocation was left to the discretion of the paroling authority, but many states required any returned violator to serve the full remainder of the maximum sentence imposed or to serve a prescribed term of confinement before being considered for release again.[35]

Two waves of sentencing reform swept in changes to conditional release law that have raised serious questions for the application of the *Apprendi* doctrine. Beginning in the 1970s, reformers took aim at what they considered unpredictable, inconsistent, and arbitrary decisions of parole boards and judges.[36] In an effort to increase transparency and consistency, many jurisdictions eliminated the discretion of paroling authorities to release prisoners and adopted defined terms of post-confinement community supervision that the judge was allowed or required to impose at initial sentencing along with the sentence of immediate confinement.[37] A comprehensive study released in 2022 estimated that sixteen states, the District of Columbia, and the federal

34. *See* DRESSLER, *supra* note 11, at 92 ("The paroling authority has broad discretion in deciding whether cause exists to revoke parole.").

35. *See* AG'S SURVEY: PAROLE, *supra* note 27, at 248–53, 282 (stating that the agency of a state that has the power to give parole has the power to revoke it and collecting laws describing the impact of a parole violation on the violator's sentence from forty-seven states).

36. *See* Petersilia, *supra* note 29, at 494–95.

37. *See* KEVIN R. REITZ, EDWARD E. RHINE, ALLEGRA LUKAC & MELANIE GRIFFITH, ROBINA INST. OF CRIM. L. & CRIM. JUST., AMERICAN PRISON-RELEASE SYSTEMS: INDETERMINACY IN SENTENCING AND THE CONTROL OF PRISON POPULATION SIZE 97 (2022), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-05/american_prison-release_systems.pdf [https://perma.cc/UW6D-TXSS] ("From the mid-1970s through the end of the 20th century, there was a slow but continuous trend among states to abolish most or all parole-release discretion in their prison-sentencing systems."); *see also* Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1191 n.98 (2021) (collecting state statues initially eliminating discretionary parole).

Some states mandate a post-confinement period of supervision for all offenses. *E.g.*, MINN. STAT. ANN. § 244.05(1) (West 2022) ("[E]very inmate shall serve a supervised release term upon completion of the inmate's term of imprisonment . . . ."); N.M. STAT. ANN. § 31-21-10(D) (West 2022) (mandating two-year parole terms after incarceration for first-, second-, or third-degree felonies, and one-year parole terms after imprisonment for fourth-degree felonies). Others mandate such terms for only designated offenses. *E.g.*, WASH. REV. CODE ANN. §§ 9.94A.701(1), 702(1) (West 2022) (mandating terms of up to three years for certain serious offenses and discretionary terms of up to one year for others).

government now use some version of such supervised release[38] rather than discretionary parole for the majority of prisoners.[39]

In some of these jurisdictions the judge imposes a maximum sentence that includes within it both a term of incarceration and supervised release term for the balance.[40] Others, like the federal government, decouple the term of incarceration from the term of supervision so that a sentencing judge imposes a term of incarceration and also announces a defined term of supervision to be served following completion of that incarceration term.[41] The ability to regulate

38. Terminology for post-confinement terms of supervision varies. *See, e.g.*, 730 ILL. COMP. STAT. ANN. 5/5-4.5-45(l) (West 2022) (using the term "mandatory supervised release"); OR. ADMIN. R. 213-005-0002 (2022) (using the term "post-prison community supervision"); KAN. STAT. ANN. § 22-3717 (West 2022) (using the term "post-release supervision"); WIS. STAT. ANN. § 973.01 (West 2021) (using the term "extended supervision"); N.M. STAT. ANN. § 31-18-15 (West 2022) (using the term "parole"). This Article uses the term "supervised release," the label used in the federal sentencing system, to refer to terms of conditional release served following completion of a sentence of confinement.

39. *See* REITZ, ET AL., *supra* note 37, at 97 (listing Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin as states using " 'non-paroling' prison-sentencing systems"). A large number of prisoners are also subject to non-parolable sentences in New York and Mississippi, and other states use such sentences less frequently, along with parolable sentences. *Id.* On the evolution of supervised release in the federal system, see Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013); Schuman, *supra* note 9; and Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180 (2013).

40. *See, e.g.*, MINN. STAT. ANN. § 244.101(1) (West 2022) (stating that fixed sentences for felony offenders are composed of "two parts: (1) a specified minimum term of imprisonment that is equal to two-thirds of the executed sentence; and (2) a specified maximum supervised release term that is equal to one-third of the executed sentence"); N.H. REV. STAT. ANN. § 504-A:15(II–IV) (2022) (requiring a minimum of nine months' supervision for all prisoners); N.C. GEN. STAT. ANN. §§ 15A-1368.2(a), (c), 15A-1340.23(c) (West 2022) (explaining that felony sentences include separate terms of mandatory post-release supervision with fixed durations based on the offense, ranging from nine months to one year to five years); WIS. STAT. ANN. § 973.01(d) (West 2022) (requiring an "extended supervision" term of at least twenty-five percent of the term of confinement but no more than the cap set by felony offense level—e.g., three years for a class H felony—and mandating that the total of confinement plus supervision may not exceed the statutory maximum incarceration term set by statute).

41. *See, e.g.*, People v. Martin, 272 Cal. Rptr. 3d 363, 368 (Ct. App. 2020) ("Like federal supervised release, this state's parole system is currently premised on a period of *additional* supervision following a *completed* prison term."); Carter v. State, 754 So. 2d 1207, 1208 (Miss. 2000) ("Miss. Code Ann. § 47-7-34 created the post-release supervision program which provides for a term of post-release supervision in addition to any term of incarceration imposed upon those already convicted of a felony."); KAN. STAT. ANN. § 22-3717(d)(1)(A)-(C) (West 2022) (mandating post-release supervision for time frames ranging from twelve to thirty-six months for different severity of crimes); N.M. STAT. ANN. § 31-18-15(C) (West 2022) ("If imposed, the period of parole shall be deemed to be part of the sentence of the convicted person in addition to the basic sentence imposed pursuant to Subsection A of this section . . . ."); N.Y. PENAL LAW § 70.00(6) (McKinney 2022) (explaining that every non-parolable sentence for most offenses carries an additional period of "post-release supervision" of up to five years); OR. ADMIN. R. 213-005-0002(1), (4) (2022) (requiring a separate term of post-prison supervision following every prison sentence and providing that the maximum prison sentence plus the post-release supervision term may not

separately the period of post-release supervision has allowed jurisdictions to consistently limit the length of those terms.[42] Even though most of the prisoners in more than a third of the states are sentenced this way, the Supreme Court has never addressed if or how the doctrine developed in *Apprendi* applies to statutes structuring the imposition of supervised release terms at *initial* sentencing, and only in *Haymond* has it considered *Apprendi*'s application to a statute regulating the revocation of supervised release.

More recently, prompted in part by the innumerable social and economic costs of high rates of incarceration, a second wave of reform is restricting confinement and conditional confinement. At least six states have adopted presumptive probation, requiring judges to impose a sentence of probation instead of incarceration for some crimes, absent proof of aggravating facts at sentencing.[43] This approach designates a term of probation as a more lenient punishment than incarceration and regulates terms of probation separately from terms of incarceration.[44]

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exceed the statutory maximum sentence for the offense); VA. CODE ANN. § 19.2-295.2(A) (West 2022) (mandating a period of post-release supervision between six and thirty-six months).

42. *See* MODEL PENAL CODE: SENT'G § 6.13 cmt. g (AM. L. INST., Final Draft 2019) (noting that research supports a supervision period of no longer than one or two years because "[t]he first year following exit from prison is when most reoffending occurs, with diminishing rates of criminal involvement in subsequent years" and that supervised release addressed the common criticism of traditional parole as burdening those released earliest with the longest supervision terms, while the worst prisoners "maxed out" and left prison with no supervision at all).

43. *See* State v. Green, 459 P.3d 45, 47 (Ariz. 2020) ("A court must impose probation with drug treatment and may not impose a term of incarceration for an offender's first conviction for personal possession or use of drugs." (citing ARIZ. REV. STAT. ANN. § 13-901.01(A))); State v. Gomez, 127 P.3d 873, 874 (Ariz. 2006) (en banc) ("A 1996 initiative measure known as Proposition 200 requires courts to place certain first- and second-time drug offenders on probation including appropriate drug treatment or education."); United States v. Hisey, 12 F.4th 1231, 1233, 1236–37 (10th Cir. 2021) (holding that the defendant was not convicted of a "crime punishable by imprisonment for a term exceeding one year," as required by 18 U.S.C. § 922(g), when the Kansas court that sentenced the defendant "had to impose probation and drug treatment[,]" "so he could not have received *any* imprisonment[,]" even if the contingencies of potential probation violations might have allowed revocation to imprisonment); State v. Hamlin, 950 P.2d 336, 339 (Or. Ct. App. 1997) ("Probation is no longer the suspension of a sentence; probation *is* the sentence."); *Structured Sentencing Training and Reference Manual*, N.C. SENT'G & POL'Y ADVISORY COMM'N 31–32 (2014), https://www.nccourts.gov/assets/documents/publications/sstrainingmanual_14.pdf?VersionId=aN9UXo5RrBFEdTL6QiXbSKybxUWGvT3v [https://perma.cc/UK6K-LPP] (explaining that the state's sentencing guidelines sometimes mandate community punishments).

Ohio also adopted such a statute, but it was held not to create a presumption of probation. State v. Foster, 845 N.E.2d 470, 486 (Ohio 2006) (interpreting OHIO REV. CODE ANN. § 2929.13(B)).

44. *See* NEIL P. COHEN, LAW OF PROBATION & PAROLE § 1:5 (2d ed. 2021) ("[T]he theoretical justification for probation has changed dramatically in recent years. Probation went from a substitute for immediate incarceration to a separate sentence in itself."); *see also* U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 5 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf [https://perma.cc/5335-PNNJ] ("The Sentencing Reform Act of 1984 ended the authority of federal courts to impose probation as a stay of imposition or execution of a sentence and instead recognized *probation as a sentence in itself*." (emphasis

Also popular are new restrictions on the length of probation terms.[45] These departures from traditional probation raise potential constitutional concerns that also have yet to be addressed by the Court. The next Section introduces the *Apprendi* doctrine that prompts those potential concerns.

B. The Apprendi *Doctrine and the* Haymond *Decision*

In *Apprendi v. New Jersey*,[46] the Court struck down a state statute that authorized a judge to increase the maximum incarceration for an offense if the judge found at sentencing by a preponderance of the evidence that the offense had been committed with racial bias. Because the finding of racial bias under this hate-crime enhancement provision "increase[d] the penalty for a crime beyond the prescribed statutory maximum," reasoned the Court, it "must be submitted to a jury, and proved beyond a reasonable doubt" or admitted by the defendant, like any other element of a crime.[47] "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," the Court concluded.[48] The Court acknowledged that sentencing facts that mitigate rather than aggravate a range of punishment for an offense need not be decided by juries. It also recognized an exception to its general rule: Judicial factfinding at sentencing that raises the punishment range does not violate the Sixth Amendment if the fact found is a prior conviction.[49]

The Court soon invalidated presumptive sentencing schemes that allowed judges to determine at sentencing nonconviction facts[50] on which more severe sentences depended, including aggravating facts that authorized eligibility for the death penalty,[51] a longer term of

added)); STANDARDS FOR CRIM. JUST. § 18-3.13, Commentary (AM. BAR ASS'N 3d ed. 1994) ("It has been long-standing ABA policy that the legislature should authorize sentences to probation as a free-standing sanction.").

45. *See, e.g.*, People v. Greeley, 285 Cal. Rptr. 3d 548, 563 (Ct. App. 2021) (noting 2021 amendment limiting to two years the length of a probationary period for a felony conviction); Miriam Krinsky & Monica Fuhrmann, *Building a Fair and Just Federal Community Supervision System: Lessons Learned from State and Local Reform Efforts*, 34 FED. SENT'G. REP. 340, 345 (2022) (discussing reduced terms of probation in South Carolina, Oregon, and California). *See also* 28 VT. STAT. ANN. § 251(b) (2021) (rebuttable presumption of discharge from probation at midpoint of probation term).

46. 530 U.S. 466 (2000).

47. *Id.* at 490.

48. *Id.* (quoting Jones v. United States, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)).

49. *Id.*

50. I use the term "nonconviction fact" as shorthand for a fact that is neither an element of the offense of conviction nor a prior conviction exempt from the *Apprendi* rules.

51. *See* Ring v. Arizona, 536 U.S. 584 (2002).

incarceration,[52] or a larger fine.[53] In *Alleyne v. United States*,[54] the Court struck down a statute that required a higher *minimum* sentence for the offense of using or carrying a firearm during a violent crime if the judge found at sentencing that the defendant "brandished" the gun. The Court reasoned that the principle applied in *Apprendi* to facts increasing the ceiling of a sentencing range "applies with equal force to facts increasing the mandatory minimum" floor of a sentencing range.[55]

United States v. Haymond[56] was the Court's first discussion of *Apprendi* in the context of revocation of conditional release. For committing the federal crime of possessing child pornography, Haymond received a sentence of thirty-eight months of incarceration (within a zero-to-ten year range of incarceration authorized for the offense)[57] to be followed by ten years of supervised release (within the five years to life range of supervised release authorized for the offense).[58] At a hearing revoking supervised release several years later, the judge found by a preponderance that Haymond had committed one of the offenses that triggered a mandatory minimum five-year post-revocation sentence of incarceration under 18 U.S.C. § 3583(k), a subsection of the supervised release statute.[59] The judge indicated that without that statutory provision, he "probably would have sentenced in the range of two years or less" but imposed the five-year term required.[60] Haymond appealed.

The Supreme Court invalidated the mandatory five-year post-revocation sentence required by § 3583(k). In a plurality opinion authored by Justice Gorsuch, four Justices concluded that § 3583(k)

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52. *See* Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 U.S. 270 (2007).

53. S. Union v. United States, 567 U.S. 343 (2012).

54. 570 U.S. 99 (2013).

55. *Id.* at 112.

56. 139 S. Ct. 2369 (2019).

57. 18 U.S.C. § 2252(b)(2).

58. 18 U.S.C. § 3583(a) authorizes the sentencing court to place a defendant "on a term of supervised release after imprisonment." Other subsections regulate the length of supervised release and reimprisonment after a revocation of release based on the severity level of the offense of conviction. For example, for a Class D felony, the maximum term of supervised release is three years and the maximum term of reimprisonment after the revocation of a supervised release is two years. 18 U.S.C. § 3583(b)(2), (e)(3).

59. 18 U.S.C. § 3583(k):

> [If] a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

60. *Haymond*, 139 S. Ct. at 2375.

violated *Alleyne,* reasoning that it "requires a substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts under a preponderance standard."[61] In a dissenting opinion authored by Justice Alito, four other Justices rejected the application of the Sixth Amendment rule in *Alleyne* to revocation findings and contested many of the plurality's assertions, including the plurality's view that "the maximum term reflected in the jury's verdict" in Haymond's case was ten years, not ten years *plus* "the maximum period of supervised release that the statute authorized."[62]

Justice Breyer concurred in the result reached by the Gorsuch plurality but not its reasoning. He said that he "would not transplant the *Apprendi* line of cases to the supervised-release context" and instead noted three aspects of § 3583(k) that persuaded him it was "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach."[63] Those features were: (1) it "applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute"; (2) it "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long"; and (3) it mandates "imprisonment of 'not less than 5 years' upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.' "[64] His brief opinion, joined by no other Justice, became the controlling opinion in the case.[65]

A number of questions about constitutional limits on revocation statutes left open by the fractured decision in *Haymond* have divided the lower courts and jurists. Those disputes, addressed in Part III, now supplement previous disagreements about the application of the *Apprendi* doctrine to the fact-based regulation of conditional release during the initial sentencing phase, discussed next in Part II.

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61. *Id.* at 2378, 2382 (plurality opinion) (reasoning that because Haymond "faced a lawful prison term of between zero and 10 years" based on "the facts reflected in the jury's verdict," the judicial finding of conduct violating supervised release "increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments").

62. *Id.* at 2390 (Alito, J., dissenting).

63. *Id.* at 2385–86 (Breyer, J., concurring).

64. *Id.* at 2386.

65. *See id.* at 2386 (Alito, J., dissenting) (stating that Justice Breyer's concurrence contains "today's holding"); United States v. Salazar, 987 F.3d 1248, 1259 (10th Cir. 2021) ("Justice Breyer's concurrence—the narrowest ground supporting the judgment—represents the Court's holding." (citing Marks v. United States, 430 U.S. 188, 193 (1977))). For an argument that the plurality's resolution may have been narrower than Justice Breyer's, see *United States v. Shakespeare*, 32 F.4th 1228, 1238 (10th Cir. 2022), terming this an "analytically complex question."

II. LIMITS ON REGULATION OF CONDITIONAL RELEASE AT INITIAL SENTENCING

When a legislature denies eligibility for probation or parole, or authorizes a longer term of conditional release, based on a new fact found at sentencing, must that factfinding comply with *Apprendi*? The Supreme Court has yet to consider a challenge under *Apprendi* or *Alleyne* to these situations, and state courts are divided. Section A below argues that statutes delaying or denying eligibility for discretionary release on *traditional parole* based on a judicial finding of nonconviction facts at initial sentencing are unconstitutional under *Alleyne*. Section B contends that statutes mandating a higher minimum term or permitting a higher maximum term of *supervised release* based on nonconviction facts found at initial sentencing are also unconstitutional. Section C concludes that the Court's *Apprendi* cases invalidate *probation* statutes that expose a defendant to a sentence of incarceration rather than presumptive probation, or to a longer period of probation than the presumptive term available upon conviction, if a judge finds a nonconviction fact at initial sentencing.

A. Regulating Eligibility for Release on Parole at Initial Sentencing

Two premises underlie the application of the *Apprendi* doctrine to statutes that limit eligibility for parole based on judicial factfinding at initial sentencing. The first is that incarceration without the possibility of parole is a more severe punishment than incarceration with the possibility of parole. The Court assumed as much in its Eighth Amendment decisions regulating the imposition of life without parole for crimes committed by juveniles.[66] When a judicial finding of fact at sentencing transforms what would have been a term of incarceration subject to the possibility of release into a term of incarceration with no such option, that finding aggravates the range of punishment by mandating confinement that was not mandated by the conviction alone.[67]

66. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1317 (2021) (affirming *Miller*'s requirement of a discretionary sentencing procedure and that a mandatory life-without-parole sentence for an offender under eighteen "poses too great a risk of disproportionate punishment" (quoting Miller v. Alabama, 567 U.S. 460, 479 (2012))).

67. The Court suggested this in *Jones* where it observed, "If permanent incorrigibility were a factual prerequisite to a life-without-parole sentence, this Court's Sixth Amendment precedents might require that a jury, not a judge, make such a finding." 141 S. Ct. at 1316 n.3 ("If we were to rule for Jones here, the next wave of litigation would likely concern the scope of the jury right." (citing Apprendi v. New Jersey, 530 U.S. 466 (2000))).

The second premise follows from the first—a term of incarceration that must be served before eligibility for release is the floor of the range of incarceration under *Alleyne*. Two sentences with the same maximum term may vary in severity based on the time an offender must serve in confinement before release. Granted, there is no guarantee that a person eligible for discretionary parole will be released before the maximum term. And a person receiving a "hard twenty" sentence might end up serving the same amount of time as a person receiving a "hard forty" sentence, or even more. Nonetheless, a statute that requires a judge to extend from twenty to forty years the period a defendant must serve before becoming eligible for parole and a statute that raises the minimum term of imprisonment from twenty to forty years each "aggravate" the range of punishment in the same way. Both raise the minimum term of confinement.[68]

With these premises in mind, it is not difficult to evaluate statutes that regulate eligibility for parole release based on judicial factfinding at initial sentencing. The long-standing practice of limiting parole eligibility for specified offenses or for defendants with prior convictions does not violate *Alleyne*. Nor would *Apprendi* principles be implicated if judges are given *unlimited* discretion to adjust the minimum term of confinement before release eligibility, as a minority of states provide for at least some offenses.[69]

But some states expressly tie parole eligibility to judicial findings of nonconviction facts at sentencing, and courts in at least six states have held such provisions violate *Alleyne*.[70] Ohio's high court

68. *See* Nancy J. King & Brynn E. Applebaum, Alleyne *on the Ground: Factfinding That Limits Eligibility for Probation or Parole Release*, 26 FED. SENT'G REP. 287 (2014).

69. Reitz, et al., *supra* note 37, at 32 (noting states that provide some discretion to the sentencing judge to vary the period after which a prisoner is eligible for parole); *see also supra* text accompanying note 33 (noting this practice in the 1930s).

70. State v. Soto, 322 P.3d 334, 344 (Kan. 2014) (holding a Kansas statute that mandated fifty years before the possibility of parole was unconstitutional under *Alleyne*); People v. Lockridge, 870 N.W.2d 502, 506 (Mich. 2015) (holding that binding guidelines regulating minimum terms before parole eligibility were unconstitutional); State v. Grate, 106 A.3d 466, 469 (N.J. 2015) (concluding *Alleyne* renders the imposition of a mandatory minimum sentence under N.J. STAT. ANN. § 2C:39-5(i) unconstitutional); Commonwealth v. Hopkins, 117 A.3d 247, 249 (Pa. 2015) (finding multiple provisions of statute imposing mandatory minimums unconstitutional); Commonwealth v. Wolfe, 140 A.3d 651, 661 (Pa. 2016); State v. Bowers, 167 N.E.3d 947, 952–53 (Ohio 2020); *see also* Forster v. State, 236 P.3d 1157, 1170–72 (Alaska Ct. App. 2010) (holding the court may not eliminate mandatory release for a first-degree murder defendant without holding a jury trial on the aggravating circumstance in ALASKA STAT. § 12.55.125(a)); Robinson v. Woods, 901 F.3d 710, 712 (6th Cir. 2018) (concluding *Alleyne* clearly established Michigan's sentencing scheme was unconstitutional); State v. Sivo, 925 A.2d 901, 919 (R.I. 2007) (holding that any error in sentencing defendant under provision mandating a minimum eight-and-a-half years before eligibility for parole based on judicial rather than jury finding that victims was five years or younger was harmless).

decision in *State v. Bowers*[71] is illustrative. The statute that *Bowers* addressed provided that if the judge found the defendant used force or caused serious physical harm, the defendant would face a sentence of at least twenty-five years rather than a sentence with a shorter period of confinement before eligibility for release.[72] The Ohio Supreme Court concluded *Alleyne* guaranteed a right to jury trial on the force determination, as that finding raised the mandatory minimum period of incarceration that a defendant must serve.[73] It found "immaterial" the fact that the parole board would determine "the exact number of years the defendant will ultimately serve" once the defendant satisfied the twenty-five year minimum.[74] Courts in Illinois and Mississippi have disagreed. They maintain that such an application would be an unwarranted extension of *Alleyne*, which involved a statute that altered an express minimum incarceration term, not a statute that changed "the amount of time [a prisoner] must serve before becoming eligible for parole or early release."[75] Under *Alleyne*'s rationale, however, there is no basis to distinguish these two situations. The effect of judicial factfinding in aggravating the range of punishment available to the sentencing judge is exactly the same.[76]

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71. 167 N.E.3d 947 (Ohio 2022).

72. OHIO REV. CODE ANN. § 2971.03 (West 2022).

73. *Bowers,* 167 N.E.3d at 953.

74. *Id.* at 952; *see also* State v. Bevly, 27 N.E.3d 516, 522 (Ohio 2015) (holding corroborating evidence, which must be found under OHIO REV. CODE ANN. § 2907.05(C)(2)(a) before a judge could impose a mandatory prison term of sixty months, was an element that must be found by a jury).

75. Fogleman v. State, 283 So. 3d 685, 690–91 (Miss. 2019) (adopting the reasoning from *Barnes*, finding that *Alleyne* extends *Apprendi* only to facts that increase a defendant's mandatory minimum sentence, not to facts that affect how much of that sentence must be served, and rejecting constitutional challenge to a judicial finding rendering defendant ineligible for release until he has served fifty percent of his sentence); People v. Barnes, 90 N.E.3d 1117, 1140 (Ill. App. Ct. 2017).

76. Arguably *Alleyne* may also invalidate judicial discretion to increase minimum terms before eligibility in two additional states where the appellate review applied to such decisions may, in effect, create presumptive minimum terms that may only be increased upon nonconviction factfinding by the judge. Both Alaska and Montana ordinarily allow parole eligibility after serving twenty-five percent of the sentence set by the judge. ALASKA STAT. ANN. § 33.16.090(A) (West 2022); MONT. CODE ANN. § 46-23-201(3) (West 2021). In Alaska, sentencing judges have discretion to delay or deny eligibility when pronouncing a sentence but must expressly articulate reasons that are case-specific and backed by substantial evidence in the record. State v. Korkow, 314 P.3d 560, 565 (Alaska 2013); Thomas v. State, 413 P.3d 1207, 1213 (Alaska Ct. App. 2018). In Montana, a judge may make the sentence nonparolable, or require a longer term of incarceration before eligibility for release, but only if the judge first finds that "the restriction is necessary for the protection of society." MONT. CODE ANN. § 46-18-202(2) (West 2022); *see, e.g.*, State v. Hernandez, 455 P.3d 438 (Mont. 2019) (justifying parole restriction as necessary for the "protection of society" because the "sexual addict" defendant's treatment of his family member—a young girl—shows "he poses a risk to further victimize young girls). So far, the courts in both states have rejected challenges to factfinding required for delaying a defendant's eligibility for parole under these provisions. *See* Hout v. State, No. A-11212, 2015 WL 5000552, at *6 (Alaska Ct. App. Aug. 19, 2015) (stating that "the Sixth Amendment right to jury trial does not apply to the findings of fact that a judge might make during a sentencing" when deciding whether to restrict or eliminate a

B. Regulating Term Lengths of Supervised Release at Initial Sentencing

A related question arises in jurisdictions that have replaced parole for all or some offenses with separate terms of supervised release to follow terms of confinement.[77] In these states, statutes that permit a judge to impose extended periods of post-confinement supervision do not implicate *Apprendi* when those increased terms are contingent upon either the offense of conviction or the defendant's prior convictions.[78] They do violate the *Apprendi* rules, however, if they mandate a higher minimum or permit a higher maximum term of supervised release based upon a judicial finding at sentencing of a fact other than prior conviction. Multiple states have already recognized that *Apprendi* applies to this situation and have held that defendants have the right to demand that the government prove to a jury beyond a reasonable doubt any aggravating fact that allows an increased term.[79]

C. Regulating Eligibility for and Term Lengths of Probation at Initial Sentencing

Three types of probation statutes are also vulnerable to attack under *Apprendi* or *Alleyne*. The first are *presumptive probation* laws, provisions in at least six states that cap punishment upon conviction at probation, removing a judge's discretion to impose a sentence of incarceration unless the judge finds a nonconviction fact at

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defendant's eligibility for discretionary parole); State v. Garrymore, 145 P.3d 946, 952 (Mont. 2006).

77. *See supra* text accompanying notes 37–39.

78. *E.g.*, MINN. STAT. § 609.3455, subdivs. 1(g)-(h), 7(b) (West 2022) (lifetime conditional release when sentencing a defendant with a prior conviction for selected criminal-sexual-conduct offenses); WASH. REV. CODE ANN. § 9.94A.701 (West 2022); WIS. STAT. ANN. § 973.01(2)(b) (West 2022).

79. State v. Letterman, 492 P.3d 1196, 1205 (Kan. Ct. App. 2021) ("In cases . . . including extensions of postrelease supervision, . . . the only practice consistent with the guarantees of the Sixth Amendment—is to present any relevant factual questions to the jury for its consideration."); State v. Anthony, 45 P.3d 852, 854–55 (Kan. 2002) (concluding that because the fact relied upon to extend the period of post-release supervision was found by a jury beyond a reasonable doubt it did not violate *Apprendi*); State v. Her, 862 N.W.2d 692, 695 (Minn. 2015) (holding it violates a defendant's constitutional rights for a court, rather than a jury, to find the facts necessary to impose a conditional-release term, and holding that the fact that a Department of Corrections committee had assigned a risk-level-III status to the defendant is not within the prior-conviction exception); State v. Alfredson, 804 N.W.2d 153, 157 (Neb. 2011) (holding a jury must make a specific finding of facts necessary to authorize lifetime supervision); State v. Hopson 186 P.3d 317, 321 (Or. Ct. App. 2008) (holding that a jury must make the finding required to raise term of post-prison supervision to life).

sentencing.[80] By reserving incarceration for aggravated cases, these statutes recognize that probation is a more lenient sentence than incarceration. Under *Apprendi,* however, a fact that raises the ceiling of punishment permitted by the conviction from probation to incarceration must be proved like any other element of the crime charged. In Minnesota and Oregon, where courts have acknowledged this, prosecutors prove such aggravating factors beyond a reasonable doubt to juries when contested by the defendant.[81] New Jersey, too, eliminated its presumptive sentencing terms to comply with *Apprendi*, including those that conditioned sentences of incarceration on nonconviction factfinding.[82] And Arizona courts interpreted a statute that authorized a sentence of incarceration instead of mandatory probation for defendants who had certain prior convictions to exclude

80. ARIZ. REV. STAT. ANN. § 13-901.01 (2022) (requiring suspension of the imposition or execution of prison sentences for first- and second-time nonviolent drug offenders convicted of possession of a personal quantity and placement on probation); State v. Allen, 706 N.W.2d 40, 47 (Minn. 2005) (holding a presumptively stayed sentenced can only be imposed with finding that defendant was "unamenable to probation"); State v. Nykamp, 852 S.E.2d 449 (N.C. Ct. App. 2020); State v. Buehler, 136 P.3d 64 (Or. Ct. App. 2006) (holding a presumptive sentence of probation bars incarceration in the absence of additional factfinding); State v. Anderson, 867 N.W.2d 718, 721 (S.D. 2015) (holding probation is required for Class 5 or 6 felonies, excepting listed offenses, but "[t]he sentencing court may impose a sentence other than probation if the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section")*; see also* N.J. STAT. ANN. § 2C:44-1(e) (West 2022):

> The court shall deal with a person convicted of an offense other than a crime of the first or second degree, who has not previously been convicted of an offense, without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character, and condition of the defendant, it is of the opinion that imprisonment is necessary for the protection of the public under the criteria set forth in subsection a. of this section, except that this subsection shall not apply if the court finds that the aggravating factor in paragraph (5), (14) or (15) of subsection a. of this section applies . . . .

81. *Allen*, 706 N.W.2d at 47 ("[W]hen the district court found that [the defendant] was unamenable to probation, and on that basis executed his presumptively stayed sentenced, it violated [the defendant's] Sixth Amendment right . . . ."); State v. Frinell, 414 P.3d 430, 433 (Or. Ct. App. 2018) (adhering to *Buehler*, 137 P.3d at 65, which states that "if the presumptive sentence is probation, then the relevant statutory maximum, as that term is defined in *Blakely*, is the appropriate period of probation," and that "the court lacks the authority to impose anything more in the absence of additional factfinding," which conforms to the requirements elucidated in *Blakely* and *Apprendi*); *see also* State v. Greenough, 915 N.W.2d 915, 918–20 (Minn. Ct. App. 2018) (holding a court may not bypass the rule in *Allen* by staying *adjudication*, then upon violation of that stay, impose a presumptively stayed sentence, then execute that sentence after making additional findings that *Blakely* requires be made by a jury in order to exceed presumptive sentence; also rejecting state's argument that requiring courts to place back on probation defendants who violate a stay of adjudication will discourage the use of such stays).

82. State v. Natale, 878 A.2d 724, 741 (N.J. 2005) (invalidating all presumptive terms in N.J. STAT. ANN. § 2C:44-1, stating that "[w]ithout presumptive terms, the 'statutory maximum' authorized by the jury verdict or the facts admitted by a defendant at his guilty plea is the top of the sentencing range for the crime charged").

those prior convictions that have been vacated or proved only by indictment to avoid constitutional problems.[83]

By contrast, courts in two other states have reasoned that probation is an "act of grace," not a right, and that a judge's decision to depart from a presumed probation sentence to a prison sentence does not change the amount of punishment—it only "determines where an individual's sentence will be supervised."[84] Meanwhile, in Ohio, appellate courts disagree about *Apprendi*'s application to a statute mandating probation for certain offenses unless the judge finds one of several specified aggravating circumstances, which include being armed, attempting to cause or threaten harm with a deadly weapon, holding a position of trust or public office, and committing the offense for hire.[85]

The second set of vulnerable statutes also provide for probation as an authorized punishment for an offense but limit *eligibility* for that probation based on nonconviction facts found by judges at initial sentencing.[86] Here, too, courts disagree. Some have concluded that denying eligibility for probation increases the minimum punishment from conditional confinement to immediate incarceration, raising the *floor* of the penalty range, so that facts triggering that increase carry a

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83. *See* State v. Gomez, 127 P.3d 873, 878 (Ariz. 2006) (construing ARIZ. REV. STAT. ANN. § 13-901.01(B)).

84. State v. Carr, 53 P.3d 843, 849–50 (Kan. 2002); State v. Parker, 472 P.3d 133 (Kan. Ct. App. 2020) (noting it must follow *Carr*), *rev. denied* (Aug. 10, 2021); State v. Anderson, 867 N.W.2d 718, 724 (S.D. 2015) ("When a sentencing court finds the facts necessary to impose a prison term rather than that of probation, the core concern of *Apprendi*—'a legislative attempt to "remove from the province of the jury" the determination of facts that warrant punishment for a specific statutory offense[,]'—is not implicated."); *see also* State v. Shively, 323 P.3d 1211, 1213–15, 1213 n.2 (Ariz. Ct. App. 2014) (rejecting on merits challenge to judge's finding that the defendant refused drug treatment, after concluding claim was not moot because under ARIZ. REV. STAT. ANN. § 13-901.01(H), that finding may render defendant ineligible for mandatory probation).

85. *Compare* State v. Moore, No. 2021-CA-26, 2022 WL 421103, at *3 (Ohio Ct. App. Feb. 11, 2022) (discussing OHIO REV. CODE § 2929.13(B)(1)(b) and rejecting *Apprendi* claim), *with* State v. Freeman, No. 103677, 2016 WL 3018720, at *3 (Ohio Ct. App. May 26, 2016) (barring prison sentence and sustaining *Apprendi* claim, noting that "Freeman's burglary/trespass in habitation offense does not contain an element of physical harm or risk of serious physical harm").

86. *E.g.*, ALASKA STAT. ANN. § 12.55.085(f) (West 2022) ("The court may not suspend the imposition of sentence of a person who . . . uses a firearm in the commission of the offense for which the person is convicted . . . ."); 730 ILL. COMP. STAT. ANN. 5/5-5-3 (West 2022) (including numerous provisions denying eligibility for probation upon a judicial finding of such facts as "the offense was related to the activities of an organized gang," amount of property stolen or damaged, "the victim is a household or family member of the defendant," or that a firearm was "loaded or contained firearm ammunition" or "aimed toward the person against whom the firearm is being used"); 730 ILL. COMP. STAT. ANN. 5/5-6-1 (q)-(r) (West 2022) (stating a defendant charged with violating Vehicle Code is ineligible for probation if the defendant was operating a vehicle "in an urban district, at a speed that is 26 miles per hour or more in excess of the applicable maximum speed limit" or if the violation "was the proximate cause of the death of another").

right to jury.[87] Other courts have resisted the application of *Alleyne* to facts that deny eligibility for probation, arguing that such facts merely narrow the class of defendants eligible for lenient treatment and leave the incarceration range intact.[88] This argument might succeed in a traditional probation state where courts maintain that probation *is* a sentence of incarceration that happens to be stayed or suspended, not a lesser penalty. But it is less convincing in a state where the legislature has concluded that probation is a punishment less severe than incarceration and has removed the discretion of the judge to choose between the two.

Statutes that regulate probation sentences separately and tie *longer* probation periods to nonconviction facts found by the sentencing judge may implicate *Apprendi* as well. Most states avoid this issue by setting the length of probation terms by offense of conviction.[89] In states that have designated a judicial finding of nonconviction facts as

87. *See, e.g.*, Malbrough v. State, 612 S.W.3d 537 (Tex. Ct. App. 2020); Duran v. State, 492 S.W.3d 741, 745–46 (Tex. Crim. App. 2016) (holding a trier of fact must first make finding regarding deadly weapon that "not only curtails a trial court's ability to order community supervision, it also affects a defendant's eligibility for parole"). Some Arizona courts have recognized this as well. *E.g.*, State v. Viliborghi, No. 1 CA-CR 16-0550, 2017 WL 3184541, at *5 (Ariz. Ct. App. July 27, 2017) ("[A] finding that the [defendant's] fraud count involved . . . $100,000 or more increased the minimum penalty for the crime by making [defendant] ineligible for probation . . . [and] was therefore 'required to have been submitted to the jury . . . .' " (quoting State v. Flores, 335 P.3d 555, 557 (Ariz. Ct. App. 2014))). In California, multiple statutes already require that facts that deprive a person of probation eligibility be alleged in the accusatory pleading and either admitted by the defendant or established at trial. *See, e.g.*, CAL. PENAL CODE §§ 1203.045, 1203.055, 1203.06, 1203.073, 1203.075, 1203.09, 1203.095 (amount of theft, victims on public transit, using a firearm during commission, type of drug, great bodily injury, vulnerable victim, shooting at occupied house or vehicle, and exhibiting firearm on officer, respectively); *see also* LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL PROCEDURE § 25:17 (Dec. 2021).

88. *See* People v. Benitez, 26 Cal. Rptr. 3d 262, 265 (Ct. App. 2005) ("Finding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court . . . a defendant's eligibility for probation results in a reduction rather than an increase in the sentence prescribed for his offenses."); Friemel v. State, 465 S.W.3d 770, 774 (Tex. Ct. App. 2015) (holding that because defendant has no right to community supervision, the fact that a deadly weapon finding may render a defendant ineligible for community supervision does not affect the length of his sentence, only whether he can ask the court to suspend the sentence or defer adjudication of the offense).

89. *E.g.*, Commonwealth v. Merolla, 909 A.2d 337, 347 (Pa. Super. Ct. 2006) ("[T]he length of probation may not exceed the maximum term for which a defendant could be confined."); CAL. PENAL CODE. § 1203.1(l)(1) (West 2022) (limiting suspension to a "period of time not exceeding the maximum possible term of the sentence"). *See generally* Alexis Lee Watts, *Probation In-Depth: The Length of Probation Sentences*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (2016), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/probation-in-depth_final.pdf [https://perma.cc/66HG-3KGY] (collecting term limitations for twenty-one states).

necessary for imposing a longer term of probation,[90] disagreement about the application of *Apprendi* persists.[91]

To recap the main points in Part II, nonconviction factfinding by judges at initial sentencing violates *Apprendi* or *Alleyne* when it:

(1) delays or prohibits eligibility for release on parole that would be available without the finding;
(2) allows a longer maximum or mandates a longer minimum term of supervised release following confinement than that allowed without the finding;
(3) allows a sentence of immediate incarceration when probation is the presumptive maximum penalty;
(4) prohibits eligibility for probation and requires immediate incarceration instead; or
(5) allows a longer maximum or mandates a longer minimum term of probation.

In all of these circumstances, the nonconviction facts found by the judge at initial sentencing aggravate either the floor or the ceiling of the sentence range authorized by the conviction.

III. LIMITS ON REGULATION OF REVOCATION

This Part shifts from *Apprendi's* effect on the regulation of conditional release at initial sentencing to its relevance for statutes regulating revocation. It explains why due process—not the jury right underlying *Apprendi*—protects criminal defendants from post-revocation sentences that are effectively criminal punishment for a different crime or that exceed the punishment authorized for the crime of conviction.

Section A begins with Justice Breyer's opinion in *Haymond,* which identifies when a revocation statute violates due process because it imposes punishment for a releasee's new criminal offense rather than

90. *See, e.g.*, CAL. PENAL CODE § 1203.1(l)(2) (West 2022) (setting three-year instead of two-year limit on term of probation for specified offenses "if the total value of the property taken exceeds twenty-five thousand dollars").

91. *See 2020 Report to the Legislature*, MINN. SENT'G GUIDELINES COMM'N 101–19 (2020) https://mn.gov/msgc-stat/documents/reports/2020/2020MinnSentencingGuidelinesCommReportLegislature.pdf [https://perma.cc/C8RL-QYSR] (minority statement of opposition to new presumptive probation caps, noting they will be subject to jury findings like other departure facts); State v. Gutierrez, 112 P.3d 433, 434–35 (Or. Ct. App. 2005) (finding claim of error waived, but suggesting no error); State v. Hambright, 447 P.3d 972, 980 (Kan. 2019) (concluding "[i]t is not abundantly clear that *Apprendi* would be applicable" to this situation, and reasoning that an upward departure from a presumptive probation term does not require a jury determination).

the conviction offense. I argue that Justice Breyer's analysis resembles the commonly used *Kennedy-Ward* test for distinguishing regulatory sanctions from criminal punishment and that this analysis, not *Alleyne,* should apply when post-revocation consequences do not exceed the maximum authorized for the conviction offense. Section B turns to the issue debated but not settled in *Haymond*—how to measure under the Constitution the *maximum* confinement available when conditional release is revoked. This Section argues that a venerable due process analysis already provides this measure, not *Apprendi*. The constitutional cap on confinement after revocation is the maximum potential confinement a defendant must understand he faces before he is convicted of an offense; namely, the sum of the maximum incarceration term and maximum supervised release term that a judge may impose at *initial* sentencing for that offense. This standard, established in precedent defining adequate notice of the direct consequences of conviction, is a much better fit than *Apprendi* would be if transplanted to the revocation context.

Together, these two due process analyses preserve legislative discretion to allocate punishment for an offense between immediate and contingent incarceration, while prohibiting the use of revocation to pile on punishment unauthorized by the underlying conviction. By applying these analyses to a number of statutes regulating revocation of supervised release, traditional parole, and probation, Section C shows why due process offers a sensible middle ground between the extremes offered by the plurality and the dissent in *Haymond*.

A. Due Process Limits on Mandatory Post-revocation Punishment

Justice Breyer's brief controlling opinion in *Haymond* attracted no other adherents on the Court, but it provides a useful approach for evaluating when a statute providing for post-revocation sanctions within the maximum punishment authorized for the conviction imposes—not punishment for the crime of conviction but instead new criminal punishment for a different offense. This Section describes and defends that approach.

1. Justice Breyer's Analysis in *Haymond*—An Old Test for New Punishment

The plurality opinion in *Haymond* argued that *Alleyne* barred factfinding at revocation that triggered mandatory confinement not

required by conviction alone.[92] Justice Breyer agreed that § 3583(k) was unconstitutional[93] for different reasons. His thirteen-sentence opinion contained little explanation, but it was clear on one point: The Sixth Amendment doctrine established in *Apprendi* and developed in subsequent cases should not apply in revocation proceedings. Like the dissent, he stated he would not "transplant the *Apprendi* line of cases to the supervised-release context,"[94] noting only "the potentially destabilizing consequences" of doing so and that he "agree[d] with much of the dissent."[95] In addition to potential disruption as a reason to reject the application of the *Apprendi* line of cases to revocation,[96] Justice Alito's dissent invoked the Court's prior precedent, beginning with *Morrissey v. Brewer*,[97] that had repeatedly emphasized that revocation of conditional release "is not a part of a criminal prosecution," but "arises after the end of the criminal prosecution,"[98] and that the procedural safeguards required by due process at the revocation stage are less protective than those guaranteed by the Sixth Amendment at trial.[99]

Justice Breyer followed his refusal-to-transplant comment with "cf." cites to portions of several prior opinions in which he objected to the rule in *Apprendi* and *Blakely*.[100] Only after he had distanced his analysis from "the *Apprendi* line of cases" and reminded readers that

92. United States v. Haymond, 139 S. Ct. 2369, 2378 (2019) (Gorsuch, J.) (plurality opinion) ("[J]ust like the facts the judge found at the defendant's sentencing hearing in *Alleyne*, the facts the judge found [at Haymond's revocation] increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments.").

93. *Id.* at 2386 (Breyer, J., concurring).

94. *Id.* at 2385.

95. *Id.*

96. *Id.* at 2388 (Alito, J., dissenting) (noting that in 2018 federal district courts completed 16,946 adjudications for revocations of supervised release).

97. 408 U.S. 471, 480 (1972) ("[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.").

98. Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (quoting and reaffirming *Morrissey*).

99. *Haymond*, 139 S. Ct. at 2391 (Alito, J., dissenting) (first citing Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 467 (1981) (addressing revocation of commutation); then Vitek v. Jones, 445 U.S. 480, 488 (1980) (addressing parole); and then Wolff v. McDonnell, 418 U.S. 539, 556–57 (1974) (addressing goodtime credits)) (arguing that it was settled long ago that the same procedures apply in both parole revocation and supervised-release proceedings, and for revocation hearings parolees have only a right that the "fundamental requisites of due process had to be observed"); *see also* Black v. Romano, 471 U.S. 606, 615–16 (1985) (addressing revocation of probation); Young v. Harper, 520 U.S. 143, 144–45 (1997) (addressing pre-parole conditional supervision); Stith, *supra* note 10, at 1303 (stating the *Haymond* plurality "brushed past the Court's well-established holdings that other aspects of the Sixth Amendment, such as an unqualified right to counsel, do not apply to probation or parole revocation proceedings").

100. *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring).

he had previously disagreed with five of those cases did he begin to explain why he found § 3583(k) unconstitutional.[101]

Justice Breyer first referenced the Court's earlier conclusion in *Johnson v. United States*[102] that revocation of federal supervised release "is typically understood as 'part of the penalty for the initial offense' " and not a new criminal prosecution.[103] He quoted the explanation in the Sentencing Guidelines Manual that under the federal statute that governs most revocations, the severity of post-revocation confinement and supervision terms are limited by the severity of the original crime of conviction, not the conduct that results in revocation.[104] And he argued that the consequences that follow a violation of release conditions "are first and foremost considered sanctions for the defendant's 'breach of trust'—his 'failure to follow the court-imposed conditions' that followed his initial conviction—not 'for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct.' "[105] He then explained why "Section 3583(k) is difficult to reconcile with this understanding of supervised release."[106]

Justice Breyer cited three features of the statute that, "[t]aken together" and "considered in combination," led him to this conclusion.[107] The post-revocation term of confinement it provided: (1) "applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute"; (2) "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long"; and (3) "impos[es] a mandatory minimum term of imprisonment of 'not less than 5 years' upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.' "[108] After concluding that these features of the statute "more closely resemble" punishment for a new criminal offense without the constitutional rights "that attend a new criminal prosecution," including the jury right,[109] Justice Breyer reiterated that "in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term."[110] Thus, he did not abandon the

101. *Id.* at 2385–86.

102. 529 U.S. 694, 700 (2000).

103. *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

104. *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring) (citing U.S. SENT'G GUIDELINES MANUAL § 7A.3(b) (U.S. SENT'G COMM. 2018)).

105. *Id.* For a recent critique of this assertion, see Schuman, *supra* note 9.

106. *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* (citing Alleyne v. New Jersey, 530 U.S. 466 (2000)).

application of *Alleyne* in "an ordinary criminal prosecution," nor did he extend *Alleyne* to "ordinary revocation[s]."[111] Instead, he found that this particular revocation statute should be treated like an "ordinary criminal prosecution," as opposed to an "ordinary revocation."[112]

Justice Breyer's test preserves the distinction between prosecution and revocation that the *Haymond* dissent warned would be obliterated by the reasoning of the plurality. Unlike the plurality, Justice Breyer did not argue that revocation is part of the prosecution governed by the Sixth Amendment's Jury Clause. Rather, his test is an attempt to *enforce* the distinction between a revocation and the Sixth Amendment's concept of "prosecution," by separating statutes that qualify as "ordinary revocations" from statutes that may be packaged as revocations but actually function as punishment for a new criminal offense.

Justice Breyer's effort to look beyond the legislative label to determine when due process requires a court to treat post-revocation confinement as new punishment is well-grounded in the Court's past efforts to define the scope of constitutional criminal procedure. There is nothing new about relying on a multifactor due process test to determine when a statute should be treated as a new criminal punishment under the Constitution, despite a legislative label as something else. The approach that Justice Breyer appears to have relied upon in *Haymond* was first articulated in 1963, in *Kennedy v. Mendoza-Martinez*.[113]

In *Kennedy,* the Court described the problem of determining whether a statute operates as penal or regulatory in character as "extremely difficult and elusive of solution."[114] Nevertheless, in the course of finding that statutes that strip citizenship from individuals who evade military service were "plainly" punishment imposed without "the procedural safeguards guaranteed by the Fifth and Sixth Amendments,"[115] the Court set out a multifactor test that has stood for sixty years and has come to be known as the *Kennedy-Ward* test.[116] The factors to consider when making this distinction include:

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111. *Id.*

112. *Id.*

113. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165–66 (1963) (invalidating statutes that automatically deprived an American of his citizenship for leaving or remaining outside the United States to evade military service when the accused was not afforded due process safeguards, including the right to a jury trial, assistance of counsel, notice, and compulsory process for obtaining witnesses).

114. *Id.* at 168.

115. *Id.*

116. United States v. Ward, 448 U.S. 242, 253–54 (1980) (concluding that a civil statute, which imposed fines for illegally discharging oil into navigable waters, was "clearly not 'criminal' enough

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[117]

These factors "are designed to apply in various constitutional contexts" and "are 'neither exhaustive nor dispositive,' but are 'useful guideposts.' "[118]

Although this analysis is best known for distinguishing regulatory confinement from criminal punishment, the Court has also used it to evaluate the constitutionality of statutes that authorize extended confinement based on facts found outside of conviction, asking whether the extended confinement was punishment for a new crime despite its label as something else. In 1967, in *Specht v. Patterson*,[119] the Court reviewed a state law that allowed a trial judge to sentence a person convicted of a sexual offense carrying a maximum penalty of ten years to a much longer term of up to life in prison if the judge found at sentencing that the defendant posed "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill."[120] The Court concluded that the extended term for that "new finding of fact" is a "criminal punishment," and that "[t]he invocation of the Sex

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to trigger the protections of the Sixth Amendment, Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions," and finding weak evidence of congressional intent that the civil penalty contained a countervailing punitive purpose or effect). The test is also known as the " 'intent-effects' test." *See, e.g.*, State v. Payan, 765 N.W.2d 192 (Neb. 2009); State v. Muldrow, 912 N.W.2d 74 (Wisc. 2018). It is also known as the "*Mendoza-Martinez*" test. *See* Commonwealth v. Lacombe, 234 A.3d 602, 618 (Pa. 2020).

117. *Kennedy*, 372 U.S. at 168–69; *see also* Smith v. Doe, 538 U.S. 84, 97 (2003) (terming the seven factors from *Kennedy v. Mendoza–Martinez* as "a useful framework" that has "earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the Ex Post Facto Clauses"). For pre-1963 cases, see Flemming v. Nestor, 363 U.S. 603, 617–20 (1960), which states that whether certain constitutional protections apply to a statute, including the Sixth Amendment, depends upon whether the intent and effects of the statute are criminal or civil; and Lipke v. Lederer, 259 U.S. 559, 562 (1922), which concludes that simply because the title of a statute categorizes it as civil, if the "function" and effect of the statute is criminal, then depriving a person subject to the statute of an "information, indictment, or trial by jury, [is] contrary to the federal Constitution."

118. *Smith*, 538 U.S. at 97 (upholding the Alaska Sex Offender Registration Act as nonpunitive after applying the factors from *Kennedy v. Mendoza-Martinez* (citations omitted)); *see also* Hudson v. United States, 522 U.S. 93, 99–105 (1997) (reaffirming the "established rule" that the test is used to determine whether constitutional criminal procedure protections apply to a statute).

119. 386 U.S. 605 (1967).

120. *Id*. at 607.

Offenders Act means the making of a new charge leading to criminal punishment."[121]

Thirty years later, in *Kansas v. Hendricks,*[122] a five-Justice majority applied the same test to resolve Double Jeopardy and Ex Post Facto challenges to a Kansas act that authorized indefinite confinement of a sexually violent offender based on a posttrial judicial finding of dangerousness to the public. Unlike the finding in *Specht*, where the finding authorizing indefinite confinement was made at the initial sentencing stage, the finding in *Hendricks* was made following the expiration of the defendant's criminal sentence. Relying on *Kennedy*, a majority of Justices concluded that the Act was "not punitive."[123] The *Hendricks* majority reasoned that the statute did not make criminal responsibility a prerequisite, required a "mental abnormality" rather than criminal intent, was not intended to provide deterrence or retribution, recommended treatment if possible, barred further commitment once an individual was no longer dangerous or mentally impaired, and provided strict procedural safeguards in the form of annual hearings.[124]

Justice Breyer authored the *Hendricks* dissent.[125] The similarities between that dissent and his concurring opinion in *Haymond* are striking. In *Hendricks*, Justice Breyer wrote that certain "special features of the Act" convinced him "that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him."[126] Those features included: (1) the State's admission that Hendrick's "condition is treatable"[127] coupled with "a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary)";[128] (2) the state court's conclusion "that treatment is not a significant objective of the Act";[129] and (3) the absence of any

121. *Id.* at 608, 610 (all nine justices agreed that due process guaranteed a defendant the right to counsel, reasonable notice, and a fair hearing with rights to cross-examine witnesses and present evidence of his own).

122. 521 U.S. 346 (1997).

123. *Id.* at 369.

124. *Id.* at 368–71.

125. *Id.* at 373–74 (Breyer, J., dissenting).

126. *Id.* at 373.

127. *Id.*

128. *Id.* at 381, 386 (arguing that delaying the commencement of treatment until after the offender's term of confinement supports the view that this particular statutory scheme was punitive in nature and that treatment was "not a particularly important legislative objective"); *see also id.* at 390 ("[W]hen a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive.").

129. *Id.* at 383.

requirement that "less restrictive alternatives" be considered.[130] "[This] is not to say," Justice Breyer noted, "that I have found 'a single "formula" for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition.' "[131] Rather, he acknowledged, "I have pointed to those features of the Act itself, in the context of this litigation, that lead me to conclude, in light of our precedent, that the added confinement the Act imposes upon Hendricks is basically punitive."[132]

The majority and dissenting opinions in *Hendricks* represent prior examples of the use of due process, not the *Apprendi* doctrine that the Court developed in the context of initial sentencing, to differentiate confinement permissible as regulation from confinement that constitutes punishment for a new crime. While not a model of clarity, Justice Breyer's concurrence in *Haymond* also appeared to apply a version of that due process analysis. His opinion focused on why the statute should be considered criminal punishment for the new crime that *Haymond* allegedly committed while on release rather than ordinary revocation administering "the penalty for the initial offense."[133]

The first problem he noted with the statute was that it barred a judge from continuing or modifying release and instead forced the judge to recommit the violator to prison. This is indeed a departure from "ordinary revocation" of supervised release under federal law.[134] Preserving revocation discretion makes sense if the rationale for permitting revocation is to allow the decisionmaker tasked with administering the releasee's punishment to tailor the conditions or term

130. *Id.* at 387.

131. *Id.* at 394–95 (quoting Cal. Dep't of Corr. v. Morales, 514 US 499, 506 (1995)).

132. *Id.* (concluding that the statutory scheme "involves an affirmative restraint historically regarded as punishment[,]" namely incarceration, which is "imposed upon behavior already a crime after a finding of scienter; . . . serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment), and is excessive in relation to any alternative purpose assigned" (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963))). The Court had earlier struck down other laws authorizing "civil" commitment following the expiration of a criminal sentence under other theories. *See* Baxstrom v. Herold, 383 U.S. 107, 115 (1966) (finding that a New York statute that authorized commitment following a criminal sentence violated equal protection by failing to provide a hearing and other procedural safeguards for the review of a determination of insanity in conformity with other civil commitment proceedings for those without prior criminal convictions).

133. United States v. Haymond, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring) (citing *Johnson v. United States*, 529 U.S. 694, 700 (2000) for the proposition that revocation of supervised release was traditionally understood as punishment for the releasee's violation of the conditions of supervised release).

134. *Id.* (stating that 18 U.S.C. § 3583(k) "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long").

of release to the releasee's individual needs and determine whether, despite the violation, the releasee will make progress toward reentry without recommitment. Mandatory incarceration for specific violations not only eliminates that discretion but also suggests that the revocation to confinement is punishment for the violation itself and not part of the sentence for the conviction offense.

Another problem Justice Breyer identified was that revocation under the statute carried a mandatory *five years* of incarceration.[135] Again, we cannot be sure why five years was important to Justice Breyer, as he did not say. It is possible that a mandatory two years' confinement might not have concerned him, as that is the length of time the judge was allowed (but not required) to impose under § 3583(e) for other felonies of the same class.[136] Conceivably, these standard terms might have represented to Justice Breyer what "ordinary revocation" looks like.[137] The five-year sentence of confinement mandated for Haymond's revocation was more than twice as long as the standard, discretionary, two-year period that Congress had selected as appropriate and presumably adequate for those convicted of similarly serious crimes.[138] Under the *Kennedy-Ward* analysis, this differential matters, as one of the factors is "whether [the penalty] appears excessive in relation to the alternative purpose assigned."[139]

Justice Breyer's third reason for concluding that the statute in *Haymond* was not "ordinary revocation" was that this predetermined five years of incarceration was required only upon proof of the commission of one of several federal criminal offenses specifically enumerated in the statute. Justice Gorsuch found this feature of

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135. *Id.* ("§ 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of 'not less than 5 years' upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.' ").

136. 18 U.S.C. § 3583(e)(3) provides that the court *may* "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision . . . ." (subject to a two-year maximum sentence when the underlying offense-of-conviction is a class C or D felony).

137. *See, e.g.*, United States v. Bruley, 15 F.4th 1279, 1284 (10th Cir. 2021) (rejecting the defendant's *Haymond* challenge):

> The conviction for possession with intent to distribute was a class D felony, so the district court was authorized to impose up to 24 months' imprisonment. *See* § 3583(e)(3). This process of determining revocation consequences by looking to the underlying conviction is the exact process Justice Breyer approved of and termed "ordinary revocation."

138. *See* 18 U.S.C. § 3583(e)(3).

139. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963).

§ 3583(k) irrelevant. "Why should *that* matter?" he asked.[140] And, of course, when applying the rules in *Apprendi* and *Alleyne,* it does not matter. Those rules cover any fact, exempting only the fact of a prior *conviction*. Yet this feature of § 3583(k) was crucial for Justice Breyer's multifactor analysis. By mandating five years of incarceration after a judicial finding of guilt of a specified federal offense, Congress was able to authorize punishment for that offense without providing trial protections for what could have been a separate criminal prosecution. Revocation to confinement for more general conditions, such as not committing "any crime," or for conditions barring enumerated behaviors that are not crimes, would presumably not raise the same constitutional red flags. For Justice Breyer, when Congress chose to list specific crimes in § 3583(k), and then proceeded to mandate unusually severe penalties whenever the government could demonstrate it was more likely than not a releasee committed one of them, this looked like an end run around the "the rights, including the jury right, that attend a new criminal prosecution."[141]

Not surprisingly, this last feature coincides with several established factors in the *Kennedy-Ward* analysis, including whether "the behavior to which [the penalty] applies is already a crime."[142] Indeed, the plurality opinion answered its own question why it mattered that the statute's predicates are "a 'discrete set of federal criminal offenses.' "[143] Justice Gorsuch warned that upholding statutes like § 3583(k) would "permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment."[144] "[W]hy bother with an old-fashioned jury trial *for a new crime* when a quick-and-easy 'supervised release revocation hearing' before a judge carries a penalty of five years to life?" he queried.[145] During oral argument, Justice Sotomayor also expressed this concern when she remarked that "[i]f it looks like a duck, quacks like a duck, walks like a duck, it's a duck. And what [the statute] seems to be saying is, if you

140. United States v. Haymond, 139 S. Ct. 2369, 2384 n.9 (2019) (plurality opinion) (adding, "Whether the Sixth Amendment is violated in 'discrete' instances or vast numbers, our duty to enforce the Constitution remains the same.").

141. *Id.* at 2386 (Breyer, J., concurring).

142. *Kennedy*, 372 U.S. at 168.

143. *Haymond*, 139 S. Ct. at 2384 n.9 (plurality opinion).

144. *Id.* at 2381 (plurality opinion); *see also* Simon, *supra* note 10, at 595 (noting the Court's recognition that "prosecutors have every incentive to take advantage of the opportunity to litigate cases without affording defendants the full panoply of rights"); Zemel, *supra* note 10, at 974 (observing that 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").

145. *Haymond*, 139 S. Ct. at 2381 (plurality opinion) (emphasis added).

commit this crime, you go to jail for this minimum number of years."[146] Justice Breyer shared the plurality's concern that some constitutional limit must bar legislatures from evading trial protections by piling on punishment at revocation and that § 3583(k) had crossed this line. But he fundamentally disagreed with the plurality about the source and scope of that limit.

2. Why Regulate Post-revocation Consequences Using Justice Breyer's Version of the *Kennedy-Ward* Due Process Analysis Rather than *Alleyne?*

The dissenters and Justice Breyer were justifiably troubled by the destabilizing impact of transplanting *Alleyne* to revocation.[147] Although their concern focused on the impact on federal courts, state courts, with much higher case volume, have even more to be worried about, as Section C will illustrate. Justice Breyer's version of the *Kennedy-Ward* test, by contrast, bars only those statutes that are so unlike ordinary revocation that they should be treated as punishment for a new crime, affecting a much smaller set of cases.

Also, by defining the congressional overstep in *Haymond* as hijacking the ordinary revocation process to secure punishment for a new crime without providing the constitutional protections required, Justice Breyer's approach avoids any suggestion that *juries* must be added to the revocation process to find facts that would mandate

146. Transcript of Oral Argument at 26, United States v. Haymond, 139 S. Ct. 2369 (2019) (No. 17-1672).

147. Since *Haymond*, lower courts have emphasized this point as well. For example, in *United States v. Peguero*, 34 F.4th 143, 164–65 (2d Cir. 2022), the court warned that the burdens imposed by the position of the *Haymond* plurality applying *Apprendi* to revocation would not be alleviated by waiver through pleas:

> [S]upervised releasees may hesitate to plead guilty because of a belief (perhaps well-founded) that the prosecutor may choose not to even pursue a violation involving alleged new criminal conduct if he or she would need to expend the time and resources to present the evidence of such violation in a grand jury proceeding and then a jury trial. That belief may be magnified in situations where proving the new criminal conduct (or proving a non-criminal Grade C violation) in such proceedings would likely only result in a relatively short term of imprisonment if supervised release were revoked. At a minimum, supervised releasees may often make the government present the case to the grand jury before making any plea decisions, thus potentially requiring additional hundreds of grand jury presentations annually that could overwhelm prosecutors and the grand jury system. Moreover, even assuming that the guilty plea rate remained the same for supervised release violations within the dissent's new framework under the current system . . . that would potentially result in several hundred additional jury trials each year that would need to be conducted in district courts for supervised release violations.

revocation or post-revocation confinement.[148] If an arrangement dubbed "revocation" is, as a matter of due process, punishment for a new crime and not ordinary revocation, adding a jury and proof beyond a reasonable doubt to the revocation hearing would not salvage it. Instead, the statute would be invalid unless its consequences were modified so that they no longer exceeded those authorized by "ordinary revocation."[149] Any additional penalties that the government seeks for the commission of an alleged new crime committed while on release would have to be pursued in a separate prosecution with all of the requisite constitutional safeguards protecting the accused, including jurisdiction over the offense, grand jury indictment, etc.

The *Kennedy-Ward* approach also offers a viable compromise position for a divided Court. At the very least, it is more likely to gather majority support than the position of the Gorsuch plurality that would extend *Alleyne* to the revocation context. Predicting how the Justices will align in future cases is guesswork at best, especially for new applications of the perpetually contentious *Apprendi* doctrine and its two decades of 5-4 decisions. Even so, the likelihood that *two* of the current justices would join Justices Gorsuch, Sotomayor, and Kagan in their view that *Alleyne* applies to revocation seems remote compared to the likelihood that at least five Justices will recognize Justice Breyer's alternative approach as controlling and engage with it in good faith, even if only to distinguish it.

There are reasons to believe that each of the four Justices who dissented in *Haymond* is unlikely to change his mind and join the plurality's view to apply *Alleyne* to revocation. To begin, no Justice has been more consistent in his opposition to both *Apprendi* and *Alleyne* than Justice Alito.[150] In his *Haymond* dissent he targeted almost exclusively the reasoning of the plurality opinion and held his fire when mentioning Justice Breyer's concurrence, stating only: "I do not think that there is a constitutional basis for today's holding, which is set out in Justice Breyer's opinion, but it is narrow and has saved our

148. *Haymond*, 139 S. Ct. at 2391 (Alito, J., dissenting) (suggesting that the implications of the plurality's interpretation of the Sixth Amendment would be to require juries at revocation sentencing).

149. Neither the Court in *Haymond* nor lower courts have addressed this question directly. *See, e.g.,* United States v. Memmott, No. 20-4119, 2022 WL 3571420, at *3 (10th Cir. Aug. 19, 2022) ("[I]t is still an open question as to whether § 3583(k)'s mandatory minimum provision should be invalidated for violating the Fifth and Sixth Amendments or whether the statute can be salvaged by allowing a jury to be empaneled to find the facts beyond a reasonable doubt.").

150. Mathis v. United States, 579 U.S. 500, 514 n.5 (2016) (stating Justice Alito "has harshly criticized the categorical approach (and *Apprendi* too) for many years," and citing six relevant cases).

jurisprudence from the consequences of the plurality opinion . . . ."[151] The Chief Justice not only dissented in *Haymond* but also authored the dissent in *Alleyne*. Though Justice Thomas has been a strong advocate for the *Apprendi* line of cases and authored the Court's opinion in *Alleyne*, he agreed with Justice Alito that the rules in those cases have no application in the revocation context. Justice Kavanaugh joined Justice Alito's emphatic rejection of the plurality's view as well.[152] If all four remain unmoved, both Justice Barrett and Justice Jackson would have to join the pro-*Alleyne* side, and their views on this topic are entirely unknown.

For a Justice interested in proceeding cautiously and incrementally, the *Kennedy-Ward* analysis provides a middle ground between the plurality's wholesale expansion of *Apprendi* and *Alleyne* from initial sentencing to revocation and the dissent's seeming refusal to consider that a statute labeled "revocation" might be a legislative effort to inflict punishment for new criminal behavior through the back door of revocation. Were the Court to evaluate future revocation statutes under Justice Breyer's version of the *Kennedy-Ward* analysis, it would not only avoid the most controversial aspects of the plurality's approach but also preserve a sound constitutional basis, other than the Eighth Amendment, for rejecting egregiously unfair revocation penalties.[153]

Moreover, compared to the rule in *Alleyne* that the *Haymond* plurality would apply to the revocation stage, Justice Breyer's framework is much less rigid and open to future definition, especially given his choice not to provide a fuller explanation as to why he found the three factors he identified so salient. The plurality berated this aspect of the analysis.[154] But its flexibility may prove to be its greatest asset. Accepting the reasoning of Justice Breyer's narrow concurrence as controlling does not mean that in future cases the Court must either apply or articulate it exactly as he did in *Haymond*. The Court's past

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

152. Justice Kavanaugh has said very little about the *Apprendi* cases. *See* United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); McKinney v. Arizona, 140 S. Ct. 702, 708 (2020) (finding that because the death row inmate's case was on direct review before the *Ring* and *Hurst* decisions, the prisoner could not seek relief under these cases because "*Ring* and *Hurst* do not apply retroactively on collateral review").

153. *See Haymond*, 139 S. Ct. at 2390 n.4 (Alito, J., dissenting) ("If the Constitution restricts the length of additional imprisonment that may be imposed based on a violation of supervised release, the relevant provision is the Eighth Amendment, not the Sixth.").

154. *Id.* at 2384 n.9 (plurality opinion) ("Any attempt to draw lines based on when an erosion of the jury trial right goes 'too far' would prove inherently subjective and depend on judges' intuitions about the proper role of the juries that are supposed to supervise them.").

applications of the *Kennedy-Ward* test often have been divided.[155] The opportunity to define the scope and application of the test in this new context could be attractive.

B. Due Process Limits on Maximum Post-revocation Punishment

The previous Section explained why the due process test that Justice Breyer invoked in *Haymond,* not the rule of *Alleyne,* should determine when a statute mandating a *floor* for post-revocation confinement is unconstitutional. This Section addresses how due process, and not the rule of *Apprendi,* should define the constitutional *ceiling* of post-revocation punishment.

As noted earlier, because *Haymond*'s holding did not turn on any conclusion that Haymond's five-year post-revocation sentence exceeded this ceiling, the case did not settle how to determine the maximum potential incarceration term for an offense when a legislature has authorized separate terms of both confinement and supervised release as punishment for that offense. Justice Gorsuch argued for the plurality that the maximum authorized range for Haymond's conviction was only the immediate incarceration range for the offense (ten years).[156] He suggested *Apprendi* barred any revocation sentence that, when combined with time already served, exceeded that ten-year cap.[157] In contrast, Justice Alito, joined by Chief Justice Roberts and Justices Thomas and Kavanaugh, argued in dissent that Haymond's conviction authorized a maximum term of incarceration equal to the sum of the maximum term of incarceration that could have been imposed immediately at initial sentencing (ten years), *plus* the total length of supervised release terms authorized by statute (life, in Haymond's case).[158] Justice Breyer did not enter this debate. His concurrence

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155. For example, Justice Breyer, unlike some other justices, has opposed the Court's addition of "clear proof" of punitive effect to the other *Kennedy* factors. *See* Hudson v. United States, 522 U.S. 93, 115–17 (1997) (Breyer, J., concurring) (agreeing that *Ward* and *Kennedy v. Mendoza–Martinez* "set forth the proper approach," but stating that the "clearest proof" language in the *Hudson* majority opinion is misleading and that "[i]t seems to me quite possible that a statute that provides for a punishment that normally is civil in nature could nonetheless amount to a criminal punishment as applied in special circumstances").

156. *Haymond*, 139 S. Ct. at 2380–85 (plurality opinion) ("Mr. Haymond faced a lawful prison term of between zero and 10 years under § 2252(b)(2).").

157. *Id.* at 2381 ("A mandatory minimum 5-year sentence that comes into play *only* as a result of additional judicial factual findings by a preponderance of the evidence cannot stand.").

158. *Id.* at 2390 (Alito, J., dissenting):

> [T]he concept of supervised release rests on the idea that a defendant sentenced to x years of imprisonment followed by y years of supervised release is really sentenced to a maximum punishment of x + y years of confinement, with the proviso that any time beyond x years will be excused if the defendant abides by the terms of supervised release. And on this understanding, the maximum term reflected in the jury's verdict

focused on the mandatory minimum and said nothing directly about the maximum punishment issue that so concerned the other justices.[159]

Since *Haymond*, this issue has continued to percolate. Most commentators have embraced the plurality's analysis.[160] Most judges have not. Lower courts have counted Justice Breyer's general rejection of the application of "the *Apprendi* line of cases to the supervised release context" as the fifth vote in *Haymond* to keep *Apprendi* as well as *Alleyne* out of revocation altogether.[161]

The remainder of this Section will defend a definition of maximum punishment for an offense that is consistent with the view expressed by the *Haymond* dissent but is somewhat more protective than possible interpretations of that dissent. The definition is intuitive and well-grounded in due process precedent: The constitutional maximum for post-revocation confinement for an offense carrying a term of supervised release is the sum of the maximum incarceration term plus the maximum term of any supervised release term following incarceration that the legislature has authorized the judge to impose at *initial* sentencing for that offense, minus confinement time already served for the offense. Given this due process limit, *Apprendi's* Sixth Amendment rule for distinguishing sentencing factors from elements in the initial sentencing context is neither appropriate nor necessary to protect against post-revocation consequences that exceed the maximum punishment authorized for the offense.

First, the plurality's application of *Apprendi* principles to revocation is not supported by precedent. The Court has never suggested that the Sixth Amendment bars a legislature from allocating a portion of the incarceration it authorizes for an offense to a term of

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in respondent's case was not 10 years, as the plurality claims, but 10 years plus the maximum period of supervised release that the statute authorized.

159. *Id.* at 2385–86 (Breyer, J., concurring).

160. *See* Horner, *supra* note 8, at 292; Schuman, *supra* note 9. The exception is Stith, *supra* note 10, at 303, arguing the Sixth Amendment does not limit revocation, but the right to proof beyond a reasonable doubt should apply. For other works predating *Haymond* that supported application of *Apprendi* and *Alleyne* to revocation, see Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 917 (2014); Robert McClendon, *Supervising Supervised Release: Where the Courts Went Wrong on Revocation and How* United States v. Haymond *Finally Got It Right*, 54 TULSA L. REV. 175, 202 (2018); and Zemel, *supra* note 10, at 987.

161. *E.g.*, United States v. Peguero, 34 F.4th 143, 164–65 (2d Cir. 2022)*;* United States v. Seighman*,* 966 F.3d 237, 244–45 (3d Cir. 2020) (explaining that "Justice Breyer's refusal to 'transplant the *Apprendi* line of cases to the supervised-release context' forecloses" *Apprendi*-based arguments); United States v. Ka, 982 F.3d 219, 222 (4th Cir. 2020); United States v. Smithey, 790 F. App'x 643, 644 (5th Cir. 2020) (per curiam); United States v. Childs, 17 F.4th 790, 792 (8th Cir. 2021); United States v. Henderson, 998 F.3d 1071, 1075–76 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 810 (2022); United States v. Salazar, 987 F.3d 1248, 1254, 1258–59 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 321 (2021); United States v. Moore, 22 F.4th 1258, 1268–69 (11th Cir. 2022).

supervised release or from providing a term of conditional release as a supplement to, rather than a subset of, a term of immediate imprisonment. Nor is there a historical basis for the plurality's reading of the Sixth Amendment. The *Apprendi* cases have often pointed to evidence that aggravating features that increased the maximum range of punishment imposed at initial sentencing were proved to juries in the early nineteenth century.[162] Even *Alleyne* drew upon principles already in place in the early 1800s.[163] The same cannot be said about conditional release and its revocation, as Part I.A and the dissenting opinion in *Haymond* explained.

The plurality's application of *Apprendi* to the revocation context would enshrine as constitutional one innovation in criminal punishment—discretionary parole and probation—while rejecting later experiments. Legislatures transitioned away from discretionary parole release to post-confinement terms of supervised release starting in the 1970s for many reasons. Those reasons included limiting unnecessarily long periods of supervision, more effectively tailoring punishment to each releasee, and improving punishment consistency between judges.[164] Among other advantages, proponents have also argued that regulating terms of conditional release separately from terms of incarceration increases transparency, shifting the choice of how much of a sentence will be served inside to the court, rather than an administrative officer or body.[165] The plurality's position would rewrite these statutes to include a ceiling on punishment that was never

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162. *See, e.g.*, *Apprendi*, 530 U.S. at 482–83 (noting the historical connection between a jury's verdict and the limitation on judges' discretion to impose a different sentence at common law); *id.* at 498–99 (Scalia, J., concurring) (stating that, in fashioning the jury-trial right in the Bill of Rights, the Founders made expressly clear that a criminal defendant has the right to have a jury determine all facts that "determine the maximum sentence the law allows"); *id.* at 501–02 (Thomas, J., concurring) (stating that American trial courts from the Founding era to the end of the Civil War adhered to the common-law rule that any fact that operates as a basis for imposing or increasing punishment is an element of the offense and must be proved to the jury); Cunningham v. California, 549 U.S. 270, 281 (2007) (noting the *Apprendi* rule is rooted in "longstanding common-law practice"); S. Union Co. v. United States, 567 U.S. 343, 354 (2012) (noting authority indicating that English juries during the colonial era "were required to find facts that determined the authorized pecuniary punishment").

163. Alleyne v. United States, 570 U.S. 99, 108 (2013) (citing an 1804 state case as an example of the common law tradition that judges maintained little sentencing discretion and required all facts aggravating the punishment range to be determined by the jury).

164. *See* MODEL PENAL CODE: SENT'G § 6.13 cmt. c (AM. L. INST., Final Draft 2019); Schuman, *supra* note 9, at 895 ("A well-behaved prisoner would win early parole and then serve a long term of supervision, while a poorly behaved prisoner would not be paroled and then have no supervision after release.").

165. *See, e.g.*, Mica Moore, *Escaping from Release: Is Supervised Release Custodial Under 18 USC § 751(a)?*, 83 U. CHI. L. REV. 2257, 2264 (2016) ("Supervised release was intended to create a more transparent system, with each defendant receiving a fixed term of supervision at the outset of his sentence rather than through later administrative hearings.").

intended, as Justice Alito explained in his dissent. Granted, similar arguments were rejected by a majority of Justices in prior decisions applying *Apprendi* to presumptive sentencing laws structuring judicial discretion. But all of those laws affected only initial sentencing.

Most importantly, there is no need to apply *Apprendi* to revocation in order to protect a defendant from being punished in excess of the range authorized for the initial sentence for the offense of conviction. A due process measure of the maximum punishment authorized already exists. The Court has made it clear that a defendant must be able to "predict the legally applicable penalty from the face of the indictment"[166] and must be informed of that maximum penalty before conviction. Precedent regulating adequate notice of the maximum punishment before a guilty plea already fixes that maximum as the "direct consequences" of the conviction.[167] The "direct consequences" of conviction that a defendant must understand before a plea consist of the maximum term of incarceration that the judge can impose at initial sentencing, *plus* the maximum term of contingent incarceration (supervised release) the judge can impose at initial sentencing—plus the maximum fine the judge can impose at initial sentencing.[168]

Federal courts have enforced adherence to this due process rule by state courts.[169] And state law, too, mandates notice of the terms of

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166. *Alleyne*, 570 U.S. at 113–14 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.").

167. Brady v. United States, 397 U.S. 742, 755 (1970).

168. It does not matter that one statute states the available terms of supervised release and another controls the maximum term of immediate imprisonment; both apply *at initial sentencing*, so the ceiling on total potential imprisonment authorized by the conviction is the sum. For example, fines are often defined separately from incarceration terms, and yet they remain part of the maximum authorized punishment at conviction. *Apprendi* and *Blakely*, too, construed the statutory maximum as the combination of both the statute stating the maximum for each offense as well as additional provisions modifying that range. Apprendi v. New Jersey, 530 U.S. 466, 496 (2000); Blakely v. Washington, 542 U.S. 296, 303–04 (2004).

169. For cases granting habeas corpus relief to state prisoners who pleaded guilty but were not informed of a State's mandatory parole, see, for example, Carter v. McCarthy, 806 F.2d 1373, 1376 (9th Cir. 1986), *cert denied*, 484 U.S. 870 (1987), "[w]here a criminal statute imposes a mandatory parole term to be served following completion of the period of confinement, the parole term necessarily is a direct consequence of the guilty plea"; and United States *ex rel.* Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977), in which the defendant was not informed of a two-year parole term that automatically attached to his sentence. *See also* Whalen v. United States, 445 U.S. 684, 689 & n.4 (1980):

> If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty. . . . The Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit *state* courts from depriving

post-confinement supervised release as part of the maximum punishment.[170] (Indeed, several states have explicitly adopted the *Kennedy-Ward* test to distinguish between potential "punishment" and collateral consequences when determining what a defendant must understand for a guilty plea to be knowing and intelligent.[171]) This constitutional measure of maximum punishment is also reflected in Rule 11 of the Federal Rules of Criminal Procedure, which provides that the court must determine that the defendant understands "any maximum possible penalty, including imprisonment, fine, and term of supervised release" before pleading guilty.[172] Even before the Sentencing Reform Act abolished discretionary early release on parole in favor of terms of supervised release imposed by the court, federal

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persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.

For other constitutional restrictions on sentencing, see Jones v. Thomas, 491 U.S. 376, 381–82 (1989), finding a sentencing judge violates the Double Jeopardy Clause by imposing a sentence for a probation violation that would, cumulatively with the original sentence, exceed the statutory maximum for the conviction offense; and State *ex rel.* Bray v. Russell, 729 N.E.2d 359 (Ohio 2000), finding a violation of separation of powers when, after trial court sentenced prisoner to serve eight months in prison, he assaulted a prison guard and the Ohio Parole Board imposed an additional ninety-day term to be served following the conclusion of the judicially imposed, eight-month sentence.

170. *See* People v. Nuckles, 298 P.3d 867, 872 (Cal. 2013) ("Being placed on parole is a direct consequence of a felony conviction and prison term. A defendant pleading guilty to a felony must be informed that a period of parole is a direct consequence of such plea."); People v. Whitfield, 840 N.E.2d 658, 669 (Ill. 2005) (due process is violated when a court fails to advise the defendant, prior to accepting his plea, that a mandatory supervised release term will be added to sentence); Doss v. State, 961 N.W.2d 701, 710 (Iowa 2021) (defendant had the right to be informed before his guilty plea of lifetime parole); State v. Moody, 144 P.3d 612, 623 (Kan. 2006) (mandatory one-year post-release supervision is a direct consequence); People v. Pignataro, 3 N.E.3d 1147, 1148 (N.Y. 2013) ("[D]efendant could vacate a plea when the trial court failed to mention a mandatory term of PRS during the plea allocution."); Palmer v. State, 59 P.3d 1192, 1193 (Nev. 2002) (per curiam) (lifetime supervision is a direct consequence of conviction that must be disclosed); Ward v. State, 315 S.W.3d 461, 475 (Tenn. 2010) (holding that "sentence of lifetime community supervision is a direct and punitive consequence of which a defendant must be informed in order to enter a knowing and voluntary guilty plea," also noting all courts that have addressed this agree); *see also* State v. Barahona, 132 P.3d 959, 964–65 (Kan. Ct. App. 2006) (collecting authority from nine circuits and seven states holding that a mandatory supervised release period is a direct penal consequence of the plea that must be included in plea information to comply with due process; but noting "federal jurisdictions have concluded that due process is not violated by failure to advise a criminal defendant of the applicability of a postrelease supervisory period or mandatory parole, *if* the sentence assigned to the defendant and any mandatory supervised period following his release does not exceed the maximum penalty term the defendant was told at sentencing").

171. *See* People v. Cole, 817 N.W.2d 497, 501–02 (Mich. 2012); State v. Muldrow, 912 N.W.2d 74, 83 (Wis. 2018) (joining those jurisdictions that have applied that test to the issue of whether a sanction is punishment such that the defendant must be informed of it in order for a guilty plea to be knowing, voluntary, and intelligent); *Ward*, 315 S.W.3d at 466–67; State v. Payan, 765 N.W.2d 192, 201–02 (Neb. 2009).

172. FED. R. CRIM. P. 11(b)(1)(H).

courts required notice of "special parole" terms that extended the punishment *beyond* the ordinary maximum prior to a guilty plea.[173]

Using this "direct consequences" measure of maximum sentence would prevent some applications of one type of supervised release statute that the dissent's position in *Haymond* potentially permits, namely, statutes that allow judges to pile on unlimited *additional* terms of incarceration and conditional release for each violation of the term imposed at initial sentencing. Unlimited add-on terms like these should not be considered part of the maximum authorized by the conviction unless the judge could impose a lifetime of supervised release at initial sentencing and the defendant is advised before conviction that conviction would expose him to that possibility. But currently, defendants may not be warned about add-on terms like this before conviction. Such contingent penalties for later revocation are considered "collateral" rather than "direct" consequences of the conviction. Although the Court has recognized that "[t]here is some disagreement among the courts over how to distinguish between direct and collateral consequences"[174] and has not addressed this issue directly, lower courts have held that judges need not advise defendants before pleading guilty of contingencies that may happen if they later violate the terms of their supervised release.[175] Extending punishment after revocation with additional post-revocation terms that extend *beyond* the maximum periods of incarceration plus supervised release

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173. Roberts v. United States, 491 F.2d 1236, 1237–38 (3d Cir. 1974) (holding that exposure to provisions of the new Special Parole Term, which by statute "shall be in addition to, and not in lieu of, any other parole provided for by law" and takes effect upon the expiration of the period of parole supervision or release from confinement following sentence expiration, is a consequence of a guilty plea within the meaning of Rule 11); *see also* United States v. Ackerman, 619 F.2d 285, 286 (3d Cir. 1980); Lyles v. Samuels, 257 F. App'x 531, 532 (3d Cir. 2007); People v. Alcock, 728 N.Y.S.2d 328, 330–31 (Sup. Ct. 2001) (citing a collection of cases).

Presently, extended punishment under the Armed Career Criminal Act ("ACCA") is considered part of the maximum punishment a defendant faces, too, even though *Apprendi*, with its exception for prior convictions, would not require treating as elements the qualifying convictions for greater punishment under the ACCA. For example, in *United States v. Lockhart*, the Fourth Circuit found a Rule 11 error when the defendant was not advised of a potentially higher sentencing range if he was found at sentencing to qualify for the ACCA. 947 F.3d 187, 192 (4th Cir. 2020) ("If the judge told the defendant that the maximum possible sentence was 10 years and then imposed a sentence of 15 years based on ACCA, the defendant would have been sorely misled . . . ." (quoting United States v. Rodriquez, 553 U.S. 377, 384 (2008))).

174. Padilla v. Kentucky, 559 U.S. 356, 364 n.8 (2010).

175. *See, e.g.*, People v. Monk, 989 N.E.2d 1, 4 (N.Y. 2013) ("[T]he ramifications of a defendant's violation of the conditions of postrelease supervision are classic collateral consequences of a criminal conviction . . . ."); Craig v. People, 986 P.2d 951, 963 n.9 (Colo. 1999) (en banc); Williams v. Estep, 133 F. App'x 492, 496 (10th Cir. 2005) (holding a state court's advisement at guilty plea that defendant could be sentenced to between eight and twenty-four years in prison followed by an additional five years of parole "was sufficient to inform him of the possible parole consequences of his plea").

that the judge could impose at initial sentencing would be inflicting more punishment than the conviction allows, in violation of due process.[176]

Grounding the maximum punishment for revocation purposes in due process instead of *Apprendi* is critical for other reasons. As the *Haymond* dissent made clear, the *Apprendi* rule was developed in the context of initial sentencing; it makes little sense at the revocation stage.[177] The constitutional problem that *Apprendi* remedies is the failure to prove a fact that aggravates the punishment range beyond a reasonable doubt to the jury along with the other elements. But as the *Haymond* dissent points out, it is "impossible for 'the core crime' and a postjudgment fact affecting respondent's sentence to be submitted 'together' as one 'new, aggravated crime' for proof to a jury."[178] Holding a trial for just one element of an offense years later, before a different jury, raises constitutional concerns.[179] Moreover, in most states, revocations of post-confinement conditional release are decided by administrative bodies or officers, not by courts with power to impanel juries.[180]

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176. This was not an issue in *Haymond*, because the maximum term of supervised release authorized by the conviction at initial sentencing was already as high as it could be—life. *See* United States v. Haymond, 139 S. Ct. 2369, 2373 (plurality opinion).

177. *See Haymond,* 139 S. Ct. at 2395–96 (Alito, J., dissenting) ("All of the cases in the *Apprendi* line involved actual sentencing proceedings, and thus there was never any question whether they arose in a 'criminal prosecution.' That is not this case.").

178. *Id.* at 2398–99.

179. Even on remand from a finding of an *Apprendi* violation at initial sentencing, a new jury trial on a single aggravating element may violate the ban on the government's use of offensive collateral estoppel against the defendant. This is because a separate jury trial on a single element would permit punishment for the greater offense without any opportunity for the defendant to contest the other elements, unlike ordinary retrials on remand for procedural error regarding a grading element that require the new jury to consider all of the elements anew. *See* 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 26.4(i), at 1034 n.261 (4th ed. 2021) (collecting authorities). Even if trial of the aggravating fact alone was permissible *after appeal*, in that situation the defendant arguably chose to challenge the judgment or sentence in his case. The same is not true if juries were authorized at revocation to boost a conviction offense to a greater offense in any case. See Schuman, *supra* note 9; and Horner, *supra* note 8, at 278, both arguing a post-judgment jury trial of an element of a greater offense under *Apprendi* violates the Double Jeopardy Clause as an attempt to punish the defendant twice for the same offense.

180. *See* EBONY L. RUHLAND, EDWARD E. RHINE, JASON P. ROBEY & KELLY LYN MITCHELL, ROBINA INST. OF CRIM. L. & CRIM. JUST., THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 40 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/final_national_parole_survey_2017.pdf [https://perma.cc/NKR3-V5H5] ("[O]f 38 respondents, such [final revocation] hearings are conducted by releasing authority members in 21 states (55%), while hearing officers or hearing examiners do so in another 11 states (29%). Administrative Law judges, and [trial] judges, do so in a much smaller number of states."). *See also* MODEL PENAL CODE: SENT'G § 6.15 note on cmt. a (AM. L. INST., Final Draft 2019) (listing the only jurisdictions using judges for the revocation of

Lastly, transplanting *Apprendi* to the revocation context would create an unacceptable risk of indefinite punishment for any conviction because of the exception for prior convictions. A defendant could be ordered to serve unlimited additional incarceration terms, beyond the maximum punishment authorized for the original offense, so long as each recommitment followed a violation for a new conviction, even when sentenced separately for each new conviction.[181] By contrast, there are no exceptions to the principle that restricts punishment for an offense to the sum of the maximum terms of incarceration and supervised release (and fines) available to the judge at initial sentencing. That principle would bar *any* postconviction punishment in excess of that amount, even if the violation prompting revocation is a conviction for another offense, even if the defendant admitted the violation, and even if a jury found the violation at the revocation stage. In other words, the due process barrier against more severe punishment than the maximum punishment allowed at initial sentencing is not qualified like the Sixth Amendment rule in *Apprendi*. It is a hard stop.

C. Due Process Limits Applied

The previous Section laid out two due process analyses—one for assessing when a statute providing for sanctions following the revocation of conditional release authorizes penalties that exceed the maximum punishment for an offense, another for determining when such a statute imposes punishment for a new crime even though it does not exceed the maximum punishment for the conviction offense. The due process "direct consequence" test for defining the maximum punishment, and Justice Breyer's version of the *Kennedy-Ward* test for identifying revocation statutes that impose punishment for a new crime, both provide Goldilocks alternatives, positioned between the approaches currently dividing the justices.

This Section examines how these two due process tests apply to existing federal and state revocation statutes. It illustrates how reliance upon due process rather than *Apprendi* would avoid the "destabilizing consequences" feared by a majority of Justices in

post-confinement release as the federal courts, North Carolina for juvenile cases, and West Virginia for certain sex offenders).

181. *See supra* text accompanying note 49*; see also* United States v. Henderson, 998 F.3d 1071, 1086–87 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 810 (2022) (Rakoff, J., dissenting) (arguing that applying *Apprendi* to revocation of supervised release would be relatively painless for federal courts because violations for new convictions would be exempt under *Almendarez-Torres*); United States v. Isidoro, No. 3:18cr117, 2021 WL 4471591, at *8 (E.D. Va. Sept. 28, 2021) (noting that even if *Apprendi* did apply to supervised release revocation, the violation in this case was a conviction).

Haymond,[182] and yet provide a sound basis for invalidating egregious evasions of the fundamental protections for fair notice and process protected by the Bill of Rights. The discussion that follows begins with laws regulating the revocation of traditional parole, then supervised release, and finally probation.

1. Revocation of Traditional Parole

There is little risk that sentences following the revocation of traditional parole would exceed the punishment ceiling measured by either *Apprendi* or the direct consequences due process test. States already restrict confinement following parole revocation to no more than the maximum sentence the judge actually imposed at initial sentencing (less time already served in confinement).[183] Also, most states preserve for paroling authorities administering parole the discretion to decide whether to revoke parole and recommit a parolee,[184] thereby avoiding suspicion under either *Alleyne* or Justice Breyer's version of the *Kennedy-Ward* test for new punishment.

Twelve states, however, mandate revocation for the commission of a defined class of offenses,[185] sometimes to a specified term or reincarceration.[186] These provisions would easily survive Justice

182. *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring).

183. *Id.* at 2382 (plurality opinion) (stating that under prior federal law, the judge after revoking parole "generally could sentence the defendant to serve *only* the remaining prison term" and thus "could not imprison a defendant for any longer than the jury's factual findings allowed"); ALA. CODE § 15-22-32(b)(3) (2022) (total time in confinement may not exceed parolee's original sentence); ARIZ. REV. STAT. ANN. § 31-417 (2022) ("The prisoner may be thereafter imprisoned in the prison for a period equal to the prisoner's unexpired maximum term of sentence at the time the parole was granted, unless sooner released or discharged."); TEX. GOV'T CODE ANN. § 508.283 (West 2021) (limiting time after revocation of parole, mandatory supervision, or conditional pardon to the amount remaining on the sentence, without credit for time on release); N.J. STAT. ANN. § 30:4-123.65 (West 2022) ("The duration of time served prior to parole, plus the duration of any time served on parole, less any time after warrant for retaking of a parolee was issued . . . but before the parolee is arrested, plus the duration of any time served after revocation of parole, shall not exceed the term specified in the original sentence."). Statutes that structure revocation sanctions within the maximum imposed confinement sentence by requiring aggravating facts for more punitive sanctions would also steer clear of *Apprendi*. *E.g.*, ARK. CODE ANN. § 16-93-101 (West 2022) (allowing a longer period of post-revocation confinement for a violation involving a misdemeanor when it "contains a threat of violence to a victim, or a threat of violence to a family member of the victim of the offense for which the defendant was placed on probation or parole"); *see also* RUHLAND ET AL., *supra* note 180, at 44 ("[O]f 37 respondents, thirty-four releasing authorities (91%) have the leverage enabling them to revoke and order parolees to serve the remainder of their sentence in prison . . . .").

184. RUHLAND ET AL., *supra* note 180. *E.g.*, ALASKA STAT. ANN. § 33.16.220 (West 2022); GA. COMP. R. & REGS. § 475-3-.08(7) (2022); WASH. REV. CODE ANN. § 9.94A.633(1)(a) (West 2021).

185. *See, e.g.*, ALA. CODE § 15-22-32(b)(1) (2022) (mandating revocation for a violation by parolees convicted of listed offenses).

186. RUHLAND ET AL., *supra* note 180, at 44 tbl.31 (reporting that in nine states, incarceration is mandatory for a prescribed length of time, while in three additional states incarceration is

Breyer's version of the *Kennedy-Ward* test, but they would face serious challenge under *Alleyne*.

One reason to anticipate little disruption of mandatory revocation provisions under the *Kennedy-Ward* analysis is that any assessment under *Kennedy-Ward* is jurisdiction specific. What constitutes a departure from "ordinary revocation," for example, will differ from state to state, in part because state law on parole revocation varies significantly. To mention just a few of the differences, half of the states that rely heavily on discretionary parole release allow a violator to be sentenced to the entire balance of the maximum term of confinement not yet served, while half limit post-revocation terms to shorter, specific periods.[187] States also have adopted different approaches to crediting time on release toward the balance of the sentence left to serve.[188] And some states guide the revocation decision with guidelines or risk assessments, while others do not.[189]

As an illustration of how the application of *Kennedy-Ward* would permit regulation that *Alleyne* would prohibit, consider a statute that mandates revocation to a defined minimum term of confinement upon proof at revocation that the parolee committed a new offense while on parole. If *Alleyne* governed factfinding at parole revocations, it would invalidate application of the statute to any defendant on parole for an offense carrying either no mandatory minimum sentence at initial sentencing or a minimum that is lower than the minimum term of recommitment required by the revocation statute. But under Justice Breyer's version of the *Kennedy-Ward* test, the statute would probably be upheld. Because mandatory revocation for new crimes is already part of "ordinary" revocation in the state, more would be required in order to

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mandatory for a time left to the discretion of the revoking authority); *see, e.g.*, N.J. STAT. ANN. § 30:4-123.64(c) (West 2022) ("Any parole violator ordered confined for commission of a crime while on parole shall serve at least 6 months or that portion of the custodial term remaining, whichever is less, before parole release.").

187. RUHLAND ET AL., *supra* note 180, at 44 (over two-thirds of the thirty-six releasing authorities responding set the amount of time to be served for a revocation to prison or jail, sixteen impose such outcomes with no restrictions, while eighteen were subject to some limitations, including "caps" on the sanction period).

188. *Id.* at 23 (six discretionary-release states forfeit all time served on parole upon revocation, a few limit this to certain circumstances, and eight require forfeiture of all or a portion of the time on release at the discretion of the parole board).

189. *Id.* at 48–49 (reporting that a majority of the thirty-eight jurisdictions required the use of a risk assessment at revocation, and numerous releasing authorities have also embraced progressive sanction grids or more structured guidelines in responding to parolee violations, only eight releasing authorities did not); *see, e.g.*, WASH. REV. CODE ANN. § 9.94A.737(2)(a) (West 2022) (requiring "a structured violation process that includes presumptive sanctions, aggravating and mitigating factors, and definitions for low level violations and high level violations"); VA. CRIM. SENT'G COMM'N, 2021 ANNUAL REPORT 40 (2021), http://www.vcsc.virginia.gov/2021AnnualReport.pdf [https://perma.cc/H3Y3-N7KH].

conclude that the revocation statute actually imposes new punishment for the crime committed while on release. For example, legislative intent to punish the parolee for committing the new crime rather than to administer the sentence for the earlier conviction might be suggested if state law mandated recommitment unless the parolee was convicted and sentenced separately for that crime, mandated recommitment for a term equal to whatever maximum sentence was authorized for the new crime, or targeted the commission of a specific crime with a uniquely harsh post-revocation penalty for reasons inconsistent with the rationale underlying the parolee's initial sentence.

Applying *Alleyne* to back-end factfinding that triggers new minimum incarceration terms could jeopardize not only the regulation of revocation but also statutes that require corrections officials to *delay* what would otherwise be presumptive release on parole. These include presumptive release laws that tie longer periods of confinement to specific findings by corrections officials,[190] statutes and regulations that

190. For examples of statutes using rebuttable presumptions of release, see Harrington, *supra* note 37, at 1210–11 (collecting statutes from Washington, Colorado, and California). *E.g.*, HAW. REV. STAT. ANN. § 706-670(1) (West 2022) (requiring that "a person who is assessed as low risk for re-offending shall be granted parole upon completing the minimum sentence" except in certain situations, such as when the individual has committed serious misconduct while in prison); 28 VT. STAT. ANN. §§ 501a, 502a(e)(2) (2022) (creating presumptive parole for inmates meeting certain conditions unless specified findings made by the Department of Corrections); *see also* Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protections for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 243 (2017) ("There is . . . an incipient movement towards presumptive parole, as states struggle to reduce their outsized prison populations in order to cut corrections costs.").

For just one example of the confusion this could cause, consider the ongoing litigation over a recently enacted Ohio statute that reinstated discretionary parole release for the most serious offenses in the state and provided a rebuttable presumption of release once a prisoner serves the minimum term, but it allows the corrections department to rebut the presumption by showing the prisoner was classified at security level three or above or that his behavior while incarcerated "demonstrate[s] that the offender has not been rehabilitated" and that he "continues to pose a threat to society." OHIO REV. CODE ANN. § 2967.271 (West 2022). If the presumption of release is rebutted, the department may "maintain the offender's incarceration in a state correctional institution under the sentence after the expiration of the offender's minimum prison term . . . for an additional period of incarceration determined by the department . . . [that] shall not exceed the offender's maximum prison term." *Id.* As of this writing, the state's courts have rejected arguments that this statute violates the principle of *Apprendi*, but with several dissents and concurring opinions expressing different interpretations of *Haymond* and the application of *Apprendi* in this situation. *See* State v. Delvallie, 186 N.E.3d 830, 830 tbl. (Ohio 2022) (granting review of State v. Delvallie, 185 N.E.3d 536 (Ohio Ct. App. 2022)). Warned one Ohio judge, extending any ruling that this statute implicated *Apprendi* to its "logical end" would require "the courts to invalidate punishment as a result of internal prison disciplinary proceedings entirely, or require all rule infractions to be tried before a jury." State v. Wolfe, No. 2020CA00021, 2020 WL 7054428, at *13 (Ohio Ct. App. Nov. 30, 2020) (Gwin, J., concurring in part and dissenting in part); *see also* State v. Eaton, No. L-21-1121, 2022 WL 2783904, at *31 (Ohio Ct. App. July 15, 2022) (divided decision, in which judges disagreed about whether hearing under the new law is more analogous to a parole release or parole revocation decision); State v. Knox, No. 111262, 2022 WL 4373837, at *1 (Ohio Ct. App. Sept. 22, 2022) (Groves, J., concurring) (agreeing she was bound by existing precedent to require sentencing under the statute but "would have found [it] unconstitutional").

structure the allocation of credit for time spent while on parole release,[191] and the routine revocation of good-time and earned-time credits that would have advanced a prisoner's parole release date if not revoked.[192]

In short, extending *Alleyne* to factfinding for the revocation of traditional parole would significantly narrow regulatory options for states seeking to control how corrections officials administer time spent in confinement, including provisions designed to restrict severity. By contrast, the due process tests defended here would allow states to continue experimenting with regulations that structure the administration of traditional parole, except in extreme cases where a regulation clearly constitutes punishment for an offense other than the crime of conviction.

2. Revocation of Supervised Release

Apprendi's maximum-enforcing rule would have a substantial effect if applied to laws regulating the revocation of a term of supervised release. As interpreted by the Gorsuch plurality in *Haymond*, *Apprendi* would bar any post-revocation confinement once a defendant's total confinement reached the maximum incarceration term authorized for initial sentencing (i.e., ten years in Haymond's case). Contrast that to a due process test that limits post-revocation punishment to the sum of incarceration and supervised release terms available to the judge at initial sentencing. This measure would allow legislatures to deny the option of imposing the most severe post-revocation consequences to all but the most aggravated cases, while also regulating the length of terms of supervised release separately from terms of immediate confinement. At the same time, enforcing the due process ceiling would bar punishment that exceeds that authorized for the conviction at initial sentencing, fulfilling principles of fair notice.

Consider the federal system. If *Apprendi* applied, it would bar recommitment for a violation of supervised release whenever the maximum incarceration ceiling provided for the offense had already

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Recognizing that due process, not the Sixth Amendment, regulates parole release and revocation would settle these disputes. The statute does not allow confinement beyond the maximum "direct consequences" of conviction authorized at initial sentencing and made clear to the defendant before conviction. And because executive officials retain discretion to release the defendant even if the presumption was rebutted, and the statute does not target the commission of an enumerated crime or set of crimes, the scheme does not violate due process under Justice Breyer's version of the *Kennedy-Ward* test, either.

191. *See supra* note 188.

192. For the good-time and earned-time credit regulations in all fifty-two jurisdictions, see REITZ ET AL., *supra* note 37, at 66–74 tbl.8.

been served by the defendant, regardless of how many years of supervised release the judge imposed, or Congress said the judge could have imposed, at initial sentencing. The due process test, by contrast, would bar recommitment only if the defendant has, before revocation, already been confined for the length of time equal to the sum of potential and immediate incarceration terms authorized for initial sentencing. As others have noted, this occurs in only a small number of cases.[193] Yet in those infrequent cases, due process would prohibit a court from piling on another sentence of incarceration or an additional term of conditional release after revocation. And it would bar any punishment beyond what the judge could have imposed at initial sentencing, even if a statute authorized judges to order that extra punishment after revocation.

A recent example illustrates this unusual type of case. In *United States v. Moore*,[194] the trial judge initially sentenced the defendant to the maximum terms of incarceration and supervised release the judge could have imposed—ten years of incarceration to be followed by three years of supervised release.[195] Moore's first term of supervised released was revoked, and he was sentenced to six months imprisonment and two more years of supervised release under § 3583(e).[196] This second term of supervised release was revoked as well, and he was sentenced to eighteen months of imprisonment and eighteen more months of supervised release.[197] A third revocation led to a sentence of another eighteen months of incarceration and another eighteen months of supervised release.[198] Reviewing this last post-revocation sentence, the court of appeals rejected Moore's argument that, as applied to him,

193. *See* United States v. Henderson, 998 F.3d 1071, 1086 (9th Cir. 2021) (Rakoff, J., dissenting) (supervised release sentences are generally less than a year, and "judges very rarely sentence defendants at or near the statutory maximum," citing statistics from 2012–2017 reporting that "only 4.4% of federal criminal sentences following conviction were at or within one year of the statutory maximum," and that for eighty-six percent of supervisees, "the average term of imprisonment imposed . . . was 11 months"), *cert. denied*, 142 S. Ct. 810 (2022); United States v. Moore, 22 F.4th 1258, 1283 (11th Cir. 2022) (Newsom, J., dissenting in part) ("Overwhelmingly—and to their great credit—district court judges have known not to impose revocation sentences that cause a defendant's total prison time to exceed the aggregate maximum prison and supervised-release terms. Moore's sentence in this case was aberrant in the extreme . . . ."); *see also* United States v. Haymond, 139 S. Ct. 2369, 2384 (plurality opinion) (noting that "[i]n most cases (including this one), combining a defendant's initial and post-revocation sentences issued under § 3583(e) will not yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction" because "courts rarely sentence defendants to the statutory maxima").

194. 22 F.4th 1258 (11th Cir. 2022).

195. *Id.* at 1261–62.

196. *Id.* at 1262.

197. *Id.*

198. *Id.*

§ 3583(e)(3) was unconstitutional because it allowed the district court to extend his sentence beyond the authorized statutory maximum for his offense of conviction in violation of *Apprendi*.[199] The circuit judge who authored the decision observed that "nothing in the text [of § 3583(e)] provides that the total time a defendant may serve for his original conviction and revocations of supervised release cannot exceed the combined statutory maximum terms of imprisonment and supervised release for the original offense of conviction," and then concluded that no controlling authority has so held either, including *Haymond*.[200] A second judge concurred in the result only, stating that whether the district court had the authority to impose a cumulative sentence for multiple violations of supervised release and the underlying offense that exceeds the statutory maximum sentence he faced for the underlying offense was an issue of first impression and could not be the basis for relief under plain error review.[201] The third judge on the panel dissented, arguing that "[b]ecause any supervised release time can (upon the occurrence of certain conditions) be converted into prison time, the defendant's total statutory maximum penalty was 13 years in prison. Without convicting him of any new crimes, the district court sentenced the defendant to a total of 13 *and a half* years in prison."[202] This "violated Moore's 'constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress.' "[203] The dissent had it right.

In *Moore*, the defendant's decision to tie his argument for relief on appeal to *Haymond* and *Apprendi* concealed the more fundamental due process problem that the dissenting judge recognized. The problem was not that the Sixth Amendment required juries at the revocation. The problem was that due process barred interpreting the revocation statute to permit continued punishment of a defendant who had already served the maximum punishment authorized for his offense—the maximum direct consequences of conviction the judge could impose as a sentence; the maximum that the defendant was advised he would face upon conviction. The judge's decision to impose both the maximum incarceration and the maximum supervised release terms at initial sentencing was unusual, and it exhausted any later option to extend

199. *Id.* at 1265–66 (the entire panel did agree that the new term of *supervised release* violated § 3583(h), which caps new terms of supervised release after revocation at the maximum amount of supervised release authorized by statute for the offense (thirty-six months) less total imprisonment for prior revocations (forty-two months)).

200. *Id.* at 1266–69.

201. *Id.* at 1279 (Lagoa, J., concurring in part).

202. *Id.* (Newsom, J., dissenting in part).

203. *Id.* at 1280 (citing Whalen v. United States, 445 U.S. 684, 690 (1980)).

confinement with additional terms beyond that thirteen-year maximum.[204]

In the states, this due process test would have a similarly narrow effect, compared to the blunderbuss of *Apprendi*. Of states that have adopted supervised release, many already limit potential confinement after a violation to the remaining balance of the initial term of release, or to the sum of incarceration and supervised release terms available at initial sentencing,[205] and would not transgress the

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204. Another scenario that could lead to this problem is when the Supreme Court invalidates the statute that supported a defendant's sentence, that ruling applies to the defendant, and the defendant's confinement reaches the legal maximum before revocation. Such was the situation in *United States v. Childs*, 17 F.4th 790 (8th Cir. 2021). By the time his supervised release was revoked, Childs had already served fourteen years in confinement as a consequence of being erroneously sentenced to a fifteen-year mandatory minimum under the ACCA, rather than within the ten-year maximum incarceration plus two-year maximum supervised release term that applied at initial sentencing to his felony firearm offense. *Id.* at 791. The trial judge imposing the sentence after revocation believed that § 3583(e) provided authority to impose up to eight more months of incarceration for the revocation along with eighteen more months of supervised release. *Id.* On appeal, the Eighth Circuit agreed, rejecting as meritless Childs' argument "that his sentence exceeded the statutory maximum because the number of years he served was greater than the sum of the maximum term of imprisonment *plus* the maximum term of supervised release . . . ." *Id.* at 791–92. Under the approach that I argue here, the court's conclusion was wrong. Adding more time to the maximum twelve-year total available at initial sentencing punished the defendant beyond what the *conviction* allowed, in violation of his rights to due process.

See also United States v. McIntosh, 630 F.3d 699, 702 (7th Cir. 2011) (finding that the defendant's punishment was not capped at eight years—the initial term of incarceration (five years) plus the initial term of supervised release (three years)—and reasoning that a district court must be able to impose the period of incarceration authorized by § 3583 upon revocation, even for a defendant sentenced at or near the maximum sentence for his offense).

205. ALA. CODE § 15-22-54(e)(3) (2022) ("The total time spent in confinement under this subsection may not exceed the term of the defendant's original sentence."); ALASKA STAT. ANN. § 12.55.125(n) (West 2022) ("In imposing a sentence within a presumptive range . . . the total term, made up of the active term of imprisonment plus any suspended term of imprisonment, must fall within the presumptive range . . . ."); COLO. REV. STAT. ANN. § 17-2-103(11)(b) (West 2022) (mandatory term of "post release supervision" between one and five years is imposed at initial sentencing and serves as the outer limit for any additional time spent in prison if that parole is revoked); KAN. STAT. ANN. § 22-3717(d) (West 2022) (post-prison supervision set by statute per severity level of offense); KAN. ADMIN. REGS. § 44-9-503 (2022); MINN. STAT. ANN. § 244.05, subdiv. 3(2) (West 2022) (stating that "[t]he period of time for which a supervised release may be revoked may not exceed the period of time remaining in the inmate's sentence" and revocation of sex offender on conditional release may not exceed balance of conditional release term); State *ex rel.* Peterson v. Fabian, 784 N.W.2d 843, 845–46 (Minn. Ct. App. 2010) (sanction for violation of supervised release is limited to serving the remaining time on the sentence imposed (citing MINN. STAT. ANN. § 609.3455, subdiv. 8(b) (2008))); Carter v. State, 754 So. 2d 1207, 1209 (Miss. 2000) (upholding sentence to maximum incarceration of twenty years, with six months suspended, plus a five-year term of probation to follow, stating, "Carter will serve nineteen and one-half years in the penitentiary . . . [and] if he violates the conditions of his five-year probationary period, he would also have to serve the one-half year suspended, resulting in a total of twenty years served, but no more"); Johnson v. State, 925 So. 2d 86, 105 (Miss. 2006) ("[T]he period of post release supervision is limited only to the number of years, which when added to the total period of incarceration, would not exceed the maximum penalty statutorily prescribed for the felony offense committed."); N.Y. EXEC. LAW § 259-i(3)(f)(xii) (McKinney 2022) ("[The court upon revocation may] direct the violator's reincarceration up to the balance of the remaining period of post-release

"direct consequences" maximum. But just as that test would forbid the add-on punishment in *Moore,* it would also prohibit state statutes that authorized indefinite back-end increases in punishment beyond the punishment available to the sentencing judge at initial sentencing.

One potential example of a statute that might raise this problem is a California statute, section 3000.08(h) of the California Penal Code, that suggests the parole board, for "good cause," could extend an offender's supervised release term (called "parole" in California) indefinitely, for certain offenses.[206] The script that many trial courts appear to use for guilty plea proceedings in California for offenses subject to this statute[207] does not convey to a defendant that conviction would carry the possibility that he could be on parole, facing revocation, for life. Instead, that form states: "After I have served my prison term, I may be subject to a *maximum* period of parole or post-release

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supervision, not to exceed five years; provided, however, that a defendant serving a term of post-release supervision for a conviction of a felony sex offense defined in section 70.80 of the penal law may be subject to a further period of imprisonment up to the balance of the remaining period of post-release supervision . . . ."); State v. Snyder, 447 P.3d 41 (Or. Ct. App. 2019), *rev. denied*, 455 P.3d 38 (Or. Ct. App. 2019) (holding that trial court plainly erred when it imposed a term of imprisonment and post-prison supervision that exceeded sixty months for a Class C felony); OR. ADMIN. R. 213-005-0002 (2022) ("The term of post-prison supervision, when added to the prison term, shall not exceed the statutory maximum indeterminate sentence for the crime of conviction."); *see also* State v. Encinias, 726 P.2d 1174, 1177 (N.M. 1986) (upholding imposition of supervision term following completion of incarceration term even though revocation to confinement would not be an option partway through the supervision term, stating "we cannot say that the Legislature's intent . . . will be frustrated if the trial court loses the power to impose a jail term at some point in the five-year period," there are other "salutary purposes underlying the legislative intent to allow [conditional release]"); OHIO REV. CODE ANN. § 2929.141(A)(1) (West 2022) ("The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony.").

206. CAL. PENAL CODE § 3000.08(h) (West 2022); *see* People v. Martin, 272 Cal. Rptr. 3d 363, 369 (2020) (emphasis added):

> [A]lthough Martin also appears to be entitled to be released at the end of his statutory parole period, that does him little good for at least one of three reasons: (1) his statutory parole period is 20.5 years (§ 3000, subd. (b)(4)(A)); (2) that period may be extended "for good cause" (ibid.); and (3) the "notwithstanding" proviso of section 3000.08, subdivision (h) arguably means the statutory period stated in section 3000, subd. (b)(4)(A) no longer applies at all. What this means is that, . . . , *there is no express guarantee that Martin will ever be released from prison.*

See also id., at 368 ("Like federal supervised release, this state's parole system is currently premised on a period of additional supervision following a completed prison term.").

207. CAL. PENAL CODE § 3000(b)(4)(A) (West 2022), imposes a presumptive maximum term of post-release supervision of twenty years and six months for a list of designated sex offenses against children, all of which carry incarceration terms less than twenty years:

> [I]n the case of a person convicted of and required to register as a sex offender for the commission of an offense specified in Section 261, 264.1, 286, 287, paragraph (1) of subdivision (b) of Section 288, Section 288.5 or 289, or former Section 262 or 288a, in which one or more of the victims of the offense was a child under 14 years of age, the period of parole shall be 20 years and six months unless the board, for good cause, determines that the person will be retained on parole.

community supervision of . . . 20-1/2 years for persons required to register as a sex offender for the crimes specified in Penal Code section 3000(b)(4)(A)."[208] For a defendant led to believe that the maximum punishment he faces upon conviction is the maximum incarceration term authorized for his offense followed by a maximum conditional release term of twenty-and-a-half years, any confinement exceeding that total would violate due process.

Adopting this approach would call for a different analysis than that applied by the California Court of Appeals in the case of *People v. Martin*.[209] Martin was convicted in 2014 of a crime carrying a potential incarceration sentence of either five, eight, or ten years, a conviction subject to the parole extension statute described above. He was sentenced to five years, served that confinement term, but in less than a year after leaving prison, violated his term of supervised release and was revoked back to prison.[210] He claimed that a jury should have determined that he violated his release beyond a reasonable doubt. The court recognized that the violation opened the door to the potential of *lifetime* confinement for Martin under section 3000.08(h) but rejected Martin's argument that it exposed him to "more time in prison than what was statutorily authorized for his underlying offense."[211] The court read the dissent in *Haymond* as expressing "the majority view" on this issue, defining the maximum time an offender can be incarcerated for an offense including both the incarceration term authorized by statute and the maximum term of supervised release or parole authorized by statute.[212] In Martin's case, the court reasoned that this was potential incarceration for life, which in the court's view was limited only by the prohibition against cruel and unusual punishment.[213]

This conclusion that there are no constitutional constraints on a legislature's ability to pile on multiple terms of confinement for a criminal offense other than the Eighth Amendment is precisely the interpretation of the dissent in *Haymond* that the due process test advanced here rejects. The confinement ceiling upon revocation of a term of conditional release is not whatever a legislature says can be

208. *See* Felony Disposition Statement, People v. Cannon, No. 2018024898, 2020 WL 3891892, at *1 (Cal. Super. Ct. Jan. 13, 2020) (emphasis added).

209. 272 Cal. Rptr. 3d 363 (Ct. App. 2020).

210. *Id.* at 364–65.

211. *Id.* at 369.

212. *Id.* at 369–70 ("[T]here is no express guarantee that Martin will ever be released from prison. . . . But under the majority view in *Haymond*, for constitutional purposes, the initial criminal conviction authorizes not only the maximum term of imprisonment for the crime but also authorizes the maximum term of supervised release or parole.").

213. *Id.* at 370 n.5.

heaped on top of the initial sentence should a contingency be satisfied years after sentencing, even if the defendant is advised of a lower ceiling before conviction. The maximum is the punishment the legislature has defined as available for that offense when first sentencing the defendant about which the defendant must have adequate notice before conviction.

Turning to mandatory terms upon revocation, a comparison of the effect of applying *Alleyne* with the effect of applying Justice Breyer's version of the *Kennedy-Ward* test to existing statutes specifying when revocation of supervised release is mandatory reveals that *Alleyne* poses the far more serious threat.[214] For example, 18 U.S.C. § 3583(g) requires revocation of supervised release for an unspecified term if the defendant possesses an illegal drug or firearm, tests positive for illegal substances three times in a year, or refuses to comply with required drug testing.[215] Applying *Alleyne* would bar mandatory revocation to incarceration for *any* period of time, even a day, if confinement was not already mandated at initial sentencing. State statutes or regulations that mandate revocation and recommitment upon specified findings at revocation (including criminal conduct while on release) would also fail *Alleyne* whenever the revocation penalty imposes a minimum not required at initial sentencing.

These same statutes are very likely to survive Justice Breyer's version of the *Kennedy-Ward* test.[216] Under that analysis, § 3583(g) would not be considered punishment for a new crime, because it neither mandates any particular term of confinement, much less a five-year sentence, nor is it limited to the commission of a specified crime or set

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214. In states that make revocation entirely discretionary, there would be no difference between the application of avoiding any mandatory post-revocation incarceration that might trigger concerns under either analysis. *E.g.*, *In re* Flint, 277 P.3d 657, 662 (Wash. 2012) (department retains broad discretion to either reincarcerate the offender or continue community custody); VA. CODE ANN. §§ 53.1-165(A), 19.2-295.2 (2022); N.M. CODE R. § 22.510.15.8 (2022) (parole board may continue or revoke the parole). In the federal system, for example, as Justice Breyer noted in *Haymond*, § 3583(e) does not ordinarily mandate revocation and reimprisonment. *See also* United States v. Haymond, 139 S. Ct. 2369, 2383–84 (2019) (plurality opinion) ("Section [ ] 3583(e), which governs supervised release revocation proceedings generally, does not contain any similar mandatory minimum triggered by judge-found facts."); United States v. Ka, 982 F.3d 218, 222 (4th Cir. 2020) ("[Section] 3583(e) 'does not contain any of the three features that, in combination, render[ed] § 3583(k) unconstitutional.' " (quoting United States v. Doka, 955 F.3d 290, 296 (2d Cir. 2020))).

215. 18 U.S.C. § 3583(g).

216. *See, e.g.*, KAN. ADMIN. REGS. § 44-9-503 (2022) (mandating revocation for the balance of the supervision term for a new crime); *see also* NEIL P. COHEN, LAW OF PROBATION & PAROLE § 19:9 (2d ed. 1999) (reporting that only a handful of states have chosen to forbid revocation for this purpose absent conviction for the new offense (citing HAW. REV. STAT. ANN. § 706-625 (West 2022))).

of crimes.[217] Similarly, a state statute mandating revocation for the commission of a new crime would raise concerns under Justice Breyer's analysis only if an examination of multiple factors indicated that it was distinctly different from "ordinary" revocation of supervised release in that jurisdiction, in ways that suggested an intent to punish the new crime rather than administer the existing sentence for the former crime. As with mandatory revocation for crimes committed on parole, discussed earlier, this inference would have to be at least as strong as it was in *Haymond*.

3. Revocation of Probation

This last Section discusses why transplanting *Apprendi* and *Alleyne* to the context of probation revocation is unwise and unnecessary, and how the two due process analyses should govern statutes regulating the revocation of probation in the states instead. With more than half of all those under correctional control on probation,[218] the stakes are high for states seeking ways to regulate probation revocation without generating constitutional challenges.

As noted earlier, traditional probation law allows either post-revocation confinement up to the maximum authorized for the conviction[219] or the activation of all or part of the unserved term of

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217. Several cases have held this. *See, e.g.*, United States v. Garner, 969 F.3d 550, 553 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1439 (2021); United States v. Shakespeare, 32 F.4th 1228, 1237 (10th Cir. 2022); United States v. Vickers, No. 21-11741, 2022 WL 2048486, at *4 (11th Cir. June 7, 2022) (per curiam) ("[Section] 3583(g) does not strip a judge's discretion to decide 'for how long' the defendant should be imprisoned."); *see also* Jacob Schuman, *Drug Supervision*, 19 OHIO ST. J. CRIM. L. 1 (2022) (noting the Second, Third, Fourth, and Fifth Circuits have rejected *Haymond* challenges to § 3583(g) and no circuits have ruled in favor).

218. Minton et al., *supra* note 1, at 3.

219. *See, e.g.*, People v. Bolian, 180 Cal. Rptr. 3d 890, 894–95 (Ct. App. 2014) (for a "suspended imposition of sentence, the court may, upon revocation and termination of probation, 'pronounce judgment for any time within the longest period for which the person might have been sentenced,' " but for suspended execution, "upon revocation and termination of probation, the court [*must*] order that imposed sentence into effect"); Riddle v. State, 816 So. 2d 454, 456 (Miss. Ct. App. 2002) (court has the power to impose any sentence which originally could have been imposed; however, if a suspended sentence was imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence); State v. Dunlap, 225 A.3d 1068, 1077–80 (N.J. App. Div. 2020); State v. Brown, 737 N.E.2d 1057, 1060 (Ohio Ct. App. 2000) ("When the trial court elects to impose a prison term on a violator, the length of the term imposed must be within the range of prison terms available for the offense . . . [and] is further limited to the prison term specified in the notice provided to the offender at the sentencing hearing . . . ."); N.M. STAT. ANN. § 31–21–15(B) (West 2022) ("[C]ourt may impose any sentence that might originally have been imposed . . . ."); 42 PA. CONS. STAT. §§ 9754(a), 9771(b) (West 2022) (maximum term of the new sentence after revocation may not exceed the maximum term for which the defendant could be confined under statute for the original conviction offense); TEX. CODE CRIM. PROC. ANN. art. 42A.755(a) (West 2021) ("If community supervision is revoked . . . the judge may: (1) proceed to dispose of the case as if there had been no community supervision . . . ."); TEX. CODE CRIM. PROC. ANN. art. 42A.752(b) (West 2021) (allowing increase in fine as sanction for violation of community supervision but providing

incarceration already imposed.[220] Either approach caps the post-revocation sentence within the incarceration sentence the judge could have imposed initially, so a defendant will be able to predict his exposure when he is charged and understand it before he pleads guilty or goes to trial. Neither the application of *Apprendi*, nor the "direct consequences" due process test, would be implicated by revocation of traditional probation.[221] Caselaw in the states provides several examples of this principle in action, in decisions striking down post-revocation sanctions that are more severe than the maximum sentence available to the judge at initial sentencing or conveyed to the defendant before conviction.[222]

"[t]he original fine imposed on the defendant and an increase in the fine imposed under this subsection may not exceed the maximum fine for the offense for which the defendant was sentenced."); VA. CODE ANN. § 19.2-306.1 (West 2022) (after first revocation, the court may suspend again all or any part of sentence for a period up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned, less any time already served); *see also* OHIO REV. CODE ANN. §§ 2929.15(B)(2), 2929.25(D)(3) (West 2022) (prison term after revocation cannot exceed the specific term reserved at the original sentencing hearing and must be from the range of terms available for the offense that the defendant was notified of at the original sentencing hearing). *But see* Appleman, *supra* note 10, at 1367 (speaking of probation revocation, stating "a change in sentence from a non-incarcerative probation period to a term of imprisonment, based on factual determinations made by non-jury actors, might be seen as an increase in the maximum sentence" under *Blakely*).

220. ALA. CODE § 15-22-54(e)(3) (2022); State v. Durant, 892 A.2d 302, 309 (Conn. App. Ct. 2006) (serve the sentence imposed or impose any lesser sentence); Pavulak v. State, 880 A.2d 1044, 1045 (Del. 2005) (impose balance remaining on suspended sentence); England v Newton, 233 S.E.2d 787, 788 (Ga. 1977) (may not increase the original sentence); Pugh v. State, 804 N.E.2d 202, 204–05 (Ind. Ct. App. 2004) (must order execution of defendant's previously suspended sentence after revocation of defendant's probation, rather than impose a new sentence); Commonwealth v. Cole, 10 N.E.3d 1081, 1090 (Mass. 2014) (must impose the original suspended sentence); State v. French, 35 A.3d 625, 627 (N.H. 2011) (may not increase a defendant's penalty at a probation revocation); State v. Mills, 602 S.E.2d 750, 752 (S.C. 2004) (total time imposed for all revocations could not exceed length of defendant's original sentence); State v. Draper, 712 A.2d 894, 895 (Vt. 1998) (must execute imposed sentence).

221. *See Dunlap*, 225 A.3d at 1075 (stating that "constitutional limitations on a court's authority to impose an original sentence also apply to a court's authority to impose a new sentence following revocation of special probation," and *Apprendi* did not require credit against maximum for time spent on probation before violation).

222. *See, e.g.*, State v. M.S., 484 P.3d 1231, 1238 (Wash. 2021) (requiring notice of aggravating factors before plea to "provide juveniles with the information to formulate their strategy and ultimately assess the risk of pleading guilty" and noting that "later notice of these factors at a revocation hearing is an inadequate substitute because that hearing differs substantially from a trial," providing further that "[n]otice is necessary preplea because that is the critical point at which the juvenile will consider whether go to trial or to plead guilty"); *cf.* Grinstead v. State, 605 S.E.2d 417, 420 (Ga. Ct. App. 2004) ("The court may impose any sentence permitted by law for the offense [of conviction], provided that the sentence may only exceed the original first offender sentence if the accused was informed of that eventuality at the time the first offender probation sentence was pronounced."); *see also* Blair v. State, 201 So. 3d 800, 802 (Fla. Dist. Ct. App. 2016) (post-revocation sentence exceeded maximum that would have been available without fact when the fact was not an element of the offense admitted by probationer); Shields v. State, 296 So. 3d 967, 9703 (Fla. Dist. Ct. App. 2020):

One type of probation reform would be at risk, however, under the *Haymond* plurality's view that *Apprendi* applies to revocation. Extending *Apprendi* to probation revocation could reverse state efforts to curb incarceration sentences by adopting statutes that require judges to impose probation instead of incarceration for particular offenses. Presumptive probation statutes prohibit any initial sentence of immediate incarceration unless an aggravating fact is found before the initial sentence is imposed.[223] Several states have adopted presumptive probation as a tool to curb the judicial appetite for immediate incarceration at initial sentencing. Part II argued that when the legislature limits authority to incarcerate in this way, factfinding must comply with *Apprendi* before a judge *at initial sentencing* may impose incarceration instead of probation. Does this also mean that when presumptive probation is imposed, because immediate incarceration was not authorized as punishment at initial sentencing, incarceration is not an available response to a violation of probation either? Courts in at least two states initially concluded yes.[224]

This might be a plausible interpretation of the *Apprendi* rule if it were applied to the revocation context. When incarceration at the initial sentencing stage would exceed the maximum range authorized for the conviction, presumably incarceration would be barred at the revocation stage as well, if *Apprendi* applied then. Of course, a court could respond to a violation in many different ways other than commitment to prison or jail. But losing the option of confinement at the revocation stage might prompt legislatures to abandon or rule out presumptive probation policies that limit incarceration at the initial sentencing stage.

> [T]he trial court could only impose a sentence which it could have imposed at Mr. Shields' initial sentencing. Because no jury made a finding that a non-state prison sanction could present a danger to the public, the trial court could not sentence Mr. Shields to state prison . . . either at the initial sentencing or at the postrevocation sentencing.

(citations omitted).

223. *See supra* notes 80–83 (describing such statutes).

224. *See* State v. Greenough, 915 N.W.2d 915, 918–20 (Minn. Ct. App. 2018) (observing that the consequence of revoking a five-year term supervised probation after a stay of adjudication was limited to the presumptive sentence for the conviction, which, based on a criminal-history score of zero and the offense-severity level of D, was a *stayed* thirty-six-month sentence, and reversing judge's decision to impose then execute the thirty-six-month sentence as an unauthorized upward dispositional departure in violation of defendant's Sixth Amendment rights under *Blakely*). This was also a problem in Arizona, where Proposition 200 required the imposition of probation and barred incarceration for first-time drug offenders, later interpreted to bar *revocation* to incarceration as well, as that sentence exceeded the maximum punishment authorized for the conviction. Not until the initiative was amended to allow revocation of release did trial courts have this option for revocation. *See* O'Brien v. Escher, 65 P.3d 107, 109 (Ariz. Ct. App. 2003). Plea agreements barring incarceration for probation violations have also been upheld. *See* Mares v. State, 888 P.2d 930 (N.M. 1994).

This scenario is a good illustration of why it is so tricky to apply *Apprendi* to factfinding at the revocation of a term of conditional release. Totally barring revocation to confinement for the violation of probation conditions arguably ignores the fundamental nature of probation. A sentence of probation necessarily includes the possibility of later revocation leading to incarceration. It is *conditional* release after all. The Court already suggested this when it concluded that a misdemeanor sentence of probation satisfies the "actual incarceration" standard for appointed counsel under the Sixth Amendment in *Alabama v. Shelton*.[225] When the maximum punishment a defendant faces when charged with an offense is a term of conditional release, the conviction exposes him to a sentence of *potential* incarceration for no longer than that same term. Requiring probation instead of immediate incarceration does not change its conditional nature.[226]

The due process measure advanced here avoids this problem. Just as the maximum confinement available as a sanction for revocation of supervised release is the sum of the term of incarceration and the term of post-incarceration supervised release available to the judge at initial sentencing (less confinement already served), in a case where a statute authorizes only a term of probation and bars immediate incarceration, the maximum *post-revocation* penalty authorized by the conviction should be incarceration for no longer than the maximum term of probation authorized at initial sentencing.

Justice Breyer's *Kennedy-Ward* analysis also avoids the disruption that would follow *Alleyne*'s application to statutes that require, upon revocation, confinement terms the judge had the discretion to avoid when first imposing probation. Although most states continue to grant judges the discretion to decide whether to revoke

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225. 535 U.S. 654, 662 (2002) ("A suspended sentence *is* a prison term imposed for the offense of conviction." (emphasis added)); *see also id.* at 673 (noting the state's attorney's concession "that he did not know of any State that imposes, postconviction, on a par with a fine, a term of probation unattached to a suspended sentence").

226. Indeed, instead of barring revocation, other states with presumptive probation have adopted other options, such as providing a short maximum confinement term for revocation. *E.g.*, OR. ADMIN. R. 213-010-0002 (2022) (maximum of six months); KAN. STAT. ANN. §§ 21-6804(e)(3), 21-6805(c)(3) (2022) (requiring the judge at initial sentencing to pronounce the duration of the prison sentence to be served in the event of revocation).

In addition to presumptive probation provisions, also at risk if *Apprendi* applied to probation revocation are provisions that bar or limit recommitment for "technical" violations unless certain facts are established at revocation. *See, e.g.,* Heart v. Commonwealth, 877 S.E.2d 522, 533 (Va. Ct. App. Sept. 13, 2022):

> There are potential constitutional questions imbedded within Heart's argument about what must be proved at a probation violation hearing to trigger an enhanced sentence. *See* [*Haymond*] (plurality opinion) (suggesting [*Apprendi*] applies to revocation hearings). Because Code § 19.2-306.1 is the first statute of its kind in Virginia, we have not previously addressed these issues and decline to do so here.

probation,[227] many have for some time mandated revocation of release after proof of the commission of new crimes[228] or other circumstances.[229] Like mandatory parole revocation, these statutes would probably survive under Justice Breyer's version of the *Kennedy-Ward* test,[230] but could be swept away under the *Haymond* plurality's view that factfinding at revocation must comply with *Alleyne*.[231]

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227. *E.g.*, ARIZ. REV. STAT. ANN. § 13-901 (2022); ARIZ. R. CRIM. P. 27.8(c)(2) (2022); GA. CODE ANN. § 42-8-60 (2022).

228. *E.g.*, ALA. CODE § 15-22-54 (e)(1)(b) (2022) (mandating revocation upon finding of *any* violation when serving term of release for a conviction that is a "violent" Class A felony, specified sex offense, or specified aggravated theft offense); State v. Brown, 475 P.3d 1161 (Ariz. Ct. App. 2020) (discussing statute mandating revocation of special probation and imposition of presumptive sentence upon finding that probationer committed any felony offense); State v. Kelemen, 437 P.3d 1225, 1229 n.2 (Or. Ct. App. 2019) ("Under some circumstances, the legislature has made revocation of probation mandatory when an offender violates the conditions of probation by committing a new crime." (citing OR. REV. STAT. § 137.712(5))); WASH. REV. CODE ANN. § 9.94A.716(3) (West 2022) (upon arrest for new felony offense listed in RCW 9.94A.737(5), department will hold the offender for thirty days from the time of arrest, but not past his or her maximum term of total confinement or past the offender's term of community custody).

229. *E.g.*, 730 ILL. COMP. STAT. ANN. 5/5-3, 5/5-6-4 (West 2022) (mandating revocation of sex offender for violation of contact or residency restrictions); *see also* Hollingsworth v. State, 293 So. 3d 1049, 1053 (Fla. Dist. Ct. App. 4th 2020) (rejecting attack under *Alleyne* and *Haymond* to FLA. STAT. ANN § 948.06 (8)(e)(2)(a), which mandates revocation upon violation for certain offenders if the court finds the offender "poses a danger to the community," reasoning that the statute "does not change the range of punishments . . . [i]t merely prevents the judge from deviating from the Code by again imposing probation"); ARIZ. REV. STAT. ANN. § 13-917(B) (2021) ("If the court finds that the person has committed a violation of a condition of intensive probation that posed a serious threat or danger to the community, the court shall revoke the grant of intensive probation and impose a term of imprisonment as authorized by law.").

One state has prohibited any mandatory minimum term of incarceration upon revocation that was not authorized for the original sentence. *See* Nelson v. State, 617 P.2d 502, 504 (Alaska 1981) (because no parole eligibility restriction was imposed as part of Rodriguez's original sentencing order, one cannot be imposed upon revocation).

230. *See, e.g.*, State v. Brown, 475 P.3d 1161, 1166 (Ariz. 2020) (rejecting *Haymond* challenge to statute mandating revocation of special probation and imposition of a sentence authorized for the original offense upon finding that probationer committed "any additional felony offense").

231. Several states authorize unlimited extensions of probation upon a finding of nonpayment of restitution, which would violate both *Apprendi* and the due process analysis advanced here if the extension exceeds the maximum term authorized at initial sentencing. *See, e.g.*, State v. Robison, 469 P.3d 83, 96 (Kan. Ct. App. 2020) (Leben, J., dissenting) (disagreeing with majority that rejected constitutional challenge to KAN. STAT. ANN. § 21-6608(c), which limits the total probation period in a felony case to "60 months or the prison term that could be imposed, whichever is longer," but also provides that a court may extend probation indefinitely until restitution is fully paid). To avoid extensions and revocations for nonpayment alone, some states favor converting outstanding restitution debt to a civil judgment, a change that would also avoid the constitutional issues addressed here. *See* WIS. STAT. ANN. § 973.09 (West 2022) Judicial Council Notes--1987 Act 398 ("The availability of a civil judgment for unpaid restitution enforceable by the victim under s. 973.20(1), stats., substantially reduces the necessity of extending probation solely for the purpose of enforcing court-ordered payments, a practice of questionable cost-effectiveness."); PEW CHARITABLE TRS.: PUBLIC SAFETY PERFORMANCE PROJECT, POLICY REFORMS CAN STRENGTHEN COMMUNITY SUPERVISION: A FRAMEWORK TO IMPROVE PROBATION AND PAROLE 42 (2020), https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf [https://perma.cc/3BXQ-EB7N] ("[S]ome states maintain the integrity of a restitution order

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I have deliberately avoided addressing the probable effects of the various constitutional rules discussed here on sentence severity. Information about sentencing consequences may be crucial for those who craft, interpret, and enforce sentencing regulations. But ultimate effects are difficult to predict. It would be a mistake, for example, to assume that the *Haymond* plurality's expansion of *Apprendi* and *Alleyne* to revocation would necessarily be better, or worse, for defendants than the due process tests advanced here.

Consider the varied legislative responses to the Court's decision in *Blakely* to extend *Apprendi* to presumptive guidelines that structure judicial discretion at initial sentencing. Some states chose to abandon their limits on judicial discretion, rendering their guidelines "advisory" and allowing judges to impose sentences up to the statutory maximum with only deferential appellate review.[232] Many states, however, preferred not to give up on regulating extreme judicial leniency and severity through factfinding at sentencing. They opted instead to preserve their presumptive guidelines by providing defendants the right to demand that the state prove facts that aggravate a sentencing range to a jury beyond a reasonable doubt.[233] To the extent that defendants invoke that right, this option may have produced more lenient sentences in some affected cases. Yet the choice to preserve presumptive sentencing limits also comes at a cost to defendants. It offers more bargaining leverage and sentencing power to prosecutors than they would have if the sentencing decision rested entirely with the judge.[234] And some states expanded ceilings for presumptive ranges and increased reliance upon prior convictions instead of nonconviction factfinding in order to keep their presumptive guidelines.[235]

It is similarly difficult to forecast how a legislature would respond if it could no longer tie the severity of *revocation* consequences to nonconviction factfinding by judges or corrections officials. That response will necessarily depend on numerous jurisdiction-specific conditions, including the volume and type of cases affected, the nature

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without the threat of revocation by converting restitution to civil orders, which removes the possibility of incarceration but preserves legal accountability on the individual responsible for repayment.").

232. *See* Nancy J. King, *Handling Aggravating Facts After* Blakely*: Findings from Five Presumptive-Guidelines States*, 99 N.C. L. REV. 1241, 1246 (2021).

233. *Id.* (discussing five such states).

234. *See generally id.* at 1283 (discussing bargaining practices involving aggravating factors and concluding prosecutors are "free to use departures like they use mandatory minimum and sentencing-enhancement statutes—as leverage to secure pleas").

235. *Id.* at 1257, 1261–63.

of aggravating facts at issue, and the extent to which constitutional restrictions can be accommodated by bargaining, waiver, and harmless error review. In short, whether a particular constitutional restriction on sentencing law will translate into more lenient or more severe criminal justice outcomes is a complex question. Ultimately, the answer to that question will depend upon policies and practices that legislatures, courts, and litigants pursue within the broader confines of the constitutional rules explored here.

CONCLUSION

Many state legislatures continue to look for ways to reform sentencing laws in ways that will reduce high rates of incarceration and supervision. Central to that effort have been new constraints on judicial discretion to impose incarceration rather than probation at initial sentencing, new limits on the length of time a person is subject to correctional supervision, new restrictions on the circumstances that permit revocation, and various new controls on post-revocation consequences. At initial sentencing, the *Apprendi* doctrine limits when judges can exceed these constraints. When legislatures regulate revocation and post-revocation penalties, however, the rules of *Apprendi* make little sense. Instead, in the revocation context, two familiar due process standards define the boundaries between permissible regulation of punishment for the conviction offense and unlawful punishment for alleged new criminal conduct committed on release. Those two due process analyses protect against legislative evasion of trial rights guaranteed to the accused without needlessly constraining legislative experimentation yet to come.