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RECALIBRATE REVOCATIONS OF SUPERVISED RELEASE

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Everyone knows what prison is and how it fits into our criminal justice system, but that is not the case with supervised release, a time-consuming and expensive part of nearly all federal sentences.[1] Even further from common understanding is the process for revoking supervised release.[2] The current procedure for revoking supervised release is problematic because (1) on the surface it engages in the fiction that the person whose liberty is at stake enjoys ample rights,[3] and (2) the process results in excessive investments of time and money.[4] To address these problems, we can recalibrate how a court works through a relatively less serious class of revocations. Specifically, we can make the process less adversarial by having the court assume that the prosecutor need not participate unless the circumstances call for it. Courts can do this now because the law does not articulate what role the prosecutor should have in a revocation hearing.[5]

New data from the United States Sentencing Commission reveal that this less serious category of revocation accounts for over half of all supervised release violations and relates mostly to people with minimal criminal histories who were convicted of drug offenses.[6] Streamlining these hearings will save money, ease the burden on a court's calendar, allow the probation officer to assume a more fitting role, and maybe most importantly, accord with the rights of the person accused of violating supervision.

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1. *See* Harold Baer, Jr., *The Alpha and Omega of Supervised Release*, 60 ALB. L. REV. 267, 268 (1996) (discussing the supervised release process).
2. *Id.* at 270 ("Neither the Guidelines nor the Federal Rules of Criminal Procedure distinguish between supervised release or probation for the purposes of revocation procedures.").
3. *See* Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 632–33 (2020) (discussing the constitutional protection denied to people at revocation hearings).
4. *See* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1016 (2013) ("If one third of the 103,423 people currently on supervised release are likely to be reimprisoned, we can expect an additional cost—with respect to that extant cohort of releasees alone—of $858 million (33,000 people X $26,000).").
5. *See* FED. R. CRIM. P. 32.1(b).
6. U.S. SENT'G COMM'N, FED. PROB. & SUPERVISED RELEASE VIOLATIONS 31 (2020).

I. INTRODUCTION

If custody is a reflection of the gravity of a person's criminal behavior and society's disapproval of the conduct,[7] then supervised release is society's acknowledgement that at some point, most people who serve time will need to re-enter the community and make efforts to lead a law-abiding life.[8] After custody time for a drug offense, weekly drug testing and substance abuse disorder counseling may support a person's attempt to avoid negative patterns that resulted in conviction.[9]

Re-entry is successful for some people but not everyone.[10] For those who struggle and violate the terms of their release (maybe by skipping drug tests), they may face the revocation of their supervised release.[11] The result can be a new term of custody and a new term of supervision.[12] A supervisee charged with violating supervised release goes through a process that in many ways mimics a new criminal case. Both start with a document containing allegations of wrongdoing,[13] the accused has certain rights because their liberty is on the line,[14] and a neutral factfinder weighs the evidence before providing a decision on the case.[15] And the two processes in fact play out in similar ways in federal courts today.[16] But a new criminal case brings with it a whole host of protections for the accused. The right to confront adverse witnesses, the right against compelled self-incrimination, the right to a jury trial, the Federal Rules of Evidence

7. *See* 18 U.S.C. § 3582(a) (2018) ("[R]ecognizing that imprisonment is not an appropriate means of promoting correction or rehabilitation.").
8. *See id.* § 3553(a)(2)(D).
9. *See id.* § 3553(a)(2)(B).
10. U.S. DEP'T OF JUST., OFF. JUST. PROGRAMS, BUREAU JUST. STAT., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) (2018).
11. 18 U.S.C. § 3583(g)(3) (2018).
12. *Id.*
13. FED. R. CRIM. P. 32.1(b)(2).
14. *Id.* at 32.1 (b)(2)(A)–(E).
15. *See Supervised Release (Parole): An Overview of Federal Law*, CONG. RSCH. SERV. (Sept. 28, 2021) [hereinafter *Congressional Research Service*], https://sgp.fas.org/crs/misc/RL31653.pdf [https://perma.cc/23TJ-VSNP].
16. *See Steps in the Federal Criminal Process*, OFFS. OF THE U.S. ATT'YS, https://www.justice.gov/usao/justice-101/steps-federal-criminal-process [https://perma.cc/L6RF-VUQY] (last visited Apr. 5, 2022).

guarding what the jury considers, and the right to hold the government to proving its case beyond a reasonable doubt.[17]

None of those protections are in place for a supervisee.[18] But this article does not argue that the rights must be mirrored. Instead, the adjustment should be in the process courts follow for revocations, especially the hearing on whether to revoke supervision. The supervisee enjoys a sliver of the protections the law provides to a defendant in a criminal proceeding, so a revocation should reflect that in this specific way: revocation proceedings should be less adversarial. Starting with low level violations of supervised release (like failing to attend drug counseling), courts should presume that the prosecutor will participate on a stand-by basis. The supervising probation officer could present the matter before the court with defense counsel having the opportunity to put on a defense.

The law can accommodate this recalibration right now—in fact, there is nothing in the supervised release statute or the Federal Rules of Criminal Procedure specifying the role the probation officer or prosecutor should have in a revocation hearing.[19] The prosecutor could step in if requested by the court, probation officer, defendant, or the prosecution itself due to an issue of special relevance to the government or circumstances otherwise requiring it (like when the probation officer must be a witness). Adjusting revocation hearings this way would most effectively utilize each participant in the process and properly reflect the rights of a supervisee at the center of the matter. It would make revocation proceedings more cost effective and potentially reduce the need for further extensive hearings and expensive custody when a simple change to the conditions of supervision can suffice.

This article begins with a brief background on how the supervised release system came to be.[20] Next, it details the process involved when a court revokes a defendant's supervised release.[21] This is followed by an analysis of the tension created in the revocation procedure, focusing on the asymmetry in the rights of a person going

17. Micah Schwartzbach, *Criminal Defendants' Rights*, NOLO, https://www.nolo.com/legal-encyclopedia/defendants-rights-during-court-trial-29793.html [https://perma.cc/SV7D-8DE9] (last visited Apr. 5, 2022).

18. *See* Frances H. Pratt, *Revocation of Probation and Supervised Release*, DEF. SERVS. OFF. TRAINING DIV. 3, 5, 7 (Oct. 2004), https://www.ussc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Revocation-of-Probation-and-Supervised-Released.pdf [https://perma.cc/4HZF-TGN2].

19. *See* 18 U.S.C. § 3603 (2012).

20. *See infra* Part II.

21. *See infra* Part III.

through a revocation and a person with a new criminal charge.[22] Finally, the article contends that supervised release revocations should be recalibrated to address this tension, specifically by having the prosecutor participate as needed.[23]

II. THE ROAD TO SUPERVISED RELEASE

A sentence in a federal felony case today typically includes a period of imprisonment followed by a term of supervised release.[24] Supervised release is a young and unique feature of criminal sentencing. It first appeared in Congress's 1984 Sentencing Reform Act (SRA)[25] and then, following the Anti-Drug Abuse Act of 1986 (ADAA), it was implemented in 1987.[26] Generally speaking, supervised release is a portion of the sentence where the defendant is either in a halfway house or living independently while the court monitors the defendant through the U.S. Probation Office.[27] The defendant must comply with certain conditions, like weekly drug testing, or they will be brought before the court for violations and face the possibility of more custody and supervision.[28]

To briefly trace the origins of supervised release, it is helpful to set out the traditional rationales for punishment that animated the parole system that pre-dated the SRA and serve as a backdrop to modern criminal punishment. Several rationales underlie sentences imposed in the United States: retribution, deterrence, incapacitation, and rehabilitation.[29] Retribution accounts for the moral blameworthiness of the crime.[30] Deterrence is a practical approach that seeks to prevent the specific wrongdoer from recommitting an offense and to generally prevent others in the community from engaging in

22. *See infra* Part IV.
23. *See infra* Part V.
24. *See Congressional Research Service*, *supra* note 15.
25. *See Simplification Draft Paper*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2 [https://perma.cc/H9JS-JMEF] (last visited Apr. 5, 2022).
26. *See* Mary Elizabeth Phelan, *Supervised Release and the Anti-Drug Abuse Act: 'Just Say When'*, 1990 PREVIEW U.S. SUP. CT. CASES 82, 82 (1990).
27. *See* John McCurley, *Probation and Supervised Release in Federal Court*, NOLO, https://www.nolo.com/legal-encyclopedia/probation-supervised-release-federal-court.html [https://perma.cc/HPY5-CLC3] (last visited May 5, 2022).
28. *See id.*
29. Toni M. Massaro, *Shame, Culture, and American Criminal La*w, 89 MICH. L. REV. 1880, 1890 (1991); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (noting "retribution and deterrence" as "traditional aims of punishment").
30. Massaro, *supra* note 29, at 1891–93.

crimes.[31] Incapacitation calls for creating conditions where the defendant is unable to commit another offense in the immediate future.[32] And rehabilitation hopes to highlight criminal thinking behavior and ease a person's re-entry into the community.[33]

Starting in the early 1900s, federal criminal justice incorporated prison to achieve "coercive rehabilitation," and the U.S. Parole Board (Parole Board) was a central feature of the system.[34] Under the 1910 parole law, a sentence "involved all three branches of government: Congress set the maximum for the offense, the judge imposed a sentence within the statutory range, and the executive's parole authorities decided the actual duration of the imprisonment."[35] The Parole Board would hear from a person serving prison time and in its discretion determine whether that person had rehabilitated and should be released into the community early.[36] When released, a parolee was subject to conditions upon re-entering the community, and if they violated those rules the Parole Board could revoke parole and place the person back in custody to carry out their term without credit for time released on parole.[37]

For instance, a person could be halfway through their prison sentence for a low-level violent crime when the Parole Board releases them with the requirement that they complete treatment for violent behavior patterns. And if that person commits a new offense or fails to attend treatment, the Parole Board could revoke their release and they would go back into custody to serve the rest of their sentence without regard for the time they were on parole.

The Parole Board operated under a statute that failed to set clear standards for granting or revoking parole,[38] which lead to disproportionate negative impacts suffered by people of color and low-income people.[39] Leading up to the enactment of the SRA, parole faced widespread criticism for creating indeterminate sentences, meaning a "sentence for which the precise term of confinement is not known on the day of judgment but will be subject within a substantial range to the later decision of a [P]arole [B]oard

31. *Id.* at 1895–99.
32. *Id.* at 1899–1900.
33. *Id.* at 1893–95.
34. Doherty, *supra* note 4, at 987–91.
35. *Id.* at 987.
36. *Id.* at 991–92.
37. *Id.* at 985; James Horner, Haymond*'s Riddles: Supervised Release, the Jury Trial Right, and the Government's Path Forward*, 57 AM. CRIM. L. REV. 275, 279 (2020).
38. Morrissey v. Brewer, 408 U.S. 471, 485–89 (1972) (ruling that due process required, *inter alia*, preliminary and final hearings); Horner, *supra* note 37, at 279.
39. United States v. Trotter, 321 F. Supp. 3d 337, 345 (E.D.N.Y. 2018).

or some comparable agency under whatever name."[40] To bring predictability and determinacy to sentences, Congress enacted the SRA to eliminate parole and create supervised release as a supplement to custody time.[41]

With parole out of the picture, federal law punished criminal behavior with "imprisonment, probation, and fines."[42] As tools in the criminal justice system, imprisonment and fines are straightforward—some convictions require a person to lose their liberty *via* prison or lose their property by paying money. But probation is a little more intricate.

In 1925, long before the SRA, probation emerged as a sentencing option in federal criminal law.[43] It "was a sentence in its own right—an alternative to prison that provided an *opportunity* to avoid the disgrace and disruption of prison by complying with the conditions of release that the court imposed."[44] And "a sentence of probation under the SRA remained 'conditional and subject to revocation until its expiration or termination.'"[45] If the defendant violated the terms of the probation that the court ordered, the court could revoke probation and sentence the defendant within the statutory range authorized by the conviction.[46] Rehabilitation has long been a key aspect of probationary sentences.[47]

For example, a conviction for bank fraud[48] can result in a maximum sentence of thirty years in custody, but if a person convicted of that offense receives a sentence of probation, imprisonment is not a part of their sentence.[49] Instead, they re-enter the community with various conditions they must meet, such as limitations on banking related activities or regular reporting to their probation officer of their personal financial information.[50] And if they fail to comply with the conditions and the court revokes

40. Doherty, *supra* note 4, at 992 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 86 (1973)).
41. Doherty, *supra* note 4, at 959–61.
42. *Id.* at 997.
43. *Id.* at 986.
44. *Id.* at 999; *see also id.* at 986–87.
45. *Id.* at 999 (quoting Act of Oct. 12, 1984, § 3564(e), 98 Stat. at 1994).
46. *Id.* at 999–1000.
47. *Id.* at 986–87.
48. 18 U.S.C. § 1344 (2012).
49. *Id.* § 3561.
50. *Id.* § 3664.

probation, it is like the clock is wound back and the original custody range authorized by statute (up to thirty years) is back on the table.[51]

When imposing custody time, the SRA directs a judge to consider some of the traditional rationales for punishment noted earlier, but it dictates that rehabilitation is not an appropriate basis for imprisonment.[52] The court instead must look to the factors set out in 18 U.S.C. § 3553(a).[53] For the most part, these factors embody retribution and deterrence. The sentence must "reflect the seriousness of the offense, [] promote respect for the law, . . . provide just punishment for the offense[,] . . . afford adequate deterrence to criminal conduct . . . [and] protect the public from further crimes of the defendant[.]"[54]

Under the SRA, a judge imposes a supervised release term as a supplement to incarceration; and in contrast to custody, the SRA puts rehabilitation at the center of the decision to impose supervised release.[55] The primary objective is assisting a person's re-entry into the community.[56] The idea is to ease a person's transition "after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release."[57] In this sense, "[t]he term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment."[58]

In crafting a sentence, the court tailors conditions of supervised release to "reflect its rehabilitative goal."[59] For instance, "the court may require participation in substance abuse or mental health

51. *Id.* § 3565.
52. Doherty, *supra* note 4, at 997 (citing 18 U.S.C. §§ 3551(b), 3582(a) (2006)).
53. 18 U.S.C. § 3582(a) (2012) ("[I]mprisonment is not an appropriate means of promoting correction and rehabilitation."); *see id.* § 3553(a)(1)–(5) (2012) (listing sentencing factors).
54. *Id.* § 3553(a)(2)(A)–(C).
55. United States v. Johnson, 529 U.S. 53, 59 (2000) ("Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."); United States v. Granderson, 511 U.S. 39, 50 (1994) ("Supervised release, in contrast to probation, is not a punishment in lieu of incarceration.").
56. United States v. Trotter, 321 F. Supp. 3d 337, 345–46 (E.D.N.Y. 2018); Doherty, *supra* note 4, at 998–99 (citing S. REP. NO. 98–225, at 124 (1983)).
57. Doherty, *supra* note 4, at 998–99 (quoting S. REP. NO. 98–225, at 124 (1983)).
58. *Id.* at 998 (quoting S. REP. NO. 98–225, at 125 (1983)).
59. *Trotter*, 321 F. Supp. 3d at 346.

treatment, and the probation department can help a supervisee find a job."[60] In contrast to the pre-SRA coercive rehabilitation model, supervision "provide[s] rehabilitative services, but not in the guise of the coerced cure."[61]

III. REVOKING SUPERVISED RELEASE

As originally conceived, the SRA provided that if a defendant violated a condition of supervised release, the court was to treat the breach as criminal contempt for violation of a court order.[62] That procedure required the government to prove, beyond a reasonable doubt, the elements of criminal contempt: (1) willful conduct of the defendant (2) in violation of (3) a lawful and reasonably specific order.[63] The defendant would enjoy the "procedural protections applicable in a criminal proceeding."[64] If the potential penalty exceeded six months, a jury must render the ultimate decision.[65] Bottom line: it was not easy to use custody as a sanction for violating supervised release.

But the ADAA amended the SRA.[66] It changed the mechanism for addressing violations. Instead of a criminal contempt charge, the ADAA adopted a revocation procedure that plays out in federal courts today.[67] The amendment instructed that a court may "revoke" supervised release if it "finds by a preponderance of the evidence that the defendant violated a condition of supervised release," which may entail "requir[ing] the defendant to serve in prison all or part of the term of supervised release . . . without credit for time previously served on postrelease supervision[.]"[68] Instead of the conventional procedural protections in a criminal case, the court would be guided by a more narrow set of rules: the Federal Rules of Criminal Procedure applicable to revocation of probation.[69]

As implemented today, the class of the offense of conviction dictates the total custody or supervision that may be ordered

60. *Id.*
61. Doherty, *supra* note 4, at 999.
62. 18 U.S.C. § 3553(a)(4)(B) (2018).
63. Romero v. Drummond Co., 480 F.3d 1234, 1242 (11th Cir. 2007).
64. Doherty, *supra* note 4, at 1000 (citing Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826 (1994)).
65. *Id.*
66. *See generally* 21 U.S.C. § 801 (2018) (stating that the short title for the 1986 amendment was the "Anti-Drug Abuse Act of 1986").
67. *See* 18 U.S.C. § 3583(e)(3) (2018).
68. *Id.*
69. *Id.*

following revocation.[70] Federal law divides up classes of offenses by the maximum term of imprisonment authorized: Class A felonies have a maximum sentence of life imprisonment or death;[71] Class B felonies are twenty-five years or more;[72] Class C felonies are less than twenty-five years but ten or more years;[73] Class D felonies are less than ten years but five or more years;[74] Class E felonies are less than five years but more than one year;[75] and the classes of misdemeanors range from one year to more than five days.[76] The felony classification determines the limit on supervision: Class A or B felonies authorize up to five years of supervision, Class C or D up to three years, and Class E or misdemeanors up to one year.[77] For a more serious conviction, more supervised release is on the table.[78]

For context, here are some examples of federal crimes: first degree murder is a Class A felony punishable by death or life in prison;[79] the distribution of 100 grams or more of heroin is punishable up to forty years, so it is a Class B felony;[80] with a maximum of fifteen years custody, voluntary manslaughter is a Class C felony;[81] involuntary manslaughter has a maximum penalty of eight years of custody, making it a Class D felony;[82] and aggravated identity theft is a Class E felony with a two-year limit on imprisonment.[83] If a person is convicted of the Class D felony of involuntary manslaughter, they could receive a prison term of up to eight years and a supervised release term of up to three years.[84]

Those classes of felonies place the following limits on the custody or supervision that may be imposed after revocation: five years of custody for a Class A felony, three years for a Class B felony, two years for a Class C or D felony, and one year for a Class E felony or

70. *See id.* § 3583(b).
71. *Id.* § 3559(a)(1).
72. *Id.* § 3559(a)(2).
73. *Id.* § 3559(a)(3).
74. *Id.* § 3559(a)(4).
75. *Id.* § 3559(a)(5).
76. *Id.* § 3559(a)(6)–(8).
77. *Id.* § 3583(b)(1)–(3). *But see id.* § 3583(k) (describing exception of certain sex-related offenses that can result in longer terms of supervised release).
78. *Id.* § 3583(j)–(k).
79. *Id.* § 1111(b).
80. 21 U.S.C. § 841(b)(1)(B) (2012).
81. 18 U.S.C. § 1112(b) (2012).
82. *Id.*
83. *Id.* § 1028A(a)(1).
84. *See id.* §§ 1112(b), 3583(b)(2).

misdemeanor.[85] To calculate the term of supervised release the court can impose after revoking supervision, the court takes the original term of supervision authorized for the offense of conviction and then subtracts any imprisonment ordered based on a revocation.[86] So for a person who served custody time for the Class C felony of voluntary manslaughter, when their supervision is revoked for the first time, they could face a maximum of two years of additional custody.[87] If they receive one year of further custody based on that violation, then the court could impose at most two more years of supervision.[88]

The Sentencing Guidelines delineate three grades of violations.[89] A supervised release violation is Grade A if it is punishable by a term of imprisonment exceeding one year and is (1) a crime of violence, (2) a drug offense, or it (3) involves possession of a firearm or destructive device.[90] A violation can also count as Grade A if it constitutes an offense punishable by more than twenty years of custody.[91] If the violation is an offense punishable by more than one year of incarceration, it is Grade B.[92] All violations that are offenses that can result in one year or less of custody, or any other type of violation, qualify as Grade C.[93] The Sentencing Guidelines state that revocation is mandatory for Grade A and B violations.[94] In the event of a Grade C violation, the court can revoke, extend, or modify the supervised release already in place.[95]

Between 2013 and 2017, the U.S. Sentencing Commission (Sentencing Commission) reports that 54.9% of all supervised release violations were Grade C.[96] Of the remaining violations, 31.5% were Grade B, and Grade A violations came in at 13.6%.[97] For the Grade C category, the original offense of conviction was most likely drug-

85. *Id.* § 3583(e)(3).
86. *Id.* § 3583(h); U.S. SENT'G GUIDELINES MANUAL § 7B1.3(g)(2) (U.S. SENT'G COMM'N 2021).
87. *See* 18 U.S.C. § 3583(h) (2012).
88. *See id.*
89. U.S. SENT'G GUIDELINES MANUAL § 7B1.1(a)(1)–(3) (U.S. SENT'G COMM'N 2021).
90. *Id.* § 7B1.1(a)(1).
91. *Id.*
92. *Id.* § 7B1.1(a)(2).
93. *Id.* § 7B1.1(a)(3).
94. *Id.* § 7B1.3(a)(1).
95. *Id.* § 7B1.3(a)(2).
96. U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 31 (2020) [hereinafter SENTENCING COMMISSION REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf[https://perma.cc/T6GS-8HNQ].
97. *Id.*

related (37.5%), with firearms offenses being the next-most-common (21.1%).[98] Relative to the other Grades, the sentences for Grade C violations were less likely to involve prison and more likely to involve a sentence of supervised release.[99]

To bring all of this together, suppose a defendant convicted of distribution of 110 grams of heroin, a Class B felony, ends up with a three-year term of supervised release following prison. If the court orders the defendant to participate in drug testing at the direction of the probation officer, and the defendant violates that order, the violation would be a Grade C because it is "any other type of violation" under the Sentencing Guidelines. The court may revoke, extend, or modify the person's supervision.[100] Based on the defendant's criminal history, the Sentencing Guidelines produce a range for custody as a penalty for the violation within the three-year cap set for Class B felonies.[101] If supervision is revoked, and the defendant is sentenced to two months custody, then the remaining amount of supervision available is the previously authorized amount (five years), minus the two months of custody time. But if the defendant's violation is the commission of a new state drug offense with a maximum penalty of five years in prison, that is a Grade A violation and revocation is mandatory.

The revocation process often starts with the probation officer in charge of supervising the defendant filing a document referred to as a petition to revoke supervised release.[102] It contains the alleged violations of conditions.[103] The probation officer is responsible for reporting the alleged violation to the prosecutor as well.[104] Based on the petition, the court might issue a warrant for law enforcement to bring the defendant into custody.[105] Once the defendant is brought before the court on the petition, Rule 32.1 of the Federal Rules of

98. *Id.* at 32.

99. *See id.* at 35.

100. Hearings on alleged supervised release violations are typically called "revocation hearings." Even though the hearing often primarily focuses on the violation, and for Grade C violations revocation is not mandatory, this article uses "revocation hearing" and variations of that term to refer to the entire proceeding on the alleged violations and what sentence should result if those allegations are proven.

101. U.S. SENT'G GUIDELINES MANUAL § 7B1.4(a) (U.S. SENT'G COMM'N 2021).

102. *See generally* 18 U.S.C. § 3603(8)(B) (2018) (A probation officer is required to "immediately report any violation . . . to the court and the Attorney General or his designee[.]").

103. *See id.*

104. *Id.*

105. *Id.* § 3606.

Criminal Procedure guides the court.[106] The court informs the defendant of the petition's allegations and their rights to counsel and a preliminary hearing to challenge the probable cause of the petition.[107] If the defendant cannot obtain counsel, the court appoints a defense attorney.[108] The court must determine whether the defendant should remain in custody pending resolution of the petition, or whether they may be released because the defendant met the burden of showing by clear and convincing evidence that they will not flee or pose a danger to any other person or the community.[109]

The defense and the government then have an opportunity to negotiate a resolution of the alleged violations, or the defendant can assert their right to a hearing to test the grounds on which the charges rest.[110] If there is a negotiated settlement of the matter (maybe an admission to some of the petition), the court must decide whether to accept the defendant's admission as a knowing and voluntary waiver of the right to a contested revocation hearing.[111] And in the event of a contested hearing, the defendant may present evidence and question adverse witnesses.[112] The defendant is not in violation of supervised release conditions if the judge is not convinced of the facts underlying the charges by a preponderance of the evidence.[113] If the case against the defendant meets that level of proof, the court must fashion a just sentence for the defendant to serve, which may include custody time and further supervised release.[114]

106. *See* FED. R. CRIM. P. 32.1(b) (describing the procedures for revocation of supervised release).
107. *Id.* at 32.1(b)(2).
108. *Id.* at 32.1(b)(2)(D).
109. 18 U.S.C. § 3143(a)(1) (2018).
110. *See* FED. R. CRIM. P. 32.1(c).
111. United States v. Melton, 782 F.3d 306, 311 (6th Cir. 2015).
112. *See* FED. R. CRIM. P. 32.1(c).
113. 18 U.S.C. § 3583(e)(3) (2018) ("The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)— . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . . .").
114. *See id.* §§ 3553(a), 3583(e)(3).

IV. THE TENSION

At a general level, the sequence described in the preceding two paragraphs mirrors the criminal procedure followed for a felony indictment. Each begins with a document making allegations of wrongdoing, the accused has certain rights because their liberty is at stake, and a neutral factfinder assesses the charges before making a final decision.[115] But there are critical distinctions between the revocation process and a new criminal prosecution,[116] and there is good reason to question whether it is proper for the two tracks to mirror each other so closely.

The supervisee going through a revocation lacks "the full panoply of procedural safeguards associated with a criminal trial[.]"[117] This is true for events prior to the revocation hearing, like when a supervisee decides to admit to an alleged violation.[118] Federal Rule of Criminal Procedure 11 sets out a detailed process the court must follow before accepting a guilty plea in the original criminal prosecution.[119] The court must inform the defendant of the rights they are giving up, including the rights: to maintain a not guilty plea, to a jury trial, to the representation of counsel at trial, and to confront adverse witnesses.[120] The defendant must understand the maximum possible penalty.[121] The court ensures that the plea is voluntary and is not the result of force, threats, or promises.[122] Courts sometimes place a defendant under oath for this process.[123] Rule 11 does not apply to

115. *Compare* FED. R. CRIM. P. 32.1(b) (enacting preliminary and revocation hearing procedures), *with* FED. R. CRIM. P. 7, 11, 23 (enacting indictment, plea, and jury or nonjury trial procedures, respectively).

116. *Melton*, 782 F.3d at 310 (citing United States v. Correa-Torres, 326 F.3d 18, 22–23 (1st Cir. 2003)) ("The court first acknowledged that a supervised release revocation proceeding is separate and apart from a criminal prosecution even though both entail the potential for deprivation of liberty. . . . '[F]undamental fairness' requires that persons facing supervised release revocations be afforded some rights in that process, even though they are not entitled to every right attendant in a criminal prosecution.").

117. United States v. Martisko, 398 Fed. App'x 888, 889 (4th Cir. 2010) (quoting Black v. Romano, 471 U.S. 606, 613 (1985)).

118. *See, e.g.*, *Melton*, 782 F.3d at 308, 311–12 ("[Defendant] admitted to his probation officer that he used a controlled substance[.] . . . Defendant reviewed the report, discussed it with his attorney, and confirmed with the magistrate judge that he understood the report and still intended to admit to the violations. The magistrate judge also informed Defendant of the rights he would be waiving by admitting to the violations and the consequences of that waiver.").

119. *See* FED. R. CRIM. P. 11(c).

120. *Id.* at 11(b)(1).

121. *Id.* at 11(b)(1)(H).

122. *Id.* at 11(b)(2).

123. *Id.* at 11(b)(1).

the revocation procedure.[124] A defendant's waiver of the right to a revocation hearing only needs to be knowing and voluntary under the totality of the circumstances—a much lower bar.[125]

If the defendant decides to have a revocation hearing, the applicable protections and rules in that situation differ significantly from those surrounding a new criminal charge. The Sixth Amendment grants a person charged with a crime the right to counsel and a speedy jury trial where they can confront those who testify in support of the offense alleged.[126] But the Sixth Amendment does not function that way for a person facing a petition alleging violations of supervised release.[127] Instead, the Fifth Amendment affords some basic procedural rights since the person may lose their liberty.[128] Federal Rule of Criminal Procedure 32.1 expresses those protections (the same that apply in the probation context), including the right to counsel for certain stages and the right to be made aware of the allegations and challenge them in a preliminary manner.[129]

But during a full revocation hearing, the Federal Rules of Evidence are inapplicable and the defendant has no right to cross-examine adverse witnesses if the judge finds the interests of justice do not require appearance of the witnesses.[130] It is not a Fifth Amendment violation for the court to allow the introduction of the defendant's compelled self-incriminating statements.[131] Then the judge alone will weigh the evidence and resolve the case, not based on proof beyond a reasonable doubt, but instead proof by a mere preponderance.[132]

To be clear, the contrast of the rights in either procedure follows from the U.S. Supreme Court's interpretation of the supervised release phase of a defendant's sentence.[133] Under that precedent, supervised release—and any penalty for revocations—is part of the original sentence imposed.[134] So, when a judge passes a sentence of

124. *See* United States v. Melton, 782 F.3d 306, 309 (6th Cir. 2015).
125. *See id.* at 311.
126. U.S. CONST. amend. VI.
127. United States v. Kelley, 446 F.3d 688, 690 (7th Cir. 2006) ("[T]he Supreme Court long ago held that revocation hearings are not criminal prosecutions for purposes of the Sixth Amendment.").
128. United States v. Boultinghouse, 784 F.3d 1163, 1171 (7th Cir. 2015).
129. *See* FED. R. CRIM. P. 32.1(b)(2).
130. United States v. Johnson, 710 F.3d 784, 788–89 (8th Cir. 2013).
131. United States v. Ka, 982 F.3d 219, 222 (4th Cir. 2020).
132. Johnson v. United States, 529 U.S. 694, 700 (2000).
133. *Id.* (treating supervised release punishments "as part of the penalty for the initial offense").
134. *See id.*

custody plus supervised release, the "supervised release" portion contemplates the additional custody and supervised release that may follow from revocations.[135] Any Sixth Amendment protections, for example, that arose for the defendant have already been honored during the prosecution that lead to the sentence being served; there is no need to re-recognize them during the revocation process.

One significant distinction between a criminal prosecution and a supervised release revocation not discussed yet relates to how each of them start and what that says about their overarching purposes. Typically, a complaint (filed by the prosecutor) or an indictment (returned by a grand jury after hearing the prosecutor's presentation) initiates the formal criminal process.[136] It is subject to the broad discretion of the prosecutor, who must critically analyze the law enforcement agents' investigation and determine what is in the best interest of the community.[137]

The early stages of revoking supervised release, on the other hand, involve almost no participation from the prosecutor. The probation officer supervising the defendant, who is a court employee and "serves as an investigative and supervisory arm of the court[,]" often begins the process by filing a petition with the court.[138] Conceivably, the prosecutor assigned to the case, an essential participant in the original criminal trial, may know nothing of the petition or its grounds. The animating purpose behind the petition is the probation officer's duty to keep the court informed about the defendant's conduct on supervision as they re-enter the community.[139] The probation officer must "report [the] conduct and condition [of a person on supervised release] to the sentencing court[.]"[140] Federal law provides that the probation officer is "responsible for the supervision of any probationer or a person on supervised release who is . . . within the judicial district[.]"[141] "[T]he probation officer must maintain contact with the defendant to ensure that the defendant complies with the terms and conditions of his supervised release."[142]

There is no clearly defined role—not in the applicable rules of criminal procedure and not in the supervised release statute—for the

135. *See id.*
136. *See* FED. R. CRIM. P. 3, 6(f).
137. *See* United States v. Lovasco, 431 U.S. 783, 794 (1977).
138. United States v. Davis, 151 F.3d 1304, 1306 (10th Cir. 1998) (quoting United States v. Burnette, 980 F. Supp. 1429, 1433 (M.D. Ala. 1977)).
139. *See id.*
140. 18 U.S.C. § 3603(2) (2018).
141. *Id.* § 3603(4).
142. *Davis*, 151 F.3d at 1306.

prosecutor after the petition is filed. In seeing a petition through and determining whether it should result in further incarceration for the defendant, the court is addressing the defendant's breach of the court's trust and, ultimately, enforcing its orders relating to the defendant's punishment.[143] The key here is that the concept of the "defendant's punishment" encompasses the custody plus supervision that the court imposed for the underlying offense.

The core differences between criminal prosecution and supervised release—the rights and the procedure—create a tension. At the surface level, a typical revocation bears many general similarities to a felony prosecution, but revocations are a very different function and the defendants in them have a narrow band of rights. In plain terms, there is just something odd about going through a revocation hearing as if it is a court trial and having the prosecution and defense vigorously advocate, when in reality the court can accept hearsay, the basis for the charge comes not from the government but from the court, and the court only needs to be convinced that the charge is more than 50% proven.[144] From a commonsense perspective, if we are going to follow a procedure that acts like the defendant has rights comparable to a trial, then the defendant should have those rights; but if those rights are not applicable, the process should not make it seem like they are. In addition to creating this tension, the procedure that plays out now for revocations requires a greater investment of time and money than is necessary.

The adversarial system is central to American courts, and as it stands now, many courts employ an adversarial approach for revocation hearings.[145] Courts in America use the adversarial system to achieve their central objective in a trial: seeking the truth.[146] In support of that structure, the law provides protections for those accused of crimes (like those outlined above) to maintain a sort of equilibrium in the adversarial balance.[147] The idea is that pitting two sides against each other will force them to present their strongest

143. *See id.* at 1307–08.

144. *See supra* text accompanying notes 129–32.

145. *See supra* notes 102–15 and accompanying text.

146. United States v. Wecht, 484 F.3d 194, 227 (3d Cir. 2007) (Bright, J., concurring in part, dissenting in part) ("The adversary process plays an indispensable role in our system of justice because a debate between adversaries is often essential to the truth-seeking function of trials."); *see* Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

147. *See* Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

arguments to prevail. Recognizing that this system needs a counterbalance to ensure the adversarial drive does not create an unfairness, courts enforce the rights of defendants in criminal cases.[148] For instance, there could be a case where the prosecutor's competitive drive would generate a desire to comment on the defendant's failure to speak up in his own defense, and that inclination could be consistent with the adversarial nature of the proceeding, but our system provides a check against that impulse and bars any such comment because it violates the defendant's Fifth Amendment right to remain silent.[149]

The dynamic in federal criminal cases can be defined by the constant balancing of the adversarial system's search for truth and the fairness owed to someone charged with a crime. Requiring proof beyond a reasonable doubt serves both functions. As the highest evidentiary standard in the courts, it pushes the prosecution to advance its most persuasive evidence. It also protects the defendant from being convicted unless the jury can be thoroughly convinced of the charges.

But it is not right to try and seamlessly transpose that structure onto supervised release revocations. The truth-seeking function of revocation hearings is de-emphasized. There is no jury (only a judge), and the standard of proof is considerably lower (only greater than 50%).[150] The defendants going through the process enjoy far fewer protections.[151] To continue with the example above regarding the right to remain silent—in a revocation hearing, it does not violate the Fifth Amendment if the court considers compelled self-incriminating statements from the defendant.[152] Consequently, the focus of a revocation is less about finding the truth than it is about enforcing the court's orders and continuing the effort to work toward the defendant's re-entry to the community. With these fundamental differences between the criminal process and the revocation process, it follows that the adversarial nature of the revocation proceeding should be accordingly de-emphasized.

V. RECALIBRATION

In considering improvements to the supervised release process, some argue that the defendants should be given more protections akin

148. *See Dodson*, 454 U.S. at 322.
149. *See* United States v. Murra, 879 F.3d 669, 682 (5th Cir. 2018).
150. *See supra* note 132 and accompanying text.
151. *See supra* notes 117–32 and accompanying text.
152. *E.g.*, United States v. Ka, 982 F.3d 219, 222 (4th Cir. 2020); *see* discussion *supra* notes 148–49.

to a felony prosecution.[153] That would harken back to the original days of supervised release, where a violation resulted in a criminal contempt proceeding.[154] This article takes a different view. Rather than find fault in the diminished rights in revocations and argue for strengthening the protections, changing the general approach to revocations can ease the tension created by a formal process where the accused has limited rights.

The revocation process should be less adversarial. To be specific, for Grade C supervised release violations,[155] there should be a presumption that the prosecutor will participate on a stand-by basis, becoming involved only if requested by the court, probation officer, defendant, or the prosecution itself because an issue of special relevance to the government arose or a unique circumstance is presented (e.g., the probation officer must testify). This would reduce the adversarial nature of the proceeding because the centerpiece would no longer be two advocates facing off. The court and the probation officer would likely steer the hearing in a way that remains focused on the rehabilitative purpose of supervised release.

The upshot will be that (1) the procedure will facilitate each participant taking on a more fitting role, and (2) the costs associated with the revocations would go down. To expand on (1), making revocations less adversarial aligns with the reduced protections afforded to the defendant, it accounts for the lack of a clearly defined role for the prosecutor and probation officer, and it allows the probation officer to occupy a more natural role since their supervisory duties are what primarily initiated the entire proceeding. As for (2), the data from the Sentencing Commission show that the majority of revocations are Grade C,[156] so having the prosecution participate as needed will elevate the efficiency of the proceeding and allow some hearings to resemble the well-established re-entry courts in state judicial systems (e.g., veterans' court, drug court), which are gaining popularity in the federal judiciary.[157]

153. *See* Stephen A. Simon, *Re-Imprisonment Without a Jury Trial: Supervised Release and the Problem of Second-Class Status*, 69 CLEV. STATE L. REV. 569, 591–92 (2021); Schuman, *supra* note 3, at 632 ("Given the participation of United States Attorney's Offices and district court judges, these proceedings are already just as adversarial as criminal trials, and defendants deserve similar constitutional rights.").

154. Simon, *supra* note 153, at 577.

155. *See* SENTENCING COMMISSION REPORT, *supra* note 96, at 10–11.

156. *Id.* at 4.

157. *See, e.g.*, *New York Court Eases Return into Community After Prison*, U.S. CTS. (July 27, 2021), https://www.uscourts.gov/news/2021/07/27/new-york-court-eases-return-community-after-prison [https://perma.cc/VAU5-JWZ7; *Alternative Criminal Case*

Here is an example of (2). If a supervisee is brought before the court because they failed to attend substance abuse disorder counseling, the probation officer is likely the person with all of the relevant information.[158] Under this article's approach, the prosecutor would be aware of the probation officer filing the petition, but would not need to become involved, and the hearing (if any) could consist of the probation officer providing the court with the evidence underlying the petition to revoke supervised release (probably a form from the counselor confirming the supervisee did not attend). If the defendant wished, they could challenge the evidence and maybe call the substance abuse counselor as a witness. The court could consider the form without regard to hearsay because the rules of evidence do not apply.[159] Then the court would craft a sentence based on the defendant's needs, which the Sentencing Commission's data indicate would be likely to involve additional supervised release.[160] In fact, the court might not even need to revoke supervised release for the relatively minor violation because federal law says only that the court "may" revoke based on a Grade C violation.[161] For Grade A and B violations, which cover a more serious caliber of conduct, the court may decide to retain the more adversarial procedure. That decision would be consistent with the recalibration discussed in this article because the truth-seeking aim of the proceeding would be more important for conduct encompassing crimes of violence or other crimes punishable by more than one year of custody.[162]

The available data suggest that recalibrating the revocation procedure for Grade C violations would be cost effective. More than 100,000 people are carrying out the supervised release portions of their sentences, and more than 10,000 people are in federal custody

Programs, U.S. DIST. CT. FOR DIST. R.I., https://www.rid.uscourts.gov/alternative-criminal-case-programs [https://perma.cc/34SM-3WKK] (last visited Apr. 5, 2022); Michael J. Newman & Matthew C. Moschella, *The Benefits and Operations of Federal Reentry Courts*, FED. LAW., Dec. 2017, at 26, 27, https://www.sherin.com/wp-content/uploads/2018/01/Federal-Reentry-Courts.pdf [https://perma.cc/F666-AYSB]; Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1590–91 (2012).

158. *See, e.g.*, Amanda Rios, Note, *Arms of the Court: Authorizing the Delegation of Sentencing Discretion to Probation Officers*, 21 CORNELL J.L. & PUB. POL'Y 431, 438–39 (2011).

159. *See supra* note 130 and accompanying text.

160. *See, e.g.*, Newman & Moschella, *supra* note 157, at 27–30, 33.

161. A court implementing this approach would of course find numerous aspects that need to be changed to suit that specific court's needs. This is meant only as an example.

162. One problem that persists is the supervisee brought before the court on a Grade A or B violation still lacks many of the rights they have at trial.

for supervised release violations.[163] The federal government spends approximately $400 million each year to supervise people re-entering communities.[164] Between 2013 and 2017, courts heard an average of nearly 22,000 revocation hearings each year.[165] With less adversarial hearings for Grade C violations—which account for over half of all violations, approximately 11,000 each year[166]—the proceeding will be able to set the defendant's successful completion of supervision as the top priority. If there is not an adversary to the defendant arguing for a punitive response to the violation, then the hearing is more likely to embody a re-entry court. Less money will be spent on incarcerating people who violated the terms of their supervision and further supervising people seeking to re-enter their communities (if they successfully complete supervision earlier). The revocation hearings themselves will save the prosecutor's resources and allow the court to hear the matter in a more efficient manner. Even a modest change to a proceeding that occurs nearly 11,000 times per year would save a significant amount of resources.

Courts can adopt this approach now. In *Schiff v. Dorsey*, the U.S. District Court for the Dictrict of Connecticut indicated that "[s]ince the 1980s, at the request of the Judges of the District Court, [a federal prosecutor] has accompanied the probation officer on a 'stand-by' basis[.]" [167] The prosecutor became involved if "the court, the defendant, or the probation officer raise[d] a question of special relevance to the government or the probation officer himself must testify; in the latter circumstance, the [probation officer] will be less able to manage the presentation of evidence . . . ."[168] Further, making revocations less adversarial is something courts can assess for themselves, in consultation with their probation offices, prosecutors, and criminal defense bar, to see whether it would suit them. If not, there is no need to change their current effective procedures.

Beyond the precedent supporting this approach, it is consistent with the supervised release statute and rules of criminal procedure.[169]

163. Schuman, *supra* note 3, at 589.

164. Jacob Schuman, *America's Shadow Criminal Justice System*, NEW REPUBLIC (May 30, 2018), https://newrepublic.com/article/148592/americas-shadow-criminal-justice-system [https://perma.cc/6SYP-8253].

165. *See* SENTENCING COMMISSION REPORT, *supra* note 96, at 14, 17.

166. *See id.* at 31.

167. Schiff v. Dorsey, 877 F. Supp. 73, 79 (D. Conn. 1994).

168. *Id.* (concluding that the probation officer would be "absolutely immune for his testimonial function").

169. *See supra* notes 55–69 and accompanying text.

Neither of those sources of authority specify how a court should incorporate a prosecutor into a revocation proceeding. And very little guides the court on involving the probation officer. But the case law does direct that supervised release, which is the outcome of Grade C violations more often than any other, must be imposed with rehabilitation in mind.[170] The supervised release statute details the responsibilities of the probation officer as an extension of the court tasked with supervising compliance with the court's sentence.[171] Having the probation officer, the expert in community re-entry, at the forefront of the revocation hearing accords with the supervised release law. The rules of criminal procedure call for reduced rights of defendants in revocation hearings, so de-emphasizing the adversarial nature of the proceeding also corresponds with the reality that the defendant lacks the ability to assert the protections they had when originally charged.

Some might criticize this proposal as avoiding one awkward situation for a worse one: eschewing a probation officer drifting into the position of prosecution case agent in favor of putting the probation officer in the role of the prosecutor. It is generally accurate that the probation officer is "prosecuting" the violation and accordingly should have prosecutorial immunity.[172] But seen through the eyes of the defendant, the probation officer likely would not take on the same host of associations that naturally arise when observing a prosecutor present an adversarial case. While probation supervises the defendant's compliance during re-entry, and sometimes that requires them to be strict with the supervisee, they cannot unilaterally cause the defendant to receive another felony conviction.[173] Most important, their broad priorities are the same as the court's—promoting respect for the court's orders and successful re-entry—in contrast to the more narrow and targeted goals of a prosecutor aiming to protect the community.[174]

VI. CONCLUSION

Supervised release is a costly program in need of improvement. We can improve it by recalibrating the way a court conducts a hearing on whether to revoke supervised release. With no specified position in

170. *See* United States v. Johnson, 529 U.S. 53, 59 (2000); United States v. Granderson, 511 U.S. 39, 50 (1994).

171. *See* 18 U.S.C. § 3603 (2018).

172. *See, e.g.*, *Schiff*, 877 F. Supp. at 79 ("USPO Medina should be protected by absolute immunity against plaintiff's claims.").

173. *See* 18 U.S.C. § 3603 (2018).

174. *See supra* notes 138–42, 171 and accompanying text.

the revocation process, the prosecutor can participate on an as-needed basis for lower-level violations. Proceeding in a less adversarial fashion, resources can be conserved as the probation officer and the court focus on how to support the defendant's effective re-entry into the community rather than responding with expensive, new terms of custody and supervision.[175] Unless the defendant is going to receive a more robust set of rights in the revocation process, this approach is more consonant with the limited protections provided to a person accused of violating a supervised release condition.[176]

175. *See supra* notes 163–66 and accompanying text.
176. *See supra* notes 117–32, 153–62 and accompanying text.