AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Juries and Lawyers: Juries

**United States v. Haymond,** \_\_\_ U.S. \_\_\_ (2019)

*Andre Haymond was convicted of violating federal laws on child pornography. Federal law authorized the judge to sentence Haymond to up to ten years in prison, and between five years and a lifetime of supervisory release. The district court judge sentenced him to 38 months in prison and then ten years of supervised release. While Haymond was on release, the government found new images on child pornography on his computers and cell phones. At the hearing required by the Sentencing Reform Act of 1984 (SRA), a federal judge applying a preponderance of evidence standard found that Haymond did possess child pornography. He was then required under* [*18 U.S.C. § 3583(e)(3)*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_pp_4b250000f9dd6) *to sentence Haymond to between five years and life in prison. The district court judge and Court of Appeals for the Tenth Circuit ruled that federal law unconstitutionally deprived Haymond of his Fifth and Sixth Amendment rights because the judge was permitted to give Haymond a sentence for a violation of his supervisory release greater than the minimum sentence he could have obtained for the crime. The United States appealed to the Supreme Court.*

*The Supreme Court by a 5-4 vote declared that the sentencing provisions of § 3583(e)(3) were unconstitutional. Justice Neil Gorsuch, speaking for three other justices, insisted that persons who violated the terms of a sentence release could not be sentenced to more years in prison that the maximum prison sentence they could have been given under federal law. Justice Stephen Breyer claimed that because § 3583(e)(3) had a greater resemblance to a criminal statute than parole conditions, Haymond had a right to a jury trial and a reasonable doubt standard before receiving a sentence greater than ten years. Justice Samuel Alito’s dissent insisted that persons had no more right to juries and a reasonable doubt standard for violations of supervisory release than for parole. All justices agree that a judge may find a person who violates the condition of parole may be returned to prison by a federal judge based on a preponderance of the evidence standard. All justices agree that a judge in a sentencing hearing may not send a person to prison for more than the maximum sentence allowable by law for the original crime. Why does Justice Gorsuch think that maximum sentence was ten years? Why does Alito disagree? The dissent claims that* Haymond *has major implications for the federal sentencing process. Gorsuch disagrees. Why do Alito and Gorsuch dispute the significance of* Haymond*? Who has the better argument?*

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4) announced the judgment of the Court and delivered an opinion, in which Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4) joined.

Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.

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Together with the right to vote, those who wrote our Constitution considered the right to trial by jury “the heart and lungs, the mainspring and the center wheel” of our liberties, without which “the body must die; the watch must run down; the government must become arbitrary.” Just as the right to vote sought to preserve the people’s authority over their government’s executive and legislative functions, the right to a jury trial sought to preserve the people’s authority over its judicial functions. Toward that end, the Framers adopted the Sixth Amendment’s promise that “[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” In the Fifth Amendment, they added that no one may be deprived of liberty without “due process of law.” Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has “extend[ed] down centuries.” *Apprendi v. New Jersey* (2000).

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Consistent with these understandings, juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge’s power to punish. A judge’s authority to issue a sentence derives from, and is limited by, the jury’s factual findings of criminal conduct. Because the Constitution’s guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt every fact “ ‘which the law makes essential to [a] punishment’ ” that a judge might later seek to impose. . . . “[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum,” th[e] *Apprendi* Court explained, “must be submitted to a jury, and proved beyond a reasonable doubt” or admitted by the defendant. . . . [*Apprendi*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000387238&pubNum=0000780&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) applies with equal force to facts increasing the mandatory minimum” as it does to facts increasing the statutory maximum penalty. . . . [U]nder our Constitution, when “a finding of fact alters the legally prescribed punishment so as to aggravate it” that finding must be made by a jury of the defendant’s peers beyond a reasonable doubt.

. . . . Based on the facts reflected in the jury’s verdict, Mr. Haymond faced a lawful prison term of between zero and 10 years under But then a judge—acting without a jury and based only on a preponderance of the evidence—found that Mr. Haymond had engaged in additional conduct in violation of the terms of his supervised release.. . . [T]hat judicial factfinding triggered a new punishment in the form of a prison term of at least five years and up to life. . . .

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. . . . Our precedents . . . have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a “sentencing enhancement.” . . . [A]any “increase in a defendant’s authorized punishment contingent on the finding of a fact” requires a jury and proof beyond a reasonable doubt “no matter” what the government chooses to call the exercise. . .. To be sure, . . . founding-era prosecutions traditionally ended at final judgment. But at that time, generally, “questions of guilt and punishment both were resolved in a single proceeding” subject to the Fifth and Sixth Amendment’s demands. Over time, procedures changed as legislatures sometimes bifurcated criminal prosecutions into separate trial and penalty phases. But none of these developments licensed judges to sentence individuals to punishments beyond the legal limits fixed by the facts found in the jury’s verdict. . . .

Today, we merely acknowledge that an accused’s final sentence includes any supervised release sentence he may receive. . . . . As at the initial sentencing hearing, that does not mean a jury must find every fact in a revocation hearing that may affect the judge’s exercise of discretion within the range of punishments authorized by the jury’s verdict. But it does mean that a jury must find any facts that trigger a new mandatory minimum prison term.

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. . . . 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. . . . If the government were right, a jury’s conviction on one crime would (again) 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. And if there’s any doubt about the incentives such a rule would create, consider this case. Instead of seeking a revocation of supervised release, the government could have chosen to prosecute Mr. Haymond under a statute mandating a term of imprisonment of 10 to 20 years for repeat child-pornography offenders. But why bother with an old-fashioned jury trial for a new crime when a quick-and-easy “supervised release revocation hearing” before a judge carries a penalty of five years to life? This displacement of the jury’s traditional supervisory role, under cover of a welter of new labels, exemplifies the “Framers’ fears that the jury right could be lost not only by gross denial, but by erosion.”

. . . . Where parole and probation violations generally exposed a defendant only to the remaining prison term authorized for his crime of conviction, as found by a unanimous jury under the reasonable doubt standard, supervised release violations . . . can, at least as applied in cases like ours, expose a defendant to an additional mandatory minimum prison term well beyond that authorized by the jury’s verdict—all based on facts found by a judge by a mere preponderance of the evidence. . . . While the Sixth Amendment surely does not require a jury to find every fact that the government relies on to adjust the terms of a prisoner’s confinement (say, by reducing some of his privileges as a sanction for violating the prison rules), that does not mean the government can send a free man back to prison for years based on judge-found facts. . . .

. . . . . As we have emphasized, our decision is limited to [§ 3583(k)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_340a00009b6f3)—an unusual provision enacted little more than a decade ago. . . . In most cases (including this one), combining a defendant’s initial and post-revocation sentences issued under [§ 3583(e)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_7fdd00001ca15) 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. . . .

In the end, the dissent is left only to echo an age-old criticism: Jury trials are inconvenient for the government. Yet like much else in our Constitution, the jury system isn’t designed to promote efficiency but to protect liberty. . . .

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Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4), concurring in the judgment.

I agree with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is consistent with traditional parole. . . . Nevertheless, I agree with the plurality that this specific provision of the supervised-release statute, is unconstitutional. Revocation of supervised release is typically understood as “part of the penalty for the initial offense.” The consequences that flow from violation of the conditions of supervised release 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.” Consistent with that view, the consequences for violation of conditions of supervised release . . . . are limited by the severity of the original crime of conviction, not the conduct that results in revocation. . . .

[Section 3583(k)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_340a00009b6f3) is difficult to reconcile with this understanding of supervised release. In particular, three aspects of this provision, considered in combination, lead me to think it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach. First, [§ 3583(k)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_340a00009b6f3) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. Second, [§ 3583(k)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_340a00009b6f3) takes away the judge’s discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. Third,[§ 3583(k)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_340a00009b6f3) 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.”

Taken together, these features of [§ 3583(k)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3583&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_340a00009b6f3) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution. . .

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4), with whom THE CHIEF JUSTICE, Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4), and Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib959b744980a11e9b8aeecdeb6661cf4) join, dissenting.

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Many passages in the opinion suggest that the entire system of supervised release, which has been an integral part of the federal criminal justice system for the past 35 years, is fundamentally flawed in ways that cannot be fixed. . . . Many statements and passages in the plurality opinion strongly suggest that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding. Take the opinion’s opening line: “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty.” In a supervised-release revocation proceeding, a judge, based on the preponderance of the evidence, may make a finding that “take[s] a person’s liberty,” in the sense that the defendant is sent back to prison. . . .

The intimation in all these statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment—which means that the defendant is entitled to a jury trial, which means that as a practical matter supervised-release revocation proceedings cannot be held. . . .

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A narrower interpretation of the plurality opinion is also contradicted by another important statement in the opinion. The plurality says that the maximum “lawful prison term” “reflected in the jury’s verdict” in respondent’s case was “10 years.” This statement is full of meaning because if 10 years is the maximum amount of time that respondent could lawfully be required to spend in prison on the basis of the jury’s verdict, there is a serious constitutional defect in the very design of the supervised-release system. That is so because the concept of supervised release is based on a fundamentally different conception of the maximum term of confinement authorized by a guilty verdict.

To understand this, it is important to understand the relationship between the system of supervised release and the old federal parole system it replaced. . . . . The replacement of parole with supervised release changed the form of federal sentences but not their substance. Here is an example: A pre-SRA sentence of nine years’ imprisonment meant three years of certain confinement and six years of possible confinement depending on the defendant’s conduct in the outside world after release from prison. At least for present purposes, such a sentence is the substantive equivalent of a post-SRA sentence of three years’ imprisonment followed by six years of supervised release. . . . [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 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.

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This should not have been a difficult or complicated case. I start with the proposition that the old federal parole system did not implicate the Sixth Amendment’s jury trial right. A parole revocation proceeding was not a “criminal prosecution” within the meaning of the Sixth Amendment, and revocation did not result in a new sentence. When a prisoner was paroled, the Executive was simply exercising the authority conferred by law to grant the defendant a conditional release from serving part of the sentence imposed after a guilty verdict. Supervised release, for reasons already explained, is not fundamentally different and therefore should not be treated any differently for Sixth Amendment purposes. When a jury finds a federal defendant guilty of violating a particular criminal statute, the maximum period of confinement authorized is the maximum term of imprisonment plus the maximum term of supervised release. . . . Once this is understood, it follows that the procedures that must be followed at a supervised-release revocation proceeding are the same that had to be followed at a parole revocation proceeding, and these were settled long ago. At a parole revocation hearing, the fundamental requisites of due process had to be observed, but a parolee did not have a right to a jury trial.

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I begin with who may assert the jury trial right. The text of the Sixth Amendment makes clear that this is “a right of the ‘accused’ and only the ‘accused.’ ” . . . Despite the plurality’s suggestion otherwise, respondent was no longer the “accused” while he served his term of supervised release. . . . This is especially so given that respondent’s reimprisonment was not primarily a punishment for new criminal conduct. The principal reason for assigning a penalty to a supervised-release violation is not that the violative act is a crime . . . rather, it is that the violative act is a breach of trust. . . .

It is similarly awkward to characterize a supervised-release revocation proceeding as part of the defendant’s “criminal prosecution.” A supervised-release revocation proceeding is not part of the criminal prosecution that landed a defendant in prison in the first place because “[a] ‘criminal prosecution’ ... ends when sentence has been pronounced on the convicted or a verdict of ‘Not guilty’ has cleared the defendant of the charge.” This follows from the early understanding that a “prosecution” concludes when a court enters final judgment. . . .

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Supervised-release revocation proceedings are not part of the defendant’s criminal prosecution for the same reasons. . . . The administration of a sentence occurs after a court imposes that sentence—i.e., after the criminal prosecution has ended. That fact is equally true here. No matter what penalties flow from the revocation of parole, probation, or supervised release, the related proceedings are not part of the criminal prosecution.

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Prior to and at the time of the adoption of the Sixth Amendment, convicted criminals were often released on bonds and recognizances that made their continued liberty contingent on good behavior. If a prisoner released on such a bond did not exhibit good behavior, the courts had discretion to forfeit the bond (a loss of property) or to turn the individual over to the sheriff (a loss of liberty) until new conditions could be arranged. There is no evidence that there was a right to a jury trial at such proceedings, and the plurality does not even attempt to prove otherwise. . . . A violation of the conditions permitted not only the defendant’s reimprisonment, but several other penalties as well. In the parole context, these penalties most often included the forfeiture of good time credits—a reduction in prison time based on good behavior—that the parolees had accrued prior to their release on parole, as well as the forfeiture of any time served for the duration of their parole. . . .

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The plurality’s extension of the jury trial right to the administration of previously imposed sentences also sidelines what has until now been the core feature of the [*Apprendi*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000387238&pubNum=0000780&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) line of cases—a meaningful connection to the trial for the charged offense. . . . The Court’s rationale has been that “the core crime and the fact triggering [an increased maximum or] mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.” . . . Here, the factual basis for revoking respondent’s supervised release did not “g[o] precisely to what happened in the ‘commission of the offense’ ”; it did not even “relate to the commission of the offense.” It had virtually nothing to do with the child-pornography offense that led to respondent’s conviction, incarceration, and supervised release. The same would be true of a defendant convicted of burglary, arson, or any other crime: His failure to attend an employment class or to pass a drug test while on supervised release would have nothing to do with how he carried out those offenses. And it would be 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. . . .

The plurality also errs by failing to distinguish between the unconditional liberty interests with which [*Apprendi*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000387238&pubNum=0000780&originatingDoc=Ib959b744980a11e9b8aeecdeb6661cf4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is concerned and the conditional liberty interests at issue in cases like this one. When a person is indicted and faces the threat of prison and supervised release, his unconditional liberty hangs in the balance. But convictions have consequences. “[G]iven a valid conviction, the criminal defendant [may be] constitutionally deprived of his liberty.” To this end, “[s]upervised release is ‘a form of postconfinement monitoring’ that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison.” Convicts like respondent on supervised release thus enjoy only conditional liberty. He most certainly was not “a free man.” This means, then, that “[r]evocation” of supervised release “deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of ... conditional liberty.” It is perhaps for that reason that the decisions of this Court that mention “conditional liberty” speak only of general due process rights, not other constitutional protections that unaccused and unconvicted individuals enjoy.