Michigan Law Review

Volume 122 | Issue 7

2024

Revocation at the Founding

Jacob Schuman
Temple University Beasley School of Law, jacob.schuman@temple.edu

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation
Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381 (2024).
Available at: https://repository.law.umich.edu/mlr/vol122/iss7/1

https://doi.org/10.36644/mlr.122.7.revocation

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REVOCATION AT THE FOUNDING

*Jacob Schuman**

The Supreme Court is divided over the constitutional law of community supervision. The justices disagree about the nature of a defendant's liberty under supervision, the rights that apply when the government punishes violations, and the relationship between parole, probation, and supervised release. These divisions came to a head in 2019's United States v. Haymond, *where the justices split 4–1–4 on whether the right to a jury trial applies to revocation of supervised release. Their opinions focused on the original understanding of the jury right at the time the Constitution was ratified.*

This Article aims to settle the debate over the law of revocation at the Founding. In the late-eighteenth-century United States, there was a close legal analogue to modern community supervision: the recognizance to keep the peace or for good behavior. Like probation, parole, and supervised release, the recognizance was a term of conditional liberty imposed as part of the sentence for a crime, providing surveillance and reporting on the defendant's behavior, with violations punishable by imprisonment. Given these similarities, the best way to determine if the original understanding of the jury right would apply to revocation proceedings today is to ask whether the common law required a jury for punishing violations of a recognizance.

Fortunately, Founding Era legal authorities make the answer to that question clear: Yes, at the time the Constitution was ratified, punishing recognizance violations required a jury trial. This requirement disappeared during the nineteenth century only due to the development of probation and parole, which changed the structure of community supervision from an additional penalty into a delayed punishment. Because supervised release is structured as a penalty, not a delay, the original understanding of the jury right would apply to revocation of supervised release, even if not to revocation of probation or parole. The law of revocation at the Founding preserves lost constitutional rights that deserve modern recognition and renewal.

---

* Associate Professor, Temple University Beasley School of Law. For their advice and comments, I thank Samuel Bray, Douglas Berman, Fiona Doherty, Kevin Douglas, Richard Epstein, Eric Fish, Kellen Funk, Aliza Hochman Bloom, Ben Johnson, Anil Kalhan, Orin Kerr, Kit Kinports, Jud Mathews, Lee Liberman Otis, Nicholas Price, Victor Romero, Stephen Ross, Mark Storslee, Samuel Wiseman, Megan Wright, and the participants in Drexel University Kline School of Law's Faculty Workshop and Penn State Law's Faculty Works-in-Progress Series. For her extraordinary research support, I am indebted to Rebecca Mattson, Penn State Law's Head of Faculty and Research Services and Professor of Legal Research, without whom I could not have written this Article. Finally, I am grateful for the careful editing of my research assistant, Erin Karmen, and the students on the *Michigan Law Review*.

TABLE OF CONTENTS

TABLE OF CONTENTS 1382
INTRODUCTION 1382
I. THE SEARCH FOR REVOCATION ANALOGUES 1389
A. *Community Supervision Basics* 1389
B. *History of Community Supervision* 1391
1. Probation and Parole 1391
2. *Morrissey* and *Gagnon* 1393
3. Supervised Release 1395
C. United States v. Haymond 1397
1. Gorsuch's Plurality 1399
2. Alito's Dissent 1400
3. Breyer's Concurrence 1401
II. THE RECOGNIZANCE TO KEEP THE PEACE OR FOR GOOD BEHAVIOR 1402
A. *Recognizance Basics* 1403
B. *Founding Era Community Supervision* 1407
1. Term of Conditional Liberty 1407
2. Imposed as Sentence 1409
3. Surveillance and Reporting 1412
4. Violations Punishable by Imprisonment 1415
C. *Forfeiture Juries* 1417
1. Caselaw and Treatises 1418
2. In- Versus Out-of-Court Violations 1422
3. Laying a Case "on File" 1426
III. REVOCATION TODAY 1430
A. *Penalty Versus Delay* 1431
B. *Structures of Community Supervision* *1433*
C. *The Right to a Revocation Jury* *1435*
CONCLUSION 1439

INTRODUCTION

The Supreme Court is divided over the constitutional law of community supervision. The justices disagree about the nature of a defendant's liberty under supervision, the rights that apply when the government punishes violations, and the relationship between parole, probation, and supervised release. The stakes of these disputes are enormous. Almost four

million people in the United States are currently serving terms of community supervision,[1] and one-third of them will eventually have their supervision revoked,[2] sending approximately two hundred thousand people to prison every year and accounting for 42 percent of all prison admissions.[3] Experts warn that "mass supervision" has become "overly burdensome, punitive and a driver of mass incarceration, especially for people of color."[4]

The Court's divisions over community supervision came to a head in 2019's *United States v. Haymond*, where the justices split 4–1–4 on whether the right to a jury trial applies to revocation of supervised release.[5] Their opinions focused on the original understanding of the jury right at the time the Constitution was ratified. Justice Gorsuch wrote a four-vote plurality opinion, describing the jury right "[a]t the founding" as a fundamental limit on "the judge's power to punish" and concluding that the same limit must apply to revocation of supervised release today.[6] Justice Alito authored a four-vote dissent, criticizing the plurality for making "no real effort to show" that the Constitution was "originally understood to require a jury trial in a proceeding like a supervised-release revocation proceeding" and arguing that the nearest "historic analogues" did not require a jury.[7] Lastly, Justice Breyer penned a brief solo concurrence, joining the plurality on the outcome of the case yet also "agree[ing] with much of the dissent, in particular . . . the role of the judge in a supervised-release proceeding."[8] With no clear majority on the Court, the right to a revocation jury remains one of the most important unresolved issues in constitutional criminal procedure.

---

1. DANIELLE KAEBLE, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2020 1 (2021), https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf [perma.cc/96MS-W9KX].

2. *See* PEW CHARITABLE TRS., PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 9 (2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf [https://perma.cc/7JBA-HL8F]

3. *See National Report*, THE COUNCIL OF STATE GOV'TS JUST. CTR., https://csgjusticecenter.org/publications/more-community-less-confinement/national-report [perma.cc/WC9N-3D3C] (noting that in 2018 and 2019, over 250,000 prison admissions stemmed from community supervision violations, whereas in 2020—a pandemic year—the number dropped to 172,000); Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (May 2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023.html [perma.cc/6QZS-XSWD] (showing that in 2021, over 230,000 prison admissions stemmed from community supervision violations).

4. *Overview*, EXIT: EXECUTIVES TRANSFORMING PROBATION & PAROLE, https://www.exitprobationparole.org/overview [perma.cc/9TEV-47AF].

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

6. *Id.* at 2376.

7. *Id.* at 2392, 2396–97 (Alito, J., dissenting).

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

This Article aims to settle the debate over the law of revocation at the Founding.[9] In the late-eighteenth-century United States, there was a close legal analogue to modern community supervision: the recognizance to keep the peace or for good behavior, also known as the "peace bond" or "suret[y] for the *peace*."[10] Like probation, parole, and supervised release, the recognizance was a term of conditional liberty imposed as part of the sentence for a crime, which provided surveillance and reporting on the defendant's behavior, with violations punishable by imprisonment.[11] Given these similarities, the best way to determine if the original understanding of the jury right would apply to revocation today is to ask whether the common law required a jury trial to punish violations of a recognizance.

Fortunately, Founding Era legal authorities make the answer to that question clear: Yes. At the time the Constitution was ratified, punishing violations of a recognizance, also known as "forfeiting" a recognizance,[12] required a jury trial.[13] The sole exception to this requirement was for violations committed inside the courtroom and memorialized on the record, which could be found by a judge, not a jury.[14] The forfeiture jury disappeared during the nineteenth century only due to the development of

9. The "Founding" refers to the "period surrounding the drafting, ratification, and early interpretation of the Constitution." Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 247–48 (2023); *see also* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 61–63 (2019) (discussing relevance of the "first post-Founding practices" to "the Constitution's *original* meaning").

10. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 38–39 (1993); Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, C PA. MAG. HIST. & BIOGRAPHY 173, 175 (1976); 4 WILLIAM BLACKSTONE, COMMENTARIES *251.

11. FRIEDMAN, *supra* note 10, at 38–39.

12. *See* BLACKSTONE, *supra* note 10, at *252.

13. *See infra* Section II.B. This Article does not address the standard of proof in forfeiture proceedings, a concept which only began to develop during the eighteenth century and was not fully established until later in the nineteenth century. *See* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1570 (2016); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975); *see also* NEIL P. COHEN, 1 THE LAW OF PROBATION AND PAROLE § 25:18 (2d ed. 2021) (discussing standards of proof in revocation proceedings). In addition to U.S. caselaw, this Article also relies on English precedents, which proved highly influential on the American law of the recognizance. *See* United States v. Feely, 1 Brock 255, 257 (Marshall, Circuit Justice, C.C.D. Va. 1813) ("[T]he power which the courts of common law exercised over recognizances in England, may, in the United States, be exercised by this Court."); *see also Ex Parte* United States, 242 U.S. 27, 45 (1916) (citing English precedent on the recognizance); United States v. Quitman, 2 Am. Law Reg. 645, 650 (C.C.E.D. La. 1854) (same); Reed v. Sullivan, 1 Ga. 292, 294 (1846) (same); Estes v. State, 20 Tenn. (2 Hum.) 496, 498 (1841) (same).

14. *See infra* Section II.C.2.

probation and parole, which changed the structure of community supervision from an additional penalty to a delayed punishment.[15] Because supervised release is structured as a *penalty*, not a delay, the original understanding of the jury right would apply to revocation of supervised release, even if not to revocation of probation and parole.[16]

In his *Haymond* dissent, Justice Alito suggested forfeiture of a recognizance as a potential analogue to revocation of supervised release but said he could find "no evidence that there was a right to a jury trial at such proceedings."[17] This Article, however, presents substantial evidence that recognizance forfeitures did require a jury trial. The reason Justice Alito may have been unable to find this evidence is that most legal scholarship on the history of community supervision begins with the invention of probation and parole in the middle of the 1800s, several decades *after* the Constitution was ratified.[18] Starting at such a late date means that no legal scholar has ever asked how the original understanding of the jury right would apply to revocation proceedings today. Modern legal scholars have described the recognizance as an early form of pretrial release and restraining order,[19] yet none have identified it as an ancestor of probation, parole, and

---

15. *See infra* Section II.C.3.

16. *See infra* Section III.B.

17. United States v. Haymond, 139 S. Ct. 2369, 2396 (2019) (Alito, J., dissenting).

18. *See, e.g.*, Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 964–90 (2013); Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 307 (2013); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1022, 1026 (2013); Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 174 (2003); Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 487 (1999); Joan Petersilia, *Probation in the United States*, 22 CRIM. & JUST. 149, 155–57 (1997) [hereinafter Petersilia, *Probation*]. In a perceptive 1941 article, Frank Grinnell described the historical connection between the recognizance and probation but did not consider the constitutional implications of this relationship, nor could he have anticipated the enormous changes in the law of community supervision over the next 80 years. *See* 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). Despite the lack of legal scholarship, a number of historians and criminologists identify the recognizance as an early form of community supervision, and this Article is indebted to their work. *See* MARIE-EVE SYLVESTRE, NICHOLAS BLOMLEY & CÉLINE BELLOT, RED ZONES: CRIMINAL LAW AND THE TERRITORIAL GOVERNANCE OF MARGINALIZED PEOPLE 48 (2019); MAURICE VANSTONE, SUPERVISING OFFENDERS IN THE COMMUNITY: A HISTORY OF PROBATION THEORY AND PRACTICE 2–3 (2004); Joel B. Samaha, *The Recognizance in Elizabethan Law Enforcement*, 25 AM. J. LEGAL HIST. 189, 190 (1981); Lermack, *supra* note 10, at 179; DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 19, 23 (2d ed. 1969); JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776) 516–17 (1944).

19. *See* Kellen Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816, 1823–24 (2024) (bail); David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1450–51 (2010) (restraining order); Sidney Childress, *Peace Bonds—Ancient Anachronisms or Viable Crime*

supervised release, nor considered the consequences of this historical connection for modern constitutional law.

The jury requirement in recognizance forfeitures is not just a matter of scholarly interest, but also concerns an urgent issue in American criminal justice. The jury right is among the most important constitutional protections for criminal defendants, appearing at least three times in the Constitution[20] and providing "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[21] Yet under current Supreme Court precedent, revocations of probation and parole are not considered "part of a criminal prosecution" and therefore "the full panoply of rights . . . does not apply,"[22] including the right to a jury trial.[23] Although *Haymond* failed to resolve whether the jury right applies to revocation of supervised release, the lower courts have unanimously concluded that it does not.[24] Historical evidence for the right to a revocation jury, therefore, may provide a legal basis for protecting a critical liberty interest for the millions of Americans currently subject to community supervision.[25]

Prevention Devices?, 21 AM. J. CRIM. L. 407, 415–17 (1994) (restraining order); Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 401–02 (1970) (bail); *see also* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285, 1302 (2020) (red-flag laws). Nancy King observes that the recognizance shared "limited features" with modern-day probation, but argues they were fundamentally different because the recognizance did not "allow[] a judge to impose punishment for the conviction once the defendant was released [from prison]." Nancy J. King, *Constitutional Limits on the Imposition and Revocation of Probation, Parole, and Supervised Release After* Haymond, 76 VAND. L. REV. 83, 87–88 n.11 (2023). As explained in Section II.B.4 below, however, violations of a recognizance were effectively punishable by imprisonment.

20. U.S. CONST. art. III, § 2; *id.* amends. VI, VII; *see also* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that the jury right is a component of the Fifth Amendment right to due process).

21. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

22. Morrissey v. Brewer, 408 U.S. 471, 480 (1972); *see also* COHEN, *supra* note 13, § 21:1, ("A probation or parole revocation proceeding is not considered to be a criminal proceeding in the federal court system and in most states. Therefore, the rules of criminal procedure—generally—do not apply in the federal system or in those states, and the proceedings are sometimes informal, even summary, in nature." (footnotes omitted)).

23. *See* COHEN, *supra* note 13, at § 21:49 ("Although a jury trial is an important right for many criminal defendants, it is not an absolute right applicable to all criminal proceedings. . . . After being placed on probation pursuant to a criminal conviction . . . the offender loses the right to a jury trial at state probation revocation proceedings.").

24. *See, e.g.*, United States v. Shakespeare, 32 F.4th 1228 (10th Cir. 2022); United States v. Henderson, 998 F.3d 1071 (9th Cir. 2021); United States v. Doka, 955 F.3d 290 (2d Cir. 2020); United States v. Eagle Chasing, 965 F.3d 647 (8th Cir. 2020).

25. *See* KAEBLE, *supra* note 1, at 1.

Of course, there is also heated debate about the proper role of the Constitution's original meaning in judicial decisionmaking.[26] Originalists argue that judges should interpret the Constitution based solely on the public understanding of the document at the time it was ratified.[27] Nonoriginalists, by contrast, contend that judges should interpret the Constitution based on multiple factors, including original understanding, precedent, policy, morality, and other modalities.[28] This Article takes no position on that debate. Regardless of their interpretive method, virtually everyone agrees that the original understanding of the Constitution is *at least one* factor judges should consider when analyzing the document.[29] The question dividing originalists from nonoriginalists is not whether judges should refrain from ever considering the original understanding of the Constitution, but whether judges should make the original understanding their sole consideration versus one of many. As one critic of originalism put it, "we can all care about . . . original public meaning without being originalists."[30]

The Supreme Court's recent embrace of originalism in cases leading to convservative policy victories has proved controversial,[31] but interest in the original understanding of the Constitution remains bipartisan, especially when it comes to the jury right.[32] In the five years since *Haymond* was

---

26. RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 4–6 (2021).

27. *Id.* The subtle differences between the various subtypes of originalism are beyond the scope of this Article. For a more in-depth discussion of these subtypes, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–61 (2009).

28. *See* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 427–28 (2006); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 709–10 (2011).

29. BARNETT & BERNICK, *supra* note 26, at 10.

30. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009).

31. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022) (finding no constitutional right to an abortion based on the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies" (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963))); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (finding a constitutional right to carry a handgun for self-defense outside the home based on "the scope of the right as originally understood" (citing Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019))); *see also* Erwin Chemerinsky, *Originalism Has Taken over the Supreme Court*, A.B.A. J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [perma.cc/CB7G-Y3GT] (discussing the controversy around the current Supreme Court's originalist arguments that led to both the *Dobbs* and *Bruen* decisions); David Cole, *Egregiously Wrong: The Supreme Court's Unprecedented Turn*, N.Y. REV. BOOKS (Aug. 18, 2022), https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole [perma.cc/EFW2-FWQP] (criticizing the Supreme Court for rejecting precedent in recent cases, including *Dobbs* and *Bruen*).

32. *See, e.g.*, Lawrence B. Solum, *Progressives Need to Support Justice Ketanji Brown Jackson*, BALKINIZATION (Dec. 9, 2022, 9:00 AM), https://balkin.blogspot.com/2020/06/mcclain-symposium-10.html [perma.cc/HKS8-TPCQ]; *see also*

decided, for example, Justices Barrett and Jackson have joined the Court, each appointed by presidents of different parties, yet both emphasizing the importance of the Constitution's original meaning in their judicial philosophies.[33] The Court is particularly focused on the original understanding of the jury right,[34] drawing its "understanding of the jury trial right from historical practices that existed at the founding and soon afterward."[35] Even nonoriginalist justices emphasize "the Framers' conception of the jury right,"[36] "the historical record,"[37] and "whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.' "[38] When the Court inevitably returns to the question of whether the jury right applies to revocation proceedings, therefore, the original understanding of the Constitution will likely inform the answer.

This Article proceeds in four parts. Part I describes the history of community supervision in the United States and the Supreme Court's search for analogues to revocation proceedings from the Founding Era. Part II argues that forfeiture of a recognizance to keep the peace or for good behavior was the closest Founding Era analogue to revocation of community supervision and that the common law, when the Constitution was ratified, required a jury trial. Part III explains how the requirement of a forfeiture jury disappeared during the nineteenth century and why the original understanding of the jury right would apply to revocation of supervised release, even if not to revocation of probation or parole. Finally, the

---

Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 194 (2005).

33. *See* Randy E. Barnett, Opinion, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL ST. J. (Mar. 24, 2022, 6:38 PM), https://www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063?mod=hp_opin_pos_3 [perma.cc/4CJG-UHRA]; Brian Naylor, *Barrett, an Originalist, Says Meaning of Constitution 'Doesn't Change over Time,'* NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [perma.cc/2B9G-GCW2].

34. *See* Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 959–60 (2010) ("The Supreme Court has shown an increasing enthusiasm for originalist methodology in the field of criminal procedure and with respect to the jury trial in particular." (footnote omitted)); *see also* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 133, 133 n.189 (2023) (noting that the Supreme Court's "Seventh Amendment cases" apply a "historical–analogical inquiry").

35. United States v. Haymond, 139 S. Ct. 2369, 2396 (2019) (Alito, J., dissenting) (citing Alleyne v. United States, 570 U.S. 99, 111 (2013) and Apprendi v. New Jersey, 530 U.S. 466, 495 (2000)).

36. Jones v. United States, 526 U.S. 227, 244 (1999).

37. S. Union Co. v. United States, 567 U.S. 343, 353 (2012).

38. Oregon v. Ice, 555 U.S. 160, 168 (2009) (citation omitted) (quoting Harris v. United States, 536 U.S. 545, 557 (2002) (plurality opinion)).

conclusion explores the ancient roots of surveillance and rehabilitation in American criminal law.

I. THE SEARCH FOR REVOCATION ANALOGUES

Community supervision in the United States goes by a variety of different names but is ultimately reducible to three basic forms: probation, parole, and supervised release.[39] During the 1970s, the Supreme Court held that criminal defendants had no right to a jury trial when the government revokes probation and parole.[40] In 2019's *United States v. Haymond*, however, the Court split 4–1–4 on whether the jury right applied to revocation of supervised release.[41] The *Haymond* justices searched for the best Founding Era analogue to modern-day revocation proceedings yet ultimately failed to reach agreement on this important question.[42]

A. *Community Supervision Basics*

Probation, parole, and supervised release "are similar in most respects," which Neil Cohen describes as follows:

> All of them enable criminal offenders to serve at least part of their sentences in the community rather than in prison. Moreover, all of them usually require the offender to adhere to a set of conditions and to be under the watchful eye of a caseworker assigned to assist the offender and monitor his or her progress. Finally, the sanction for disobedience of release conditions in all three cases may be imprisonment.[43]

This list of similarities suggests a four-part definition of community supervision: (1) a term of conditional liberty in the community, (2) imposed as part of the sentence for a crime, (3) providing surveillance and reporting on the defendant's behavior, and (4) with violations punishable by imprisonment. Probation, parole, and supervised release would all fit this definition. Pretrial monitoring ("bail") would not, because it is imposed to

---

39. COHEN, *supra* note 13, § 1:1. Different jurisdictions use different terms to describe these three forms of supervision. Minnesota, for example, calls supervision upon early release from prison "supervised release" and supervision to follow a full term of imprisonment "conditional release." State v. Schwartz, 628 N.W.2d 134, 139 (Minn. 2001). The federal government, by contrast, calls these forms of supervision "parole" and "supervised release," respectively. *See infra* Section III.B. For the sake of clarity, this Article uses the federal nomenclature.

40. *See* Morrissey v. Brewer, 408 U.S. 471, 483 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973).

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

42. *See, e.g.*, *id.* at 2392 (Alito, J., dissenting).

43. COHEN, *supra* note 13, § 1:1.

"prevent pretrial flight" and "protect[] the community" *before* a criminal conviction, not as part of a criminal sentence.[44]

Despite their similarities, probation, parole, and supervised release are also different in important respects. Probation is a term of conditional liberty imposed *instead of* a term of imprisonment, whereas parole is a term of conditional liberty imposed upon *early release* from prison.[45] In other words, probation allows a defendant to avoid prison entirely, whereas parole merely reduces a term of imprisonment.[46] Finally, "supervised release" is a term of conditional liberty imposed at sentencing *that follows* full service of a prison sentence.[47] While probation and parole both "replace[] a portion of a defendant's prison sentence," supervised release is "a separate term imposed at the time of initial sentencing."[48]

Punishment for violating a condition of community supervision is called a "revocation" proceeding.[49] In other words, the government "revokes" the defendant's probation, parole, or supervised release. This label makes sense for probation and parole, which are both terms of conditional liberty "granted" to a defendant in lieu of imprisonment and, therefore, can be "revoked" as punishment for violations.[50] However, supervised release is not granted but *added* to the defendant's prison sentence, and, thus, there is nothing for the government to "revoke."[51] As Judge Weinstein explained, the term of supervised release "is not being 'revoked'; rather, [the] supervisee is being punished for violating conditions and for . . . individual or general deterrence."[52] The legal significance of this distinction remains subject to significant debate, as discussed below in Section III.B. Nevertheless, for the sake of convention, this Article will refer to the punishment of probation, parole, and supervised release violations as "revocation" proceedings.

---

44. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1351 & nn.20–21 (2014) (footnote omitted).

45. *See* United States v. Murray, 275 U.S. 347, 356 (1928).

46. *See id.* at 355, 357, 358; *see also* Tonja Jacobi & Addie Maguire, *Searches Without Suspicion: Avoiding a Four Million Person Underclass*, 48 B.Y.U. L. REV. 1769, 1809–17 (2023) (discussing differences between probationers and parolees).

47. *See* 18 U.S.C. § 3583(a), (c).

48. Johnson v. United States, 529 U.S. 694, 725, 727 (2000) (Scalia, J., dissenting); *see also* Samson v. California, 547 U.S. 843, 850 (2006) ("[F]ederal supervised release, . . . in contrast to probation, is meted out in addition to, not in lieu of, incarceration." (quoting United States v. Reyes, 283 F.3d 446, 461 (2d Cir. 2002))).

49. *See, e.g.*, 18 U.S.C. §§ 3565 & 3583(e)(3); 18 U.S.C. § 4214(d) (1982).

50. *See* United States v. Peguero, 34 F.4th 143, 166, 170–75 (2d Cir. 2022) (Underhill, J., dissenting).

51. *See Johnson* v. United States, 529 U.S. at 706, n.9 (acknowledging that the supervised-release statute used the word "revoke" in an "unconventional way").

52. United States v. Trotter, 321 F. Supp. 3d 337, 347 (E.D.N.Y. 2018).

B. *History of Community Supervision*

The standard history of community supervision begins in the mid-1800s with the invention of probation and parole. In the 1970s, the Supreme Court held that revoking these forms of supervision was not a "criminal prosecution" and, therefore, did not require a jury trial. In 1984, however, Congress replaced parole with supervised release. For the next thirty-five years, the Court remained silent on how the Constitution applies to this new form of supervision.

1. Probation and Parole

The invention of community supervision is traditionally credited to two penal reformers working on opposite sides of the planet in the mid-1800s—John Augustus of Boston, Massachusetts and Alexander Maconochie of New South Wales, Australia.[53] Augustus was a wealthy cobbler who invented probation by accident in 1841, when, while visiting the city courthouse, he spontaneously offered to take in a man charged with being a common drunk rather than see him sent to prison.[54] Augustus thereby volunteered himself as the world's "first probation officer" and eventually helped over two thousand offenders avoid prison by finding them employment, education, and housing, while reporting to the court on their behavior.[55]

Maconochie was a British colonial secretary who proposed the idea for parole in 1837 as part of a report on the mistreatment of convicts in the Australian penal colony.[56] He condemned convict labor as a "disguised system of slavery," which made offenders "bad men instead of good."[57] Instead, he argued, criminal defendants should be required to earn a certain amount of "marks" to win release from the colony on a "ticket-of-leave," with marks awarded for good behavior and deducted for bad.[58] Exerting this "moral . . . influence," he argued, would "have the most powerful effect in changing the characters of many, even of the very hardened."[59] British officials later implemented Maconochie's proposals in domestic prisons,

53. *See* Klingele, *supra* note 18, at 1022–23, 1026; Petersilia, *Probation*, *supra* note 18, at 155–57; Doherty, *supra* note 18, at 964–70.

54. Grinnell, *supra* note 18, at 24–25; Petersilia, *Probation*, *supra* note 18, at 155.

55. Grinnell, *supra* note 18, at 24–25; Petersilia, *Probation*, *supra* note 18, at 156.

56. *See* Doherty, *supra* note 18, at 966–70.

57. ALEXANDER MACONOCHIE, AUSTRALIANA: THOUGHTS ON CONVICT MANAGEMENT AND OTHER SUBJECTS CONNECTED WITH THE AUSTRALIAN PENAL COLONIES 11, 37 (London, J.W. Parker 1839) (emphasis omitted).

58. *Id.* at 19–22.

59. *Id.* at 8, 21 (emphasis omitted).

"reward[ing] good behavior by advancing inmates from solitary imprisonment, to communal labor, and finally to freedom."[60]

Over the next several decades, American criminal justice reformers took up Augustus and Maconochie's ideas and promoted them throughout the United States. In response to this advocacy, state legislatures enacted two new kinds of laws. First, states authorized judges to "suspend" prison sentences and impose terms of conditional liberty in lieu of imprisonment, called "probation," from the Latin for "period of proving."[61] Second, they authorized correctional officials to grant defendants early release from prison subject to supervision in the community, called "parole," from the French for "word of honor."[62] The federal government enacted its own Parole and Probation Acts in 1910 and 1925, which created both federal probation and federal parole systems.[63] Supporters at the time celebrated these laws as "giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals,"[64] while "aid[ing] suffering humanity and . . . lend[ing] a helping hand toward the reformation of convicted criminals."[65]

The Supreme Court quickly approved the outlines of this new system of supervision. In 1902, the Court held that the "admixture of powers" exercised by parole boards did not violate "the due process of law prescribed by the Fourteenth Amendment"[66] and, in 1908, that prisoners had no right to a hearing on their applications for the "favor" and "privilege" of early release.[67] In two 1930s cases, *Burns v. United States* and *Escoe v. Zerbst*, the Court held that because probation was an "act of grace," punishing violations did not require "a trial in any strict or formal sense."[68] The Court even suggested that the government could "dispense with notice or a [revocation] hearing" altogether.[69]

---

60. Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 596 (2020).

61. *See* Petersilia, *Probation*, *supra* note 18, at 156.

62. Doherty, *supra* note 18, at 981 & n.139; *see also* 4 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PAROLE 7–18 (1939).

63. Parole Act of 1910, ch. 387, 36 Stat. 819; Probation Act of 1925, ch. 521, 43 Stat. 1259.

64. United States v. Murray, 275 U.S. 347, 357 (1928).

65. Doherty, *supra* note 18, at 984–85 (quoting 45 CONG. REC. H6374 (daily ed. May 16, 1910) (statement of Rep. Clayton)).

66. Dreyer v. Illinois, 187 U.S. 71, 84 (1902) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 395 (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891) (1833)).

67. Ughbanks v. Armstrong, 208 U.S. 481, 487 (1908).

68. Escoe v. Zerbst, 295 U.S. 490, 492–93 (1935) (citing Burns v. United States, 287 U.S. 216, 220, 222–23 (1932)).

69. *Id.* at 493.

Intriguingly, the Supreme Court put up one brief roadblock to the development of probation, in 1916's *Ex Parte United States*.[70] There, the Department of Justice challenged the lawfulness of a judicial practice called "laying the case on file," which had existed in the federal courts for "probably sixty years."[71] "[L]aying the case on file" meant the district judge would postpone a defendant's sentencing hearing, contingent on their good behavior, informally imposing a probation sentence long before enactment of the 1925 Probation Act.[72] The DOJ claimed this practice was "a permanent suspension based upon considerations extraneous to the legality of the conviction or the duty to enforce the sentence" and, therefore, "void[,] as it was equivalent to a refusal to carry out the statute."[73]

The Supreme Court agreed, holding that federal judges had no power to "lay a case on file" without express congressional authorization.[74] In the course of its analysis, the Court briefly considered as a potential precedent for "laying a case on file" the "common law" power of judges to "exact from the convicted person a bond" by taking a "recognizance[] to secure good behavior."[75] Ultimately, however, the Court rejected this comparison on the ground that taking recognizance imposed a "legal penalty" that "enforce[d] the law," whereas "laying a case on file" granted a "favor" by "permanently declin[ing] to enforce the law."[76] In response to the Court's decision, Congress passed the 1925 Probation Act, which expressly authorized federal judges to impose terms of probation, which the Court then construed broadly.[77]

2. *Morrissey* and *Gagnon*

By the mid-twentieth century, every state and the federal government had incorporated probation and parole into their "core criminal justice polic[ies]."[78] In 1965, for example, there were over 600,000 people serving terms of probation and parole,[79] approximately one-and-half times the number in correctional institutions.[80] Revocations of probation and parole

70. *Ex Parte* United States, 242 U.S. 27 (1916).

71. *Id.* at 37, 40, 50.

72. *Id.* at 39, 50.

73. *Id.* at 37.

74. *See id.* at 45, 47.

75. *Id.* at 44–45, 50.

76. *Id.* at 39, 45, 50.

77. United States v. Murray, 275 U.S. 347, 353–58 (1928).

78. Doherty, *supra* note 18, at 983; *see also* Petersilia, *Probation*, *supra* note 18, at 156.

79. MARGARET WERNER CAHALAN, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 179 tbl.7-7B (1986), https://bjs.ojp.gov/content/pub/pdf/hcsus5084.pdf [perma.cc/KEJ6-B7WH].

80. *Id.* at 178 tbl.7-7A.

were also "not an unusual phenomenon."[81] There was an average 20,000 adult felony parole revocations and 108,000 adult probation revocations every year,[82] and approximately "35%–45% of all parolees" were eventually "return[ed] to prison" for violations.[83] Many jurisdictions, as permitted by *Burns* and *Escoe*, revoked probation and parole without a hearing.[84]

During the 1970s, however, the Supreme Court transformed the law of community supervision through two landmark decisions that established the constitutional right to a revocation hearing: *Morrissey v. Brewer* and *Gagnon v. Scarpelli*.[85] In *Morrissey*, the Court held that the Fourteenth Amendment's Due Process Clause required a hearing before the government could deprive a parolee of their "conditional liberty," "reject[ing] the concept that constitutional rights [could] turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' "[86] In *Gagnon*, the Court extended this logic to probation, holding that "[i]t is clear at least after *Morrissey v. Brewer*, that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, that probation is an 'act of grace.' "[87]

Although *Morrissey* and *Gagnon* recognized a defendant's right to a revocation hearing, they also limited the procedural protections available in that hearing. Both opinions emphasized that revocation was "not part of a criminal prosecution" and, therefore, "the full panoply of rights due a defendant in such a proceeding d[id] not apply."[88] Because probation and parole both allowed the defendant to avoid prison "with the recognition" of a "risk that they will not be able to live in society without committing additional antisocial acts," the government "ha[d] an overwhelming interest in being able to return [them] to imprisonment without the burden of a new adversary criminal trial."[89] Revocation proceedings, therefore, did not need to include the same protections as criminal prosecutions so long as they provided "an informal hearing structured to assure that the finding of

---

81. Gagnon v. Scarpelli, 411 U.S. 778, 788 n.11 (1973); Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

82. *Gagnon*, 411 U.S. at 788 n.11.

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

84. Ronald B. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 175, 176–87, 193 (1964).

85. *Morrissey*, 408 U.S. 471; *Gagnon*, 411 U.S. 778.

86. *Morrissey*, 408 U.S. at 480–82 (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971)).

87. *Gagnon*, 411 U.S. at 782 n.4 (citations omitted) (first citing *Morrissey*, 408 U.S. 471; and then citing Escoe v. Zerbst, 295 U.S. 490, 492 (1935)).

88. *Morrissey*, 408 U.S. at 480; *see also Gagnon*, 411 U.S. at 782.

89. *Morrissey*, 408 U.S. at 480, 483.

a . . . violation will be based on verified facts and . . . accurate knowledge of the [violator's] behavior."[90]

Rather than write "a code of procedure" for revocation proceedings, *Morrissey* and *Gagnon* adopted a "flexible" analysis that defined the "minimum requirements of due process."[91] Balancing the interests of the defendant, the government, and the public, the Court concluded that probationers and parolees had the right to written notice of the alleged violations; disclosure of evidence against them; an opportunity to be heard in person before a neutral body; confrontation of witnesses in most circumstances; a written statement of the reasons for revocation; and (depending on the complexity of the issues) appointed counsel.[92] Notably absent from this list, however, was the right to a jury trial.[93]

3. Supervised Release

At the very moment the Supreme Court was transforming the law of community supervision, probation and parole were losing political support across the country. During the 1960s and 1970s, policymakers came to believe that prisons were not rehabilitative and that correctional officials could not reliably determine which prisoners were ready for early release.[94] Lawmakers also came to see the parole system as arbitrary because the term of supervision depended on the "almost sheer accident" of how much time the prisoner had left on their sentence, rather than their "actual[] need" for supervision.[95] In the late 1970s, states began "abolish[ing] the institution of parole" and implementing more "structured sentencing systems."[96]

---

90. *Id.* at 484.

91. *Id.* at 488–89; *Gagnon*, 411 U.S. at 788 (noting that "due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed").

92. *Morrissey*, 408 U.S. at 489; *see also Gagnon*, 411 U.S. at 786–90. The Court also required a "preliminary hearing" before an independent decision-maker to determine whether there was "reasonable ground to believe" the defendant committed a violation. *Morrissey*, 408 U.S. at 485.

93. *See Gagnon*, 411 U.S. at 789 ("In a criminal trial . . . a defendant must make a presentation understandable to untrained jurors. . . . In a revocation hearing, on the other hand . . . the members of the hearing body are familiar with the problems and practice of probation or parole.").

94. Schuman, *supra* note 60, at 600.

95. S. REP. NO. 98-225, at 124–25 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182 (hereinafter "Senate Report").

96. Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 395 (2006); *see also* Schuman, *supra* note 60, at 601–02 (footnotes omitted) ("Maine went first in 1976, followed by California and Indiana. By 1984, ten states had ended parole, and by the year 2000, every state in the country had enacted determinate sentencing reforms." (footnotes omitted)).

The federal government abolished its own parole system through the Sentencing Reform Act of 1984 ("SRA"), replacing it with a new form of community supervision called "supervised release."[97] Going forward, federal prisoners would be required to serve their prison terms in full, with no opportunity to apply for early release. Instead, judges would sentence defendants to terms of supervised release to follow their terms of imprisonment,[98] based on their need for post-confinement "monitoring"[99] and "assistance,"[100] with violations punishable by imprisonment.[101] Although lawmakers rejected the rehabilitative theory of *imprisonment*, they still believed that *community supervision* could "fulfill[] rehabilitative ends, distinct from those served by incarceration."[102]

Today, thirty-four states allow prisoners to apply for early release on parole, while the remaining sixteen and the federal government impose fixed terms of imprisonment followed by fixed terms of supervised release.[103] Meanwhile, the population under community supervision has skyrocketed from almost 700,000 in 1965[104] to nearly four million in 2023.[105] The proportion of prison admissions for revocations has also increased—from 20 percent in 1980 to almost 40 percent in 2020.[106] At the federal

97. Schuman, *supra* note 60, at 589.

98. The SRA also allowed defendants to earn a 10 percent reduction in their prison time for good behavior, awardable by the Bureau of Prisons. Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 895 & n.101 (2021). This figure was later increased to 15 percent. *Id.*

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

100. United States v. Johnson, 529 U.S. 53, 60 (2000).

101. Originally, violations of supervised release were punishable as criminal contempt. Schuman, *supra* note 60, at 604. Two years later, however, Congress authorized judges to "revoke" supervised release for violations and sentence defendants to imprisonment. *Id.*

102. United States v. Johnson, 529 U.S. at 59.

103. Edward E. Rhine, Alexis Watts & Kevin R. Reitz, *Parole Boards Within Indeterminate and Determinate Sentencing Structures*, ROBINA INST. OF CRIM. L. & CRIM. JUST., UNIV. OF MINNESOTA (Apr. 3, 2018), https://robinainstitute.umn.edu/articles/parole-boards-within-indeterminate-and-determinate-sentencing-structures [perma.cc/X8M7-H3N6].

104. CAHALAN, *supra* note 79, at 179.

105. *Probation and Parole*, PRISON POL'Y INITIATIVE (Apr. 25, 2024 5:04 PM), https://www.prisonpolicy.org/research/probation_and_parole [perma.cc/Q78Y-5HG9].

106. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 40–41 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); *National Report*, *supra* note 3.

level, the population under post-release supervision has more than quintupled, reaching over 110,000 people.[107] Approximately one-third of federal supervisees are eventually sent back to prison for a violation, for an average prison sentence of eleven months.[108]

For over thirty years after passage of the SRA, the Supreme Court remained virtually silent on how the Constitution should apply to revocation of supervised release.[109] In the meantime, the circuit courts unanimously concluded that "the old parole precedents" should apply.[110] Invoking *Morrissey* and *Gagnon*, they held that revocation of supervised release was subject to the "minimum requirements of due process"[111] but not any of the other rights that would apply at a criminal prosecution, including the right to a jury trial. As the Second Circuit put it, "the 'full panoply of rights' due a defendant in a criminal prosecution does not apply to revocation hearings for parole, for probation, or for supervised release, all of which are virtually indistinguishable for purposes of due process analysis."[112]

C. United States v. Haymond

The Supreme Court's long silence came to an end in 2019's *United States v. Haymond*,[113] which finally addressed the question of whether the right to a jury trial applied to revocation of supervised release. In the years since *Morrissey* and *Gagnon*, however, the Court's methodology had changed dramatically, with originalism taking "center stage."[114] Rather

---

107. *See* CAHALAN, *supra* note 79, at 183; *Federal Probation System Statistical Tables for the Federal Judiciary—Table E-2*, U.S. CTS. (Dec. 31, 2021), https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2021/12/31 [perma.cc/54P8-KBMW].

108. *Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes*, U.S. CTS. (June 14, 2022), https://www.uscourts.gov/news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes [perma.cc/Z3BU-FSDE]; U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 34 (July 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf [perma.cc/9EZF-TPUN].

109. Schuman, *supra* note 60, at 612–15.

110. *Id.* at 615–19 (collecting cases).

111. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

112. United States v. Carlton, 442 F.3d 802, 807 (2d Cir. 2006) (first citing Gagnon v. Scarpelli, 411 U.S. 778 (1973); and then *Morrissey*, 408 U.S. 471); *see also* United States v. Hall, 419 F.3d 980, 985 n.4 (9th Cir. 2005) ("Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner."); United States v. Reese, 775 F.3d 1327, 1329 (11th Cir. 2015) ("[C]ourts treat revocations the same whether they involve probation, parole, or supervised release." (quoting United States v. Frazier, 26 F.3d 110, 113 (11th Cir. 1994))).

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

114. *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1423–42 (2021).

than balance the interests at stake, the justices focused on the original understanding of the jury right at the time the Constitution was ratified, searching for the closest Founding Era analogue to revocation proceedings.[115]

The defendant in *Haymond* had been convicted of possessing child pornography and sentenced to thirty-eight months in prison, followed by ten years of supervised release.[116] After completing his prison term, he "encountered trouble" on supervised release.[117] The government conducted an "unannounced search of his computers and cellphone" and found "59 images that appeared to be child pornography."[118] Based on this evidence, the government invoked 18 U.S.C. § 3583(k), a statute enacted in 2003 to impose a five-year mandatory minimum prison sentence on sex offenders who violated their supervised release by committing another sex crime.[119] At the defendant's revocation hearing, the judge found "just enough" evidence to make it "more likely than not" that he knowingly possessed thirteen of the new images, but not enough evidence as to the other forty-six images.[120] The judge imposed the five-year mandatory minimum sentence "with reservations," calling the statute "repugnant" to traditional constitutional protections.[121]

On appeal, the defendant argued that the five-year mandatory minimum sentence under § 3583(k) violated his Fifth and Sixth Amendment right to a jury trial.[122] According to the Supreme Court's prior decisions in *Apprendi v. New Jersey* and *Alleyne v. United States*, prosecutors were required to prove to a jury any fact aggravating the legally prescribed "penalty for a crime."[123] The defendant claimed that § 3583(k) violated this rule because it increased his minimum revocation sentence from zero to five years' imprisonment based on a violation found by a judge, not a jury.[124] A majority of justices agreed that § 3583(k) was unconstitutional, but disagreed about how the jury right applied to revocation of supervised release.

115. *See infra* Section II.C.1–3.

116. *Haymond*, 139 S. Ct. at 2373.

117. *Id.* at 2374.

118. *Id.*

119. *Id.*

120. *Id.* at 2374–75.

121. *Id.* at 2375.

122. *Id.*

123. Alleyne v. United States, 570 U.S. 99, 103 (2013) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

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

1. Gorsuch's Plurality

Justice Gorsuch wrote a four-vote plurality opinion, joined by Justices Ginsberg, Sotomayor, and Kagan, finding that § 3583(k) was unconstitutional under *Apprendi* and *Alleyne*.[125] He invoked the words of President John Adams, who declared 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.' "[126] Citing other Founding Era legal thinkers such as Joseph Story, William Blackstone, Noah Webster, Joel Bishop, John Archbold, and Matthew Hale, Justice Gorsuch contended that "the Framers adopted" the Fifth and Sixth Amendments to ensure that "juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish."[127] Because this guarantee could not "mean less today than [it] did the day [it was] adopted," he concluded that "a jury must find . . . every fact 'which the law makes essential to [a] punishment' that a judge might later seek to impose," and that this requirement applies " 'no matter' what the government chooses to call the exercise."[128]

Justice Gorsuch acknowledged that *Morrissey* and *Gagnon* did not require a jury trial for revocations of probation or parole, but he argued that there was an important "structural difference" between those forms of supervision and supervised release.[129] Probation and parole both "replace[d] a portion" of a prison term, so revoking them exposed the defendant "only to the *remaining* prison term authorized for [the] crime of conviction."[130] As a result, the length of a probation or parole revocation sentence could never "exceed the remaining balance of the term of imprisonment already authorized by the jury's verdict."[131] Supervised release, by contrast, ran

---

125. *Id.* at 2371–72.

126. *Id.* at 2375 (quoting Letter from The Earl of Clarendon to William Pym (Jan. 27, 1766, *in* 1 PAPERS OF JOHN ADAMS 169 (Robert J. Taylor, Mary-Jo Kline & Gregg L. Lint eds. 1977))).

127. *Id.* at 2375–76 (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779, pp. 540–541 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873); BLACKSTONE, *supra* note 10, at *298, *343; *Prosecution*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE §§ 80, 84, 87 pp. 51–53, 55 (Boston, Little, Brown & Co. 2d ed. 1872); JOHN ARCHBOLD, ARCHBOLD'S SUMMARY OF THE LAW RELATING TO PLEADING AND EVIDENCE IN CRIMINAL CASES 106 (John Jervis ed., New York, Banks, Gould & Co. 5th Am. ed. 1846); 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *170 (Sollom Emlyn ed., Savoy, E. and R. Nutt & R. Gosling 1736)).

128. *Haymond*, 139 S. Ct. at 2376, 2379 (first quoting Blakely v. Washington, 542 U.S. 296, 304 (2004) (third alteration in original); and then quoting Ring v. Arizona, 536 U.S. 584, 602 (2002)).

129. *Id.* at 2381–82.

130. *Id.* at 2382.

131. *Id.* at 2377.

"*after* the completion" of a prison sentence.[132] Therefore, § 3583(k) could expose a defendant "to an additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict."[133] Because § 3583(k) "require[d] a substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts," he concluded, the statute "offend[ed]" the "Fifth and Sixth Amendments' ancient protections."[134]

2. Alito's Dissent

Justice Alito wrote a four-vote dissenting opinion, joined by Chief Justice Roberts and Justices Thomas and Kavanaugh, arguing that the plurality opinion was "not based on the original meaning of the Sixth Amendment."[135] He ridiculed the plurality for "sprinkling its opinion with quotations from venerable sources," yet making "no real effort to show that the Sixth Amendment was originally understood to require a jury trial in a proceeding like a supervised-release revocation proceeding."[136] Based on his historical analysis, he concluded there was no "affirmative evidence" that juries ever played a "role in the administration of previously imposed sentences."[137]

While Justice Alito claimed that "close historical analogues" to revocation proceedings were "lacking," he argued that the two "nearest [Founding Era] practices that can be found" did not support applying the jury right.[138] First, he observed that judges in colonial times "often" took "bonds and recognizances" from "convicted criminals," which "made their continued liberty contingent on good behavior."[139] If a defendant "did not exhibit good behavior," then "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)."[140] However, he could find "no evidence that there was a right to a jury trial at such proceedings," and stated that "the plurality [did] not even attempt to prove otherwise."[141] Second, he proposed that "corporal punishment of prisoners" was analogous to revocation proceedings.[142] However, there

132. *Id.* at 2382.
133. *Id.*
134. *Id.*
135. *Id.* at 2386 (Alito, J., dissenting).
136. *Id.* at 2392.
137. *Id.* at 2397 n.9.
138. *Id.* at 2396.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 2396–97.

was "no suggestion" that a "jury finding of a violation was needed" when prisoners were disciplined for misbehavior.[143]

Justice Alito also attacked the plurality's structural distinction between parole and supervised release, which he said was "purely formal" and had "no constitutional consequences."[144] He contended that the SRA changed "the form of federal sentences," but "not their substance,"[145] offering the following 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. In both situations, the period of certain confinement (three years) and the maximum term of possible confinement (nine years) are the same.[146]

On this basis, he concluded 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."[147] Under *Morrissey* and *Gagnon*, the jury right did not apply to revocation of supervised release.[148]

3. Breyer's Concurrence

Finally, Justice Breyer cast the deciding vote in a short but controlling concurrence, which joined the plurality in striking down § 3583(k), yet also "agree[d] with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is consistent with traditional parole."[149] He emphasized that he would not apply *Apprendi* and *Alleyne* to revocation of supervised release due to "the potentially destabilizing consequences."[150] Nevertheless, he still voted to invalidate § 3583(k) based on

143. *Id.*

144. *Id.* at 2388–89.

145. *Id.* at 2390.

146. *Id.*

147. *Id.* at 2391.

148. *See id.* at 2394–95.

149. *Id.* at 2385 (Breyer, J., concurring); *see also id.* at 2386 (Alito, J., dissenting) (stating that Justice Breyer's "narrow[er]" opinion sets forth "today's holding"); *Marks v. United States*, 430 U.S. 188, 193–94 (1977) (holding that when there is no majority opinion, the narrowest opinion controls); United States v. Garner, 969 F.3d 550, 552 (5th Cir. 2020) (describing Justice Breyer's *Haymond* concurrence as controlling); United States v. Coston, 964 F.3d 289, 295 (4th Cir. 2020) (same). *But see* United States v. Shakespeare, 32 F.4th 1228, 1237–39 (10th Cir. 2022) (noting that Justice Breyer's concurrence is, in some respects, broader than Justice Gorsuch's plurality).

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

"three aspects" of the provision which, "considered in combination," made it different from revocation as "typically understood."[151]

First, § 3583(k) targeted "a discrete set of federal criminal offenses specified in the statute."[152] Second, the statute "t[ook] away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long."[153] Third, the provision "impos[ed] a mandatory minimum term of imprisonment of 'not less than 5 years.' "[154] Together, these features made § 3583(k) "less like ordinary revocation" and more like "the punishment of new criminal offenses."[155] And "in an ordinary criminal prosecution," Justice Breyer concluded, "a jury must find facts that trigger a mandatory minimum prison term."[156]

II. The Recognizance to Keep the Peace or for Good Behavior

None of the *Haymond* opinions provide a satisfactory account of how the original understanding of the jury right would apply to revocation proceedings today. Justice Gorsuch powerfully invoked the Framers' reverence for the jury right yet remained stuck at a high level of abstraction, making "no real effort" to show that Founding Era law "require[d] a jury trial in a proceeding like a supervised-release revocation proceeding."[157] Justice Alito compared revocation proceedings to prison discipline yet ignored the "tradition of summary process in prison, where administrators face the 'formidable task' of controlling a large group of potentially unruly prisoners."[158] Finally, Justice Breyer agreed with the dissent's legal history but applied a functionalist test tailored to § 3583(k) without explaining how the jury right would apply to "ordinary" revocation proceedings.[159] With no clear majority on the Supreme Court, the right to a revocation jury remains one of the most important unanswered questions in constitutional criminal procedure.

As the *Haymond* debate illustrates, the "central challenge" of constitutional analysis via historical analogy lies in "finding historical sources" and then "drawing meaningful connections between them and present controversies."[160] Fortunately, Founding Era sources suggest a clear analogy to modern-day revocation proceedings: forfeiture of a recognizance to keep

151. *Id.* at 2386.
152. *Id.*
153. *Id.*
154. *Id.* (quoting 18 U.S.C. § 3583(k)).
155. *Id.*
156. *Id.*
157. *Id.* at 2392 (Alito, J., dissenting).
158. *Id.* at 2383 (Gorsuch, J.) (quoting O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987)).
159. *Id.* at 2385–86 (Breyer, J., concurring).
160. Blocher & Ruben, *supra* note 34, at 111, 137.

the peace or for good behavior. Justice Alito himself suggested recognizance forfeitures as an analogue to revocation proceedings, but claimed there was "no evidence" that defendants had the right to a jury trial in such proceedings.[161] He was half right. At the time the Constitution was ratified, the recognizance to keep the peace or for good behavior *was* the legal equivalent to community supervision.[162] However, there is also substantial evidence that forfeiting a recognizance *did* require a jury trial. This jury requirement disappeared during the nineteenth century only due to the emergence of a new form of community supervision called "laying a case on file," which later developed into probation and parole.[163]

A. *Recognizance Basics*

Common-law courts in the Founding Era used an "extensive and complex system of money escrows or forfeitures, called bails, or, more generally, recognizances" to "insure compliance with their decrees."[164] Blackstone's *Commentaries on the Laws of England*, the canonical text of early American legal education,[165] defined a "recognizance" as "an obligation of record, which a man enters into before some court of record or magistrate duly authorized [], with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like."[166] In other words, a court taking a person's recognizance required the person to promise, on the record, to comply with a list of conditions or else forfeit a sum of money.[167]

The recognizance to "keep[] the peace" or "for good behaviour" was a special form of obligation originating in the Justices of the Peace Act of 1361.[168] During a lull in the Hundred Years' War, out-of-work mercenaries

---

161. *Haymond*, 139 S. Ct. at 2396 (Alito, J., dissenting).

162. *See infra* Section II.A.

163. *See infra* Section II.C.3.

164. Lermack, *supra* note 10, at 174–75. For more on the importance of recognizances in early American law, see Funk & Mayson, *supra* note 19, at 35–41.

165. Eric R. Claeys, *Blackstone's* Commentaries *and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 782 (2008).

166. BLACKSTONE, *supra* note 10, at *341; *see also* 4 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 105 (London, A. Strahan 1800) ("Recognizance is a bond of record, testifying the recognizor to owe a certain sum of money . . . subject to a condition . . . upon the performance of which the recognizance shall be void").

167. *See* GOEBEL & NAUGHTON, *supra* note 18, at 513; *see also* United States v. Rahimi, No. 22-915, 2024 WL 3074728, at *7–8 (U.S. June 21, 2024) (describing Founding Era surety laws).

168. Justices of the Peace Act 1361, 34 Edw. III, c. 1; *see also* Commonwealth v. M'Neill, 36 Mass. (19 Pick.) 127, 140 (1837) (discussing history).

began to pillage the English countryside.[169] Seeking to quell the disorder, King Edward III appointed "one lord, and with him three or four of the most worthy in the county, with some learned in the law" as "justices of the peace," and commanded them to "take all of them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people."[170]

Over the next several centuries, this royal decree developed into an inherent power of common-law courts to take recognizance from those "not of good fame," on the condition that they "keep the peace" or be of "good behaviour."[171] Being "not of good fame" was a broad concept, including anyone "who by their general evil course and habits of life had acquired a bad reputation, and were supposed to be dangerous to the community."[172] Blackstone described their obligation as a debt to the king:

> This security consists in being bound . . . in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required . . . with condition to be void and of none effect, if the party shall appear in court on such a day . . . keep the peace . . . [or] for the good behavior.[173]

If a "condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehavior in the other," then "the recognizance becomes forfeited" and the recognizor, "having now become the king's absolute debtor[]," could be "sued for the . . . sums in which they are . . . bound."[174] The court could also order the recognizor to find "sureties"—third parties who would promise to forfeit their own money in case of violations.[175] The duration of the term, the size of the bond, and the number of sureties were all "completely within the discretion of the trial judge."[176]

169. J.F.S., Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914, 914 (1966).

170. *See* 34 Edw. III, c. 1.

171. BLACKSTONE, *supra* note 10, at *251, *253. For more on the relationship between common-law courts and justices of the peace, see Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 364–67 (2003).

172. Commonwealth v. Davies, 1 Binn. 97, 99. (Pa. 1804).

173. BLACKSTONE, *supra* note 10, at *249–50.

174. *Id.* at *250.

175. *Id.*; *see also* BURN, *supra* note 166, at 108 (giving examples of recognizances "with sureties" and "without sureties").

176. Lermack, *supra* note 10, at 182; *see also* 6 MATHEW BACON, A NEW ABRIDGMENT OF THE LAW 436 (Henry Gwillim ed., London, A. Strahan 5th ed. 1798) ("A recognizance for keeping the peace is to be regulated, as to the number and sufficiency of the sureties, the largeness of the sum it is to be taken in, and the time it is to continue in force, at the discretion of the justice of the peace by whom it is taken.").

Early American courts "made extensive use" of the recognizance to keep the peace or for good behavior,[177] which was an "integral and indisseverable incident" of colonial law.[178] William Waler Hening's 1795 handbook *New Virginia Justice*, "the most published and widely circulated" legal manual in Virginia,[179] even included a sample recognizance for readers to use.[180] The sample obligated "A O," with "A S" and "B S" as sureties, to appear at the next court session and, in the meantime, keep the peace or be of good behavior:

> Be it remembered that on the ____ day of ____ in the year ____ AO, of ____ in the county aforesaid, yeoman, A S, of the same place, yeoman, and B S, of the same place, yeoman, came before me . . . and acknowledged themselves to owe to C M, esquire, governor or chief magistrate of the commonwealth of Virginia, and his successors, to wit, the said A O, the sum of ____ dollars, and the said A S, the sum of ____ dollars, and the said B S, the sum of ____ dollars, current money of Virginia, to be respectively levied and made of their several goods and chattels, lands and tenements, to the use of the commonwealth aforesaid, if he the said A O, shall fail in performing the condition underwritten. The condition of this recognizance is such, that if the above bound A O, shall personally appear at the next court, to be holden, in and for the county of ____ aforesaid, to do and receive what shall then and there be enjoined him by the said court, and in the mean time shall keep the peace [*or*, be of the good behavior; *or*, shall keep the peace, and be of the good behavior] towards the commonwealth and all its citizens . . . Then the said recognizance shall be void, or else remain in full force.[181]

The power of American courts to take recognizance had both common law and statutory bases.[182] Richard Burn's *The Justice of the Peace and Parish Officer*, regarded as "the highest authority" on this subject,[183] described taking recognizance as an inherent power of common-law courts, possessed "rather in congruity, and by reasonable intendment of law, than by any express authority [conferred] by the statute."[184] State legislatures also

177. FRIEDMAN, *supra* note 10, at 38.

178. GOEBEL & NAUGHTON, *supra* note 18, at 552.

179. Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800*, 26 J.S. LEGAL HIST. 315, 328 (2018).

180. WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, IN THE COMMONWEALTH OF VIRGINIA 438 (Richmond, T. Nicolson 1795).

181. *Id.*

182. *See* 2 WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH, AND COMMON PLEAS, IN PERSONAL ACTIONS; AND EJECTMENT 1144 (Francis J. Troubat ed., Philadelphia, Towar & Hogan 2d Am. ed. 1828).

183. Bradstreet v. Furgeson, 17 Wend. 181, 187 (N.Y. Sup. Ct. 1837).

184. BURN, *supra* note 166, at 105.

passed legislation explicitly authorizing judges to take recognizances,[185] putting "the whole matter" on "a statutory footing."[186] Congress followed suit in the Judiciary Act of 1798, which empowered federal district judges to "take cognizance of offences against the constitution and laws thereof . . . [with] the like power and authority to hold to security of the peace, and for good behaviour."[187] Like their state counterparts, federal courts embraced this authority.[188]

---

185. *See, e.g.*, An Act Against Breaking the Peace, 1808 Conn. Pub. Acts § 5 at 546 (enacted in Connecticut in 1698); An Act About Binding to the Peace, 1 Del. Laws 52 (1700) (enacted in Delaware); An Act for the Punishment of Vagabonds and Other Idle and Disorderly Persons, § 3 (Feb. 1, 1779), *reprinted in* HORATIO MARBURY & WILLIAM H. CRAWFORD, DIGEST OF THE LAWS OF THE STATE OF GEORGIA 568–70 (Savannah, Seymour, Woolhopter & Stebbins 1802) (enacted in Georgia); An Act to Reduce into One the Several Acts Establishing Courts of Quarter Sessions and Directing the Proceedings Therein, § 2 (Dec. 19, 1796), *reprinted in* HARRY TOULMIN, A COLLECTION OF ALL THE PUBLIC AND PERMANENT ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY WHICH ARE NOW IN FORCE, ARRANGED AND DIGESTED ACCORDING TO THEIR SUBJECTS 171 (Frankfort, William Hunter 1802) (enacted in Kentucky); County Courts, § 44, *reprinted in* THOMAS HERTY, A DIGEST OF THE LAWS OF MARYLAND 187 (Baltimore, 1799) (enacted in Maryland); Justices of the Peace, § 4, *reprinted in* 3 WILLIAM CHARLES WHITE, A COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS 821 (Boston, Thomas B. Wait & Co. 1810) (enacted in Massachusetts); Act for Regulating the Fees of the Several Officers and Ministers of Justices, Within this State, 1887 N.Y. Law 39, 49 (enacted in New York); Act for the Punishment of Crimes, § 73 (Mar. 18, 1796) *reprinted in* WILLIAM PATERSON, LAWS OF THE STATE OF NEW-JERSEY 221 (Newark, Matthias Day 1800) (enacted in New Jersey); Act Ascertaining the Time and Method for the Executing and Return of Original Writs and for the Better Regulating Divers Proceedings in the Court of Pleas, Ch. 16 (1715) *reprinted in* 1 JAMES IREDELL, THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 10 (Francois-Xavier Martin ed., Newbern, Martin & Ogden rev. ed. 1804) (enacted in North Carolina); Act of 1700, § 1 *reprinted in* JOHN PURDON, JUNR., AN ABRIDGEMENT OF THE LAWS OF PENNSYLVANIA 522, § I (Philadelphia, Farrand, Hopkins, Zantzinger, and Co. 1811) (enacted in Pennsylvania); Act Establishing Justices of the Peace, and Vesting Them with Certain Powers, 1798 R.I. Pub. Laws 8, § 2 (enacted in Rhode Island); Act to Repeal the Statute Made in the First Year of the Reign of King James the First, Intituled, *An Act Against Conjuration, Witchcraft, and Dealing with Evil and Wicked Spirits*, Except so Much Thereof as Repeals an Act of the Fifth Year of the Reign of Queen Elizabeth, *Against Conjurations, Inchantments and Witchcrafts*, and to Repeal an Act Passed in the Parliament of Scotland in the Ninth Parliament of Queen Mary, Intituled, *Anentis Witchcrafts*, and for Punishing Such Persons as Pretend to Exercise or Use Any Kind of Witchcraft, Sorcery, Inchantment, or Conjuration, § 4 (1712) *reprinted in* 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 509–10 (Thomas Cooper ed., Columbia, A.S. Johnston 1837) (enacted in South Carolina); Act for the Punishment of Certain Inferior Crimes and Misdemeanors, § 8 (Mar. 4, 1797) *reprinted in* LAWS OF THE STATE OF VERMONT, DIGESTED AND COMPILED 355 (Randolph, Sereno Wright 1808) (enacted in Vermont); Act of 1792, § 22 *reprinted in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 94 (Richmond, Augustine Davis 1794) (enacted in Virginia).

186. GOEBEL & NAUGHTON, *supra* note 18, at 552.

187. Act in Further Addition to the Act, Intituled "An Act to Establish the Judicial Courts of the United States", 1 Stat. 609 (1798).

188. Numerous federal cases demonstrate early use of the recognizance. *See, e.g.*, United States v. Greiner, 26 F. Cas. 36 (E.D. Pa. 1861) (No. 15262); United States v. Quitman,

B. *Founding Era Community Supervision*

The recognizance to keep the peace or for good behavior was the Founding Era equivalent of probation, parole, and supervised release, sharing all four of the features that define modern community supervision: (1) a term of conditional liberty in the community; (2) imposed as part of the sentence for a crime; (3) providing surveillance and reporting on the defendant's behavior; and (4) with violations punishable by imprisonment.[189] Given these similarities, the best way to determine how the original understanding of the jury right would apply to revocation proceedings today is to ask whether the common law required a jury for forfeiture of a recognizance.

1. Term of Conditional Liberty

Like probation, parole, and supervised release, the recognizance was a term of conditional liberty in the community. The term could last until the next court session, for a fixed period of time, or even for life.[190] The term could also be renewed at each court session, so that a recognizor might be required to "appear and often be continued from day to day or from Sessions to Sessions until discharged, without any . . . other proceedings had."[191]

Every recognizance was also "subject to a *condition*," which was "either endorsed or underwritten or contained within the body of it[,] upon the performance of which the recognizance shall be void."[192] A recognizor who violated a condition would forfeit their bond, meaning they would have to pay the promised sum of money.[193] If a recognizor violated a condition by committing a new crime, then the government could *both* forfeit their recognizance *and* prosecute them for the new offense.[194] An early nineteenth-century treatise designated the device as a "conditioned recognizance[]," which "may be considered in its nature as a judgment conditional; and execution being contingent on the breach of conditions."[195]

---

17 F. Cas. 680 (C.C.E.D. La. 1854) (No. 16111); Dillingham v. United States, 7 F. Cas. 708 (C.C.D. Pa. 1810) (No. 3913); *Ex Parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

189. *Cf.* COHEN, *supra* note 13, at § 1:1.

190. *See* Respublica v. Donagan, 2 Yeates 437, 438 (Pa. 1799); BLACKSTONE, *supra* note 10, at *249–50; MICHAEL DALTON, THE COUNTREY JUSTICE 207 (London, John Streater, James Flesher & Henry Twyford 1666).

191. GOEBEL & NAUGHTON, *supra* note 18, at 494–95.

192. WILLIAM GRAYDON, THE JUSTICES AND CONSTABLES ASSISTANT 54 (Philadelphia, Uriah Hunt 1830).

193. BLACKSTONE, *supra* note 10, at *250.

194. *See* Commonwealth v. Braynard, 23 Mass. (6 Pick.) 113, 114 (1828).

195. PEREGRINE BINGHAM, THE LAW AND PRACTICE OF JUDGMENTS AND EXECUTIONS, INCLUDING EXTENTS AT THE SUIT OF THE CROWN 65 (Philadelphia, John. S. Littell 1836).

One of the most common conditions of a recognizance was to appear in court on a particular date.[196] This condition could serve two different purposes, depending on whether the recognizor had been charged with a crime, or had already been convicted. If the recognizor had been charged with a crime, then requiring their appearance helped to ensure that they would return to court to participate in the proceedings (much like modern-day pretrial release or bail). If the recognizor was convicted of a crime, then ordering them to appear was a way for the judge to keep a "watchful eye" on their behavior in the community.[197] Used in this manner, the appearance condition was more like a reporting requirement similar to those used today by probation and parole officers.[198]

Two other common recognizance conditions were to "keep the peace" or "be of good behavior."[199] Sir Edward Coke explained the difference between these conditions in his *Institutes of the Laws of England*, which was "the predominant treatise for lawyers during the entire colonial period."[200] "The surety of the peace cannot be broken without some Act, as an Affray, or Battery, or the like," whereas "the surety [of the good behavior] consisteth chiefly, that a man demean himself well in his port and company."[201] In other words, a recognizance to keep the peace could be violated only by crimes of violence,[202] while one for good behavior prohibited "scandal against good morals" generally.[203]

196. *See* BURN, *supra* note 166, at 105–06.

197. GOEBEL & NAUGHTON, *supra* note 18, at 487.

198. *See generally* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 316–17 (2016) (discussing probation reporting requirements).

199. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660 27 (1983); *see also* BLACKSTONE, *supra* note 10, at *251–52 (describing "both species of recognizances, for the *peace*, and for the *good behaviour*"). Technically, there were differences in the circumstances where a court could take a recognizance to keep the peace versus a recognizance for good behavior, but, in practice, courts often disregarded these rules. *See* Note, *Binding Over to Keep the Peace or Be of Good Behavior*, 25 J. CRIM. L. 220, 222 (1961).

200. William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 406 (1968).

201. 1 EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 180 (London, M. Flesher 1644).

202. *See* BLACKSTONE, *supra* note 10, at *252 ("Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person . . . or . . . by any unlawful action whatsoever, that either is or tends to a breach of the peace.").

203. HENING, *supra* note 180, at 440 ("A recognizance for the same good behaviour may be forfeited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance to the terror of the people; by speaking words tending to sedition; or by, committing any acts of misbehavior, which the recognizance was intended to prevent.") (emphasis omitted).

Although conditions to "keep the peace" or "be of good behavior" both prohibited a broad range of behavior, they were not unlimited. A recognizance to keep the peace, for example, could not be forfeited by "a bare trespass upon the lands or goods of another . . . unless accompanied with a willful breach of the peace."[204] A recognizance of good behavior was "more extensive" yet still did not cover all antisocial conduct.[205] One English treatise described the case of a man accused of violating his recognizance of good behavior by shouting colorful insults at local townsfolk: "Thou art a lying Rascal"; "One of you is dead of the Plague, and I hope I shall see more of you to dye of the Plague"; "an [sic] Whore and a Jade"; and "he was a forsworn Knave."[206] The court acknowledged these were "words of heat and intemperance" but concluded that they were not "sufficient cause of forfeiture of a recognizance."[207] It "would be inconvenient," the court explained, if, by words alone, "a man should be in danger of his recognizance."[208]

2. Imposed as Sentence

Like probation, parole, and supervised release, the recognizance was part of the sentence imposed for criminal conduct.[209] Judges in the Founding Era took recognizances in three circumstances: when the recognizor was accused of a crime, charged with a crime, or convicted of a crime. Although modern legal scholars identify the first two uses of the recognizance as precursors to modern pretrial release and restraining orders,[210] none have acknowledged its third use as an early form of community supervision.

The first two uses of the recognizance are well-known. First, if someone was willing to swear an oath that another person had threatened them harm, then a judge could take the accused's recognizance to "keep the

204. BLACKSTONE, *supra* note 10, at *252; *see also* Rankin v. Commonwealth, 72 Ky. (9 Bush) 553, 556–56 (1873) (holding that drunkenness and disorderly conduct did not breach a recognizance to keep the peace).

205. *See* HENING, *supra* note 180, at 440–41.

206. 3 GEORGE CROKE, REPORTS OF SIR GEORGE CROKE, KNIGHT 498 (London, Harebotle Grimston 1657).

207. *Id.* at 499.

208. *Id.*; *see also* COKE, *supra* note 201, at 180 (explaining that slander was not a "breach of the good behavior, for that none of [the words spoken] did tend immediately to the breach of the peace").

209. *See* GOEBEL & NAUGHTON, *supra* note 18, at 516; *see also* BURN, *supra* note 166, at 108 (giving examples of recognizances "with sureties" and "without sureties").

210. *See supra* note 19.

peace" or be of "good behavior" toward the threatened party.[211] As David Michael Jaros argues, this use of the recognizance was similar to a present-day restraining or civil-protection order.[212] Second, if a defendant was charged with a crime, then a judge could take their recognizance to appear for trial and in the meantime keep the peace or be of good behavior.[213] As Larry Tribe, Kellen Funk, and Sandy Mayson have observed, this use of the recognizance served as an early form of pre-trial release or bail.[214]

Largely forgotten, however, is the third use of the recognizance—as part of the punishment for criminal conduct. Blackstone, for example, wrote that the "requisition of sureties" was "part of the penalty inflicted upon . . . certain gross misdemeanors."[215] Michael Dalton's *The Countrey Justice*, one of the most influential treatises in the American colonies,[216] recounted how the author had "granted the good behaviour" against a defendant who "bought Ratsbane [a toxic herb] and mingled the same with Corn, and then wilfully and maliciously did cast the same among his neighbors fowls, whereby most of his fowls, died."[217] In 1804, the Supreme Court of Pennsylvania held that judges had inherent power to take recognizance for good behavior after conviction for any "indictable offence, in which case it forms part of the judgment of the court."[218] State legislatures also enacted

211. *See* BLACKSTONE, *supra* note 10, at *249–50; *see also* William E. Nelson, *Law and the Structure of Power in Colonial Virginia*, 48 VAL. U. L. REV. 757, 762 (2014); GOEBEL & NAUGHTON, *supra* note 18, at 488–90.

212. Jaros, *supra* note 19, at 1450–51; *see also* United States v. Rahimi, No. 22-915, 2024 WL 3074728, at *9–10 (U.S. June 21, 2024) (identifying surety laws as Founding Era analogues to modern-day restrictions on gun possession by individuals subject to domestic-violence restraining orders).

213. Funk & Mayson, *supra* note 19 (manuscript at 6–7); *see* Tribe, *supra* note 19, at 401–02.

214. *See* Tribe, *supra* note 19, at 401–02; Funk & Mayson, *supra* note 19 (manuscript at 7). Contemporary bail statutes still sometimes refer to releasing defendants on their "own recognizance." *E.g.*, CAL. PENAL CODE § 1318; OHIO REV. CODE ANN. § 2937.29.

215. BLACKSTONE, *supra* note 10, at *248.

216. Stoebuck, *supra* note 200, at 403, 406.

217. DALTON, *supra* note 190, at 224.

218. Commonwealth v. Davies, 1 Binn. 97, 99 (Pa. 1804). This decision was reported in one of the first issues of the first American law journal, which must have given it "wide currency." Grinnell, *supra* note 18, at 20.

statutes explicitly authorizing judges to take recognizances as punishments for a variety of crimes, including voluntary manslaughter,[219] dueling,[220] and even witchcraft.[221] Judges could even take recognizance as part of the penalty for violating a recognizance.[222]

Legal records from the time paint a lively picture of courts taking recognizance as a form of criminal punishment. As far back as the 1680s, Pennsylvania courts required convicted defendants to post bonds "to be of good behavior and to appear at the next session of court (when their sureties would be discharged)."[223] Between 1754 and 1764, the Court of Quarter Sessions in Philadelphia took "forty-one recorded peace bonds," of which "thirty-seven were imposed on individuals who had been convicted of crimes" including theft, assault, running a disorderly house, fornication, and bastardy.[224] Perhaps the most famous recognizance was taken in Philadelphia as part of the Marbois Affair of 1784, in which a fight involving a French diplomat nearly caused an international incident.[225] The man who started the fight was convicted of assault, sentenced to "two years imprisonment," and ordered to:

> [G]ive good security to keep the peace, and be of good behavior to all public Ministers, Secretaries to Embassies, and Consuls, as well as to all the liege people of Pennsylvania, for the space of seven years, by entering into a recognizance, [him]self in a thousand pounds, and two securities in five hundred pounds each.[226]

Records from colonial New York show courts combining the recognizance with corporal punishments.[227] In 1755, a man named James Gaines was "convicted for assault with intent to ravish an eight-year-old child" and sentenced to pay a ten-pound fine, spend an hour in the pillory, serve six months in jail, and, after release, "give a recognizance of good behavior for

---

219. Act of 22d April 1794, § VII *reprinted in* JOHN PURDON, JUNR., AN ABRIDGEMENT OF THE LAWS OF PENNSYLVANIA § VII, at 395 (Philadelphia, Farrand, Hopkins, Zantzinger, and Co. 1811).

220. An Act for the Punishing and Preventing of Duelling, § 1 (1719) *reprinted in* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 422, 423 (Boston, T.B. Wait & Co. 1814).

221. 2 THE STATUTES AT LARGE OF SOUTH CAROLINA § IV, at 510 (Thomas Cooper ed., Columbia, A.S. Johnston 1837).

222. Dalton, *supra* note 190, at 194. *See generally* BLACKSTONE, *supra* note 10, at *248–54.

223. Lermack, *supra* note 10, at 180.

224. *Id.* at 187.

225. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 638–40 (2002); Alfred Rosenthal, *The Marbois–Longchamps Affair*, 63 PA. MAG. HIST. & BIOGRAPHY 294, 294–301 (1939).

226. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 118 (Pa. Ct. Oyer & Terminer 1784).

227. GOEBEL & NAUGHTON, *supra* note 18, at 513–17, 514 n.117 (collecting cases).

seven years."[228] In 1774, Nathaniel Cooley, convicted of "attempted murder and attempting to fire the new jail," was sentenced to "be exposed for three hours in a cart, carted about the city, then to receive thirty-nine lashes and six months in jail and to be discharged only if he could find sureties for good behavior in the amount of [four hundred pounds]."[229]

Finally, recognizances were a "well known" sentence in New England[230] and "commonly used" in Virginia and Maryland.[231] Charlotte Hubbell of Connecticut was convicted of keeping "a house reputed to be a house of bawdry and ill fame" and ordered to take "recogniz[ance], with sufficient surety . . . in the sum of forty dollars, conditioned that she should . . . keep the peace, and be of good behavior, and not keep, frequent, or maintain, houses of bawdry and ill fame."[232] Samuel Clemmons of Virginia was convicted of selling whiskey without a license and sentenced to pay a thirty dollar fine as well as to "enter into a recognizance, himself in the sum of $100 . . . conditioned for his good behaviour for one year."[233] These examples show that during the Founding Era, the recognizance was a major form of criminal punishment throughout the United States.

3. Surveillance and Reporting

Like probation, parole, and supervised release, the recognizance provided surveillance and reporting on the recognizor's behavior. Unlike modern community supervision, responsibility for this supervision was placed in the hands of private sureties, not government officials.[234] Nevertheless, sureties played an important role in early American criminal justice.

When taking a person's recognizance, judges could also require them to find "sureties," third parties who would promise to forfeit their own money if the recognizor violated a condition.[235] Typically, recognizors were "bound with two sureties, a practice which probably stemmed from the recommendations of the manuals."[236] Sureties were "expected to exercise some supervision over the bonded person, and they possessed the

---

228. *Id.* at 515–16.

229. *Id.* at 516.

230. Grinnell, *supra* note 18, at 20; *see also* U.S. DEP'T OF JUST., 2 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PROBATION 18 (1939).

231. FRIEDMAN, *supra* note 10, at 39; *see also* Nelson, *supra* note 211, at 827.

232. Darling v. Hubbell, 9 Conn. 350, 350 (1832).

233. Clemmons v. Commonwealth, 27 Va. (1 Rand.) 681, 681 (1828).

234. Charles Lindner, *Thacher, Augustus, and Hill—The Path to Statutory Probation in the United States and England*, FED. PROB., Dec. 2007, at 36, 37 (noting that "court supervision" was a "key component of today's probation not present in recognizance").

235. Lermack, *supra* note 10, at 177; *supra* Section II.A.

236. GOEBEL & NAUGHTON, *supra* note 18, at 518.

power to render him up for incarceration if they felt he was becoming untrustworthy."[237] They also had the power to "arrest [the recognizor] upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty."[238] A surety could even enter the recognizor's home without consent or a warrant,[239] and, if "the door should not be opened . . . break it down, and take the principal from his bed."[240]

Because sureties had risked a large sum of their own money based on the recognizor's compliance with the conditions, they had a natural incentive to keep a "wary eye" on the recognizor's behavior.[241] Colonial governments, therefore, never "develop[ed] a means of checking outstanding recognizances by requiring meticulous registration," instead relying on this "very practical check" of surety self-interest.[242] When a recognizor was in danger of forfeiting their bond due to nonappearance, their sureties would be "notified in order to give them a chance to convince the defendant to attend sessions."[243] And if a surety ever came to believe their recognizor was going to violate a condition, they could surrender them to the court to "discharge their obligation."[244] In 1696, for example, two sureties in Maryland reported to the court that their recognizor was planning to "Run away and Leave his Said Suretyes in the Lurch" and asked the judge take him into custody and release them from their bonds.[245]

Of course, there was also one major difference between Founding Era sureties and modern-day probation and parole officers. Sureties were private individuals, usually the recognizor's "friends, relatives, and neighbours,"[246] whereas probation and parole officers are trained and employed by the government.[247] John Augustus undoubtedly took a "critical step" in the mid-1800s when he began to administer community supervision on

---

237. Lermack, *supra* note 10, at 179.

238. Reese v. United States, 76 U.S. (9 Wall.) 13, 21 (1869); *see also* United States v. Rycraft, 27 F. Cas. 918, 920 (D. Wis. 1852) (No. 16211) (enslaved person at issue) ("A surety may pursue and carry back his absconding principal, and commit him to prison in discharge of his recognizance.").

239. Nicolls v. Ingersoll, 7 Johns. 145, 156 (N.Y. Sup. Ct. 1810).

240. Commonwealth v. Brickett, 8 Pick. 138, 144 (Mass. 1829).

241. GOEBEL & NAUGHTON, *supra* note 18, at 520–21.

242. *Id.* at 520; *see also* Lermack, *supra* note 10, at 177.

243. ROBERT B. SHOEMAKER, PROSECUTION AND PUNISHMENT: PETTY CRIME AND THE LAW IN LONDON AND RURAL MIDDLESEX, *C.* 1660–1725, at 109 (1991).

244. GOEBEL & NAUGHTON, *supra* note 18, at 520, 522; *see also* Lermack, *supra* note 10, at 179.

245. FRIEDMAN, *supra* note 10, at 39.

246. Susanne Jenks, *Writs* De Minis *and* Supplicavit*: The History of Surety of the Peace in* LAWS, LAWYERS AND TEXTS 253, 261, 269–70 (Susanne Jenks, Jonathan Rose & Christopher Whittick eds., 2012) (footnotes omitted).

247. *See* Gagnon v. Scarpelli, 411 U.S. 778, 783–84 (1973).

behalf of defendants he "did not know personally."[248] Nevertheless, it would be a mistake to overstate this distinction. "Professional sureties," who began to appear in London during the late-fifteenth century, were early precedents for modern probation officers.[249] Today, some jurisdictions are returning to the private model, with "probation supervision for misdemeanors and criminal traffic cases . . . in many states increasingly . . . outsourced to for-profit, private companies."[250]

Although private sureties were different from professional probation and parole officers, they still played an important part in Founding Era criminal justice. Courts took the responsibilities of suretyship seriously, encouraging the selection of people "sufficiently detached from the defendant's immediate circle of acquaintances [so] that they were effective in getting the recognizance (and hence their risk) discharged."[251] In one forfeiture proceeding, the Massachusetts Supreme Court scolded two sureties who claimed to be ignorant of their recognizor's obligations: "They knew that he was under arrest as a dangerous man, regardless of human life. . . . We cannot permit sureties to come into court, under these circumstances, and defend themselves on the ground of their misconception of the extent of their legal liability."[252]

Evidence from the Founding Era also reveals the significant role of sureties as early law-enforcement officers. Legal records from the fifteenth and sixteenth centuries contain "far more" recognizances than indictments, suggesting that recognizances were a "more essential part of the law enforcement machinery" than "formal court proceedings."[253] One study of Richmond County, Virginia in the early 1700s found that "[m]ore than 10 percent of free men of property" were "named as sureties on recognizances,"[254] and historians have described "the quickened use" of sureties in New York in 1750 as an effort "to bolster the sorry police establishment of the times."[255] Widespread suretyship reflected a "horizontal" system of policing[256] that gave everyone a "stake in keeping order" through

---

248. Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1709 (2019).

249. *See* Jenks, *supra* note 246, at 270.

250. *"Set up to Fail": The Impact of Offender-Funded Private Probation on the Poor*, HUM. RTS. WATCH (Feb. 20, 2018), https://www.hrw.org/report/2018/02/21/set-fail/impact-offender-funded-private-probation-poor [perma.cc/S97A-Y92S].

251. See SHOEMAKER, *supra* note 243, at 107.

252. Commonwealth v. M'Neill, 36 Mass. (19 Pick.) 127, 146 (1837).

253. Samaha, *supra* note 18, at 198, 204.

254. FRIEDMAN, *supra* note 10, at 39.

255. GOEBEL & NAUGHTON, *supra* note 18, at 496.

256. Jenks, *supra* note 246, at 261.

a participatory "warn and watch system,"[257] which "depended upon the active assistance of the community . . . to control deviance."[258] The development of professional probation officers during the mid-1800s "filled an existing procedural role on behalf of the poor" but "added nothing new to the court's procedural repertoire."[259]

4. Violations Punishable by Imprisonment

Finally, like probation, parole, and supervised release, violating a condition of a recognizance was punishable by imprisonment. Although a recognizance forfeiture formally resulted only in a monetary loss, the process also functionally empowered courts to imprison people for their violations.[260] Judges in the Founding Era therefore acknowledged the "criminal nature" of forfeiture proceedings, describing them as "prosecutions" and "punishment" and holding that they were criminal for jurisdictional purposes.[261]

When a recognizor violated a condition of their recognizance, the court could forfeit their bond and require them to pay the promised sum. Often, however, violators could not afford to pay.[262] When this happened, case

257. FRIEDMAN, *supra* note 10, at 39.

258. AM. HIST. ASS'N, AMERICAN LEGAL RECORDS: CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, at lxxi (Peter Charles Hoffer & William B. Scott eds., 1984).

259. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 960 (2000). In *Gagnon*, the Supreme Court cited the professionalism of probation and parole officers as one reason why they were "entrusted traditionally with broad discretion" but also acknowledged "the modification in attitude which is likely to take place once the officer has decided to recommend revocation," at which point their "role as counsellor" was "surely compromised." 411 U.S. at 784–85.

260. When identifying historic analogues to modern-day criminal laws, a perfect match between punishment mechanisms is not necessary, so long as they are functionally equivalent. In *United States v. Rahimi*, for example, the Supreme Court rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(8)—which prohibits gun possession by individuals subject to domestic-violence restraining orders—by citing Founding Era surety laws as the "appropriate analogue." United States v. Rahimi, No. 22-915, 2024 WL 3074728, at *10 (U.S. June 21, 2024). The Court acknowledged that violating § 922(g)(8) is punishable by imprisonment, whereas violating a surety was only punishable by a financial loss, but concluded that despite these "different penalties," *id.*, the two laws were "relevantly similar." *Id.* at *9 (quoting New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U.S. 1, 29 (2022)). Although sureties did not formally threaten defendants with prison, the Court explained, another set of colonial laws, known as "affray laws," did provide "a mechanism for punishing those who had menaced others with firearms" through "imprisonment." *Id.* at *8–9 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149). The Court concluded that the existence of this potential punishment meant that the penalty associated with § 922(g)(8) "fit[] within the regulatory tradition." *Id.* at *10; *see also id.* at *43 (Thomas, J., dissenting) (criticizing the majority for "combining aspects of surety and affray laws to justify § 922(g)(8)").

261. Respublica v. Cobbet, 3 U.S. (3 Dall.) 467, 474–75, 2 Yeates 352 (Pa. 1798).

262. GOEBEL & NAUGHTON, *supra* note 18, at 548, 548 n.279.

law and treatises authorized (and even encouraged) judges to send violators to jail until they complied.[263] Violators could be detained for the length of the recognizance term,[264] which itself was left to the judge's discretion.[265]

Even if a violator did pay the forfeited bond, the judge could simply take another recognizance and then imprison them for failing to comply.[266] According to Blackstone, the only limit on a judge's authority to jail a recognizor for "want of sureties" was to "express the cause thereof with convenient certainty; and take care that such cause be a good one."[267] Hening's 1795 treatise warned that this power "might be made an engine of oppression."[268] Nevertheless, he still included a sample order to jail a party, "A O," who failed to make the required pledge:

> Whereas A O, of ___ in the said county, yeoman, is now brought before me . . . requiring him to find sufficient sureties to be bound with him in a recognizance, for his personal appearance at the next court to be holden in and for the said county, and in the mean time to keep the peace [*or*, be of the good behaviour] towards the said commonwealth, and all its citizens . . . and whereas he the said A O, hath refused, and doth now refuse before me to find such sureties: These are therefore, in the name of the commonwealth, to command you the said constable, forthwith to convey the said A O, to the common jail of the said county, and to deliver him to the keeper thereof there, together with this precept: And I do, in the name of the said commonwealth, hereby command you the said keeper to receive the said A O, into your custody, in the said jail, and him there safely keep, until he shall find such sureties as aforesaid [*or, be otherwise discharged by due course of law*].[269]

Early American courts did not hesitate to leverage their power to convert recognizance forfeitures into prison sentences. Legal records from the time show that judges sometimes ordered recognizors to pledge enormous sums of money, which no one in the community could have realistically afforded, as a way to keep them "in prison in default of the ability to procure

263. R v. Dunn (1840) 113 Eng. Rep. 939, 940 (QB); *see also* BURN, *supra* note 166, at 105 ("[A]nd if the party shall refuse to be bound, the justice may send him to gaol [jail]."); JAMES PARKER, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 363 (Woodbridge, James Parker 1764) (same).

264. *See* R v. Dunn (1847) 116 Eng. Rep. 1155 (QB).

265. *See supra* note 176.

266. *See* Jenks, *supra* note 246, at 273; GOEBEL & NAUGHTON, *supra* note 18, at 516, 548; Lermack, *supra* note 10, at 180, 189 (1976); THOMAS WALTER WILLIAMS, 4 THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE 782–83 (London, 1795); BLACKSTONE, *supra* note 10, at *252; DALTON, *supra* note 190, at 194.

267. BLACKSTONE, *supra* note 10, at *253.

268. HENING, *supra* note 180, at 432.

269. *Id.* at 438–39.

the very large bail demanded."[270] Although prisoners might seek release by asking a higher court to "discharge" them from their recognizances, these requests were granted only in sympathetic cases, such as when the defendants were especially "ignorant" or "poor."[271] In 1766, the governor of New York complained that "the jails were full of persons who were unable to satisfy the Crown for forfeited recognizances."[272]

Recognizance forfeitures were officially considered civil matters,[273] yet courts also emphasized their criminal aspects.[274] In 1798, for example, the Supreme Court of Pennsylvania held that a recognizance forfeiture could not be removed to federal court under the First Judiciary Act of 1789 because it was "of a *criminal* nature."[275] The recognizance, the court explained, was "taken to prevent criminal actions by the defendant, in violation of the peace, order, and tranquility of the society," and it could be forfeited only if the recognizor "be convicted of having committed some crime which would incur its breach."[276] The forfeiture proceeding, therefore, had to be treated as a "prosecution" and "punishment of a crime against the State."[277]

C. *Forfeiture Juries*

Because the recognizance was the Founding Era equivalent to modern community supervision, the best way to determine if the original understanding of the jury right would apply to revocation proceedings today is to ask whether the common law required a jury trial for punishing violations of a recognizance.[278] The answer to that question is yes. At the time

---

270. THOMAS RAEBURN WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 111 (1907); *see also* Lermack, *supra* note 10, at 180–81. For specific examples, see GOEBEL & NAUGHTON, *supra* note 18, at 495 (describing recognizance taken from woman for "keep[ing] company and ha[ving] conversation with slaves" and noting she was imprisoned for failure to comply), and *Respublica v. Donagan*, 2 Yeates 437, 437 (Pa. 1799) (describing recognizance taken from two defendants acquitted of murder and noting they were imprisoned for failure to comply).

271. GOEBEL & NAUGHTON, *supra* note 18, at 550; BURN, *supra* note 166, at 107–08.

272. GOEBEL & NAUGHTON, *supra* note 18, at 548.

273. *E.g.*, Commonwealth v. M'Neill, 36 Mass. (19 Pick.) 127, 138 (1836).

274. *See, e.g.*, Lermack, *supra* note 10, at 177–78.

275. Respublica v. Cobbet, 3 U.S. (3 Dall.) 467, 474–75, 2 Yeates 352 (Pa. 1798); *see also* Applegate v. Commonwealth, 46 Ky. (7 B. Mon.) 12, 12–13 (1846) (holding recognizance forfeiture was "a *criminal* proceeding as contra distinguished from civil," because it concerned a "violation of the penal law") (first quote is a margin note).

276. *Cobbet*, 3 U.S. at 475 (emphasis omitted).

277. *Id.* at 475–76.

278. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) ("[A]nalogical reasoning requires only . . . a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough."); *see also* United States v. Rahimi,

the Constitution was ratified, recognizance forfeitures required a jury trial. The sole exception to this requirement was if the alleged violation was committed inside the courtroom and memorialized on the record, in which case the violation could be found by a judge, not a jury.[279] The requirement of a forfeiture jury was forgotten during the nineteenth century only when judges stopped taking recognizance and began "laying cases on file," which later developed into probation and parole.[280]

1. Caselaw and Treatises

The government could forfeit a recognizance during the Founding Era by filing either a writ of "scire facias" or an "action of debt."[281] Both of these proceedings required a jury trial to resolve factual disputes.[282] Numerous cases and treatises from the time expressly referred to and discussed the use of juries in recognizance forfeitures. Highlights from this history are recounted below, with additional citations provided in the margin.[283]

No. 22-915, 2024 WL 3074728, at *6 (U.S. June 21, 2024) ("[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.' ") (citation omitted).

279. *See infra* Section II.C.2.

280. *See infra* Section II.C.3.

281. GOEBEL & NAUGHTON, *supra* note 18, at 532; *see also* Commonwealth v. M'Neill, 36 Mass. (19 Pick.) 127, 138 (1837) ("A recognizance is a debt upon condition, and on default it is forfeited and becomes a debt due. But the remedy is by debt or *scire facias* . . . ."); *Cobbet*, 3 U.S. at 468, 475 (referring to recognizance forfeiture as both "scire facias" and "action of debt").

282. *See* JOHN MERRIFIELD, THE LAW OF ATTORNIES, WITH PRACTICAL DIRECTIONS IN ACTIONS AND PROCEEDINGS BY AND AGAINST THEM, AND FOR THE TAXATION AND RECOVERY OF COSTS 494–96 (London, Saunders & Benning 1830); CHARLES PETERSDORFF, PRACTICAL TREATISE ON THE LAW OF BAIL, IN CIVIL AND CRIMINAL PROCEEDINGS 385 (London, Joseph Butterworth & Son 1824).

283. *See* Mix v. People, 29 Ill. 196, 197 (1862) ("The case was a *scire facias* upon a common recognizance . . . . The verdict of the jury was . . . 'for the plaintiff . . . .' "); R v. Harmer, 1859 CarswellOnt 245 (Can. U.C.Q.B.) (WL) ("[*Scire facias*] was afterwards brought upon this recognizance . . . . The defendant pleaded, that he did not . . . in any way break the peace . . . as is alleged . . . . [and] was tried in that court by a jury, on the 14th of September[] 1858, and was found guilty of the said assault . . . ."); Sans v. People, 8 Ill. (3 Gilman) 327, 329–30 (1846) ("[A] *scire facias* issued against him, and . . . his security. . . . The jury returned a verdict against the plaintiff, upon which judgment was rendered by the court."); R v. Wiblin (1825) 172 Eng. Rep. 5; 2 Car. & P. 9 n.2 (1825) ("When a person has entered into a recognizance to keep the peace . . . . If the jury find that the recognizance has been forfeited, they find a verdict for the crown, and judgment is entered up . . . ."); Commonwealth v. Emery, 2 Binn. 431, 433–35 (Pa. 1810) ("The objections are, that the evidence given to the jury was not a recognisance, but only a loose note . . . . But I see nothing illegal or dangerous in the[] practice of taking and certifying recognisances by short minutes, or in permiting [sic] those minutes to be given in evidence to juries, as often as questions arise on the recognisances."); Commonwealth v. Davies, 1 Binn. 97, 99–100 (Pa.

Legal records from as far back as the fifteenth century describe English courts using juries in recognizance forfeitures. One account of a forfeiture proceeding from 1494 states that the "[d]efendant was obliged to the king on a recognisance to keep . . . the peace. One appeared for the king, who surmised that defendant recognisor had breached the peace. Scire facias issued against defendant recognizor. The . . . jurors appeared."[284] Apparently, the King's counsel realized near the end of trial that "the jurors intended . . . to give their verdict . . . against the king (whether defendant recognisor had breached the peace and forfeited his recognisance)" and, therefore, asked the court to "relinquish[] the issue."[285] The court agreed to do so reluctantly, noting that "this would be taken as strongly against the king" and that the "defendant recognisor (the party) will never be vexed afterwards on this breach (of the peace) without a new *Scire facias*, and (without putting) defendant recognisor to a new trial."[286] Treatises from the seventeenth and eighteenth centuries indicate that forfeiture proceedings in England were held before "the Kings Courts at Westminster," where a "jury" would decide whether the defendant had "forfeited his recognizance by breach of the peace."[287]

Early American courts similarly used juries in recognizance forfeitures.[288] One 1725 record, from Virginia's King George County Court, describes a "suit brought by our Sovereign Lord the King against Thomas Monteith for a breach of his Recognizance for the Peace and good Behaviour to which the Defendant pleaded Not Guilty."[289] A "Jury was impanelled

1804) ("[T]he point which led ultimately to the present argument . . . was this, that unless the jury might find less than the whole amount, and this it was said they could not do, a recognizance of this kind if forfeited by a libel would prove a direct restraint upon the press."); CROKE, *supra* note 206, at 498–99 ("*Scire facias* upon a recognizance of the good behaviour. . . . Wherefore it was left to the jury to consider the verity and validity of the evidence, and of the manner of speaking them; whereupon they, being a substantial jury, considering thereof, gave their verdict for the defendant, that he was not guilty."); *see also* GOEBEL & NAUGHTON, *supra* note 18, at 533 ("In the case of a forfeited recognizance to keep the peace . . . . [t]he issue of breach was tried by a jury . . . .").

284. BOS. UNIV. SCH. OF L., *The Year Books: Report #1494.073*, LEGAL HISTORY: THE YEAR BOOKS, https://www.bu.edu/phpbin/lawyearbooks/display.php?id=21576 [perma.cc/EKR5-4JBJ].

285. *Id.*

286. *Id.*

287. DALTON, *supra* note 190, at 208 (emphasis omitted); *see also* RICHARD GUDE, 1 PRACTICE OF THE CROWN SIDE OF THE COURT OF KING'S BENCH, AND THE PRACTICE OF THE SESSIONS; THE GENERAL RULES OF COURT, FROM THE REIGN OF JAMES I. TO THE PRESENT TIME AND THE STATUTES RELATING TO THE PRACTICE 235 (London 1828); WILLIAMS, *supra* note 266, at 789; A. HIGHMORE, JUNR., A DIGEST OF THE DOCTRINE OF BAIL 246 (London, His Majesty's Law Printers 1783).

288. GOEBEL & NAUGHTON, *supra* note 18, at 533.

289. King v. Monteith (King George Cnty. Ct., Sept. 4, 1725), *in* VIRGINIA COUNTY COURT RECORDS ORDER BOOK ABSTRACTS OF KING GEORGE COUNTY, VIRGINIA 1723–1725, at 97 (Ruth Sparacio & Sam Sparacio eds., 1992).

and sworne to try the matter" and, "having heard the evidence and arguments on both sides withdrew & some time after return'd the following verdict . . . Not Guilty."[290] In another case from New York in 1771, a man named Thomas Tobias was accused of breaching a recognizance for good behavior by committing a streak of violent crimes, including threatening and assaulting a woman.[291] He denied these charges and "put[] himself upon the Country," meaning that he requested a jury trial, at which the victim was required to testify.[292] Following "the usual jury process," he was found "guilty of the breaches of the recognizance," and the government forfeited his bond.[293]

The Supreme Court of Pennsylvania expressly referred to the use of juries in recognizance forfeitures in two opinions from 1798 and 1800,[294] both involving a British loyalist named William Cobbett who owned a printshop in Philadelphia.[295] Cobbett had been "bound by a recognizance to be of good behavior," but, upon "a supposition[] that he had broken the condition, by . . . his libellous [sic] publications," the commonwealth initiated "an action of debt . . . upon the recognizance."[296] As a foreign citizen, Cobbett sought to invoke the protection of federal diversity jurisdiction by removing the case from state to federal court under the First Judiciary Act.[297] The court rejected this attempt at removal, concluding that the Act did not apply to recognizance forfeitures because Congress could not have intended for them to be tried by a federal, rather than local, jury:

290. *Id.*

291. GOEBEL & NAUGHTON, *supra* note 18, at 544.

292. *Id.* at 545–547, 545–46 n.266; 3 WILLIAM BLACKSTONE, COMMENTARIES *349 (defining trial "by the country" as "by jury").

293. GOEBEL & NAUGHTON, *supra* note 18, at 547.

294. Respublica v. Cobbet, 3 U.S. (3 Dall.) 467, 475–76, 2 Yeates 352, (Pa. 1798); Respublica v. Cobbet, 3 Yeates 93, 100–01 (Pa. 1800).

295. Edward Smith, *Cobbett, William*, *in* 11 DICTIONARY OF NATIONAL BIOGRAPHY 142, 142–43 (Leslie Stephen ed., New York, Macmillan & Co. 1887).

296. *See Cobbet*, 3 U.S. (3 Dall.) at 467, 2 Yeates at 352. The libels allegedly concerned the United States government, several Revolutionary Era heroes, and the American people as a whole, including:

> [T]hirty five different . . . publications . . . defaming, ridiculing and reflecting on the general government of the Union, the principles of republican government, the people for adopting those principles, Mr. Thomas Jefferson, Mr. James Monroe, &c. . . . the government of Pennsylvania, and his Excellency Thomas Miffin, late governor thereof, Drs. Benjamin Franklin and David Rittenhouse, Mr. Alexander James Dallas, and other individuals, the justices of the peace, board of health, and overseers of the poor for supposed acts of tyranny and neglects of official duty . . . .

Respublica v. Cobbet, 3 Yeates 93, 94 (Pa. 1800).

297. *See Cobbet*, 3 U.S. at 472–73, 2 Yeates at 359–60.

> Can the Legislature of the United States be supposed to have intended . . . that an alien, residing three or four hundred miles from where the Circuit Court is held . . . should, after a breach of his recognizance and a prosecution for it commenced, be enabled to remove the prosecution before a Court at such a distance, and held but twice in a year, *to be tried by a jury, who know neither the persons, nor characters, of the witnesses, and consequently are unqualified to try their credit* . . . ?[298]

After losing the trial in state court, Cobbett appealed again on the ground that recognizance forfeitures had to be initiated via presentment to a grand jury.[299] The court again rejected his argument, holding that presentment was unnecessary because recognizors were already protected by their right to a jury trial: "The jury . . . ha[s] the constitutional right of determining . . . whether [there is] . . . . good cause[] of forfeiture of a recognizance to keep the peace or of good behavior."[300]

Founding Era courts also required jury trials in forfeiture proceedings filed against sureties. In one 1801 case, the government sought to forfeit a surety's bond on the ground that the recognizor had violated his recognizance for good behavior by "publish[ing] certain libels."[301] The dispute went to a jury trial, at which the judge allowed the government to present evidence of the recognizor's concession in a different proceeding that he had published the libelous materials.[302] On appeal, the court found the verdict against the recognizor inadmissible against the surety, holding that evidence of the libels "must go to the jury, who will judge of their publication."[303]

Justice Alito emphasized in his *Haymond* dissent that the text of the Sixth Amendment referred only to "accused" defendants, not "convicted" ones.[304] He therefore concluded that the jury right protected only defendants who were *charged* with crimes, not those who has been *convicted*, sentenced, and faced revocation of their community supervision.[305] However, no Founding Era legal authority appears to have drawn this distinction with respect to recognizance forfeitures. To the contrary, the evidence shows that courts used juries to forfeit recognizances taken both before trial and after conviction.[306] Regardless of whether the violator had been

298. *Id.* at 475–76, 2 Yeates at 362 (emphasis added).

299. *Cobbet*, 3 Yeates at 97–98.

300. *Id.* at 100–01.

301. Respublica v. Davis, 3 Yeates 128, 128 (Pa. 1801).

302. *Id.* at 129.

303. *Id.* at 131.

304. United States v. Haymond, 139 S. Ct. 2369, 2392 (2019) (Alito, J., dissenting).

305. *Id.*

306. *See* Brumme v. State, 39 Tex. 538, 543–44 (1873) (using a forfeiture jury where recognizance was taken as part of the punishment of a convicted defendant); Dillingham v. United States, 7 F. Cas. 708, 708 (C.C.D. Pa. 1810) (No. 3913) (using a forfeiture jury

accused or convicted of a crime, forfeiting a recognizance required a jury trial.

2. In- Versus Out-of-Court Violations

Instead of "accused" versus "convicted," the key Founding Era distinction for applying the jury requirement to recognizance forfeitures was between in-court and out-of-court violations. Violations committed inside the courtroom and memorialized on the record could be found by a judge. However, violations committed outside the courtroom and that required proof by extrinsic evidence had to be found by a jury.[307] In practice, this distinction usually meant that failures to appear could be found by a judge whereas breaches of the peace and other misbehavior had to be proved to a jury. Nevertheless, courts still required juries for forfeiture proceedings based on failures to appear that were not properly recorded.[308]

The Supreme Court of Pennsylvania described the basic difference between in-court and out-of-court recognizance violations in an 1804 opinion: "[T]here are some kinds of recognizances which are forfeited *in*, and others which are forfeited *out* of court. . . . Of the latter kind is the recognizance in the present case [publishing libel]; of the former are those to appear."[309] An 1851 legal treatise drew the same distinction, differentiating between a violation committed "in the face of the Court," such as a failure to appear, and misbehavior "beyond the precincts of the Court," such as "an assault," which "require[d] extrinsic evidence to prove."[310]

The reason this distinction mattered is that it determined whether recognizance forfeitures would require a jury trial. Although juries were generally considered necessary to resolve factual disputes, judges were allowed to find facts based on the contents of their own records. As Matthew Bacon's 1798 *A New Abridgment of the Law*, an influential colonial-era treatise,[311] explained: "It is in the general true, that every question of fact arising in a cause is to be tried by a jury," but "[e]very question arising in a cause concerning a matter of record, is to be tried by the record; because a record imports in itself such verity, that an averment contrary

---

where recognizance was taken from an accused defendant); Respublica v. Cobbett, 3 U.S. 467, 475–76, 2 Yeates 352, 362 (Pa. 1798) (same).

307. A similar distinction still exists in the law of criminal contempt. *See* Young v. United States *ex rel.* Vuitton Et Fils S.A., 481 U.S. 787, 798 (1987) (distinguishing "between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence [a]re dispensed with, and all other contempts where more normal adversary procedures [a]re required") (quoting Bloom v. Illinois, 391 U.S. 194, 204 (1968)).

308. *See, e.g.*, *Dillingham*, 7 F. Cas. at 708; BACON, *supra* note 176, at 635.

309. Commonwealth v. Davies, 1 Binn. 97, 104 (Pa. 1804).

310. THOMAS CAMPBELL FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 295–301 (London, V. & R. Stevens & G. S. Norton 1851).

311. *See* Stoebuck, *supra* note 200, at 416.

thereto is not to be received."[312] In other words, any "issue of fact" that was "known to the Court as a matter of record" could be "tried by the Court," but if "the issue be taken" on "any other matter *in pais* [outside the record]," then "the trial" had to be "by jury."[313]

Effectively, this rule meant that recognizance forfeitures based on failures to appear could be tried by a judge because these violations were, by definition, committed inside the courtroom and memorialized on the record. By contrast, forfeitures based on breaches of the peace or other bad behavior outside the courtroom had to be tried before a jury because they relied on proof by extrinsic evidence. Legal authorities at the Founding emphasized this distinction: "If the question be general, whether a defendant did appear, it is to be tried by the record; because the appearance ought to be entered upon the record,"[314] but "if the forfeiture has not been incurred in the face of the Court, as if the condition were that he should keep the peace . . . which can only be determined by inquiry, then the [recognizor] has a right to be heard" by "the jury."[315] Nevertheless, even a failure to appear might require a jury trial if all the pertinent facts were not properly memorialized. Bacon explained, for example, that a forfeiture for a failure to appear "at a day certain" had "to be tried by a jury: for it is not necessary[] that the day of appearance should be entered upon the record."[316]

The fascinating 1810 opinion in *Dillingham v. United States*, which Supreme Court Justice Bushrod Washington authored while riding circuit in Pennsylvania, illustrates the importance of the forfeiture jury and the limits of proving violations by the record.[317] The case began as an action of debt, filed by the federal government against a recognizor who allegedly violated a condition by failing to appear in court to answer to criminal charges.[318] The district court convened a jury trial, at which "counsel for the United States offered in evidence" a record of "the recognisance" as well as the testimony of "the magistrate who took the recognisance, to prove

312. BACON, *supra* note 176, at 634, 641.

313. Whitley v. Gaylord, 48 N.C. (3 Jones) 286, 288–89 (1856).

314. BACON, *supra* note 176, at 635.

315. FOSTER, *supra* note 310, at 295, 301.

316. BACON, *supra* note 176, at 635.

317. Dillingham v. United States, 7 F. Cas. 708 (C.C.D. Pa. 1810) (No. 3913). It is important to acknowledge the disturbing facts of this case, in which the recognizor was accused of "beating and abusing and cruelly treating a little black boy, called James, of which cruel treatment the said child languished, and shortly after died; the same having happened on board a vessel . . . sailing under the United States flag." *Id.* at 708. Whether race was a factor in Justice Washington's decision is impossible to know for certain, but he was himself a slave owner. Lynn Price, *Bushrod Washington: Slavery and Colonization in the Shadow of George Washington*, WASHINGTON PAPERS (Oct. 18, 2019), https://washingtonpapers.org/bushrod-washington-slavery-and-colonization-in-the-shadow-of-george-washington [perma.cc/5JFF-NME2].

318. *Dillingham*, 7 F. Cas. at 708.

that the [recognizor] did not appear before him."[319] The court then "charged the jury, that if they, as a matter of fact, were of opinion that the said paper so produced in evidence, was the recognisance . . . then, that the said several matters so produced in evidence" were "sufficient" to prove the violation.[320] The "jury found for the United States, and judgment was given on the verdict."[321]

On appeal, Justice Washington reversed on the ground that "the forfeiture was not even proved at the trial to have been legally incurred."[322] The recognizor had been recorded as failing to appear, he explained, yet the condition of the recognizance required him "to appear *when he is called*," and the government had presented no evidence that the court had "solemnly called [him] before his default [wa]s entered."[323] Evidence of this call was "essential to a breach of the condition," in order "to prevent a forfeiture accruing from the ignorance or inattention of the accused."[324] Therefore, he concluded, "the district court erred, in the opinion which was delivered to the jury."[325] Although Justice Washington's decision involved a recognizance taken as a form of bail, rather than community supervision, it still reflects the seriousness with which judges in the Founding Era took the jury trial in forfeiture proceedings, even for in-court violations.

Finally, the Supreme Court itself acknowledged the requirement of a forfeiture jury in the 1869 case of *Basset v. United States*.[326] There, a recognizor named Orrin Olmstead pled guilty in federal court to stealing letters from a post office and was sentenced to six months' imprisonment.[327] Several days after Olmstead was sent to prison, however, the district judge set aside the conviction and allowed him to withdraw his guilty plea.[328] The judge then took his recognizance, with Edward Basset and E.H. Harger serving as sureties, "conditioned for [his] appearance . . . from day to day during the term."[329] The next day, Olmstead failed to appear, and the government moved to forfeit the recognizance.[330] In response, his sureties argued that "there was no record of any such recognizance in the court."[331]

319. *Id.* at 708–09.

320. *Id.* at 709.

321. *Id.*

322. *Id.* at 709–10.

323. *Id.* at 710 (emphasis added).

324. *Id.*

325. *Id.*

326. Basset v. United States, 76 U.S. 38 (1869).

327. Transcript of Record at 6–7, Basset v. United States, 76 U.S. 38 (1869) (No. 262).

328. *Basset*, 76 U.S. at 39. Apparently, the judge set aside the conviction due to newly discovered legal defects in the indictment. *See* Transcript of Record, *supra* note 327, at 6, 12.

329. *Basset*, 76 U.S. at 39; Transcript of Record, *supra* note 327, at 12.

330. *See* Transcript of Record, *supra* note 327, at 13.

331. *Basset*, 76 U.S. at 39.

The judge rejected their argument, finding that "the record of the case showed that the recognizance was taken, and remained among the rolls and records of the court[,]" and, therefore, ordered them to pay the forfeited bond.[332]

The Supreme Court affirmed in a unanimous opinion, holding that the judge did not need to convene a jury trial to resolve the dispute in this case but also emphasizing that a jury would be required for recognizance forfeitures based on evidence outside the record.[333] The Court first noted that the case involved a plea of "*nul tiel record*," in other words, a denial of the existence of "a supposed record of the court in which the plea is made."[334] As a result, the dispute could be "tried by the court, because it is an issue to be determined by the inspection of its own records."[335]

The Court went on to clarify, however, that if the alleged violation had been based on "the record of a foreign court," then the proceedings would have had to be "tried by a jury."[336] The "existence of [that] record," the Court stressed, "must first be made by proof, which it may be necessary to submit to a jury."[337] In other words, violations based on the court's own records, like failures to appear, could be found by a judge. By contrast, violations based on outside evidence—even records of a foreign court—required a jury trial.[338]

Basset is a post-Civil War case, far removed from the Founding Era. Yet the Court's discussion of the jury requirement in recognizance forfeitures reflected a longstanding legal distinction, dating back at least to the eighteenth century. The cases *Basset* cited for this principle all came from around the Founding Era, including Coke's *Institutes of the Laws of England*, an English decision from 1804, and two state court opinions from the early 1800s.[339] Despite *Basset*'s significance, however, the Court's later decisions on revocation proceedings have never addressed, nor even acknowledged, this opinion. In fact, Westlaw indicates that, over the past one hundred fifty

332. *Id.* at 39–40.

333. *Id.* at 40–41.

334. *Id.* at 40.

335. *Id.* at 40–41.

336. *Id.* at 40.

337. *Id.*

338. The Court did not make clear whether this jury requirement was based on common law or the Constitution, but because the former helps define the latter, the difference is not significant. *See id.* at 40–41; *infra* Section III.C.

339. *See Basset*, 76 U.S. at 40, 40 n.1 (first citing COKE, *supra* note 201, at 180; then Mitchell v. New-England Marine Ins. Co., 23 Mass. 117 (6 Pick.) 117 (1828); and then citing Pattin v. Miller, 13 Serg. & Rawle 254 (Pa. 1825)).

years, just three law review articles have *ever* cited *Basset*, none of which concerned community supervision.[340]

3. Laying a Case "on File"

The forfeiture jury began to disappear in the 1830s when judges started taking recognizance while delaying the defendant's sentencing hearing, rather than as part of the sentence for the crime. They described this new practice as laying a case "on file."[341] Because laying a case "on file" merely postponed sentencing, courts concluded that they could resume the proceedings as punishment for violations without a jury trial. Later in the nineteenth century, legislatures formalized this practice by enacting probation and parole statutes that officially authorized suspending prison terms on condition of the defendant's good behavior. Courts again concluded that they could reinstate the suspended prison sentences as punishment for violations without a jury trial.[342]

Records suggest that, as early as 1829, judges in Massachusetts began experimenting with allowing the cases of convicted criminals to wait "on file" while allowing them a second chance at living a law-abiding life.[343] If the defendant behaved themself, then their "prison sentence would remain suspended."[344] But if they misbehaved, then the court could reconvene their deferred sentencing hearing and impose the punishment for their original conviction.[345] Although courts described what they were doing as taking "recognizance,"[346] this practice differed significantly from the common law, with major implications for the jury requirement.

The key moment of legal change was sealed in amber by the 1831 opinion of Boston municipal court judge Peter Oxenbridge Thacher in *Commonwealth v. Chase*.[347] The defendant in that case had pled guilty to theft, but "the prosecuting officer did not move for sentence," instead agreeing with the judge to let her "indictment [be] laid on file" while she "enter[ed] into

340. *See* Paul J. Larkin, Jr., *The Future of Presidential Clemency Decision-Making*, 16 U. ST. THOMAS L.J. 399, 415 n.66 (2020); Andrew L. Johnson, Comment, *Sentence Modification in Texas: The Plenary Power of a Trial Court to Alter Its Sentence After Pronouncement*, 38 ST. MARY'S L.J. 317, 326 n.43 (2006); E.T.Y., Jr., *Courts—Effect of Amended Judgment and of Order Extending Term of Court Upon Time for Appeal*, 15 TEX. L. REV. 259, 259 (1937).

341. *See* Doherty, *supra* note 248, at 1707–08.

342. *Id.* at 1710–13.

343. *Id.* at 1707, 1707 n.23.

344. *Id.* at 1711.

345. *Id.*

346. Commonwealth v. Chase, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher 267 (Bos. Mun. Ct. 1831); VANSTONE, *supra* note 18, at 6.

347. *Chase*, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher, at 267.

recognizance with sureties to appear before the court when sent for."[348] As conditions on her recognizance, she was required to "come when sent for and in the meantime keep the peace and be of good behavior."[349] A year later, she got into trouble again, was charged with larceny, and was acquitted, at which point the prosecutor finally moved to sentence her on the original theft conviction.[350] In her defense, she argued that the court's decision to delay her sentencing "ha[d] discharged her, so that no further judgment can be produced on the record."[351]

Judge Thacher rejected the defendant's argument, using logic that marked the beginning of the end of the forfeiture jury. He explained that the sentencing hearing had been "delayed from tenderness," "humanity," and "by mutual consent," "not because it had ceased to be the right of the government to claim the judgment."[352] As a result, the court could, "on motion," have the defendant "brought in and sentenced at any subsequent period. . . . according to the condition of the recognizance."[353] Her only "rights . . . under such circumstances" were either to "admit the conviction, and plead a pardon for the offence," or to "deny that [s]he is the same person who is named in the indictment; in which case, the government must prove h[er] identity, like any other material fact, by verdict of the jury."[354] Because Chase had "admitted her identity," the judge could sentence her for her original conviction without a jury trial.[355] The Massachusetts Supreme Judicial Court later affirmed this holding in a decision that has apparently gone missing.[356]

Judge Thacher's use of words like "recognizance," "sureties," and "keep the peace and be of good behavior" may make it seem like this case was

---

348. *Id.*

349. Doherty, *supra* note 248, at 1707 (quoting Indictment Against Jerusha Chase, Commonwealth v. Chase, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher, at 267 (Bos. Mun. Ct. 1831)).

350. *Chase*, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher, at 268.

351. *Id.*

352. *Id.* at 269. *But cf.* Commonwealth *ex rel.* Nuber v. Keeper of Workerhouse, 6 Pa. Super. 420, 425–26 (Pa. Super. Ct. 1898) (arguing that "[s]uch a proposition shocks the moral sense as well as the legal instinct . . . . [because] the defendant [is] helpless . . . . [and] would naturally feel that an order of the court must be complied with or that [they] would suffer in the end.").

353. *Chase*, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher, at 268.

354. *Id.* at 268–69.

355. *Id.* at 269.

356. Fisher, *supra* note 259, at 953 n.367. Records indicate that the defendant filed a petition for certiorari and that Chief Justice Lemuel Shaw "delivered an opinion" for the Massachusetts Supreme Judicial Court affirming Judge Thacher's decision. *Id.* at 270 n.1.

just another example of a court taking recognizance as a part of the sentence for a crime. But as the Supreme Court later noted in *Ex Parte United States*, "laying the case on file" was very different from the common-law recognizance.[357] "Laying the case on file" was a decision to "decline to enforce the law" by "postponing" the defendant's punishment "indefinitely"[358]—a "favor" to the defendant.[359] By contrast, taking recognizance was an "exertion of the power of the court[]" that "exact[ed]" a "legal penalty."[360] This distinction was key to Judge Thacher's conclusion in *Chase*. Because "laying the case on file" did not add to the defendant's punishment, but, rather, delayed it out of leniency and by consent, no jury was required to punish her for violations.[361]

Fiona Doherty describes *Chase* as "the first recorded example of probation" and "the first recorded example of a prosecutor and judge deciding that a defendant has failed the test of probation."[362] In addition to these two "firsts," *Chase* is also the first recorded example of an argument for why the right to a jury trial did not apply to revocation proceedings. Judge Thacher paid homage to the traditional requirement of a forfeiture jury by acknowledging that a jury trial would be necessary to prove any "material fact," which, in these circumstances, included only the defendant's identity.[363] Yet because that fact was not in dispute, Judge Thatcher concluded that the defendant had no right to challenge the court's decision to sentence her to imprisonment.

Soon, judges outside Boston began "laying cases on file" while also claiming (inaccurately) that they were placing defendants "under recognisances."[364] Just like in *Chase,* these courts concluded that no jury was required to punish violations because they were merely resuming a delayed

357. *Ex Parte* United States, 242 U.S. 27, 50 (1916); *see also* Lindner, *supra* note 234, at 36–37 (arguing that Judge Thacher "broadened" the recognizance, which "would later be copied in modern methods" of probation and parole).

358. *Ex Parte United States*, 242 U.S. at 45–46.

359. Philpots v. State, 20 A. 955, 955 (N.H. 1890); *see also* State v. Crook, 20 S.E. 513, 515 (N.C. 1894) ("Such orders [to lay a case on file] are not prejudicial, but favorable, to defendants, in that punishment is postponed, with the possibility of escaping it altogether . . . .").

360. *Ex Parte United States*, 242 U.S. at 45.

361. Commonwealth v. Chase, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher 267, 268–69 (Bos. Mun. Ct. 1831).

362. Doherty, *supra* note 248, at 1707, 1718 (emphasis omitted); *see also* Commonwealth v. Simmons, 863 N.E.2d 549, 555 (Mass. 2007) (describing *Chase* as "[t]he earliest written countenance" of a case being "laid on file").

363. *Chase*, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher, at 269.

364. VANSTONE, *supra* note 18, at 6; *see also Ex Parte United States*, 242 U.S. at 50–51 (describing courts "laying the case on file" in New Jersey and Ohio). By contrast, some judges concluded that they had no inherent power to "lay cases on file" and refused to do so without legislative authorization. *See, e.g.*, People v. Morrisette, 20 How. Pr. 118, 118 (N.Y. Ct. Oyer & Terminer 1860); State v. Bennett, 20 N.C. (4 Dev. & Bat.) 170, 178 (1838);

sentencing hearing. In 1889's *Sylvester v. State*, for example, a New Hampshire judge ordered that a case "be laid on file" by sentencing an alcohol distributor to "jail one day, with an agreement . . . that the sentence should not be enforced while he did not sell intoxicating liquor."[365] A year later, the judge "heard evidence" that the defendant had violated the condition and, "being satisfied that [he] . . . had sold intoxicating liquors, ordered that a *mittimus* [order sending the defendant to prison] be issued."[366] On appeal, the New Hampshire Supreme Court held that the *mittimus* was "not a judgment" but "a mere finding of a fact involved in the interlocutory question whether the execution of the judgment should be further postponed."[367] Because the trial judge had simply rescheduled a lawful punishment, the defendant "was no more entitled to . . . [a] jury trial, than he would have been on a denial of his motion for a temporary stay."[368]

States and the federal government later formalized the practice of "laying cases on file" by enacting probation and parole legislation that officially authorized the imposition of suspended prison sentences on condition of the defendant's good behavior.[369] Once again, courts echoed the language of *Chase* and *Sylvester* in concluding that no jury was required to punish violations. The Supreme Court's early 1900s decisions, for example, described probation and parole as "favor[s]" to the defendant and concluded on this basis that revocation proceedings did not require a jury trial.[370] In the 1970s, the Court "rejected the concept that constitutional rights [could] turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege' "[371] yet still followed the same basic logic as *Chase* and *Syl-*

see also Ex Parte United States, 242 U.S. at 51 ("[N]umerous as are the instances of the exertion of the power [to 'lay cases on file'], the practice was by no means universal, many United States judges . . . persistently refusing to exert the power on the ground that it was not possessed.").

365. Sylvester v. State, 20 A. 954, 954 (N.H. 1889).

366. *Id.*

367. *Id.* at 954–55.

368. *Id.*

369. Doherty, *supra* note 248, at 1710–12; Fisher, *supra* note 259, at 943–64; *see also* Senate Report, *supra* note 95, at 59 (describing probation as "a form of sentence with conditions rather than as a deferral of imposition or execution of a sentence" (footnote omitted)); *Parole of United States Prisoners: Hearing Before the H. Subcomm. on the Judiciary on S. 870 and H.R. 23016*, 61st Cong., 12–13 (1910) (statements of Robt. V. La Dow, Superintendent of Prisons and Prisoners, Wm. H. De Lacy, J. Juvenile Court, O.E. Darnall, Superintendent National Training School for Boys, C.H. McGlasson, Department of Justice, & J. Ellen Foster, Department of Justice) (describing parole as "[l]ike a bond to keep the peace[]").

370. *See* Burns v. United States, 287 U.S. 216, 220–22 (1932) (probation); Ughbanks v. Armstrong, 208 U.S. 481, 487–88 (1908) (parole).

371. Morrissey v. Brewer, 408 U.S. 471, 481, 483 (1972) (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971)).

vester, holding that the government's "risk" in choosing to grant a defendant supervision, in lieu of imprisonment, obviated the jury requirement in revocation proceedings.[372]

Although judges eventually stopped using the recognizance as a form of community supervision,[373] the language of the common law persisted in the law of probation and parole for decades.[374] Meanwhile, courts continued to employ the recognizance as a form of pretrial release[375] and restraining order.[376] Today, bail revocation does not require a jury trial[377] whereas punishing restraining-order violations does require a jury if the sentence imposed exceeds six months.[378] These rules are similar to the common-law principle that failures to appear could be found by a judge whereas violations committed outside of court require a jury.[379] While the jury requirement for bail and restraining-order violations has remained roughly consistent since the Founding, defendants on community supervision lost the right to a revocation jury.

III. Revocation Today

The history of the forfeiture jury has major consequences for the constitutional law of community supervision. The reason the jury requirement for punishing violations disappeared during the nineteenth century was because of changes in the structure of community supervision. The recognizance was structured as an additional penalty, whereas "laying a case on

372. *Id.*

373. Sylvestre, Blomley & Bellot, *supra* note 18, at 44–46. There are three possible explanations for why probation and parole ultimately displaced the recognizance as the primary forms of community supervision in the United States. First, this change "coincided with a period during which the courts appear[ed] more reluctant to rely on common law powers to impose punishment," which may have led them to impose statutorily authorized probation and parole sentences, rather than common-law recognizances. *Id.* at 44–49. Second, judges may have preferred revoking probation and parole to the "disagreeable necessity" of imprisoning indigent defendants for failing to pay a forfeited recognizance. 2 James Wilson, Collected Works 1178 (Kermit L. Hall & Mark David Hall, eds., 2007) (1790). Third, prosecutors may have favored probation and parole because avoiding a jury trial made it procedurally easier to punish violations, giving them "a far stronger hand in controlling the defendant's future behavior." Fisher, *supra* note 259, at 955–56.

374. *See, e.g.*, Commonwealth v. McGovern, 66 N.E. 805, 805 (Mass. 1903) ("[Defendant] pleaded guilty in the superior court . . . and having entered into the usual recognizance with the probation officer, as surety, he was placed on probation . . . .").

375. *See, e.g.*, People v. Quigg, 59 N.Y. 83, 89 (1874).

376. *See* Robert A. Leflar, *Equitable Prevention of Public Wrongs*, 14 Tex. L. Rev. 427, 444–45 (1936).

377. *See, e.g.*, State v. Burgins, 464 S.W.3d 298, 307–11, 310 n.6 (Tenn. 2015).

378. *See* Frank v. United States, 395 U.S. 147, 150 (1969); *In re* Robertson, 940 A.2d 1050, 1060–61 (D.C. 2008).

379. *See supra* Section II.C.2.

file," probation, and parole were all structured as delayed punishments. Supervised release, like the recognizance, is structured as a penalty, not a delay. Therefore, the original understanding of the jury right would apply to revocation of supervised release, even if it does not apply to revocation of probation or parole.

A. *Penalty Versus Delay*

Changes in community supervision during the nineteenth century led to changes in the punishment for violations, with a corresponding impact on the jury requirement. Taking a recognizance imposed a *penalty* on the defendant and, therefore, punishing violations resulted in a deprivation of liberty or property that required a jury trial. By contrast, "laying a case on file," probation, and parole all *delayed* part of the defendant's sentence, so courts concluded that punishing violations merely reinstated a penalty that could have been imposed earlier and did not require a jury.

The common law required a jury trial for recognizance forfeitures because the recognizance was considered a "legal penalty" that "exact[ed] . . . a bond for . . . good behavior."[380] Therefore, forfeiture of a recognizance resulted in a "loss of property" or "loss of liberty."[381] To prevent unjustified deprivations of property or liberty, the government had to prove recognizance violations to a jury. As one 1795 treatise explained: "[H]e that standeth bound to keep the peace, if he hath broken or forfeited his recognizance by breach of the peace," may be "compelled to find new surety, or else to be sent to the gaol," but "this must not be done until the party be convicted of the breach of the peace upon his recognizance," for "before his conviction it resteth indifferent whether the recognizance be forfeited or no; but after that he is thereof convicted."[382] An 1866 opinion by the Michigan Supreme Court made the connection to the jury right explicit:

> The condition of a recognizance is not broken by the entry of a default, but by the facts which, if not excused, will justify such entry. And, inasmuch as the liability arises only upon an unexcused breach of a condition, it would be contrary to every principle of law to estop a party, by an *ex parte* finding, from showing that he is excused. . . . [W]here the parties dispute the facts on which relief is sought *there can be no question of the right to have a trial by jury,* and the benefit of proceedings in error . . . .[383]

---

380. *Ex parte* United States, 242 U.S. 27, 45 (1916).

381. United States v. Haymond, 139 S. Ct. 2369, 2396 (2019) (Alito, J., dissenting).

382. WILLIAMS, *supra* note 266, at 782–83; *see also* HENING, *supra* note 180, at 432; HIGHMORE, *supra* note 287, at 243.

383. Lang v. People, 14 Mich. 439, 452, 454 (1866) (second emphasis added) (citations omitted).

By contrast, nineteenth-century courts held that no jury trial was required to punish violations of a case "laid on file" because this form of supervision was not a penalty but, rather, a "delay[]" of the defendant's sentencing hearing.[384] Although courts still (inaccurately) described this practice as taking a "recognizance,"[385] they also, for the first time, began referring to the supervision as a favor, granted out of "tenderness," "humanity," and "mutual consent," "not because it had ceased to be the right of the government to claim the judgment."[386] Therefore, punishments for violations of a "case laid on file" did not result in a deprivation of liberty but, rather, the resumption of a punishment that had been postponed at the government's discretion, and the jury requirement did not apply.[387]

During the late nineteenth and early twentieth centuries, states and the federal government formalized the practice of "laying a case on file" by enacting probation and parole statutes, officially authorizing the imposition of suspended sentences, yet still maintained the same conceptual structure of conditional liberty as a delayed punishment. In other words, by imposing a suspended sentence, the government withheld from levying the full penalty for the conviction, contingent on the defendant's compliance with certain conditions.[388] Once again, the courts concluded that the government could punish violations by reinstating the original punishment without a jury trial. Initially, the Supreme Court held that no jury was necessary because probation and parole were "favors" to the defendant.[389] Later, it emphasized the "risk" the government took in granting supervision in lieu of imprisonment.[390] Either way, however, revocation of probation and parole restored a sentence that had been "imposed previously," and, therefore, no jury trial was required.[391]

---

384. *See* Commonwealth v. Chase, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher 267, 267–69 (Bos. Mun. Ct. 1831).

385. *Id.* at 268–69; *see also* 3 CHARLES JACKSON, ASAHEL STEARNS & JOHN PICKERING, REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE GENERAL STATUTES OF THE COMMONWEALTH 73 (Boston, Dutton & Wentworth, State Printers 1834).

386. *Chase*, 1845 Reps. Crim. Cases Tried Mun. Ct. City of Bos., Before Peter Oxenbridge Thacher, at 269.

387. *Id.* at 268–69; *see also* Sylvester v. State, 20 A. 954, 955 (N.H. 1889); Commonwealth v. Dowdican's Bail, 115 Mass. 133, 136 (1874).

388. *Cf.* United States v. Murray, 275 U.S. 347, 357 (1928) (referring to probation as "amelioration of the sentence").

389. *See* Burns v. United States, 287 U.S. 216, 220–22 (1932) (probation); Ughbanks v. Armstrong, 208 U.S. 481, 487–88 (1908) (parole). *Cf.* Philpots v. State, 20 A. 955, 955 (N.H. 1890) (laying a case on file); State v. Crook, 20 S.E. 513, 515 (N.C. 1894) (describing laying a case on file as "favorable" to defendant).

390. Morrissey v. Brewer, 408 U.S. 471, 483 (1972).

391. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 n.3 (1973).

B. *Structures of Community Supervision*

The distinction between community supervision imposed as a penalty versus a delay helps to resolve one of the most important disputes in the law of community supervision. Judges have long acknowledged that probation and parole both "mitigate" punishment whereas supervised release "augment[s]" it,[392] but they have disagreed about the constitutional relevance of this distinction. In *Haymond*, Justice Gorsuch argued that the difference between probation, parole, and supervised release was decisive for application of the jury right, whereas Justice Alito claimed that it was purely formal and irrelevant to the constitutional analysis.[393] The law of revocation at the Founding suggests a resolution to this debate grounded in the original understanding of the jury right.

In his *Haymond* plurality opinion, Justice Gorsuch contended that the "structural difference" between probation, parole, and supervised release "bears constitutional consequences."[394] Revocation of probation and parole did not require a jury trial, he explained, because these forms of supervision replaced a prison sentence and, therefore, revoking them "exposed a defendant only to the *remaining* prison term authorized for his crime of conviction," as already "found by a unanimous jury."[395] By contrast, revoking supervised release under § 3583(k) did require a jury trial because supervised release follows full service of a prison sentence, and, therefore, revocation exposed the defendant to a "new and additional prison sentence" that could extend "well *beyond* that authorized by the jury's verdict."[396] Although he said this analysis was "limited" to the five-year mandatory minimum in § 3583(k),[397] the dissent warned that, if he was right that "a new and additional prison sentence [must be] proven to the satisfaction of a jury beyond a reasonable doubt," then the jury right would have to apply "to *any* supervised-release revocation proceeding."[398] Justice

392. United States v. Thompson, 777 F.3d 368, 372 (7th Cir. 2015) (Posner, J.); *see also* Johnson v. United States, 529 U.S. 694, 724–25 (2000) (Scalia, J., dissenting) ("The Sentencing Reform Act's adoption of supervised release was meant to make a significant break with prior practice . . . . Unlike parole, which replaced a portion of a defendant's prison sentence, supervised release is a separate term imposed at the time of initial sentencing."); United States v. Trotter, 321 F. Supp. 3d 337, 346–47 (E.D.N.Y. 2018) (Weinstein, J.) ("Parole was based on early release from prison . . . . A person on supervised release has completed his or her prison term and is serving an independent term of supervision . . . .").

393. United States v. Haymond, 139 S. Ct. 2369, 2381–82 (2019); *id.* at 2388 (Alito, J., dissenting).

394. *Id.* at 2382.

395. *Id.*

396. *Id.* at 2371, 2382.

397. *Id.* at 2383.

398. *Id.* at 2387–88 (Alito, J., dissenting).

Gorsuch did not dispute this interpretation of his opinion,[399] and at least two federal appellate judges have since cited the *Haymond* plurality as requiring more constitutional protections in *all* revocations of supervised release based on the "structural differences between parole, probation, and supervised release."[400]

Nevertheless, not everyone agrees that the differences between probation, parole, and supervised release are constitutionally relevant. In his *Haymond* dissent, Justice Alito contended that these distinctions were "purely formal and should have no constitutional consequences" because "the replacement of parole with supervised release changed the form of federal sentences but not their substance."[401] All forms of community supervision, he argued, "provide the same sort of transition period," consisting of "possible confinement depending on the defendant's conduct in the outside world."[402] As a result, "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."[403] Justice Breyer took a similar view in his *Haymond* concurrence, emphasizing that "the role of the judge in a supervised-release proceeding is consistent with traditional parole" and that the jury right should not apply to revocation as "typically understood."[404]

Ultimately, the history of the forfeiture jury supports Justice Gorsuch's structural distinction between revoking probation and parole and revoking supervised release. When the Constitution was ratified, the common law required a jury trial for recognizance forfeitures because the recognizance was structured as an additional penalty.[405] During the nineteenth century, however, courts stopped applying the jury requirement to "cases laid on file," probation, and parole because they were all structured as delayed punishments.[406] Supervised release is structured more like the recognizance than "laying a case on file," probation, or parole, because it imposes a "legal penalty" that adds a term of conditional liberty to follow full service of the defendant's prison sentence, rather than withholding

399. *See id.* at 2382–84, 2382 n.7 (Gorsuch, J.) ("§ 3583(e), which governs supervised release revocation proceedings generally, does not contain any . . . mandatory minimum . . . . [W]e have no occasion . . . [to] pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*.").

400. United States v. Peguero, 34 F.4th 143, 166, 170, 173–75 (2d Cir. 2022) (Underhill, J., dissenting); United States v. Ka, 982 F.3d 219, 225–29 (4th Cir. 2020) (Gregory, J., dissenting).

401. *Haymond*, 139 S. Ct. at 2388, 2390, 2394 (Alito, J., dissenting).

402. *Id.* at 2389–2390.

403. *Id.* at 2391.

404. *Id.* at 2389–90 (Breyer, J., concurring).

405. *See supra* Section II.B.

406. *See supra* Section II.C.

punishment.[407] Therefore, revocation of supervised release, like forfeiture of a recognizance, inflicts a deprivation of liberty in the form of a "new prison sentence[]," not reinstatement of a deferred sentence.[408] The original understanding of the jury right would apply to revocation of supervised release, even if not to revocation of probation or parole.[409]

C. *The Right to a Revocation Jury*

To make the connection between the structure of community supervision and the right to a revocation jury perfectly clear, the chart below summarizes each form of supervision, its relationship to the rest of the defendant's sentence, and whether a jury trial is required when the government punishes violations.[410] As the shaded cells illustrate, what determines whether a jury is required to punish violations is whether the supervision is structured as a penalty, or, as a delay. The recognizance was structured as an additional penalty, and therefore a jury trial was required for punishing violations. By contrast, "laying a case on file," probation, and parole, were all structured as delayed punishments, so the government could punish violations without a jury. Although *Haymond* left unclear whether the jury right applies to punishing violations of supervised release, its penalty structure strongly suggests that a jury should be required.

407. *Ex Parte* United States, 242 U.S. 27, 45, 47 (1916).

408. United States v. Ka, 982 F.3d 219, 229 (4th Cir. 2020) (Gregory, J., dissenting); *see also* United States v. Peguero, 34 F.4th 143, 175 (2d Cir. 2022) (Underhill, J., dissenting) ("'[R]evocation' of supervised release is nothing less than new punishment imposed by a court after finding an accused guilty of a new wrong . . . ."). Although the Supreme Court has described revocation of supervised release as "part of the penalty for the initial offense," the Court has also admitted that this label is a legal fiction, adopted solely to avoid constitutional difficulties with the system. Johnson v. United States, 529 U.S. 694, 700 (2000); *see also* Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297, 318 (2022) (criticizing this aspect of *Johnson* as a "workaround").

409. *See supra* Section II.C.2.

410. The chart uses the terminology of the federal criminal justice system, which differs from the criminal justice terminology in some of the states. *See supra* note 39. Ultimately, however, it is the structure of the supervision, and not its name, that determines application of the jury right.

Supervision Structure and the Jury Right					
Form of Supervision	Recognizance	"Laying a Case on File"	Probation	Parole	Supervised Release
Year Invented	1361	~1820s	1841	1836	1984
Relationship to Sentence	In addition to sentence	While delaying sentencing	In lieu of prison	Upon early release from prison	In addition to prison
Structure of Supervision	Penalty	Delay	Delay	Delay	Penalty
Jury for Punishing Violations?	Yes	No	No	No	*Haymond* left unclear

This analysis, however, still leaves an important legal question unanswered: What is the *textual* basis in the Constitution for the right to a revocation jury? There are four possible answers to that question: the Sixth Amendment; the Seventh Amendment; Article III, Section 2; and the Due Process Clauses.

The most obvious home for the right to a revocation jury would be the Sixth Amendment right to a "jury" in all "criminal prosecutions."[411] The Supreme Court has held that the Sixth Amendment protects "the historical role of the jury at common law"[412] as "it existed during the years surrounding our Nation's founding."[413] To determine the scope of the right, the Court "consider[s] whether the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.' "[414] Because the common law at the Founding required a jury trial for punishing violations of penalty-structured supervision, the Sixth Amendment would also require a jury for revocation of supervised release.

Justice Alito argued in his *Haymond* dissent that revocation proceedings were not "criminal prosecutions" within the original understanding of

411. U.S. CONST. amend. VI.

412. Oregon v. Ice, 555 U.S. 160, 170 (2009).

413. Apprendi v. New Jersey, 530 U.S. 466, 478 (2000).

414. *Ice*, 555 U.S. at 167–68 (quoting Harris v. United States, 536 U.S. 545, 557 (2002) (plurality opinion)).

the Sixth Amendment.[415] In support, he cited several Founding Era legal authorities that defined "prosecution" as a legal proceeding concluding with "entry of final judgment."[416] He claimed that this definition made it "awkward" to "characterize a . . . revocation proceeding as part of the defendant's 'criminal prosecution' " because revocation proceedings necessarily *followed* entry of the defendant's conviction and sentence.[417]

However, Justice Alito never considered how the original understanding of a "prosecution" would have applied to recognizance forfeitures.[418] As explained previously, courts in the Founding Era acknowledged the "criminal nature" of forfeiture proceedings, expressly describing them as "prosecutions" and "punishment," securing a "final judgment."[419] If recognizance forfeitures were considered "prosecutions," then revocations of penalty-structured supervision would logically fall within the original meaning of the Sixth Amendment.

The next possible basis for the right to a revocation jury would be the Seventh Amendment's requirement of a jury trial in all "[s]uits at common law, where the value in controversy shall exceed twenty dollars."[420] The Supreme Court has interpreted this provision as based on "the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."[421] Because recognizance forfeitures were common-law suits that resulted in a financial penalty in 1791,[422] the Seventh Amendment right to a jury trial would have applied. As the Eighth Circuit Court of Appeals held in 1906, the Seventh Amendment to the Constitution applies to recognizance forfeitures, and, therefore, "defendants [a]re entitled to a trial by jury if any issue of fact [i]s tendered by them."[423] Under the same logic, the Seventh Amendment would also apply

---

415. United States v. Haymond, 139 S. Ct. 2369, 2393 (2019) (Alito, J., dissenting).

416. *Id.*

417. *Id.*; *see also* Kate Stith, Apprendi*'s Two Constitutional Rights*, 99 N.C. L. REV. 1299, 1306 (2021) ("Justice Alito was both careful and convincing in his interpretation of the Sixth Amendment: that it does not speak to supervision revocations at all."). *But see* Underhill & Powell, *supra* note 408, at 315 ("[A] supervised release revocation proceeding has all the 'defining characteristics' of a prosecution within the meaning of the Sixth Amendment." (footnote omitted)).

418. *See* Section II.B.

419. Respublica v. Cobbet, 3 U.S. 467, 469, 474–76, 2 Yeates 352 (Pa. 1798). The same courts also held that initiating forfeiture proceedings did not require presentment to a grand jury, which may complicate their constitutional status. *See* Respublica v. Cobbet, 3 Yeates 93, 99–101 (Pa. 1800),

420. U.S. CONST. amend. VII.

421. Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

422. *See supra* Section II.B.4.

423. Hollister v. United States, 145 F. 773, 780 (8th Cir. 1906).

to financial sanctions over twenty dollars levied via revocation of supervised release.[424]

A third textual justification for the right to a revocation jury would be Article III, Section 2, which requires a jury in the "trial" of all federal "crimes."[425] The Supreme Court has interpreted this requirement "together with the Sixth Amendment,"[426] yet its language is clearly more general, including not just criminal prosecutions but all criminal *trials*. In the *Federalist Papers*, for example, Alexander Hamilton described Article III, Section 2 as requiring a jury "in regard to criminal *causes*," explaining that its coverage extended beyond prosecutions to include "impeachments" and other "criminal proceedings."[427] Although recognizance forfeitures were formally considered civil matters at the Founding,[428] they also were viewed as "trials" for "crimes," which would have placed them within the scope of Article III, Section 2.[429] The sole difference between protecting the right to a revocation jury under Article III, Section 2 and under the Sixth and Seventh Amendments would be that under Article III, Section 2, the right would only apply to federal revocation proceedings, not state cases.

Finally, the right to a revocation jury could be part of the right to due process guaranteed by the Fifth and Fourteenth Amendments. When the Supreme Court applies the Due Process Clause to criminal cases, it adopts a deferential approach, asking whether the challenged practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[430] Effectively, this analysis comes down to two considerations: "historical practice" and "fundamental fairness."[431] In the past, the justices seemed to favor fairness over history, reasoning that proceedings respecting "certain fundamental rights" complied

---

424. *Cf.* Laura I. Appleman, *The Burden of Criminal Justice Debt in Federal Community Supervision*, 34 FED. SENT'G REP. 290, 290–94 (2022) (explaining the inclusion of financial sanctions in lieu of or in addition to community supervision).

425. U.S. CONST. art. III, § 2.

426. George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 806 (1995) (citing Patton v. United States, 281 U.S. 276, 298 (1930)).

427. THE FEDERALIST NO. 83, at 419, 422 (Alexander Hamilton) (Ian Shapiro ed., 2009) (emphasis added); *see also* Apprendi v. New Jersey, 530 U.S. 466, 510 (2000) (Thomas, J., concurring) (defining the original meaning of "crime" as "acts to which the law . . . affixes punishment" (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 80, at 51 (2d ed. 1872)); Betterman v. Montana, 578 U.S. 437, 443 (2016) (defining the original meaning of "trial" as "a discrete episode after which judgment (*i.e.*, sentencing) would follow").

428. Commonwealth v. M'Neill, 36 Mass. (19 Pick.) 127, 138 (1837).

429. U.S. CONST. art. III, § 2.

430. Medina v. California, 505 U.S. 437, 445–46 (1992) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

431. Herrera v. Collins, 506 U.S. 390, 408–12 (1993); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 27–36 (1991) (Scalia, J., concurring); Jerold H. Israel, *Free-Standing*

with due process, "whether sanctioned by age and custom, or newly devised."[432] More recently, however, several justices have argued that the right to due process requires the government to provide litigants with *at least* the same level of protection as they would have received under Founding Era common law, regardless of whether those protections would be considered necessary for fundamental fairness today. In his concurring opinion in *Sessions v. Dimaya*, for example, Justice Gorsuch argued that the Due Process Clauses of the Fifth and Fourteenth Amendments "sought to ensure that the people's rights [we]re *never any less secure* against governmental invasion than they were at common law."[433] Citing Lord Coke, Justice Story, and Justice Scalia, he contended that the right to due process means that "the government generally may not deprive a person of [life, liberty, or property] without affording him the benefit of (at least) those 'customary procedures to which freemen were entitled by the old law of England.' "[434] Under this theory, due process would require that defendants facing revocation of supervised release receive the same level of protection as they would have received under the common law at the Founding, including the right to a jury trial.[435]

CONCLUSION

The closest Founding Era analogue to modern-day community supervision is the recognizance to keep the peace or for good behavior. Legal records from the time the Constitution was ratified show that punishing violations of a recognizance required a jury trial whenever the violations were based on misconduct committed outside the courtroom. This jury requirement disappeared during the nineteenth century only due to the development of probation and parole, which delayed punishment rather than impose an additional penalty. Because supervised release is imposed as a penalty, not a delay, the original understanding of the jury right would apply to revocation of supervised release, even if not to revocation of probation or parole.

Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines, 45 ST. LOUIS U. L.J. 303 (2001).

432. Hurtado v. California, 110 U.S. 516, 536–37 (1884) (quoting Brown v. Bd. of Levee Comm'rs, 50 Miss. 468, 479 (1874)).

433. Sessions v. Dimaya, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring) (emphasis added).

434. *Id.* at 1224–25 (citations omitted) (quoting *Haslip*, 499 U.S. at 28).

435. *Cf.* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1705–06 (2012) (noting that Founding Era courts likely refused to enforce legislation that "abrogated the common law right to [a] jury trial" because "the jury trial [was] an essential feature of the law of the land, protected since Magna Charta").

The law of revocation at the Founding does not just open a window into the original understanding of the jury right, but also rewrites the legal history of community supervision itself. Most scholars of criminal law describe community supervision as a "modern" invention that began with a "major change" in "the middle of nineteenth century."[436] During the 1800s, they claim, governments stopped inflicting corporal punishment on "the body of the offender" and, in the following decades, instead started using community supervision to reform "the behaviour of the criminal."[437] As Michel Foucault famously argued, pre-modern states employed the "spectacle" of torture and execution as "a way of exacting retribution that [wa]s both personal and public."[438] Yet by "the end of the eighteenth and the beginning of the nineteenth century, the gloomy festival of punishment was dying out," replaced by a "modern penality" that employed " 'security measures' . . . not to punish the offence, but to supervise the individual, to neutralize his dangerous state of mind, [and] to alter his criminal tendencies."[439] Over time, "the old gaols and jails[,] a number of which dated back to the Middle Ages and earlier," developed into a "panopticon based on surveillance and normalization."[440]

The history of the recognizance challenges this depiction of community supervision as a modern innovation, revealing the ancient roots of rehabilitation and surveillance in Anglo-American criminal justice. As far back as 1769, Blackstone justified the recognizance with a rehabilitative theory of punishment, describing it as a form of "preventive justice" that was "calculated to prevent future crimes . . . [and] tend to the amendment of the offender himself."[441] Offering a humanitarian argument, which would not have been out of place in the writings of Augustus and Maconochie decades later, he declared "it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort," which "upon every principle of reason, of humanity, and of sound policy" was "preferable in all respects to *punishing* justice; [] the execution of which . . . is always attended with many harsh and disagreeable circumstances."[442]

The recognizance also served as an early tool of social control and normalization. Blackstone described the recognizance as a method of surveillance, dating back to "the Saxon constitution" of the ninth century, "by

436. RAYMOND GARD, REHABILITATION AND PROBATION IN ENGLAND AND WALES, 1876–1962 9–11, 14 (2014).

437. *Id.* at 9–11.

438. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 8, 17–19, 48 (Alan Sheridan trans., 1979).

439. *Id.* at 8, 18.

440. GARD, *supra* note 436, at 14.

441. BLACKSTONE, *supra* note 10, at *251–52.

442. *Id.* at *251.

means of King Alfred's wise institution . . . wherein . . . the whole neighbourhood . . . of freemen were mutually pledges for each other's [sic] good behaviour."[443] Evidence from Elizabethan times makes it "quite clear" that the recognizance was "essentially aimed at strangers and the poor in the town."[444] In 1795, Hening defined those "not of good fame" as including a variety of social outcasts: "[N]ight-walkers; eaves-droppers; such as keep suspicious company or are reported to be pilferers or robbers; such as sleep in the day, and walk in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons . . . ."[445] Long before the modern panopticon, common-law courts used the recognizance to monitor, restrict, and reform socially marginalized populations—the unemployed, the disreputable, and the drug addicted. There is even evidence that the recognizance may have been employed as a means of racial subordination.[446]

For centuries prior to the development of probation and parole, the recognizance served as an early form of community supervision. In addition to exacting retribution against criminal defendants through fines, imprisonment, and corporeal punishments, sentencing judges in the Founding Era also took defendants' recognizances to monitor their behaviors and reform their characters. Community supervision is no mere innovation of the industrial age, but a venerable pillar of the common law, levied for centuries alongside more spectacular punishments. The law of revocation at the Founding preserves lost constitutional rights that deserve modern recognition and renewal.

443. *Id.* at *252.

444. Samaha, *supra* note 18, at 201.

445. HENING, *supra* note 180, at 440; *accord* BLACKSTONE, *supra* note 10, at *256.

446. *See* GOEBEL & NAUGHTON, *supra* note 18, at 495 (describing a 1730 case where the court took recognizance from a woman found to be of "ill name and fame and of very lewd life" and "suspected of having seduced a slave to run away from his master after robbing him").