“Breach of Trust” and U.S. v. Haymond

I. Introduction

United States v. Haymond is the most consequential decision on federal supervised release in two decades. The U.S. Supreme Court struck down as unconstitutional a five-year mandatory minimum penalty for a supervised release violation, ruling that the revocation hearing did not respect the defendant’s jury trial rights. The significance of Haymond lies not only in its Sixth Amendment holding, but in the intensity of the dispute that emerged from its splintered opinions. The case resolved very little about the nature of supervised release, but it opened a debate that will shape federal sentencing for years to come.

The justices in Haymond clashed on whether framing revocation as a sanction for a “breach of trust” eliminates the need for Sixth Amendment protections. Four dissenting justices—in an opinion by Justice Alito—took the position that because a revocation sanction primarily punishes the “breach of trust” caused by the violation, the scale of the penalty imposed does not create Sixth Amendment concerns. Four other justices—in a plurality opinion by Justice Gorsuch—responded that imposing a five-year mandatory minimum at revocation without convening a jury violates the Sixth Amendment, no matter what label gets attached to the cause of the penalty. In a separate opinion, Justice Breyer provided the fifth vote for striking down the five-year mandatory minimum. But the way he did so strongly indicated that he would not otherwise extend jury trial rights to the supervised release context because revocation punishes, first and foremost, the defendant’s “breach of trust,” not the conduct that triggers revocation.

In the end, five justices gave constitutional weight to the notion that a defendant in a revocation proceeding is being punished for a “breach of trust.” In so doing, however, the justices did not discuss the meaning of a “breach of trust,” and instead left the concept entirely abstract. Their opinions did not analyze where the “breach of trust” language had come from, or how it got applied (or not) in the courtroom.

The changing composition of the Supreme Court, including Justice Breyer’s retirement, means that the Sixth Amendment “breach of trust” debate is still very much in play. I therefore explore the origins of the “breach of trust” framework for supervised release and the developments that have since undermined its coherence. I also excavate the record of Mr. Haymond’s own revocation hearing to show that it does not align with Justice Alito’s assertion that the district court imposed a five-year mandatory minimum as a sanction for a “breach of trust.” Finally, I think about how trust operates within the supervised release system and explore the relationship between Sixth Amendment rights and the severity of the authorized penalties.

II. “Breach of Trust” Approach

A. 1990 Origins and Assumptions

The “breach of trust” framework is not rooted in a statute. It comes from the policy statements on revocation in Chapter 7 of the Federal Sentencing Guidelines (“guidelines”). These policy statements, which are purely advisory, counsel courts in revocation proceedings to sanction a violation of supervised release primarily as a “breach of trust.” A person has breached trust by failing to comply with the conditions of their supervised release. The betrayal of trust justifies the sanction at the revocation hearing, separate and apart from the harm caused by the violative conduct.

The U.S. Sentencing Commission (“Commission”) adopted the “breach of trust” theory over an approach that would have instead punished the substantive conduct that led to revocation. It did so in 1990 after soliciting input on two competing visions of revocation—the “breach of trust” approach versus the “substantive conduct” approach—from judges, probation officers, and other practitioners. It had laid out both options in the Federal Register and asked for feedback on their feasibility and appropriateness.

Chapter 7 describes the Commission’s reasons for rejecting the “substantive conduct” approach in 1990. First, it would have been impractical to require judges at revocation to engage in the kind of detailed fact-finding necessary to apply the guidelines to the substantive conduct of a violation. Many revocations are based on allegations that the supervisee violated state or local laws, making them challenging for federal courts to adjudicate. Second, adopting the “substantive conduct” theory would have meant that judges in revocation hearings were duplicating the role of the courts that had jurisdiction over this new criminal conduct: there now would be two sets of courts punishing the same conduct. Third, the relatively low penalties that applied to supervised release revocation at the time would not have adequately punished the substantive conduct underlying the most serious violations.

Fiona Doherty* 
Clinical Professor of Law, Yale Law School
Director of the Jerome N. Frank Legal Services Organization

*Fiona Doherty is a Clinical Professor of Law at Yale Law School and Director of the Jerome N. Frank Legal Services Organization located at 261 College Street, New Haven, CT 06520. She also maintains a private practice in New York City and is a member of the District of Columbia Bar. Fiona provides legal services for criminal defendants, and represents indigent clients throughout the United States. She is a member of the New York and New Haven Bar Associations, the American Bar Association, the National Association of Criminal Defense Lawyers, and the New York State Bar Association. She is a co-founder of the Vera Institute of Justice’s Criminal Justice Policy Program, where she worked until the publication of this article. Fiona was previously a member of the American Bar Foundation and is a former director of the American Bar Association’s Commission on Services to indigent defendants. She serves as a member of the ACIR’s National Advisory Board and the Advisory Board of the National Legal Aid and Defender Association. She was a visiting professor of law at the University of Chicago Law School in 2010 and served as the University of California Los Angeles School of Law’s Visiting Professor of Law in 2011, 2013, and 2014. She was a full-time faculty member at the University of California Hastings College of the Law in 2011, 2012, and 2013. She was an associate professor of law at Columbia Law School in 2007-2008, and a visiting professor at the University of California Berkeley School of Law in 2009. She received her J.D. from Yale Law School, and her B.A. from the University of Pennsylvania where she was a member of the National Honor Society. She clerked for Judge Harold H. Greene of the U.S. Court of Appeals for the District of Columbia, and served as law clerk to Justice David Souter and Justice Stephen G. Breyer on the U.S. Supreme Court. Fiona is a member of the American Bar Foundation and the American Society of Legal Scholars and is a recipient of the Poynter Prize for Criminal Justice Reporting.
A letter from probation officers in the District of Kansas, dated March 29, 1990, gives more texture to the kinds of input the Commission received in opting for the “breach of trust” approach. The officers explained that the “substantive conduct” approach would have required them to draft entirely new pre-sentence reports for revocation hearings and placed them in the “ untenable” position of making judgments about state and local crimes under the federal guidelines. Although the officers assumed that the court at revocation would be bound by the statutory maximum of the person’s offense of conviction (the crime for which the person was on supervised release), they worried that this restriction was not sufficiently clear.

In 1994, Sharon O. Henegan, the Director of Training and Technical Assistance at the Commission, provided an insider’s account of the Commission’s decision to adopt the “breach of trust” approach. She explained that the Commission was concerned that the “substantive conduct” approach would mean that federal judges would be adjudicating and punishing new crimes under a preponderance of the evidence standard, when defendants were otherwise entitled to a reasonable doubt standard. She also emphasized that the Sentencing Reform Act had moved to a determinate sentencing system—that is, the federal system had abandoned the long-standing practice of allowing early release on parole. In light of this change, a sentence at revocation was no longer part of the prison term for the original crime; “sentencing reform had rendered this approach obsolete.” Because the judge was providing “an appropriate sanction” for the original crime at the initial sentencing hearing, “addressing that again at revocation would be unnecessary.” Instead, the revocation sentence would sanction the defendant’s breach of trust for failing to abide by the conditions of supervision.

According to the advisory policy statements of Chapter 7, applying the “breach of trust” approach would not mean that judges had to ignore the nature of the substantive conduct altogether. The Commission made clear that judges could consider the substantive conduct of the violation in a limited way—to measure the extent of the breach of trust.

B. Reshaped Understandings and Rising Punishments

Subsequent developments shifted the terrain. Perhaps most importantly, the U.S. Supreme Court decided that the revocation of supervised release must in fact punish substantive conduct, but not in the manner the Commission had contemplated. In a 2000 case, Johnson v. United States, the Court held that revocation penalties must be attributed back to the defendant’s original offense of conviction. The Court found that any prison sentence for a supervised release violation must be counted as part of the penalty for the initial offense—and cannot be “punishment for the violation of the conditions of supervised release”; otherwise, the absence of jury trial rights at revocation would create “serious constitutional questions.” Thus, revocation had to punish the substantive conduct of the past crime—and could not punish the substantive conduct of the new crime (or any other new violative conduct).

The decision in Johnson strained the logic of the Commission’s “breach of trust” approach. Under the guidelines, a court could consider the substantive conduct of a violation to judge the scale of the breach of trust occasioned by the defendant’s failure to follow its conditions. But under Johnson, a court could not “punish” a defendant for failing to follow its conditions in sanctioning that defendant for a breach of trust. Instead, the sanction for the breach of trust had to raise the punishment for the defendant’s original crime. It had to do so even though a key idea of the sentencing reform movement, as Ms. Henegan noted in her 1994 article, was that the substantive conduct of that crime would have received “appropriate” sanction already through the application of the guidelines at the initial sentencing hearing.

As the “breach of trust” analysis grew less coherent, the available penalties grew more extreme. Important changes included the following:

- **Supervisees could be reimprisoned for successive breaches of trust.** A 1994 statute allowed judges to reimpose a term of supervised release after a revocation, making it possible for people to be revoked cyclically over years of supervision.

- **The caps on imprisonment for breaches of trust increased.** A 2003 statute allowed the aggregate caps that had once constrained the total prison time available for repeated revocations to instead apply to each new instance of revocation. This amendment let courts impose the old aggregate cap, of between one and five years, each time they revoked a person’s supervised release.

- **Judges could sentence defendants in drug trafficking and sex crime cases to lifetime supervised release.** And even if the court did not impose lifetime supervision at the original sentencing hearing, it could do so at a subsequent revocation hearing. These types of cases make up almost half of non-immigration-related federal convictions.

A crucial debate in Haymond concerned the boundaries of this enhanced penalty structure and, in particular, the role of statutory maximums in constraining the available sanctions. Mr. Haymond’s crime of conviction had carried a statutory maximum of ten years in prison and a statutory maximum of lifetime supervised release. Justice Gorsuch took the view that Mr. Haymond could receive no more than an aggregate of ten years in prison for this crime under Johnson—his initial prison term for the crime of conviction plus any prison term(s) imposed at revocation. But Justice Alito claimed that Mr. Haymond could receive an aggregate sentence of life in prison for this crime—his initial prison term for the crime of conviction plus any prison term(s) imposed at revocation. The resolution of this question, which was debated in dicta in Haymond, will have profound consequences for the federal sentencing system.
III. Mr. Haymond’s Own Revocation Process

A. The Revocation Hearing

The rising penalties—and the debate about statutory maximums in Haymond—make the reliability of fact-finding at revocation all the more important.28 Mr. Haymond’s own revocation hearing, however, exemplifies the distorted incentives that the supervised release system can create.

Mr. Haymond’s term of supervised release arose from a 2010 conviction for possession of child pornography, a charge that the U.S. Attorney’s Office (USAO) proved to a jury beyond a reasonable doubt.29 At trial, the USAO presented evidence that the then eighteen-year-old Mr. Haymond had accessed images of child pornography through LimeWire, a peer-to-peer file sharing program. An FBI agent testified that Mr. Haymond had confessed to downloading child pornography from LimeWire.10 After hearing the evidence, a jury convicted him of possessing seven images of child pornography. The district court sentenced him to thirty-eight months in prison and ten years of supervised release.11

In 2015, while he was on supervised release, the USAO again accused Mr. Haymond of possessing child pornography, but this time its evidence was much weaker. The probation department discovered fifty-nine images of child pornography on Mr. Haymond’s phone during a surprise search. Mr. Haymond had passed multiple polygraph tests in which he denied accessing or viewing child pornography, and the tests indicated no evidence of deception.32 A bigger issue was that all of the images were found in the cache of Mr. Haymond’s phone. In a 2011 decision, U.S. v. Dobbs, the U.S. Court of Appeals for the Tenth Circuit had reversed a jury verdict because the images of child pornography were in the cache (the temporary internet files folder) of a computer.33 In reversing the conviction, the Tenth Circuit explained that a “user does not necessarily have to see an image for it to be captured by the computer’s automatic-caching function.”34 Under Dobbs, the existence of images in a cache did not establish knowing possession.

In the face of these problems, the USAO elected not to charge Mr. Haymond under any criminal statute and instead chose to proceed exclusively through the supervised release revocation process. The USAO decided, for example, not to charge Mr. Haymond under a statute for repeat child-pornography offenders that included a ten-year mandatory minimum.35 Instead, it charged him under 18 U.S.C. § 3583(k) of the supervised release statute: a provision triggering a five-year mandatory minimum—and authorizing a sentence of up to life in prison—if the district court (acting without a jury) determined by a preponderance of the evidence that Mr. Haymond had violated his supervised release by knowingly possessing any of these images.36

Despite the mandatory minimum, the USAO leaned into the lower burden of proof at the revocation hearing. It decided not to call a forensic expert to testify about the nature of the cache or to educate the judge about whether there was any evidence that Mr. Haymond had seen (or otherwise known about) any of the fifty-nine images. It also declined to file a pre-hearing brief that analyzed the relevant legal cases, prompting the judge to erupt in frustration at the Assistant U.S. Attorneys who were handling the revocation hearing:

So I can look on your brief and find case law that backs up your argument? There’s not a damn case in your brief. I gave you the opportunity to provide the court with some stuff. I’m not going to do your research for you. Just for your edification, as you go forward in your career, when a court gives you an opportunity to file a brief and to provide some research, take it.36

Although the court did its best to shame the USAO into taking the revocation process seriously, the USAO also failed to file a post-hearing brief to aid the court in evaluating the testimony at the hearing. The defense had called a forensic expert, who explained, consistent with Dobbs, that a phone can automatically capture images in the cache without the user’s knowledge. The expert also testified that there was no metadata on Mr. Haymond’s phone for any of the fifty-nine images that could shed light on when or how these images got on the phone, or whether they had been viewed by Mr. Haymond.37 After the defense expert testified, the district court asked the USAO to submit a post-hearing brief “to assist the Court in applying Tenth Circuit law on ‘knowing possession’” to the fifty-nine images the prosecution submitted as evidence.38 The USAO declined to do so.39

In the end, the trial court concluded that it was more likely than not that Mr. Haymond had knowingly possessed thirteen of the images in the cache, while emphasizing that the issues were complex and that it had struggled to parse the forensic testimony in the case. In finding evidence of knowing possession—with respect to thirteen of the fifty-nine images—the court stressed that the intricacies of the cache were difficult for “a judge who practiced law using Dictaphones and copy machines and whose children have to help him with a cell phone and the IT department with my computer…. The court doesn’t, this court at least, doesn’t know much about a cache or pathways or thumbnails and we did the best that we could.”40 Although it upheld the violation, the court found it “troubling that the United States failed to call its own expert, which made this case much more difficult for the court, and demonstrates to the court either some amount of laziness or lack of concern for educating the court on matters far outside the court’s normal base of knowledge.”41 The court emphasized that the evidence presented by the USAO could not have prevailed under the “beyond a reasonable doubt” standard.42

At the sentencing hearing for the revocation, the district court expressed deep unease with the scale of the required punishment. The judge denounced the five-year mandatory prison term as “repugnant” given the dilution of due process protections.43 He indicated that his sentencing decisions were ordinarily meant to promote respect for the law, but in this case, “I’m not sure that’s even true.”44 The judge
also protested the required five-year period of supervised release, noting, “I wouldn’t give as much time in supervised release were I not forced to.” The USAO did not respond. When invited to address the court, its attorney said simply: “Nothing, Your Honor, other than to ask for a guideline sentence. Thank you.”

B. The Appeal

On appeal, the Tenth Circuit determined that the evidence of knowing possession was much weaker than the district court had supposed. It held that the lower court had “abused its discretion by relying on a clearly erroneous finding of fact that Haymond knowingly took some volitional act related to [the thirteen images] that resulted in the images being on his phone in a manner consistent with knowing possession.” The defense expert had tried to explain that this was not the case by laying out five different ways that the images could have arrived on the phone without Mr. Haymond’s “knowledge or volitional acts.”

The Tenth Circuit found that the district court had misunderstood the expert’s testimony, but upheld the finding of violation; it did so because Mr. Haymond had near exclusive use of the phone, the thirteen images were similar in nature to the ones involved in his original conviction (all were images of boys), and the images “were accessible somewhere” on the phone at some point (even if there was no evidence demonstrating that Mr. Haymond had known about or accessed the images). In upholding the violation, the Tenth Circuit stressed that it was a close case even under a preponderance standard.

This thin showing of evidence nevertheless triggered a sentence of five years to life in prison until the U.S. Supreme Court held that the five-year mandatory minimum provision in § 3583(k) was unconstitutional. The problem was not that Mr. Haymond had received a five-year sentence; the problem was that § 3583(k) had raised the mandatory minimum to five years, based on facts that were not found by a jury beyond a reasonable doubt. In a fractured decision, the Court concluded that the application of this mandatory minimum violated Mr. Haymond’s rights under the Fifth and Sixth Amendments. In so doing, it upheld a decision by the Tenth Circuit, which also had found the mandatory minimum unconstitutional.

At oral argument before the Supreme Court, the government’s position on the severity of the penalty crystallized the stakes of the Sixth Amendment debate. In response to a question, the government told the justices that Congress could authorize even the death penalty for a supervised released violation without a jury and by a preponderance of the evidence. Indeed, the government maintained that even a statute requiring the death penalty for a violation would not implicate the Sixth Amendment, but instead should be analyzed only under the Eighth Amendment. Justice Gorsuch used this point as an example of the “absurd” results that would flow from the government’s view of the Sixth Amendment. He emphasized that “if the government were right,” a jury’s conviction on one crime would “permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment.”

Importantly, Justice Alito agreed with the government that the gravity of a penalty for a supervised release violation did not raise Sixth Amendment concerns. He did so even while arguing that the district court actually could have sentenced Mr. Haymond to life in prison for the violation. In his view, life in prison for a violation might be “very harsh,” but it was authorized by the jury’s verdict in the underlying conviction. “If the Constitution restricts the length of additional imprisonment that may be imposed based on a violation of supervised release, the relevant provision is the Eighth Amendment, not the Sixth.”

It was at this critical juncture that Justice Alito relied on the Commission’s advisory “breach of trust” language to defend the view that Mr. Haymond could not invoke the protections of the Sixth Amendment. He explained that jury rights did not apply at revocation (no matter how severe the sanction) because the penalty was directed at Mr. Haymond’s breach of trust, not at his new criminal conduct. Mr. Haymond could not be protected as an “accused” within the meaning of the Sixth Amendment, because he was charged with violating the conditions of his supervised release, not with a new crime. Citing the guidelines, Justice Alito emphasized: “The principal reason for assigning a penalty to a supervised release violation is not that the violative act is a crime (indeed, under other provisions of § 3583(h), the act need not even be criminal); rather it is that the violative act is a breach of trust.”

Justice Breyer in a separate opinion also cited the Commission’s “breach of trust” approach to justify the lack of Sixth Amendment rights at revocation. He narrowly found that the particular features of § 3583(k) (including the five-year mandatory minimum) made the penalty under this section less like ordinary revocation and more like punishment for a new crime. But he did not address the debate among the other justices about which statutory maximum constrained the scope of the authorized penalty for violations. His opinion did not take a position on whether the district court could stretch Mr. Haymond’s original thirty-eight-month prison term to ten years without a jury—or whether the court could stretch it to life.

Given the balance of votes in Haymond, the invocation of the “breach of trust” language to ward off application of the Sixth Amendment is likely to figure prominently in future decisions about supervised release.

IV. The Meaning of a “Breach of Trust”

Haymond elevated the importance of the Commission’s “breach of trust” framework, but there is little clarity about what it means in practice. Under Chapter 7, a defendant presumably breaches the district court’s trust by failing to abide by the “court-ordered” conditions of supervision. Chapter 7, in other words, treats the judge as the victim who
assesses the impact of the defendant’s breach in the circumstances. But Haymond itself offered an example of a district court railing against the externally imposed penalty for a “breach of trust,” because that penalty overstated the extent of the harm. Changes in the law of supervised release since 1990 have complicated the “breach of trust” analysis, both by raising the stakes and by creating a maze of competing mandates about what is being punished at revocation. This section addresses some of the challenges of the “breach of trust” framework.

A. Who Decides When Trust Is Breached?

The district court made clear that Mr. Haymond had not breached its trust in a way that justified a five-year prison term. The court had initially imposed the mandatory minimum that it considered repugnant. In 2018, shortly after the Tenth Circuit’s decision, the district court got the chance to resentence Mr. Haymond without the constraints of the mandatory minimum. By this time, Mr. Haymond had been in prison for more than two years—the maximum that the court had indicated might be appropriate. In 2018, the court resentenced Mr. Haymond to time served and reduced his supervised release to two years.

Although the Supreme Court resolved the “breach of trust” quandary in Haymond, a separate provision of the statute creates similar problems. Section 3583(g) requires judges to revoke supervised release for a number of extremely common violations: possessing a controlled substance, refusing to comply with drug testing, or testing positive for drugs more than three times in a year. If the court finds by a preponderance of the evidence that a defendant has committed any of these violations, it must revoke supervised release and impose a prison term. It must do so even if it does not consider the defendant’s conduct to have breached its trust under the circumstances—or even if it decides there has been a breach of trust, but not one that justifies the consequences mandated by the statute. In such circumstances, the conceptual framing does not match what happens in practice.

B. Must Actual “Trust” Be Broken?

Several years after the Commission adopted its “breach of trust” approach, Congress passed an amendment permitting courts to revoke supervised release multiple times for the same defendant in the same case. The fact that judges can now revoke and reinstate a defendant’s supervised release makes it less likely that each new decision to impose supervised release is an expression of trust for that defendant. In many cases of repeat revocations, courts express scorn for the defendant, rather than trust. In a Tenth Circuit case, U.S. v. Vigil, for example, the defendant was revoked repeatedly over the course of about six years. At first, the court sentenced Ms. Vigil to three years of probation after she pleaded guilty to making a false statement. At her initial revocation hearing, she received six days in prison and two years of supervised release, with the first six months of supervised release to be spent at a halfway house. The court warned her at this revocation hearing that it would send her to prison “with no time off” “if you so much as violate even a curfew rule, you so much as tell one lie” to a probation officer or a halfway house employee. At the second revocation hearing, the court sentenced her to two years of imprisonment and another year of supervised release after finding that she had used a controlled substance, failed to follow the instructions of her probation officer, and failed to follow the rules of the halfway house. The third time she was brought before the court—for missing GED classes and for failing to complete community service hours—the court ordered her back to the halfway house for six months.

Several months later, when her supervised release was revoked yet again, it was clear that the court had long ago lost all trust for Ms. Vigil. At the revocation hearing, the court determined that she had failed to comply with the halfway house rules and had failed to participate in treatment. The court criticized her for lying throughout her supervised release term: “Your case… is astonishing, in that it starts on such a minor basis, but there hasn’t been a single change in you. You have lied through your first conviction and you have continued to lie on every single event that’s in this violation report.” The court then sentenced her to a year in prison for the new violations. The Tenth Circuit upheld this sentence without any analysis of the tenor of the trust that was now being breached—or the fact that this was now the fourth round of sanctions for nearly identical conduct.

Such cases highlight doubts about whether betrayed “trust” is truly the engine that drives the revocation of supervised release. The idea of supervision as rooted in trust is a legacy of parole, the system that supervised release replaced in 1987. As I have explored elsewhere, parole was invented in the nineteenth century as a test of new programs aimed at generating meaningful (internally driven) rehabilitation inside prisons. Unlike supervised release, those on parole were offered the chance to participate in these programs to earn their own early release from prison. The decision to release a prisoner early on parole demonstrated a prison’s trust—trust both in the effectiveness of its programming and in the sincerity of the individual’s embrace of that programming. The supervised release system does not hinge on trust in the same way; judges do not have the expertise, inside knowledge, or incentive structure to assess (and take responsibility for) the quality of rehabilitative programming inside or outside prisons. Imposing a term of supervised release is not a signal that a court has faith in the rehabilitative environment a defendant will encounter in prison. To the contrary, the sentencing statute makes clear that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”

C. “Breach of Trust” Does Not Hold as a Unifying Framework

Although the “breach of trust” approach figured prominently in Haymond, the case did not address the conflicting
instructions provided to judges about how to sanction a breach of trust. Johnson tells courts that the sanction for a breach of trust cannot be imposed to punish the substantive conduct that breached the court’s trust—and instead must be imposed to retroactively extend punishment for the defendant’s underlying crime of conviction. The guidelines tell courts to consider the nature of the new conduct in gauging the extent of the breach of trust—in order to sanction the defendant “for failing to abide by the court-ordered conditions.” The governing statute, meanwhile, instructs courts to consider the purpose of “punishing the offense” and “promoting respect for the law” only at the initial sentencing hearing, and not at the revocation hearing. The omission of punishment from the statutory purposes of revocation does not square easily with the holding in Johnson.

These clashing mandates sow confusion about how courts should conceptualize the sanction for a “breach of trust.” The Ninth Circuit has reversed judges who take the nature of the conduct underlying a violation of supervised release too much into account, while acknowledging that “the difference between sanctioning a supervised release violator for breach of trust and punishing him in order to promote respect for law is subtle indeed.” The Second Circuit has been more permissive in permitting district courts to take the seriousness of the new conduct into account when imposing a sanction at revocation.

The haziness created by these conflicting directives is compounded by the adjudicative concerns that were raised by the district court in Haymond. When a person is accused of a new crime through a revocation proceeding, how scrupulously should the evidence of that crime be put to the test before it can justify a hefty revocation sanction? The story of the hearing in Haymond illustrates the sloppiness that the revocation system can invite.

Haymond also reveals that increasing the penalties for revocation does not necessarily inspire a more painstaking approach. The USAO knew that it had proof problems with respect to the cache, but it skirted these problems in a revocation proceeding. The idea that reduced rights can be balanced by lesser sanctions unravels as the penalties increase. In Haymond, the government argued that a statute that mandated the death penalty as a revocation sanction would not implicate the Sixth Amendment. However, its own record at the revocation hearing in Haymond demonstrates that the disincentives created by the revocation system need to play a large role in grounding the nature of the penalties that can be imposed for a breach of trust.

V. Conclusion

In this Article, I have explored the origins and evolution of the “breach of trust” framing that shapes the Sixth Amendment analysis in Haymond, showing how this framing, a creation of advisory policy statements, lost coherence under Johnson and under the rising tide of the authorized penalties. I have also drawn on the record of Mr. Haymond’s own revocation hearing to show that the district court did not impose the five-year mandatory minimum as a sanction for a breach of its trust. The record reveals that the district court was preoccupied by a different question of trust at the hearing: its own lack of trust in the integrity and fairness of the process.

Notes

2. See, e.g., U.S. v. Hofierka, 83 F.3d 357, 361 (8th Cir. 1995) (under § 3553(a) and (b), courts are required to follow guidelines—Chapter 7 contains policy statements, which must only be considered); U.S. v. Hieberka, 83 F.3d 357, 361 (11th Cir. 1996) (judges have to consider policy statements but do not have to follow them).
3. USSG § 7A3(b).
6. USSG § 7A3(b).
9. USSG § 7A3(b).
12. USSG § 7A3(b).
15. Haymond, 139 S.Ct. at 2385–86 (Breyer, J., concuring in judgment).
17. USSG § 7A3(b) (2018).

PROTECT Act of 2003, Pub. L. No. 108–21, 117 Stat. 650. See, e.g., United States v. Jaimes-Jurado, 694 Fed. Appx. 312, 313 (5th Cir. 2017) (upholding district court’s decision to impose lifetime supervised release at a revocation hearing for a defendant who was on supervised release for a drug trafficking crime; the defendant had previously received three years of supervised release for this crime, but the court extended the supervision period to life in “response to his violations of the terms of his supervised release”).


Haymond, 139 S.Ct. at 2378, 2381–82.

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


The defense had disputed the agent’s testimony about these statements and the claim that Mr. Haymond had downloaded the images from LimeWire. See Appellant’s Petition for Rehearing, United States v. Haymond, 10-5079 (10th Cir. 2013) (noting that the guidelines instruct judges to punish the “defendant’s breach of the court’s trust” at revocation).

Haymond, 139 S.Ct. at 2375 (noting that the Tenth Circuit had vacated Mr. Haymond’s revocation sentence and remanded the case to the district court for resentencing).

Id.


18 U.S.C. § 3583(g).

See supra note 22.


696 F.3d 997 (10th Cir. 2012).

Id. at 999–1000.

Id. at 1001.

Doherty, supra note 21, at 971–76.

Id.

Unlike parole, moreover, the supervised release term is imposed at the time of sentencing, before judges, regardless of expertise, could evaluate whether defendants have rehabilitated themselves.


USSG § 7A3(b) (“the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision”).

18 U.S.C. §§ 3553(a)(2) & 3538(e).

U.S. v. Miqbel, 444 F.3d 1173 (9th Cir. 2006); United States v. Simtob, 485 F.3d 1058 (9th Cir. 2007).

Miqbel, 444 F.3d at 1182.
The government took the position with the Supreme Court that it should be allowed to cure the constitutional problem by convening a jury for Mr. Haymond’s revocation hearing, but as soon as the case was remanded to the Tenth Circuit, the government indicated that “even if the court were to adopt the government’s remedial argument, [it] would not seek a jury trial in this case.” United States v. Haymond, 935 F.3d 1059, 1064 (10th Cir. 2019).

Henegan, supra note 15, at 199.