

Punishments for violating supervised release may violate constitutional rights

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People who violate their supervised release—a period of community supervision after release from prison—by committing new crimes are punished not only for their crimes, but also for violating their

supervision. In a new paper to be published in the *Virginia Law Review*, Jacob Schuman, assistant professor of law, Penn State, conducted the first comprehensive examination of how revocation of supervised release for new criminal conduct contributes to mass incarceration—a term referring to the high rates of incarceration in the United States. He also investigates how these punishments are used as a tool of immigration enforcement.

"Every year, approximately 50,000 federal prisoners finish their [prison sentences](#) and begin serving terms of supervised release, with the average term of post-release supervision lasting 47 months," said Schuman.

"Approximately one-third of these defendants are eventually found in violation of their supervised release and sent back to prison—about half the time for non-criminal conduct, like missing a meeting or skipping curfew (technical violations), and the other half for new crimes, which I call 'criminal violations.'"

What's unique about criminal violations, Schuman explained, is that they are also punishable through criminal prosecution. By revoking supervised release for criminal violations in addition to prosecuting them, the government can add years to people's sentences, sometimes even doubling them.

For example, Schuman, who was a public defender in Philadelphia prior to joining the faculty at Penn State, described a case in which he represented a woman who was addicted to drugs and was selling them to support her habit. The woman was sentenced to four years in prison, along with four years of supervised release.

"During her supervised release, she was again caught selling drugs," said Schuman, "so she received a new sentence of four years for selling the drugs, along with another four years in prison for violating her supervised release, for a total of eight years in state and federal prisons.

In other words, her sentence was effectively doubled."

In his research, Schuman examined (1) the extent to which criminal violations of supervised release contribute to incarceration, (2) the ways that revocations of supervised release may be used as an additional justification for punishing criminal conduct and as an easier alternative to criminal prosecution and (3) the use of supervised release as a tool of immigration enforcement.

According to Schuman, advocates for criminal justice reform typically focus on technical violations because they involve less serious conduct. However, he said, focusing only on technical violations misses a major part of the story. Criminal violations, his research revealed, contribute the majority of prison time imposed through revocation of supervised release. Despite the violations being more aggravated, he argued, the punishment still warrants examination for constitutionality and fairness.

To determine the amount of punishment resulting from criminal violations, Schuman examined data from the U.S. Sentencing Commission's first report on supervised release violations, published in July 2020. The report gathered data from more than 100,000 revocation hearings in federal district courts between 2013 and 2017. By analyzing these data, Schuman found that criminal violations accounted for two-thirds of the total prison time imposed.

"This equates to about 8,200 years of imprisonment imposed by federal judges annually through revocations of supervised release for criminal violations, on top of the many years of imprisonment imposed through prosecutions for the crimes themselves," said Schuman. "In my paper, I argue that these revocations inflict unfair double punishment and erode constitutional rights."

Schuman noted that the government may use revocation of supervised

release as an easier alternative to criminal prosecution. For example, Schuman described a case in which a man on supervised release was prosecuted for assault and won at trial with a "not guilty" verdict. Nevertheless, the court still revoked the man's supervised release as a way to send him back to prison. "The fact that a jury is required to try a [criminal case](#) but not to revoke supervised release raises serious questions about the constitutionality of the supervised-release system."

Indeed, Schuman referenced a 2019 decision by the Supreme Court, *United States v. Haymond*, which struck down a five-year mandatory minimum sentence for sex offenders who violated their supervised release by committing a new sex crime. In that case, the Supreme Court concluded that the minimum sentence was unconstitutional because it "more closely resemble[d] the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution."

Schuman said one area where revocation of community supervision is often used as an alternative to prosecution is in immigration enforcement. He explained that just like U.S. citizen criminal defendants, non-citizen defendants can also be sentenced to a term of supervised release to follow imprisonment. Yet under U.S. immigration law, these defendants are also very likely to be deported from the United States after they are released from [prison](#). The reason for sentencing them to supervised release, according to the courts, is that if they attempt to return the United States, they can be punished for violating their supervised release.

"My analysis of the U.S. Sentencing Commission's database revealed that revocations of illegal reentry accounts for up to one-third of all revocations along the U.S.-Mexico border and one-third of revocations for criminal violations nationally, making it among the most commonly punished criminal violations of supervised release. This suggests that

supervised release is being used not only as a program of surveillance, but also as a tool of immigration enforcement."

Schuman said the original purpose of the supervised release system was to help individuals reintegrate into society as constructive individuals, but his findings suggest that the system is instead often used as a tool for punishing criminal conduct. He concluded, "I propose that the Sentencing Commission stop recommending consecutive sentences for criminal violations, and that the Department of Justice should instruct federal prosecutors not to use revocation as an alternative to [criminal prosecution](#) except to prevent an imminent public safety threat."

More information: Paper: papers.ssrn.com/sol3/papers.cfm?abstract_id=4034991

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