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REVOKING SUPERVISED RELEASE IN THE AGE OF LEGAL CANNABIS

ZACHARY J. WEINER[†]

INTRODUCTION

Supervised release—part of the original sentence following a guilty verdict[1]—is a system by which federal probation officers monitor prisoners released from federal prison.[2] In imposing supervised release, sentencing judges set conditions that each supervisee must comply with, or risk reincarceration at the discretion of the sentencing judge.[3] Certain conditions of supervised release are prescribed by statute and others are crafted by judges.[4]

If a defendant violates the terms of supervised release by possessing cannabis products, the statutory regime provides the sentencing judge with two options: revoke the defendant's supervised release and reincarcerate her or, alternatively, release the defendant from the supervised release program altogether.[5] While district judges are not often confronted with cannabis-related revocations, as state and federal cannabis laws have diverged, judges have increasingly faced serious questions of penological philosophy when asked to punish those engaged in cannabis use sanctioned by state law but proscribed by federal law.[6] This Note highlights the sources of those burgeoning areas of conflict and suggest numerous ways that these conflicts might be resolved.

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[1] 18 U.S.C. § 3583(a) (2018).

[2] *See generally id.* § 3583.

[3] *Id.* § 3583(d), (e).

[4] *Id.* § 3583(d). This provision requires that judges issue certain conditions as part of all supervised release sentences, including nonpossession of any controlled substance, and also allows judges to craft their own additional conditions. *Id.*

[5] *Id.* § 3583(e)(1), (g)(1).

[6] *See, e.g.*, United States v. Trotter, 321 F. Supp. 3d 337, 340–41 (E.D.N.Y. 2018).

A recent case in the Eastern District of New York is instructive. On July 13, 2018, Senior District Judge Jack Weinstein changed Tyran Trotter's life forever.[7] Trotter appeared before Judge Weinstein for a violation of his supervised release for the use of recreational marijuana.[8]

As Judge Weinstein illustrated, Trotter was a troubled teen born into difficult circumstances:

> He never knew his father. His mother struggles with drug addiction. His brother was apparently murdered. At fourteen he was placed in foster care. By sixteen he had half-a-dozen arrests on his record. He was convicted of a federal drug distribution charge and sentenced to two years imprisonment before he could legally drink alcohol. Now twenty-two years old, Trotter is on federal supervised release trying to lead a productive life, with a chronic problem holding him back: marijuana addiction.[9]

Judge Weinstein went on to describe how Trotter complied with the terms of his supervised release, aside from his marijuana use.[10] Instead of revoking Trotter's supervised release in accordance with 18 U.S.C. § 3583(g), Judge Weinstein used his discretion to terminate Trotter's supervised release altogether, allowing Trotter to reintegrate into society on his own, but without any of the helpful guidance and supervision that supervised release provides.[11]

The wooden rules that govern how federal judges must deal with those who violate their terms of supervised release leave judges, like Judge Weinstein, with but two choices when faced with a violation resulting from drug use: (1) send the violator to prison and prescribe a further term of supervised release;[12] or (2) terminate the violator's supervised release completely and let her go free without any further monitoring.[13] In a world where cannabis products are now legal in some form in thirty-three

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[7] *Id.* at 341.

[8] *Id.* at 342.

[9] *Id.* at 341.

[10] *Id.*

[11] *Id.* The court explained that continuing supervision, a decision that would require reincarceration, would not serve the rehabilitative goals of supervised release. *Id.*

[12] 18 U.S.C. § 3583(g)(1) (2018) (requiring revocation of supervised release on a finding of drug possession).

[13] *Id.* § 3583(e)(1) (permitting the court to "terminate a term of supervised release" after considering certain factors).

states,[14] there remains no procedural mechanism that allows judges to keep violators under supervision and at the same time not send them back to prison for cannabis use.[15] This is true regardless of whether the offense arises from medicinal or recreational use, or whether the use is legal or illegal in the particular jurisdiction in question.[16]

The inflexibility of the supervised release statute is a vestige of the Controlled Substances Act ("CSA"), which was passed in 1970, and is still used today to categorize the severity of drug use by defendants on supervised release.[17] Under the CSA, marijuana remains in the most severe category of illegal drugs—Schedule 1—and a judge who finds that a defendant has used marijuana must revoke that defendant's supervised release and prescribe a further prison term.[18] This is true whether the drug was prescribed by a physician and purchased at a pharmacy, or whether it was bought on the street for purely recreational use.[19] As a result, many sentences for non-drug-related crimes are artificially extended due to drug-related violations, even when cannabis is being used for legitimate therapeutic purposes.[20] While Trotter's case is unrelated to the therapeutic use of marijuana, Judge Weinstein's characterization of supervised release and its interaction with marijuana law is nonetheless pertinent: "[f]or some, supervised release can be a trap where they bounce between supervision and prison."[21] This Note examines the structure of supervised release and how it interplays with legal cannabis use.

In Part I, this Note discusses the history and beginnings, as well as the statutory framework, of the supervised release regime. Part II deals with the changing landscape of marijuana law at the state level and the changing public view of marijuana in general. Part III discusses how conflict between the supervised release statutes and state law raises a number of serious constitutional and prudential problems. Lastly, Part IV suggests

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[14] Jiachuan Wu & Daniella Silva, *Map: See the States Where Marijuana Is Legal*, NBC NEWS (Nov. 20, 2018, 11:04 AM), https://www.nbcnews.com/news/us-news/map-see-if-marijuana-legal-your-state-n938426 [https://perma.cc/CR7Y-XTKD].

[15] 18 U.S.C. § 3583(e)(1), (g)(1).

[16] *See* United States v. Hicks, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010).

[17] *See id.* at 832–33 (citing Gonzales v. Raich, 545 U.S. 1, 27 (2005)).

[18] 18 U.S.C. § 3583(g)(1); *Hicks*, 722 F. Supp. 2d at 832–3.

[19] *Hicks*, 722 F. Supp. 2d at 833 (citing United States v. Landa*,* 281 F. Supp. 2d 1139, 1145 (N.D. Cal. 2003); *Raich*, 545 U.S. at 27).

[20] *See* United States v. Trotter, 321 F. Supp. 3d 337, 347 (E.D.N.Y. 2018) (explaining how revocation of supervised release can result in long prison terms).

[21] *Id.* at 363.

a number of narrow changes to the supervised release law that may alleviate some of these problems.

I. SUPERVISED RELEASE

A. Statutory History and Legislative Intent

Supervised release was created as part of the Sentencing Reform Act of 1984 ("SRA")[22] and has a long and often misunderstood history. The motivations behind the act were primarily to reform the federal sentencing regime to promote uniformity and fairness.[23] At the time, like many states today, the federal criminal sentencing structure was based on indeterminate sentence lengths capped with release decisions made by parole boards.[24] In a parole system, a judge prescribes a sentence with a minimum and maximum length.[25] Once the prisoner exceeds the minimum time in jail, the parole board may decide whether to allow that prisoner to complete the sentence outside of jail.[26]

From the creation of the parole system in 1910 until the mid-1980s, legislatures argued that it was effective, because the parole system promoted parity with state systems, and that it was fiscally responsible to release rehabilitated prisoners.[27] Parole boards, at least in theory, were meant to narrowly tailor the sentence of each inmate in a way that would best maximize the penological outcomes from each case.[28] Parole boards were vested with extraordinary powers to make individualized decisions with respect to each individual prisoner.[29] However, as the number of federal prisoners rose over time, this kind of high-touch system became increasingly unworkable.[30]

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[22] Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 190 (2013).

[23] *Id.* at 189–90.

[24] *Id.* at 188–89.

[25] *Id.*

[26] *Id.*

[27] Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U.L. REV. 958, 984 (2013).

[28] *See id.* at 986–87.

[29] Wiley v. U.S. Bd. of Parole, 380 F. Supp. 1194, 1196 (M.D. Pa. 1974) (citing United States v. Frederick, 405 F.2d 129 (3d Cir. 1968)).

[30] *See* Doherty, *supra* note 27, at 988. Over time the parole boards became more removed from the actual facts on the ground. Eventually the parole board was installed in Washington D.C. and was charged with dealing with all federal prisoners throughout the country. *Id.*

The "War on Drugs," conceived by the Nixon administration and continued through the Clinton years and into the administration of George W. Bush[31] put an acute strain on the justice system, inundating courts and prisons with a large number of new convictions on drug-related charges.[32] The number of individuals serving time for drug-related offenses increased from 19,000 in 1980 to 242,200 in 2009, an increase of 1,175%.[33] This leap in the number of participants in the federal criminal system made it difficult for parole boards to keep up with the pace of cases crossing their desks and ultimately increased the amount of randomness in each parole determination.[34] Over time, a perception of randomness and lack of transparency began to emerge.[35] Confidence in the system eroded, and Congress began to pursue a replacement.[36]

In 1984, partially in an attempt to reduce the sense of unfairness in the parole system, Congress passed the SRA to standardize the way in which each prisoner was released from jail.[37] The Act required that each inmate serve her entire sentence in prison, followed by a term of supervision assigned at the judge's discretion.[38] The amount of supervised release that could be assigned was commensurate with the severity of the crime committed by the defendant.[39] Specifically, 18 U.S.C. § 3583(b)(1)–(3) divides the amount of allowed supervised release by the class of each of defendant's offenses.[40] Class A and B offenders may receive up to five years; Class C and D, up to three years; and Class E and misdemeanor offenders, up to one year.[41]

Given that the new supervised release regime was not meant as a replacement for years spent in prison, the purpose of

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[31] *See generally A Brief History of the Drug War*, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/issues/brief-history-drug-war [https://perma.cc/C5B3-W9ZL] (last visited May 30, 2020).

[32] John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 173–74 (2015).

[33] *Id.* at 181.

[34] *See* Doherty, *supra* note 27, at 991–92.

[35] *Id.* at 991.

[36] *Id.* at 992–93. "[T]he vagueness and uncertainty created by indeterminate sentencing were 'prima facie evils,' at odds with the certainty and predictability that we otherwise value in the law." *Id.* at 992.

[37] Scott-Hayward, *supra* note 22, at 190.

[38] U.S. SENT'G GUIDELINES MANUAL ch. 7, pt. A(2)(b) (US SENT'G COMM'N 2018).

[39] *See* 18 U.S.C. § 3583(b) (2018).

[40] *Id.*

[41] *Id.*

supervised release differs from that of parole.[42] In its legislative conception, supervised release was intended to benefit the supervisee.[43] It was to be a service to help the supervisee reintegrate into society.[44] This goal was meant to be non-punitive—supervisees who have completed their jail sentences have paid their debts to society, and society is simply helping them overcome whatever stumbling blocks to rehabilitation they may encounter in their renewed civilian lives.[45]

As a result, the original statute did not provide for a possibility of revocation.[46] However, as a result of skepticism surrounding the new statutory regime and growing political pressures to be strong on crime—before the SRA went into effect as a result of a lengthy agency enactment process—Congress passed the Anti-Drug Abuse Act of 1986, which codified "mandatory terms of supervised release for certain drug offenses" coupled with the possibility of revocation.[47] "Supervised release as originally envisaged by the SRA was never implemented, and rather than being need-based, . . . its imposition became offense-based."[48]

In practice, therefore, supervised release has taken on a unique hybrid role in the criminal law, serving both rehabilitative and punitive purposes.[49] On the one hand, the statutes call for certain mandatory conditions and include revocation provisions to allow for punishment when conditions are violated,[50] while on the other hand, mental health, narcotics, alcohol, and financial counseling, as well as other rehabilitative programs, are routine features.[51] For example, 18 U.S.C. § 3583(d) provides for the following mandatory conditions of supervised release: "[t]he court

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[42] United States v. Trotter, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018) ("The purpose of federal supervised release is to assist people who have served prison terms with rehabilitation and reintegration into the law-abiding community.").

[43] Scott-Hayward, *supra* note 22, at 190.

[44] *Trotter*, 321 F. Supp. 3d at 339.

[45] S. REP. NO. 98-225, at 125 (1983) (noting that all the disciplinary functions of the criminal justice system should be satisfied in jail, not while on supervised release).

[46] *Id.*

[47] Scott-Hayward, *supra* note 22, at 191.

[48] *Id.* at 191–92.

[49] *See* United States v. Partlow, 372 F. App'x 353, 354 (4th Cir. 2010) (noting that "supervised release ha[s] both punitive and rehabilitative aspects").

[50] 18 U.S.C. § 3583(d) (2018).

[51] *See, e.g.*, Gall v. United States, 552 U.S. 38, 48 n.4 (2007) (psychological counseling); United States v. Williams, 212 F. App'x 902, 903 (11th Cir. 2006) (drug counseling); United States v. Thomas, 346 F. Supp. 3d 326, 328 (E.D.N.Y. 2018) (alcohol counseling).

shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime . . . , that the defendant make restitution . . . , *and that the defendant not unlawfully possess a controlled substance*."[52] But a judge may also craft any specialized conditions that they see fit so long as those conditions are "reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);" do not involve any deprivation of liberty greater than those approved by section 3553; and are consistent with the policy statements issued by the Sentencing Commission.[53] This statutory regime allows judges the opportunity, but does not impose the requirement, to prescribe conditions that will ultimately help prisoners reintegrate into society, while at the same time *requiring* certain mandatory punitive conditions.

Given this statutory structure, judges often view the purposes of supervised release differently. For some, supervised release has become a de facto extension of prison sentences, meant to continue protecting the community and deterring criminal conduct.[54] As a result, many judges suffice themselves with only the standard conditions of supervised release imposed by statute and do not mold conditions on an individual basis for each defendant.[55] Others, like Judge Weinstein, view rehabilitation as the primary purpose of supervision and may even resort to ending a term of supervision that is not benefiting the supervisee.[56]

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[52] 18 U.S.C. § 3583(d) (emphasis added).

[53] *Id.* The above-mentioned § 3553(a) factors include "the nature and circumstances of the offense and the history and characteristics of the defendant," *Id.* § 3553(a)(1), as well as "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct," *Id.* § 3553(a)(2)(B); "to protect the public from further crimes," *Id.* § 3553(a)(2)(C); and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," *Id.* § 3553(a)(2)(D).

[54] *See, e.g.*, United States v. Woodrup, 86 F.3d 359, 361 (4th Cir. 1996) (citing United States v. Parriett, 974 F.2d 523, 526 (4th Cir. 1992)).

[55] *See* United States v. Trotter, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018) ("I, like other trial judges, have provided unnecessary conditions of supervised release and unjustifiably punished supervisees for their marijuana addiction . . . .").

[56] *See id.* ("The purpose of federal supervised release is to assist people who have served prison terms with rehabilitation and reintegration in the law-abiding community.").

B. Procedural Considerations

It is also important to note the uniqueness of the process by which a revocation action comes before a judge. Unlike most relief granted in our adversarial system, supervised release may be revoked pursuant to an ex parte proceeding initiated by the judge upon a parole officer's report that a violation has occurred.[57] No grand jury indictment or motion practice is required.[58] Reports by probation officers—agents of the judicial branch of government,[59] whose duties include keeping the sentencing court informed of a supervisee's compliance with, and violations of, conditions of supervised release[60]—may serve as the lone basis for a revocation proceeding.[61]

Upon report of a violation, the sentencing judge will generally issue a bench warrant for the arrest of the supervisee[62] who will then be subject to a preliminary hearing, and eventually an evidentiary proceeding where the judge will determine if the violation has in fact occurred.[63] Once satisfied by a preponderance of the evidence that revocation is in order, the judge will prescribe a sentence for the violation in accordance with the statute.[64] The entire process of "violating" a supervisee *can* occur without any action by the United States Attorney.[65]

C. Constitutional Considerations

When the particulars of supervised release are viewed in the abstract, they beg an obvious question: how can the Constitution countenance a penal proceeding that may result in a restriction or even revocation of a defendant's liberty without all of the

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[57] 18 U.S.C. § 3606.

[58] *See id.*

[59] *Probation and Pretrial Officers and Officer Assistants*, U.S. CTS., http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer [https://perma.cc/F7BU-VDL6] (last visited May 30, 2020).

[60] 18 U.S.C. § 3603(8).

[61] United States v. Mejia-Sanchez, 172 F.3d 1172, 1175 (9th Cir. 1999); 18 U.S.C. § 3606. The probation officer may make the arrest with or without a warrant. *Id.*

[62] 18 U.S.C. § 3606.

[63] FED. R. CRIM. P. 32.1(b).

[64] 18 U.S.C. § 3583(e).

[65] *See supra* notes 60–64 and accompanying text. Normally, the United States Attorney will appear to represent the government at a revocation hearing, but no action is required by the office of the United States Attorney to initiate the proceedings.

normal trappings of due process? How can a judge, without the guidance of a jury, find a supervisee guilty of a violation by a preponderance of the evidence?

The Supreme Court of the United States took up this very question in *Johnson v. United States*. The Court held that since any punishment for violation of supervised release cannot exceed the term of imprisonment prescribed for the original sentence, any punishment for violation relates back to the original crime.[66] The Court pointed out that the government wisely disavows any assertion that punishment for a violation of supervised release is actually a punishment for the violation rather than the original crime because, in so doing, they avoid "serious constitutional questions."[67] In short, when a supervisee is sentenced for a violation, the court employs a legal fiction that ties the new sentence to the original criminal act.[68]

Given the weight of the rights in question, the statutes are narrowly construed. For example, the Court in *United States v. Haymond* invalidated section 3583(k), a special incarceration provision for supervisees that violate terms of release prescribed pursuant to a sentencing for certain sexual offenses.[69] Because the length of the sentences for violation of supervised release mandated by this section are higher than the defendant's maximum sentence for the original crime, they cannot be handed down without a fresh prosecution.[70] Without operation of the relation-back principle in *Johnson*, a new trial with all of the rights and trappings provided by the Fifth and Sixth Amendments is required.[71]

D. Revocation

When a supervisee violates a non-narcotic related condition of release, the judge has a number of courses of action allowed by statute. She may (1) "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year . . . if [she] is satisfied that such action is warranted by the conduct of the defendant released and the interest of

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[66] Johnson v. United States, 529 U.S. 694, 700 (2000).
[67] *Id.*
[68] *Id.*
[69] United States v. Haymond, 139 S. Ct. 2369, 2374, 2382 (2019).
[70] *Id.* at 2382.
[71] *Id.*

justice"[72]—this being the course of action taken by Judge Weinstein in *Trotter*;[73] (2) "extend a term of supervised release" if the original term was not imposed at the maximum length allowed by statute;[74] (3) revoke supervised release based on a preponderance of the evidence and sentence the defendant to a term of imprisonment not more than the maximum time allowed for supervised release of the original offense;[75] (4) order house arrest;[76] or (5) simply do nothing.[77]

However, a violation relating to possession of a controlled substance is different. A substance-related violation must be punished by imprisonment or, if the judge decides that justice so requires, termination of supervision.[78] Unlike other violations that allow judges to decide what the best course of action may be, the possession of controlled substances, regardless of their status under state law, requires a punitive response.[79] Therefore, more often than not, defendants found guilty of a violation of supervised release for possession of controlled substances have their supervision automatically revoked and are sentenced to prison and a further term of supervised release.[80] It is by the mechanical application of these provisions that defendants sentenced to one felony can be sentenced to successive terms of prison and supervised release.[81]

But judges are left with no good choices. Their only other choice—termination—comes with the consequence of the supervisee no longer having access to all the rehabilitative services that would otherwise be available under proper supervision.[82] Judges are forced into a unique choice when faced with controlled substance violations: punish those who violate supervised release or simply cut them loose, regardless of whether those outcomes serve the interests of society or the supervisee. This unique in-

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[72] 18 U.S.C. § 3583(e)(1) (2018).

[73] United States v. Trotter, 321 F. Supp. 3d 337, 365 (E.D.N.Y. 2018).

[74] 18 U.S.C. § 3583(e)(2).

[75] *Id.* § 3583(e)(3).

[76] *Id.* § 3583(e)(4).

[77] *Id.* § 3583(e). Revocation is permissive. It is a right the court may exercise, but not one that it must exercise, in non-drug-related cases.

[78] *Id.* § 3583(e)(1), (g)(1).

[79] *Id.* § 3583(g); *see also* United States v. Hicks, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010).

[80] United States v. Trotter, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018) (admonishing trial judges for mechanically using supervised release far too liberally).

[81] *Id.*

[82] *See supra* notes 49–53 and accompanying text.

flexibility, reserved for drug violations alone, highlights how the statutes have become outmoded by the changing place of cannabis in society both for therapeutic and recreational uses. These issues will be further addressed in Parts III and IV below.

E. Bad Choices

When one understands the unique legal device that is supervised release, it becomes clear how defendants can easily fall into the cycle of serving a prison sentence, followed by supervised release, a violation, and then further prison time. One conviction can lead to multiple prison sentences and multiple terms of supervised release.[83] However, when it comes to drug-related violations of supervised release where the statute takes the discretion away from the judge, requiring that supervised release be revoked or terminated,[84] the likelihood of this cycle occurring is far higher.[85]

In *Trotter*, Judge Weinstein avoided subjecting a young, marijuana-addicted defendant to this merry-go-round of prison and supervised release by using his power under 18 U.S.C. § 3583(e)(1) to terminate the defendant's supervised release in the interest of justice.[86] This decision represented a choice by Judge Weinstein to pick the lesser of two evils. He preferred terminating supervised release in the hope that the defendant could get his life back on track without help of parole officers rather than sending him to jail for a minor drug offense.[87]

However, the disposition in *Trotter* is an outlier. Courts in other jurisdictions often mechanically send violators back to prison.[88] Courts in at least four federal circuits have indicated that revocation of supervised release for use of even medicinal

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[83] *Trotter*, 321 F. Supp. 3d at 365 ("If his supervision continues, he will probably end up in the almost endless cycle of supervised release and prison. Because the revocation statute requires jail time for drug use . . . , he is likely to be sent back to prison, to be followed by a term of supervised release, which, when violated, will again send him back to prison.").

[84] 18 U.S.C. § 3583(e)(1), (g) (2018).

[85] *Trotter*, 321 F. Supp. 3d at 348 ("In the Eastern District of New York, 13.45% of revocations are related to drug use . . . .").

[86] *Id.* at 365.

[87] *Id.*

[88] *See, e.g.*, United States v. Guess, 216 F. Supp. 3d 689, 698 (E.D. Va. 2016); United States v. Hicks, 722 F. Supp. 2d 829, 835 (E.D. Mich. 2010) (citing United States v. Friel, 699 F. Supp. 2d 328, 330 (D. Me. 2010)).

marijuana is proper.[89] These holdings include cases where doctors have duly prescribed marijuana for use in palliative care.[90] In an illustrative decision, the Eastern District of Michigan in *United States v. Hicks* equated the use of marijuana for palliative care to the recreational use of alcohol and other substances that may be restricted by supervised release.[91] "[T]he Court reminds the Defendant that even if possessing medical marijuana was legal under federal law, which it is not, a court may restrict otherwise legal behavior of a defendant on supervised release."[92] This decision is a clear embrace of the punitive purposes of supervised release.

This choice between jailing a user of legal marijuana or simply cutting her loose from supervision is confining, but it is one that will likely become ever more common as federal supervised release and state drug laws fall into greater tension.

II. STATE AND LOCAL MARIJUANA LAW

The trend in state and local law over the last number of years has been toward legalization or decriminalization of marijuana use.[93] As of this writing, thirty-three states and the District of Columbia have legalized medicinal marijuana; ten states and the District of Columbia have legalized the use of recreational marijuana.[94] Fifteen additional states have decriminalized marijuana use within their borders.[95] Four ballot measures approving the use of medicinal and recreational marijuana were passed during the 2018 midterm elections.[96] Additionally, numerous municipalities have decriminalized the possession and

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[89] *See, e.g.*, United States v. Schostag, 895 F.3d 1025, 1028 (8th Cir. 2018); United States v. Harvey, 659 F.3d 1272, 1273–74 (9th Cir. 2011); United States v. Bey, 341 F. Supp. 3d 528, 530 (E.D. Pa. 2018); *Hicks*, 722 F. Supp. 2d at 835.

[90] *Hicks*, 722 F. Supp. 2d at 832, 835.

[91] *Id.* at 835.

[92] *Id.*

[93] United States v. Trotter, 321 F. Supp. 3d 337, 342–43 (E.D.N.Y. 2018).

[94] *See* Wu & Silva, *supra* note 14; *see, e.g.*, N.Y. PUB. HEALTH LAW §§ 3360–3369-e (McKinney 2018).

[95] German Lopez, *15 States Have Decriminalized–But Not Legalized–Marijuana*, VOX (Jul. 10, 2019, 5:34 PM), https://www.vox.com/identities/2018/8/20/17938358/marijuana-legalization-decriminalization-states-map [https://perma.cc/Z5RU-JLZ8].

[96] Tom Angell, *Marijuana's Ten Biggest Victories of 2018*, FORBES (Dec. 6, 2018, 2:35 PM), https://www.forbes.com/sites/tomangell/2018/12/06/marijuanas-ten-biggest-victories-of-2018 [https://perma.cc/D3AD-W4U7] (citing medicinal marijuana ballot measures in Oklahoma, Missouri, and Utah, and a measure for recreational use in Michigan).

use of small amounts of marijuana.[97] In May 2018, New York City was added to that list, with the mayor ordering the police to cease making arrests for petty possession of marijuana.[98]

This overwhelming shift in state law stands in stark contrast to the lack of movement at the federal level. Since 1970, the status of marijuana as a Schedule 1 drug under the CSA has been unwavering.[99] Individuals are prohibited from obtaining or possessing any Schedule 1 substances under federal law, even by valid prescription.[100] Schedule 1 is reserved for only the most serious drugs as determined by a combination of the following factors: (1) those with the highest "potential for abuse"; (2) those with "[s]cientific evidence of . . . pharmacological effect"; (3) "current scientific knowledge regarding the drug or . . . substance"; (4) its "history and . . . pattern of abuse"; (5) "[t]he scope, duration, and significance of abuse"; (6) risk to health; (7) dependence; and (8) "[w]hether the substance is an immediate precursor" for another substance banned under the CSA.[101]

Not only has the federal law's "opinion" of marijuana, as evinced by its continued placement on Schedule 1, not evolved at the same speed that state and local governments have, the punishments for violation of the CSA also remain extremely strong. Simple possession of marijuana carries a penalty of imprisonment of not more than one year and a $1,000 fine for the first offense, a prison sentence of not more than two years and a $2,500 fine for the second offense, and not more than three years and a fine of $5,000 for the third offense.[102] However, distribution or possession with the intent to dispense even small amounts of marijuana may be penalized by up to five years in prison, a two-year mandatory stint of supervised release, and a fine of up to $250,000.[103] Attempt or conspiracy to commit any of these crimes carries the same sentence as the completed crime.[104]

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[97] Joseph Misulonas, *15 Largest Cities That Have Decriminalized Marijuana*, CIVILIZED, https://www.civilized.life/articles/largest-cities-decriminalized-marijuana (last visited June 2, 2020) [https://perma.cc/6TP2-PM5D].

[98] Rachel Kaufman, *NYC Mayor Taking Steps Toward Marijuana Decriminalization*, NEXT CITY (May 21, 2018), https://nextcity.org/daily/entry/nyc-mayor-taking-steps-toward-marijuana-decriminalization [https://perma.cc/6XNL-5AY9].

[99] 21 U.S.C. § 812(c)(10) (2018).

[100] *See* United States v. Pickard, 100 F. Supp. 3d 981, 995 (E.D. Cal. 2015) (citing Ams. for Safe Access v. Drug Enf't Admin., 706 F.3d 438, 441 (D.C. Cir. 2013)).

[101] 21 U.S.C. § 811(c)(1)–(8).

[102] *Id.* § 844(a).

[103] *Id.* § 841(b)(1)(D).

[104] *Id.* § 846.

Moreover, penalties are increased significantly if any of these acts are committed while maintaining a premises that is deemed to be "drug-involved," or used or designated for the use, manufacture, sale, or consumption of any controlled substances.[105] The same is true if they are committed in proximity to a school,[106] involve a person under the age of twenty-one,[107] or drug paraphernalia.[108] Additionally, if found guilty of any of the crimes under the CSA, Social Security and food stamp benefits may be revoked.[109] These crimes are often stacked one on top of another to further stiffen the penalties for any activity having to do with marijuana or drugs in general.

One exception to the above, where federal drug law has started to move, albeit at a snail's pace, is the legalization of certain cannabidiol-based drugs used to treat epilepsy.[110] Cannabidiol, or CBD, is a part of the marijuana plant that does not alter mood or consciousness, but has considerable therapeutic properties.[111] In June 2018, the Food and Drug Administration ("FDA") approved the use of CBD for the treatment of seizures in certain severe cases of epilepsy.[112] Even so, the federal law remains considerably behind the science in many other areas and potential uses of therapeutic cannabis.[113]

The stiff federal guidelines and the ever-changing landscape of state law have come into active conflict in a number of areas. First, the most direct conflict between the federal law and state law took the form of *Gonzalez v. Raich*, the original test case for federal marijuana jurisprudence.[114] In *Raich*, the Court, relying on its Commerce Clause jurisprudence in *Wickard v. Filburn*,[115]

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[105] *Id.* § 856(a)–(b).

[106] *Id.* § 860(a).

[107] *Id.* § 859(a).

[108] *Id.* § 863(a)–(b).

[109] *Id.* § 862a(a).

[110] News Release, U.S. Food & Drug Admin., FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana To Treat Rare, Severe Forms of Epilepsy (June 25, 2018), https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm [https://perma.cc/RX2F-PP3F].

[111] *Id.*

[112] *Id.*

[113] *See generally* NAT'L ACADS. OF SCI., ENG'G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 85–86 (2017), https://www.ncbi.nlm.nih.gov/books/NBK425767/ [https://perma.cc/SG3B-VM7R].

[114] *See* Gonzalez v. Raich, 545 U.S. 1, 7–8 (2005).

[115] *See generally* Wickard v. Filburn, 317 U.S. 111 (1942). In his time-honored opinion, Justice Jackson famously defended the validity of the Agriculture Adjust-

upheld the convictions of Angel Raich and Diane Monson, who both cultivated marijuana for home use as prescribed by licensed physicians in accordance with the California Compassionate Use Act.[116] The Court announced that, under the Commerce Clause, Congress had the power to regulate the possession and use of medicinal marijuana even when used on a small, intrastate scale.[117] Second, and perhaps most importantly to this Note, in response to presidential policy under the Obama administration and as a concession to get the federal budget passed in 2014, Congress defunded Justice Department prosecutions of marijuana-related crimes in states where marijuana is legal under state law.[118] The Ninth Circuit has held that this serves to abrogate indictments brought by the Justice Department in violation of the funding bill.[119] While this is not a conflict per se, it highlights the tension between the CSA and evolving societal views on marijuana use.

This tension has created interesting questions of law in other areas as well. For example, the Money Laundering and Control Act[120] as well as the Bank Secrecy Act[121] combine to make it difficult for state-sanctioned marijuana businesses to gain access to normalized banking relationships.[122] These acts prohibit transactions with the proceeds of criminal activity, including the sale of marijuana as proscribed by the CSA.[123] They also prompt certain reporting requirements by the financial institution to the Federal Reserve that may raise suspicions around legitimate in-state marijuana businesses.[124] State-chartered banks, as recipi-

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ment Act of 1938 that placed production limits on certain crops. *Id.* at 118–20. He argued that intrastate commercial regulation was valid pursuant to the Commerce Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3. In so doing, Justice Jackson announced the Commerce Clause doctrine of aggregation, namely that Congress may regulate any area of intrastate commerce which when taken together could rationally relate to, or affect, interstate commerce. *Wickard*, 317 U.S. at 127–28.

[116] *Raich*, 545 U.S. at 6–7, 10.

[117] *Id.* at 32–33.

[118] Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

[119] United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016).

[120] 18 U.S.C. § 1956 (2018).

[121] 12 U.S.C. § 1829 (2018).

[122] Deborah L. Dickson, *Bank on Marijuana: A Legitimate Industry Warranting Banking Access*, 2 SAVANNAH L. REV. 459, 464 (2015).

[123] *Id.* at 463.

[124] *Id.* at 464–65.

ents of insurance through the Federal Deposit Insurance Corporation, must also comply with these laws.[125]

Additionally, the United States Trustee's office has repeatedly blocked the reorganizations of state-sanctioned marijuana businesses in bankruptcy.[126] When legal marijuana businesses have sought bankruptcy protection, the United States Trustee's Office, a division of the Justice Department, has petitioned the bankruptcy court for dismissal of the case or for the forfeiture of all drug-related assets.[127] The argument by the trustees has been that they cannot simultaneously administer the estate of the debtor and adhere to the provisions of the CSA.[128]

These flashpoints all convey one common theme: how far state law has come, and how stubborn the federal law has been in dealing with drug-related developments. Use of banking law, the Bankruptcy Code, and, as this Note argues, supervised release to tacitly prosecute marijuana crimes all combine to underline the reluctance of the federal government to relinquish mid-century conceptions of drug use. Specifically, when the criminal law is involved, several constitutional and prudential issues are implicated.

III. THE PROBLEMS

A. Eighth Amendment Concerns

1. Cruel and Unusual Punishment and Denial of Medicinal Marijuana

The Eighth Amendment proscribes the administration of cruel and unusual punishments.[129] The Supreme Court has interpreted the amendment as embodying " 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures."[130] Punishments must

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[125] Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 215, 231 (2018).

[126] Steven J. Boyajian, *Just Say No to Drugs? Creditors Not Getting a Fair Shake When Marijuana-Related Cases Are Dismissed*, 36 AM. BANKR. INST. J. 24, 25 (2017).

[127] *Id.* at 24–25.

[128] *Id.* at 25, 74–75.

[129] U.S. CONST. amend. VIII.

[130] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

be measured according to "the evolving standards of decency that mark the progress of a maturing society."[131]

Therefore, the infliction of unnecessary suffering by failure to provide medical care to federal prisoners qualifies as cruel and unusual.[132] However, not all denials of medicine rise to the level of a violation of the Eighth Amendment. Rather, such violations must encompass a "deliberate indifference" to the medical needs of the prisoner.[133] Therefore, defendants are not entitled to any medicine they choose, but they must be provided with medicine commensurate with a minimal standard of care and which relieves pain that is unnecessary to achieving penological goals.[134] It seems, therefore, that based on the evolving standard of decency that courts must embody in their Eighth Amendment analyses, as cannabis becomes the standard and accepted treatment for certain diseases, a court must not deny it to a supervisee simply because they are being punished.

Indeed, recent medical scholarship has started to identify certain conditions that respond best to cannabis-based medicines.[135] For example, CBD, a part of the marijuana plant that does not alter consciousness, has been shown to uniquely aid in the treatment of epilepsy as well as chronic pain.[136] CBD-based drugs are now considered a viable and uniquely effective treatment of epilepsy and are authorized for use by the FDA.[137]

The implications of marijuana as a vital drug to treat epilepsy and chronic pain have strong Eighth Amendment implications. The government cannot restrict the ability of prisoners to access their needed medicine simply because they are being punished, especially when there may not be other medicines to treat that specific condition.[138] Therefore, supervisees, who are

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[131] *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[132] *Id.* at 103 ("These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.").

[133] *Id.* at 104 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[134] *See id.* at 105–06.

[135] *See* NAT'L ACADS. OF SCI., ENG'G, & MED., *supra* note 113, at 86–87.

[136] Jon Johnson, *Everything You Need To Know About CBD Oil*, MEDICAL NEWS TODAY (Jul. 27, 2018), https://www.medicalnewstoday.com/articles/317221.php [https://perma.cc/G572-6JVQ].

[137] *Id.*

[138] Meriwether v. Faulkner, 821 F.2d 408, 411 (7th Cir. 1987) ("A state has an affirmative obligation under the Eighth Amendment 'to provide persons in its custody with a medical care system that meets minimal standards of adequacy.' " (quoting Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985))).

also protected by the Eight Amendment,[139] may not be punished with the deprivation of required medicines that meet the current medical standard.[140] As the science around the use of marijuana products for therapeutic purposes develops, the supervised release statutes that require incarceration or termination for possession of any cannabis-based substances are susceptible to constitutional challenge pursuant to the Eighth Amendment. The federal government, through the FDA, has admitted that CBD has certain unique therapeutic properties for various diseases.[141] This admission puts all statutes that proscribe its use for prisoners on conceptually precarious constitutional footing.

2. The Proportionality Principle of the Eighth Amendment

In addition to proscribing the denial of medical care to those in its care, the Supreme Court has held that the Eighth Amendment also embodies a proportionality principle that requires punishments not be grossly disproportionate to their underlying crime.[142] The Court announced this principle in *Solem v. Helm*. In *Solem*, the Court held that a life sentence without possibility of parole for a seven-time financial crime offender was constitutionally disproportionate.[143] The Court reasoned that since the concept of proportionality existed at common law since the days of the Magna Carta and the English Bill of Rights,[144] that the Eighth Amendment, adopted with those precepts in mind, certainly encompassed the very same principle.[145] The Court relied heavily on its own opinions in *Weems v. United States* and *Robinson v. California* to prove an unbroken chain of proportionality jurisprudence dating back to the common law.[146] In *Weems*, the Court noted that the method of punishment for an individual convicted of falsifying a public document—fifteen years of hard labor in iron chains—violated the Eighth Amendment, because the punishment was "cruel in its excess of

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[139] Carnell v. Paterson, 385 F. App'x 15, 17 (2d Cir. 2010) (applying Eighth Amendment jurisprudence to claims emanating from supervised release, but ultimately finding qualified immunity).

[140] *Meriwether*, 821 F.2d at 411 (citing *Benson*, 761 F.2d at 339).

[141] *See* News Release, *supra* note 110.

[142] *See* Solem v. Helm, 463 U.S. 277, 285–86 (1983).

[143] *Id.* at 303.

[144] *Id.* at 284–85.

[145] *Id.* at 285–86.

[146] *Id.* at 286–87 (first citing Weems v. United States, 217 U.S. 349, 367, 372–73, 377 (1910); and then citing Robinson v. California, 370 U.S. 660, 667 (1962)).

imprisonment."[147] In *Robinson*, echoing the sentiments of Judge Weinstein in *Trotter*, the Court held that sentencing an individual for his or her *addiction* to narcotics was invalid because imposing jail time based on a condition without a further act cannot be proportionate punishment.[148] "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[149]

Solem announced a cogent doctrinal structure for assessing proportionality challenges.[150] The Court recommended a tripartite analysis. First, the reviewing court must compare the nature and gravity of the sentence imposed with the nature and gravity of the crime committed and the culpability of the defendant.[151] Second, the court should compare the sentence to other sentences imposed in the same jurisdiction for similar crimes.[152] Lastly, the court should compare the sentence with sentences imposed in other jurisdictions for similar crimes.[153]

However, this analytical system was called into question in *Harmelin v. Michigan*.[154] The Court, in a fractured set of opinions, upheld a life sentence for an individual found to be in possession of 672 grams of cocaine.[155] Justice Scalia and Chief Justice Rehnquist rejected the idea that the Constitution contains a proportionality principle at all.[156] Scalia and Rehnquist sharply criticized Justice Powell's historical analysis in *Solem* and argued that there is no basis for the claim that the Eighth Amendment incorporated a proportionality principle exigent in the common law.[157] However, Scalia's caustic rejection of the *Solem* opinion notwithstanding, seven justices in *Harmelin* voted to uphold the proportionality principle.[158] But Justice Kennedy's concurrence, in which Justices O'Connor and Souter joined, severely limited the scope of *Solem*.[159] They held that the propor-

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[147] *Weems*, 217 U.S. at 377.
[148] *Robinson*, 370 U.S. at 667.
[149] *Id.*
[150] *See Solem*, 463 U.S. at 292.
[151] *Id.* at 290, 294–95.
[152] *Id.* at 291.
[153] *Id.* at 291–92.
[154] Harmelin v. Michigan, 501 U.S. 957, 985–87 (1991) (citing *Solem*, 463 U.S. at 290–91).
[155] *Id.* at 957, 961.
[156] *Id.* at 965.
[157] *Id.* at 966–67.
[158] *See id.* at 996 (Kennedy, J., concurring); *id.* at 1009 (White, J., dissenting).
[159] *Id.* at 997 (Kennedy, J., concurring).

tionality principle is reserved for only "grossly disproportionate" sentences.[160] Therefore, courts should hold off on employing the *Solem* proportionality analysis unless a preliminary showing can be made that a punishment is "grossly disproportionate" to the crime committed.[161]

In *Miller v. Alabama*, Justice Kagan reaffirmed and elucidated this structure.[162] She noted that proportionality must be viewed "less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society,' " the very same standards required for all other "cruel and unusual punishment" determinations under the Eighth Amendment.[163] To aid in establishing whether a certain sentencing scheme violates these "evolving standards of decency," the Court must consider the relationship between the sentence, the crime, the culpability of the offender, and the "national consensus" regarding the use of that type of punishment for similar crimes.[164] If there is a consensus that a certain punishment may not be employed then such a punishment cannot be constitutional.[165]

While the Court's Eighth Amendment jurisprudence has been in flux at times, four things are clear: (1) a proportionality principle is embodied in the Eighth Amendment;[166] (2) the principle applies to noncapital cases;[167] (3) any punishment must be weighed against the gravity of the offense committed and the relative culpability of the offender;[168] and (4) the analysis will look to how the crime is punished in other jurisdictions.[169]

Because the imposition of supervised release and its revocation are all incidents of the original crime committed, all the

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[160] *Id.* at 1005 (quoting Rummel v. Estelle, 445 U.S. 263, 281 (1980)).

[161] *Id.*

[162] Miller v. Alabama, 567 U.S. 460, 469–70 (2012) (first citing Roper v. Simmons, 543 U.S. 551, 560 (2005); and then citing Graham v. Florida, 560 U.S. 48, 59 (2010)).

[163] *Id.* at 469 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

[164] *Id.* at 469, 482 (first quoting *Estelle*, 429 U.S. at 102; and then quoting *Graham*, 560 U.S. at 61).

[165] *See id.* at 482–83.

[166] *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring).

[167] *Id.* at 997 (citing Rummel v. Estelle, 445 U.S. 263, 271–74 & n.11 (1980)).

[168] *Miller*, 567 U.S. at 470.

[169] *Id.* at 482 (citing *Graham*, 560 U.S. at 61); *see also Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) ("[I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").

conditions of supervised release are necessarily open to scrutiny on Eighth Amendment grounds as punishments.[170] Regardless of its form, once something is established as a punishment, the Eighth Amendment applies.[171] Therefore, the imposition of a marijuana condition, and any instances of revocation related to that condition, must be proportionate to the underlying crime being punished.[172]

3. Supervised Release Conditions That Deny Use of Therapeutic Marijuana Violate the Proportionality Principle

As Judge Weinstein observed in *Trotter*, penalizing use of marijuana can have the effect of morphing relatively small sentences into life sentences served in installments,[173] a sentence that is manifestly unjust for the use of a potentially therapeutic product. Each drug charge can land a violator up to two years in prison, followed by up to five years of supervised release depending on the infraction.[174] If that term of supervised release is violated as a result of drug use, the judge has little choice but to sentence the violator to more jail and possibly more supervised release.[175] The cycle can go on and on. Unlike *Solem*, the term of imprisonment is not simply life in jail, but rather the continued denigration of jail, violation, arrest, and more jail, all for a substance that is legal in a majority of states for either therapeutic or recreational purposes.[176] Revoking an individual's liberty as a result of use of a therapeutic product while turning a blind eye to progressing science on the matter is tantamount to arbitrary

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[170] Johnson v. United States, 529 U.S. 694, 700 (2000).

[171] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 198–99 (1989).

[172] *Cf. Johnson*, 529 U.S. at 700 (noting that, unless "postrevocation sanctions" are considered "part of the penalty for the initial offense," double jeopardy issues would arise).

[173] United States v. Trotter, 321 F. Supp. 3d 337, 363 (E.D.N.Y. 2018) ("For some, supervised release can be a trap where they bounce between supervision and prison. 'Violations of [supervised release] frequently cause a return to prison, often with new supervisory terms attached. This has created the "threat of never-ending supervision." ' " (alteration in original) (quoting Nora V. Demleitner, *How To Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 FED. SENT'G REP., no. 4, 2016, at 232)).

[174] *See* 21 U.S.C. §§ 841(b), 844(a) (2018).

[175] 18 U.S.C. § 3583(g) (2018) (providing that "the court *shall* revoke" supervised release for possession of controlled substances (emphasis added)).

[176] *See* Wu & Silva, *supra* note 14.

penological behavior and is grossly disproportionate to the act committed.

In dealing with this very issue, Judge Weinstein used a similar doctrinal analysis to the Court in *Harmelin* and *Miller*. First, he compared the sentence to the gravity of the crime committed.[177] Finding that smoking marijuana is essentially a victimless act, and one for which he would be required to prescribe jail time under the supervised release statutes,[178] he argued that doing so would be simply unjust.[179] He also addressed the fact that New York City, where Trotter lived, had in essence decriminalized the use of marijuana altogether.[180] This two-pronged analysis—weighing culpability against the punishment and then comparing punishments in other jurisdictions—is the hallmark of a proportionality analysis.[181]

Those who oppose this view will certainly point to the Supreme Court's oft repeated maxim from *Johnson*: revocation of supervised release is an incident of a previous crime—not the current conduct.[182] While it is true that a defendant who commits a crime bears the responsibility for his supervision in the first place, that does not simply open her up to any form of punishment the government chooses; the punishment still must comport with the Eighth Amendment.[183] The principle at the heart of the Eighth Amendment is that the punishment must fit the crime and must not be rejected by a majority of jurisdictions in the nation.[184] However, when the supervisee is using marijuana for therapeutic reasons, punishing her for following a physician's prescription creates a never-ending cycle of jail and supervised release, serving little to no purpose,[185] and is disavowed by the criminal laws of a majority of states.[186] Therefore, restricting

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[177] *Trotter*, 321 F. Supp. 3d at 341 ("No useful purpose is served through the continuation of supervised release for many defendants whose only illegal conduct is following the now largely socially acceptable habit of marijuana use.").

[178] *Id.* at 340–41, 343.

[179] *Id.* at 363.

[180] *Id.* at 343 (refrencing announcements by the Manhattan and Brooklyn District Attorneys and the New York City mayor regarding systematic non-enforcement of marijuana-related criminal statutes in the city) .

[181] *See* Miller v. Alabama, 567 U.S. 460, 469–70 (2012).

[182] Johnson v. United States, 529 U.S. 694, 700 (2000).

[183] Solem v. Helm, 463 U.S. 277, 285–86 (1983).

[184] *Id.* at 290–92.

[185] *Trotter*, 321 F. Supp. 3d at 365.

[186] *See* Wu & Silva, *supra* note 14.

access to medicinal marijuana likely offends the proportionality principle.

Furthermore, when an individual is in need of a drug for therapeutic purposes, the idea that punishing her for using it promotes respect for the law, deterrence, or any other penological goal is weak at best. A person in need of a drug will likely violate her supervised release to get physical relief. Therefore, withholding therapeutic marijuana from supervisees does not serve any penological goals. When a punishment becomes completely unmoored from its penological underpinnings, it becomes unprincipled and arbitrary.[187] Arbitrary punishments cannot withstand a proportionality analysis because there is no link between the crime and the punishment in the first place.[188] Therefore, even if the length of a marijuana sentence were per se reasonable, it would still fail an Eighth Amendment test for want of penological reasoning. Without a rationale for a punishment, it is impossible to measure its reasonableness.

B. Constitutional Issues: Separation of Powers Concerns

The procedure that allows judges to revoke supervised release upon report by a probation officer alone removes all prosecutorial discretion from the executive branch and vests that power in the judicial branch. In other areas of the law, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."[189] This "exclusive authority" is far reaching.[190] For example, a United States Attorney may decide against pursuing a prosecution after a grand jury has returned an indictment.[191] "The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause."[192] Similar to the role of a jury, the United States Attorney acts as a sort of conscience of the community when deciding when

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[187] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 322–23 (1987) (Brennan, J., dissenting).

[188] *Id.*

[189] United States v. Nixon, 418 U.S. 683, 693 (1974) (citing The Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied sub nom.* Cox v. Hauberg, 381 U.S. 935 (1965)).

[190] *Id.*

[191] *Cox*, 342 F.2d at 170–71.

[192] *Id.* at 171.

and how to pursue a prosecution.[193] She may decide that certain cases are simply not important enough to prosecute.[194] The executive branch may decide when to enforce laws and when not to enforce laws when acting for the people,[195] and this power is largely unreviewable by courts.[196] A judge cannot be forced to grant mandamus relief to force a prosecutor to bring a case or to stop a case from being brought.[197] Prior to the case being admitted to the judicial process, the cause of action is "owned" by the people, and the United States Attorney acts on their behalf in the public trust.

This power is a central feature of the scheme of checks and balances and separation of powers.[198] By spreading power throughout the various governmental branches, prosecutorial discretion bolsters the Constitution's clear bias against the deprivation of liberty while favoring due process.[199] James Madison wrote in *Federalist* Paper No. 47 that "[w]hen the legislative and executive powers are united in the same person or body . . . , there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."[200] Justice Jackson, in his opinion in *Youngstown Sheet and Tube*, famously argued that "the Constitution diffuses power . . . to secure liberty."[201] When all power to remove liberty is vested in one branch of government, the ability for another branch to check that power evaporates.[202]

In a 2013 D.C. Circuit case, Judge Brett Kavanaugh, who would years later become Associate Justice Brett Kavanaugh of the Supreme Court, echoed this sentiment:

> The Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers. One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is

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[193] *See id.*

[194] *See id.*

[195] *Id.* at 192 (citing United States v. Thompson, 251 U.S. 407, 412–413, 415 (1920); *Ex parte* United States, 287 U.S. 241, 249, 251 (1932)).

[196] *Id.*

[197] *Id.* (citing Goldberg v. Hoffman, 225 F.2d 463, 464–65 (7th Cir. 1955)).

[198] Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power To Protect Liberty*, 97 B.U.L. REV. 489, 528 (2017).

[199] *Id.* at 529–30.

[200] THE FEDERALIST NO. 47 (James Madison).

[201] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[202] Markowitz, *supra* note 198, at 528–29.

> the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior . . . . [T]he President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed . . . .[203]

Justice Kavanaugh's view of prosecutorial misconduct hints at the importance of prosecutorial discretion in situations where the law being enforced is controversial or oppressive. Mechanical incarceration for use of marijuana, as prescribed by the federal supervised release statutes, is certainly an area where the public's view, as evidenced by state and local law, differs from congressional law making.[204] Therefore, depriving the Executive of its prosecutorial discretion in this area seems to flout the very scheme that the Framers aimed to establish through the Constitution.[205]

However, courts have generally declined to extend the doctrine of prosecutorial discretion to revocation hearings.[206] Courts have held that revocation is not a prosecution, but rather a custodial hearing fully within the realm of the judicial branch.[207] In so holding, they have stuck to a narrow interpretation of the statutes that vest judges with the power to conduct supervised release hearings[208] and ignored the policy concerns central to the concept of prosecutorial discretion in general.

In *United States v. Mejia-Sanchez*, the Ninth Circuit tersely summarized the prevailing judicial philosophy with regard to supervised release and prosecutorial discretion, holding that, since the supervised release statutes clearly allow for judicial initiation of proceedings, the United States Attorney's prosecutorial discretion is implicitly limited.[209] The court held that, since "[a] district court has supervisory authority over and maintains a

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[203] *In re* Aiken Cty., 725 F.3d 255, 264 (D.C. Cir. 2013).

[204] United States v. Trotter, 321 F. Supp. 3d 337, 342 (E.D.N.Y. 2018) (citations omitted).

[205] Markowitz, *supra* note 198, at 531 (explaining that the constitutional framework is bolstered by strong prosecutorial discretion, because constitutional bias skews against any deprivation of liberty).

[206] *See, e.g.*, United States v. Mejia-Sanchez, 172 F.3d 1172, 1175 (9th Cir. 1999) (citations omitted); United States v. Davis, 151 F.3d 1304, 1307–08 (10th Cir. 1998) (citations omitted).

[207] *See Mejia-Sanchez*, 172 F.3d at 1175 (citations omitted).

[208] *See id.* at 1174 (relying, in part, on a narrow construction of 18 U.S.C. § 3603 for its holdings).

[209] *Id.* at 1175.

relationship of trust with a defendant on supervised release," a revocation is not a prosecution but rather a consequence for breaching the court's trust.[210]

But this narrow construction of prosecutorial discretion seems to run counter to constitutional law's overarching policy-driven reason for vesting prosecutorial discretion in the executive branch in the first place—the executive branch acts as a check on the judicial and legislative branches.[211] When we examine the constitutional sources of prosecutorial discretion, an alternative view of revocation proceedings emerges. Professor Peter Markowitz, in his article *Prosecutorial Discretion at its Zenith: The Power To Protect Liberty*, argues that various clauses of the Constitution, as well as its structure and philosophy, all support an expansive view of prosecutorial discretion.[212] Professor Markowitz suggests a number of textual sources for the power.[213] He argues that the power may emanate from the Take Care Clause, from the Article II Vesting Clause, or more likely from the President's pardon power.[214] Markowitz argues that since the Take Care Clause charges the Executive with responsibilities, it has diminished force as a textual source of power.[215] The Article II Vesting Clause is a direct grant of power, but it does not come with much jurisprudential history and is therefore limited in its usefulness in understanding prosecutorial discretion.[216]

However, the pardon power is a specific power for the Executive, with a well-developed jurisprudential history, and arguably subsumes the power of prosecutorial discretion.[217] The Executive, pursuant to the pardon power, may exonerate individual defendants in any stage of the criminal prosecution, before or even after conviction.[218] This sweeping power is the closest to our modern-day conception of prosecutorial discretion as a power vested in the Executive to under-enforce the laws, thereby pro-

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[210] *Id.*

[211] *In re* Aiken Cty., 725 F.3d 255, 264 (D.C. Cir. 2013).

[212] Markowitz, *supra* note 198, at 494–95.

[213] *Id.*

[214] *Id.* at 516–17.

[215] *Id.* at 518–19.

[216] *Id.* at 521.

[217] *In re* Aiken Cty., 725 F.3d 225, 265 (D.C. Cir. 2013) ("But the President has clear constitutional authority to exercise prosecutorial discretion to decline to prosecute violators of such laws, just as the President indisputably has clear constitutional authority to pardon violators of such laws.").

[218] Markowitz, *supra* note 198, at 522.

viding implicit pardons as a check on the power of Congress.[219] The power cannot be modified, diminished, or limited by Congress.[220] Moreover, the power to pardon has been understood to vest the Executive with the power to provide wide-ranging amnesty with respect to any type of enforcement actions that the Executive determines to be against the public interest.[221] This power extends to any "[o]ffenses against the United States," which Professor Markowitz argues is inclusive language that includes non-criminal proceedings as well as criminal prosecutions.[222]

In a case bearing some similarities to supervised release, the Supreme Court endorsed a wide-ranging pardon power that extends beyond the reaches of criminal proceedings. In *Ex Parte Grossman*, the Supreme Court held that when a defendant was sentenced to civil contempt for violating a district court injunction, the President could intervene and pardon that individual from her resulting contempt penalties.[223] The case involved presidential intervention in the enforcement of Prohibition-era anti-alcohol laws, perhaps a corollary to today's marijuana laws.[224] Seemingly speaking directly to our issue, Chief Justice Taft wrote: "[t]hat which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States, and so must be an offense against the United States" and subject to the pardon power of the President.[225] Just because the offense involves a breach of the court's trust does not automatically remove such offense from the limiting actions of the Executive; rather, the concepts of the separation of powers continue to operate.[226] He went on to state that:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as

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[219] *Aiken Cty.*, 725 F.3d at 265.
[220] *See* Schick v. Reed, 419 U.S. 256, 266 (1974).
[221] Markowitz, *supra* note 198, at 523.
[222] *Id.* at 523 (quoting U.S. CONST. art. II, § 2).
[223] *Ex parte* Grossman, 267 U.S. 87, 121 (1925).
[224] *Id.* at 107.
[225] *Id.* at 115 (citation omitted).
[226] *Id.*

> well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the [E]xecutive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to prevent it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.[227]

The sweeping power contemplated by the Taft Court is clearly one that would embrace an executive role in revocation of supervision, even if the proceeding is custodial and not prosecutorial.

When prosecutorial discretion is viewed as derivative of the pardon power, it is difficult to understand why it would not apply to supervised release. And yet, "prosecutions" for violation of supervised release are not only not subject to the prosecutorial discretion of the United States Attorney, but they are under the complete control of the probation officer and the sentencing judge.[228] They may be initiated by the probation officer or the judge on an ex parte basis and do not require the assent of the United States Attorney.[229] Allowing ex parte prosecutions like these are not only likely outside of the framer's vision,[230] but are more akin to a star-chamber inquest[231] than free, just, and adversarial proceedings in our American system.[232]

The absence of prosecutorial discretion from revocation proceedings removes a potentially protective layer from those subject to prosecution. If the United States Attorney were required to move the court to revoke supervised release, the defendant would have the benefit of the discretion of both the United States Attorney and the judge. Both the executive and judicial branches would have a chance to decide if revoking supervised release were wise. But when a judge and a probation officer are responsible for making the decision themselves, only one branch of government reviews the charges. Unless the judge

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[227] *Id.* at 120–21.

[228] FED. R. CRIM. P. 32.1(b); United States v. Feinberg, 631 F.2d 388, 390–91 (5th Cir. 1980) (holding that an agreement not to revoke probation made by the probation officer is unenforceable because the court is the ultimate custodian of the relationship with the defendant).

[229] United States v. Mejia-Sanchez, 172 F.3d 1172, 1175 (9th Cir. 1999).

[230] Markowitz, *supra* note 198, at 531.

[231] *See* Crawford v. Washington, 541 U.S. 36, 43–45 (2004) (explaining how the civil-law inquests used in the trial of Sir Walter Raleigh are the antithesis of the constitutional framework of criminal justice).

[232] *Id.* at 50.

is inclined to discontinue supervision entirely, when a cannabis-related violation is reported, the judge is bound by statute to send the violator back to prison.[233] The system is set up in an extremely inflexible manner, with a bias towards punishment rather than rehabilitation. This bias towards punishment is the inverse of our Constitution's overall bias against revocation of liberty and in favor of due process.[234]

Of course, one could contend that when the prosecutor brought the original case against the supervisee, she did so knowing that one of the punishments that may be levied against the supervisee would be revocation of release for a drug-related violation, and thus the prosecutor has already used her discretion. While this is true, the public view on marijuana has been quick to evolve and may change significantly between the time of an initial prosecution and a revocation proceeding.[235] The legal and scientific landscape is ever-changing, and relying on prosecutorial decisions made years before a potential revocation proceeding only reinforces the lack of flexibility in the system and does nothing to foster the underlying policies behind prosecutorial discretion.

C. Prudential Concerns

One more result of the conflict between the federal sentencing regime and state drug law is a perceived lack of clarity as to what behavior is permitted while on supervision and what is not. In *United States v. Parker*, for example, the D.C. District Court had to clarify whether a defendant's participation in the D.C. medical marijuana program for relief from severe migraines caused by bullet fragments lodged in his skull qualified as a violation of supervised release.[236] The court found that it would have been a violation, but because the defendant did not know that his participation in the program would violate his release, it declined to recommend revocation.[237] The Justice Department also asked the court to rule on whether the United States Attorney's office could participate in the hearings after a 2014 budget measure removed the Justice Department's funding for

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[233] 18 U.S.C. § 3583(g) (2018).

[234] *See* Markowitz, *supra* note 198, at 529.

[235] *See, e.g.*, United States v. Trotter, 321 F. Supp. 3d 337, 342–43 (E.D.N.Y. 2018).

[236] United States v. Parker, 219 F. Supp. 3d 183, 184–85 (D.C. 2016).

[237] *Id.* at 189.

any prosecutions that would run counter to any state marijuana legalization measures.[238] The court acknowledged the issue but declined to review it, given that the Justice Department was not actually petitioning for revocation, but rather asking for clarification as to what may constitute a violation.[239] This lack of clarity is extraordinary and is causing harm to the judicial and penal systems in a number of ways, including sowing a lack of predictability for defendants in revocation proceedings and causing a large divergence between the penalties for violations for supervised release as opposed to fresh prosecutions for marijuana possession.[240]

1. Predictability in Sentencing

Not surprisingly, the conflicts between state and federal law have created an extremely messy body of law, unmoored from any guiding doctrinal principles. Ironically, the same supervised release statutes that were adopted as a means of promoting consistency and fairness in sentencing[241] have backfired. While many courts continue to mechanically follow the default sentencing rules,[242] certain judges like Judge Weinstein, understanding that there has been a sea change in societal thinking on marijuana, have started to veer from the norm.[243] This reality has reintroduced uncertainty and unfairness into the justice system. Certain individuals get thrown in jail for use of marijuana in violation of supervised release conditions, while others have their supervision terminated early for the very same behavior. When a defendant goes before a tribunal and has no idea what kind of sentence she will receive, that defendant's view of the fairness of that tribunal is called into question.

2. Congressional Intervention

Adding more confusion to the system, in a 2014 deal to keep the government funded, Congress slashed funding to the Justice Department for marijuana-related prosecutions.[244] In a conces-

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[238] *Id.* at 187–88.

[239] *Id.* at 188.

[240] *See, e.g.*, *Trotter*, 321 F. Supp. 3d at 342–43 (noting lack of fresh prosecutions by states and public entities).

[241] *See* Doherty, *supra* note 27, at 991.

[242] *See, e.g.*, United States v. Friel, 699 F. Supp. 2d 328, 330 (D. Me. 2010).

[243] *Trotter*, 321 F. Supp. 3d at 365.

[244] John Schroyer, *An End to Gov't Meddling in MJ Industry? Impact of Marijuana Legislation Uncertain*, MARIJUANA BUS. DAILY (Jan. 8, 2015), https://mjbizdaily.com/

sion to President Obama, the Republican-controlled Congress voted to defund all efforts by the Justice Department to enforce federal drug laws in states that had voted to legalize medicinal marijuana.[245] Specifically, the Justice Department was barred from spending money on prosecutions that could interfere with state deregulation schemes.[246] This momentary concession was re-codified in subsequent budget bills as well.[247]

The Ninth Circuit has held that this bar on Justice Department spending acts to abrogate prosecutions brought under the CSA in states that have legalized medicinal marijuana.[248] The court held that even though a prosecutor had decided to bring a case against certain marijuana growers in California, Congress's tacit disapproval of this policy as embodied in the budget bill rendered the prosecutor's charges invalid.[249] Ultimately, the United States Attorney's continued pursuit of the case violated the Appropriations Clause because her office was essentially drawing money from the Treasury without the approval of Congress.[250]

However, supervised release proceedings remain unaffected.[251] The fact that fresh prosecutions for marijuana are prohibited in jurisdictions where state law has legalized medicinal use,[252] but the supervised release laws continue to act with the same force[253] serves to further confuse the issue. This difference between supervised release law and fresh prosecutions have allowed judges and probation officers to rule over a shadow judicial system that

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an-end-to-govt-meddling-impact-of-federal-mj-legislation-on-cannabis-industry-remains-to-be-seen/ [https://perma.cc/R7TG-Z8MQ].

[245] *Id.*

[246] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

[247] John Schroyer, *Federal Medical Cannabis Protection Extended Again*, MARIJUANA BUS. DAILY (Feb. 9, 2018), https://mjbizdaily.com/federal-medical-cannabis-protection-extended/ [https://perma.cc/2US3-EED6].

[248] United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016).

[249] *Id.* Interestingly, this decision further bolsters Justice Kavanaugh's view of prosecutorial discretion as a protective mechanism against deprivation of liberty. His view that the prosecutorial discretion acts as part of a system that demonstrates an anti-prosecution bias is supported by the Ninth Circuit in the sense that the court did not credit the prosecutorial discretion of the United States Attorney who brought the cases in contravention of his funding constraints. Prosecutorial discretion is valid as a limiting device, and not as a device that expands the power of the prosecutor.

[250] *See id.* at 1179.

[251] United States v. Guess, 216 F. Supp. 3d 689, 698 (E.D. Va. 2016).

[252] *McIntosh*, 833 F.3d at 1178.

[253] *Guess*, 216 F. Supp. 3d at 698.

is prosecuting crimes that otherwise would not be prosecuted. Running a system that consistently endorses disparate and confusing outcomes runs the risk of denigrating the reputation of the courts and the Justice Department. The United States District Court in *United States v. Guess* seized on this very issue—reasoning that the government's decision to prosecute individuals for marijuana use based on their geography alone creates concerns of unequal prosecution and unwarranted sentencing disparities.[254] Continuing to run revocation proceedings as separate from fresh marijuana prosecutions runs the risk of further muddying the waters in the conflict between state and federal law.

IV. PROPOSED SOLUTIONS

While it is doubtful that there is support in Congress for a wholesale amendment of the supervised release statutes or the CSA, there are a number of smaller measures that can be used to partially alleviate the constitutional and prudential concerns raised above. First, doing away with the mandatory no-drugs condition for supervisees[255] would deal with many of these issues. Second, requiring that drug-related revocations for supervised release be available only upon motion by the United States Attorney would alleviate separation of powers issues. Third, those supervisees who have their supervision revoked as a result of medicinal marijuana use should assert claims for constitutional torts. These measures, while partial, could go a long way to reduce unfairness in this area of the criminal justice system.

A. Doing Away with Mandatory Conditions

An elegant solution to the issues presented above is actually hidden in the sentencing statutes themselves. The statutes require certain conditions be imposed in every supervised release case, while they also allow judges to add certain discretionary conditions if they comport with the section 3553(a) factors.[256] The section 3553(a) factors embody various penological goals and give guidance to judges on when and how to apply punishment to certain defendants.[257] Most importantly, they allow the court to

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[254] *Id.* at 697.

[255] 18 U.S.C. § 3583(d) (2018).

[256] *Id.* § 3583(c).

[257] *Id.*; *id.* § 3553. Section 3553 provides in pertinent part:

customize the conditions placed on a supervisee while also staying within the bounds prescribed by law. This begs the question: Why not allow judges to craft all release conditions in accordance with these factors? Allowing such a regime would allow judges to impose conditions on a case-by-case basis, and it would not require

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(a) *Factors to be considered in imposing a sentence.*—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

* * *

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

* * *

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Id. § 3553.

judges to deal with mandatory conditions that hem in their ability to deal fairly with each defendant.

Allowing judges to set all the conditions of release would also require judges to take into consideration any access to medications, including marijuana, that each individual defendant may need. It would also promote a tailored and proportional approach to punishment in accordance with section 3553(a)(2)(D). Much of the consternation caused by the current system comes as a result of the wooden nature of the drug conditions and the revocation requirement. Allowing for maximum flexibility will put the supervised release regime in line with the greater sentencing framework and allow for fairer outcomes.[258]

Judge Weinstein acknowledged the viability of a tailored approach in *Trotter* and also suggested a different, yet similar approach based on the section 3553(a) factors.[259] Judge Weinstein argued that since the supervised release statutes already allow for termination of supervision after a year, if justice so requires and the decision comports with the section 3553(a) factors,[260] judges should be required to hold a hearing after a year of supervision to decide if continuing supervision promotes the goals of the section 3553(a) factors.[261]

While these approaches may increase the uncertainty in sentencing, they will also increase the fairness of each individual proceeding. In a system where conditions are tailored to each defendant, a judge will be required to show how applying a condition comports with the penological goals set out in section 3553(a) and explain that rationale to the defendant. That rationale will also be subject to appellate review. While the outcomes will be more disparate, they will also be more transparent and more fair.

B. Requiring Adversarial Hearings for Cannabis-Related Violations of Supervised Release

In an effort to alleviate the potential constitutional issues posed by denying the executive branch its prosecutorial discretion in such a hotly contested area of law, the Federal Rules of

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[258] *See, e.g.*, United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the Federal Sentencing Guidelines are merely advisory, granting judges the choice of whether to follow them or not).

[259] *See* United States v. Trotter, 321 F. Supp. 3d 337, 363–65 (E.D.N.Y. 2018).

[260] 18 U.S.C. § 3583(e)(1).

[261] *See id.*

Criminal Procedure should be amended to require a motion by the United States to commence a revocation proceeding for cannabis-related violations.[262] Because of the unique place that cannabis occupies in our criminal law at this moment, having a dual layer of discretion acting as the conscience of the community is important. Both in *Aiken County* and in *Grossman*, the courts embraced a sweeping view of executive power when hotly contested issues of law were in question.[263] When an area of law is a potential fount of complaints of unfairness, allowing two governmental branches to have a say will likely save the judicial branch from unneeded doubt and promote fairness in general.

Not only would this wrest complete control of the revocation proceeding away from the judiciary, but it would allow these hearings to comport with more traditional adversary hearings and promote the constitutional bias against deprivations of liberty.[264] The prosecutor would be a gatekeeper to valueless revocation proceedings that do not serve any penological goals. Adding an additional layer of review to the revocation process would likely filter out those proceedings that have the least penological merit and increase the fervor with which the government can pursue the ones with the most merit. Given the scarcity of resources within the Justice Department, United States Attorneys will be forced to prioritize those cases that need the most attention. More cases would be resolved with pleas, and the strain on the court system would be reduced.

C. Constitutional Torts

Absent Congress feverishly working to adopt the humble policy suggestions contained above, it is likely that those faced with revocation for use of necessary medicinal marijuana could bring plausible civil actions under the Eighth Amendment pursuant to 42 U.S.C. § 1983. Section 1983 provides for a private right of action for those who have had their constitutional rights abridged.[265] As described above, the Eighth Amendment requires that those subject to governmental punishment have access to

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[262] While the same constitutional principles should apply to all revocation proceedings, this Note only deals with cannabis-related revocations as they are one of the most hotly contested areas of law.

[263] *See generally In re* Aiken Cty., 725 F.3d 255 (D.C. Cir. 2013); *Ex parte* Grossman, 267 U.S. 87 (1925).

[264] *See* Markowitz, *supra* note 198, at 523.

[265] 42 U.S.C. § 1983 (2018).

standard medical care.[266] Given that supervisees are protected by the Eighth Amendment, the government should not be able to, as an incident of supervised release, deprive access rights to individuals who truly need medicinal marijuana. Based on the prevailing Eighth Amendment jurisprudence, an individual denied use of a medicine, duly prescribed, should have a valid tort action against the government.

While a supervisee need not be given her choice of medicine for the government to comply with the Constitution,[267] there are cases where cannabis may be the only medically indicated remedy. The FDA has already recognized CBD in the realm of epilepsy,[268] and as the science develops this will certainly not be the only area where cannabis is indicated. If a doctor duly prescribes medicinal marijuana and the government remains deliberately indifferent to the need for the medication, a constitutional tort will likely arise.

Federal prisoners in California have brought multiple cases based on this theory.[269] While no court has foreclosed the possibility of relief, the cases have either not met the specific elements of the cause of action, or they have been deficiently pleaded. In *Harris v. Lake County Jail*, the plaintiff did not have a valid prescription for the medicine that he wanted to obtain, and therefore he was not even allowed to use medicinal marijuana under state law.[270] While in *El-Shaddai v. Zamora*, the pro se plaintiff failed to properly plead the section 1983 action and had his case dismissed on procedural grounds, he was granted leave to amend, indicating a possibility that the claim could be pleaded properly.[271] While these cases have not been successful, perhaps through these kinds of actions change will eventually come.

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[266] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 198–99 (1989) (first citing Estelle v. Gamble, 429 U.S. 97, 103–04 (1976); and then citing Robinson v. California, 370 U.S. 660, 675 (1962)).

[267] Harris v. Lake Cty. Jail, No. C-11-6209, 2012 WL 1355732, at *5 (N.D. Cal. Apr. 18, 2012).

[268] *See* News Release, *supra* note 110.

[269] *See, e.g.*, El-Shaddai v. Zamora, No. CV-13-2327, 2018 WL 3201859, at *4–5 (C.D. Cal. June 27, 2018); *Harris*, 2012 WL 1355732, at *5.

[270] *Harris,* 2012 WL 1355732, at *5.

[271] *El-Shaddai,* 2018 WL 3201859, at *13.

CONCLUSION

The confluence of the federal supervised release regime and changing state marijuana laws have created an unjust system where certain prisoners have their supervision revoked for marijuana infractions, while others have their terms of release terminated as a result of their violations. The government must deal with a host of constitutional and prudential issues that arise as a result of these diverging bodies of law. This Note has argued that allowing judges more discretion in crafting supervised release conditions, requiring adversarial hearings for revocation, and bringing possible tort actions may be partial solutions to these serious and ever-growing issues.