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Legal Sidebar

Can Retribution Justify the Revocation of Supervised Release? Courts Disagree.

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What are the legitimate reasons that a government may subject an individual to criminal punishment? Western penological theory and American legal history generally identify four principled bases for criminal punishment: retribution, deterrence, incapacitation, and rehabilitation. The Sentencing Reform Act (SRA) requires federal courts to impose an initial sentence that reflects these purposes of punishment.

The SRA also authorizes federal courts to sentence defendants to supervised release, encompassing a set of conditions that the defendant must comply with upon release from prison for a period of time (or, for some offenses, for up to life). A defendant's compliance with these conditions is "supervised" or monitored by a federal probation officer. If a defendant violates a condition, the court may revoke the supervised release and send the defendant back to prison, among other things. The SRA lists deterrence, incapacitation, and rehabilitation among the factors that a judge must consider in making these revocation determinations. The SRA does not, however, expressly include retribution as one such factor.

The federal appeals courts disagree as to whether, and to what extent, retribution may justify the revocation of supervised release in light of this statutory omission. On one side of the divide, the U.S. Courts of Appeals for the First, Second, Third, Sixth, and Seventh Circuits have held that federal courts may consider retribution in making revocation decisions. On the other side, the Fourth, Fifth, and Ninth Circuits have concluded that courts either may not consider retribution in these decisions at all or may consider it only to a limited degree.

This Sidebar summarizes the four purposes of punishment, including retribution; offers an overview of supervised release; and summarizes the aforementioned split. The Sidebar concludes with congressional considerations.

The Purposes of Punishment

"[T]he goals of penal sanctions that have been recognized as legitimate," according to the Supreme Court, are "retribution, deterrence, incapacitation, and rehabilitation." In general, retribution is the principle that an individual should be punished because they deserve punishment. This theory of punishment is most associated with philosopher Immanuel Kant, who wrote that punishment "must in all cases be imposed only because the individual on whom it is inflicted *has committed a [c]rime*." Retributive theory has

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multiple strands. The "hard" form of retribution provides that an individual who violates the law invites and deserves social vengeance or retaliation. This understanding of retribution is restated colloquially in the phrase "an eye for an eye." Thomas Jefferson similarly characterized retribution as providing that "whoever . . . shall maim another, or shall disfigure him . . . shall be maimed or disfigured in like sort." Other forms of retribution are not necessarily expressions of, or channels for, social anger, but are rather dispassionate responses to the actions of the lawbreaker. Under this view, retribution is seen as a reflection of the social contract in that an individual who voluntarily violates the law is owed punishment. In this sense, retribution furthers several goals, including respecting the moral choices of the individual, restoring the equilibrium upset by the wrongdoer's attempt to gain an advantage over others through unlawful means, and ensuring that shared laws are enforced and not ignored.

Critical distinctions exist between the retributive and the utilitarian models of punishment (the latter of which encompasses deterrence, incapacitation, and rehabilitation). The retributivist model is concerned about the nature of the past criminal conduct, focusing on the culpability of the defendant and the severity of the harms inflicted. This past criminal conduct is sufficient for the retributivist to believe that punishment is warranted. By contrast, the utilitarian is interested in what can be gained prospectively by the imposition of punishment. The commission of a crime is therefore insufficient to impose punishment; there must also be a future social benefit for punishment to be justified. That is, in reaching punishment decisions, the retributivist approach generally is backward-looking and the utilitarian forward-looking.

The three utilitarian models of punishment—deterrence, incapacitation, and rehabilitation—have a common thread in that each justifies punishment if there is a social good or benefit to such punishment. First, deterrence theory, writes philosopher Jeremy Bentham, works "towards the prevention of like acts." That is, deterrence aims to make sure that the cost from punishment is greater than the advantages of crime, such that the self-interested actor will decide against committing the crime. Put differently, deterrence ensures that crime is not "worth it." There are two types of deterrence: specific deterrence, where the punishment is designed to disincentivize a particular defendant from committing "like acts," and general deterrence, where the punishment is aimed at disincentivizing the public from committing "like acts." Second, incapacitation removes the individual from society, physically eliminating the risk that the individual may commit additional crimes against others. Third, rehabilitation seeks to reform the individual such that they will be better able, upon release, to stay within the bounds of the law.

In 1984, Congress enacted the SRA, which established the U.S. Sentencing Commission and charged this new agency with promulgating the first-ever federal sentencing guidelines. The SRA also codified the purposes of punishment for violations of federal criminal law—18 U.S.C. § 3553(a)(2)(A) (corresponding with retribution); 18 U.S.C. § 3553(a)(2)(B) (corresponding with deterrence); 18 U.S.C. § 3553(a)(2)(C) (corresponding with incapacitation); and 18 U.S.C. § 3553(a)(2)(D) (corresponding with rehabilitation)—and instructed federal judges to impose an initial sentence that would be "sufficient, but not greater than necessary," to reflect these purposes.

Differences Between Retributive and Utilitarian Models

The models of justification for punishment described above can lead to different sentencing outcomes. Kant illustrated one distinction in writing that, if an individual on death row were the last member of a dissolving society, the individual still should be executed in accordance with the retributive theory because the punishment remains his moral desert regardless of the presence of, or benefits to, other people. The differences between retributive and utilitarian models are also evident in judicial and administrative settings. For example, the Seventh Circuit observed that, from a retributivist standpoint, a defendant's diminished capacity would justify a lighter sentence because an individual with diminished capacity may have minimal ability to appreciate their conduct and thus may have minimal culpability. By contrast, diminished capacity may warrant a longer sentence under a utilitarian perspective, the court explained, because an individual with diminished capacity may have minimal ability to conform their

conduct to the law and thus may require longer incapacitation. When the Sentencing Commission developed the initial federal sentencing guidelines, the agency addressed the "philosophical dilemma" of attempting to reconcile the retributive and utilitarian models by adopting an empirical approach based on past sentencing practices. The Commission reasoned that judges issuing those sentences necessarily considered the purposes of punishment and thus past sentences embodied the principled justifications for sentencing.

Supervised Release in the Federal System

The SRA authorizes, and in some instances requires, federal courts to impose supervised release on an individual convicted of a federal crime. In general, supervised release comprises a set of conditions that a federal defendant must comply with upon release from prison. Supervised release is distinct from probation and parole. While all three may involve the imposition of behavioral conditions, probation may be imposed with *no* attendant term of imprisonment, parole may be imposed to replace *some* (i.e., the unexpired part) of a term of imprisonment, and supervised release begins only after a defendant *fully* serves a term of imprisonment (minus any good time credits). Of the three, only supervised release and probation remain options for sentencing judges; the SRA prospectively abolished parole for federal crimes to promote certainty, or "truth," in sentencing.

Supervised release is required if the defendant is convicted of specific crimes, such as certain drug or sex offenses. Where supervised release is not mandated by statute, a court has discretion as to whether to impose a term of supervised release. In practice, federal courts impose supervised release in virtually all cases.

The SRA identifies conditions of supervised release that are mandatory and discretionary. Mandatory conditions include requirements that the defendant must not commit another offense; must submit to drug testing, unless excepted; and must comply with federal sex offender registration conditions, if applicable. A court also may impose "standard" or "special" discretionary conditions, such as reporting to the probation officer; not leaving the jurisdiction without approval; allowing home visits by the probation officer; obtaining full-time employment; not possessing firearms; and receiving substance use or mental health treatment. The length of a term of supervised release depends on the crime of conviction and generally may span one, three, or five years, with the possibility of early termination after one year. For certain serious offenses, however, supervised release may be imposed for longer periods, including life.

Compliance with conditions is monitored by a federal probation officer. Depending on the circumstances, a federal court may terminate, extend, or revoke the term of supervised release. If a supervisee violates a condition, 18 U.S.C. § 3583(e)(3) provides for revocation, stating that a "court may, after considering the factors set forth in [18 U.S.C.] section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D) . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release" (with some limits). Section 3553(a)(1) includes the "nature and circumstances of the offense," and the other factors that are listed correspond to the utilitarian considerations of deterrence, incapacitation, and rehabilitation. Absent from the enumerated considerations is 18 U.S.C. § 3553(a)(2)(A), the purpose of punishment corresponding with retribution.

The Judicial Disagreement

The U.S. Courts of Appeals are split as to whether retribution may be considered in supervised-release revocation decisions. On one hand, the First, Second, Third, Sixth, and Seventh Circuits have held that, despite the omission of Section 3553(a)(2)(A) as a required revocation consideration listed in Section 3583(e)(3), judges retain discretion to take all four purposes of punishment, including retribution, into account as part of the revocation process. In justifying this interpretation, the First Circuit explained its view that the reference in Section 3583(e)(3) to certain enumerated factors does not forbid or foreclose

consideration of other Section 3553(a) factors. Moreover, the Second Circuit has indicated that, practically speaking, consideration of the enumerated factors, including the "nature and circumstances of the offense," necessarily requires consideration of the seriousness of the offense, a retributive factor. The Second Circuit further suggested that the legislative history of the SRA confirms that the "nature" of the offense encompasses retributive considerations. The Sixth Circuit has also indicated that some of the purposes of revocation—to help the individual learn respect for the rule of law and to sanction the individual for the violation—are retributive in character.

On the other hand, the Fourth, Fifth, and Ninth Circuits have held that the Section 3553(a) factor corresponding to retribution is either forbidden in supervised-release revocation decisions or is entitled to less weight in such decisions. These courts interpret the omission of Section 3553(a)(2)(A) in Section 3583(e)(3) to indicate Congress's deliberate intent to remove retribution from the universe of what a federal court may consider at the revocation stage. The Fifth and Ninth Circuits favorably cited the canon of construction that, if Congress uses language in one section of a statute and omits that language in another section of the same statute, it may be presumed that the omission was intentional. That said, while the Fourth and Fifth Circuits have held that retribution may not be considered at all in this context, the Ninth Circuit has appeared to take a more nuanced approach, indicating that reliance on an omitted factor "as a primary basis for a revocation sentence" would be improper.

Congressional Considerations

The circuit split regarding retributive considerations in supervised-release revocation decisions exists against the backdrop of a broader policy debate. At least one scholar has argued in favor of using only utilitarian factors in revocation decisions. By contrast, the Sentencing Commission has been cited in support of the opposite position, on the ground that it "take[s] into account the seriousness of the violation of supervised release by setting lengthier guideline ranges for offenses classified as more serious." That said, the Commission also has suggested that courts in supervised release revocation proceedings should consider the purposes of punishment "except" for the factor corresponding with retribution.

Congress may seek to consider whether to address the ongoing confusion and disagreement given its potential ramifications. The prevalence of supervised release violations has "varied considerably" across federal districts, and the circuit split reflects that different jurisdictions apply different revocation standards when violations do occur. These disparities may have real-life consequences, as a federal sentence of imprisonment is followed by a term of supervised release in 99.1% of cases and more than 109,000 individuals are currently under supervised release. If desired, Congress could address this situation by amending Section 3583(e) to make clear that the sentencing factor corresponding to retribution either may or may not be considered in supervised release revocation decisions. Doing so would likely yield uniformity in a common and consequential component of the federal criminal justice system.

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