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Token Triumph: *Esteras v. United States* Reinforces, Rather than Restrains, Carceral Logic

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ABSTRACT. This Essay casts the Supreme Court's June 2025 decision in *Esteras v. United States* as a token triumph. It was commendable in that it prevents federal judges from relying on retribution related to a defendant's underlying conviction when revoking supervised release. Yet, it is silent as to whether judges can rely on retribution vis-à-vis a defendant's post-release conduct when revoking supervised release. By declining to address the appropriateness of judges' reliance on retribution in this latter context, the Court leaves intact a practice that threatens to undermine the rehabilitative aims of supervised release.

With supervised release, lawmakers sought to help rehabilitate defendants following incarceration. Rehabilitation is a forward-looking theory of punishment, seeking to produce positive outcomes in a person's future. Lawmakers did not mean for the program to serve a retributive or backward-looking theory of punishment, condemning defendants for their past conduct. Despite the law's rehabilitative purpose, *Esteras* risks solidifying the transformation of supervised release into an extension of punitive carcerality—a mechanism not for easing defendants' reintegration into society, but for reincarcerating defendants as punishment for post-release conduct. The decision thus reinforces rather than curtails carceral logic, offering only the appearance of progress while continuing to enable courts to revoke supervised release retributively and reincarcerate defendants.

In making these arguments, this Essay first mines supervised release's legislative history and text, revealing the law's rehabilitative aims and demonstrating the significance of what the Court neglected to address in *Esteras*. It then identifies the racial disparities prevalent in criminal supervision and shows how *Esteras* risks amplifying them. Third, it suggests an approach the Court could take when considering an inevitable future challenge to retributive revocation that aligns with Congress's rehabilitative goals. In conclusion, this Essay recommends efforts that federal judges can adopt in the meantime to help curb retributive revocations and advance the rehabilitative aims of supervised release.

INTRODUCTION

In 2018, Edgardo Esteras pleaded guilty to federal crimes involving heroin possession.[1] Based on Mr. Esteras's prior record and guilty plea, Judge Benita Pearson sentenced Mr. Esteras to twenty-four months in prison and six years of supervised release.[2] Upon his release from prison, Mr. Esteras's six-year period of supervision began.[3] Three years passed without incident.[4] Then, in January 2023, the state arrested Mr. Esteras and charged him with domestic violence and gun possession.[5] Although the state dismissed the domestic-violence charges at the victim's request, Mr. Esteras's federal probation officer notified Pearson about the incident.[6]

At the revocation hearing, Judge Pearson found that Mr. Esteras possessed a gun, in violation of the conditions of supervision and thus requiring revocation of his supervised release.[7] The supervised-release statute, 18 U.S.C. § 3583(e), cross-references the federal-sentencing statute, 18 U.S.C. § 3553(a), instructing judges to rely on certain sentencing factors when revoking supervised release and determining an appropriate sentence.[8] These factors include the nature and circumstance of the underlying conviction, the history and character of the defendant, deterrence, rehabilitation, and others.[9] Collectively, the law regards these factors as utilitarian.[10] The idea is that utilitarian punishments have the potential to bring about the greatest good for the greatest number of people.

However, excluded from the list of factors on which judges can rely in revoking supervised release and imposing a new sentence is Section 3553(a)(2)(A) of the federal-sentencing statute. This provision dictates the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[11] The law regards these factors as

1. *See* United States v. Esteras, 88 F.4th 1163, 1164-65 (6th Cir. 2023).
2. *Id.*
3. *Id.* at 1165.
4. *Id.*
5. *Id.*
6. *Id.*
7. *See* 18 U.S.C. § 3583(g) (2024). Federal circuit courts hold that the Section 3553(a) factors govern mandatory revocation. *See, e.g.*, United States v. Thornhill, 759 F.3d 299, 307-10 (3d Cir. 2014).
8. *See* 18 U.S.C. § 3583(e) (2024) (referencing 18 U.S.C. § 3553(a)).
9. *Id.*
10. *See* Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 4, 18 (2010).
11. See 18 U.S.C. § 3553(a)(2)(A) (2024).

retributive,[12] meaning the punishment must relate directly to the defendant's personal culpability. The core logic of retribution stems from the maxim, "an eye for an eye."[13] Thus, by the explicit terms of the statutory scheme, the law permits judges to take retribution into account when imposing a sentence for the original conviction, but not when revoking supervised release.

But, in sentencing Mr. Esteras for violating the conditions of release, Judge Pearson relied on retribution, evoking the Section 3553(a)(2)(A) factors that the supervised-release statute explicitly excluded. She expressed concern that her earlier sentence "failed . . . to encourage [Mr. Esteras] to be respectful of the law," and stated that this new sentence was based on Mr. Esteras's "'dangerous' and 'disrespectful' behavior."[14] Departing upwards from the sentencing guidelines, Pearson sentenced Mr. Esteras to twenty-four months in prison for the violation and added a three-year term of supervised release.[15] The judge's retributive response to Mr. Esteras's post-release conduct contravened the statutory factors on which a judge may rely when revoking supervised release.

After the Sixth Circuit affirmed the court's sentence, Mr. Esteras and two other similarly situated petitioners sought review from the Supreme Court.[16] The three petitioners asked whether, even though Congress excluded the sentencing statute (Section 3553(a)(2)(A)) factors from the supervised-release statute (Section 3583(e)), a district court may rely on the excluded (a)(2)(A) factors when revoking supervised release and sentencing a defendant for violating the conditions of supervision.[17] The Court held that federal judges can no longer rely on retribution when sentencing a defendant for violating the conditions of supervised release.[18]

On the surface, the Court's decision in *Esteras v. United States* is a win for federal defendants, defense counsel, and those concerned with determinacy in federal sentencing. A less discerning reader might celebrate the decision and move on. Yet, the Court's holding is a narrower response to the question petitioners asked the Court to consider. Petitioners asked the Court to take retribution completely off the table when judges revoke supervised release and sentence

12. *See* Tapia v. United States, 564 U.S. 319, 326 (2011) (noting that the Section 3553(a)(2)(A) factors are designed for retribution).

13. *See* Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1078-79 (1964).

14. United States v. Esteras, 88 F.4th 1163, 1165 (6th Cir. 2023).

15. *Id.*

16. *See* Petition for a Writ of Certiorari at 2, Esteras v. United States, 606 U.S. 185 (2025) (No. 23-7483).

17. *Id.* at i.

18. *See Esteras*, 606 U.S. at 188.

a defendant for violating the conditions of supervision. In a footnote, however, the Court specified: "[W]e address only whether § 3583(e) precludes the court from considering retribution for the underlying criminal conviction."[19] The Court went on to "take no position" on whether district courts can consider retribution for the defendant's violation of the conditions of supervised release.[20] The underlying criminal conviction refers to the original offense for which the court imposed supervised release whereas a violation of the conditions of supervised release refers to the defendant's post-release conduct. As applied to Mr. Esteras, the decision means Judge Pearson is prohibited from relying on retribution related to Mr. Esteras's original conviction (heroin possession), but she *can* rely on retribution for Mr. Esteras's violating conduct (gun possession), when sentencing Mr. Esteras for violating the conditions of supervision.

This Essay focuses on the problem this latter form of reliance creates. The Court's decision in *Esteras* leaves a broader inquiry unaddressed: whether judges can rely on retribution when sentencing a defendant for violating the conditions of supervision. This subtle distinction may seem insignificant, but the decision-making authority judges carry in imposing and revoking supervised release and in sentencing a defendant for violating supervision reveals its importance. The law bestows broad decision-making authority on judges when navigating supervised release. Beyond what the law mandates, judges are empowered to decide whether to impose supervised release,[21] whether to set or modify release conditions,[22] whether to terminate release early,[23] whether to revoke supervision,[24] and for how long to sentence a defendant to prison for violating the conditions of supervision.[25]

Given this broad decision-making authority, judges may feel personally invested in defendants' compliance and spurned at defendants' failure to comply, activating a retributive response. In sentencing Mr. Esteras for violating the supervision conditions, Judge Pearson chastised his "disrespectful behavior," taking umbrage at Mr. Esteras's failure to follow her instructions. Because *Esteras* permits judges to rely on retribution for the defendant's violating conduct, they can punish defendants for defying orders not with an eye toward rehabilitation,

19. *Id.* at 194 n.5.

20. *Id.*

21. 18 U.S.C. § 3583(a) (2024).

22. *Id.* § 3583(d)-(e).

23. *Id.* § 3583(e).

24. *Id.*

25. *Id.*

but with an eye toward vengeance.[26] Retribution is a backward-looking form of punishment aimed at addressing a person's past conduct, whereas rehabilitation is forward-looking, seeking to produce positive outcomes in a person's future.[27]

Beyond *Esteras* defying the text of the supervised-release statute, it also runs afoul of congressional intent. Congress intended for rehabilitation to guide judges' decisions when sentencing defendants who fail to comply with supervision;[28] however, *Esteras* allows judges to respond retributively.

As included in the 1984 Sentencing Reform Act, supervised release was meant to reflect evolving perceptions that prisons were not doing enough to rehabilitate people or prepare them for a successful return to society.[29] Congress intended supervised release "to ease the defendant's transition into the community[,] . . . or to provide rehabilitation . . . [or] training . . . after release" from prison.[30] Thus, the goal of the program is forward-looking. Congress did not want judges to impose supervised release "for purposes of punishment or incapacitation since those purposes will have been served . . . by the [initial] term of imprisonment."[31] Reliance on retribution removes supervised release from its original purpose—rehabilitation—and morphs it into a more regressive, punitive program.

Keeping retribution on the table for courts when sentencing defendants for violating supervision is problematic for two related reasons. First, judicial participation in sentencing creates a heightened sense of emotional investment in the defendant's compliance.[32] When sentencing Mr. Esteras, Judge Pearson scolded him for "disrespectful behavior" before departing upward from the

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26. *See, e.g.*, United States v. Johnson, 640 F.3d 195, 203 (6th Cir. 2011) (referencing the "gravity of [the defendant's] breach of trust" when sentencing him to a term of reincarceration for violating a supervised-release condition).

27. *See* Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 890-91 (2021).

28. Although 18 U.S.C. § 3583(e) also directs judges to consider factors like incapacitation and deterrence, Congress and the Court have recognized that rehabilitation predominates. *See* United States v. Johnson, 529 U.S. 53, 59 (2000) (noting that "Congress intended supervised release to assist individuals in their transition to community life" and that it "fulfills rehabilitative ends, distinct from those served by incarceration"); *see also* S. REP. NO. 98-225, at 124 (1983) (indicating that "the primary goal" of supervised release "is to ease the defendant's transition into the community . . . to provide rehabilitation").

29. *See* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 994-96 (2013).

30. S. REP. NO. 98-225, at 124.

31. *Id.* at 125.

32. *See* Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1125 (1992) (recognizing that "judges invest[] substantial energy and emotion into fashioning appropriately individualized sentences").

suggested sentencing range.[33] Under *Esteras*, judges can continue to respond retributively when sentencing defendants for violating supervision conditions, casting a punitive, coercive pallor over a statutory program that was intended to facilitate rehabilitation.[34] Second, race is inextricably intertwined with retribution in this country. Societally, the United States associates "payback and retribution" with Black people and "mercy and leniency" with white people.[35] The racialized notion of retribution, combined with judicial discretion and heightened emotional investment in defendants' compliance, risks compounding the racial disparities that exist within criminal supervision.[36] Black and Latino individuals are already overrepresented in federal sentencing and supervision—approximately thirty-eight percent of those in federal prison are Black and thirty percent are Latino.[37] Yet instead of removing retribution from consideration in judges' decisions to revoke supervision, *Esteras* preserves it as it relates to defendants' violating conduct.

The Court's decision in *Esteras* represents a token triumph: commendable in the limitation it placed on what judges can consider when revoking supervised release vis-à-vis the underlying crime of conviction, yet troubling in its silence about a more insidious practice. In neglecting to address whether judges can

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33. United States v. Esteras, 88 F.4th 1163, 1165 (6th Cir. 2023).

34. *See* United States v. Johnson, 640 F.3d 195, 203 (6th Cir. 2011) (citing the defendant's "breach of trust" as a factor in revocation); United States v. Morris, 71 F.4th 475, 482 (6th Cir. 2023) (same); United States v. Dawson, 980 F.3d 1156, 1162 (7th Cir. 2020) (same).

35. *See* Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 844 (2019) (arguing that for Americans, "race and retribution have become cognitively inseparable").

36. *See* Jacob Schuman, *Indian Country Supervision*, 100 N.Y.U. L. REV. 1148, 1151-52 (2025) (relying on a 2023 Department of Justice report finding "extreme and systematic disparities affecting American Indian and Alaska Native defendants" regarding supervision-revocation rates and incarceration rates for revocation compared to other groups); Jesse Jannetta, Justin Breaux, Helen Ho & Jeremy Porter, *Examining Racial and Ethnic Disparities in Probation Revocation*, URB. INST. 3-5 (Apr. 2014), https://www.urban.org/sites/default/files/publication/22746/413174Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF [https://perma.cc/H4JM-V7JV] (finding higher rates of revocation for Black people on probation relative to white and Hispanic people); Michelle S. Phelps, *Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation*, *in* HANDBOOK ON PUNISHMENT DECISIONS: LOCATIONS OF DISPARITY 43, 43-44 (Jeffery T. Ulmer & Mindy S. Bradly eds., 2018) (noting criminal supervision's role "in stratifying outcomes in the criminal justice system, providing an off-ramp for some and a conveyer belt toward prison for others"); Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1882-83 (2022) (recognizing that supervised-release revocations for illegal reentry reflect an "extreme racial disparity" with data showing an "overwhelming[] focus[] on Hispanic defendants").

37. *See Statistics: Inmate Ethnicity*, FED. BUREAU OF PRISONS (Sep. 20, 2025), https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp [https://perma.cc/NM95-3GS9] (indicating federal incarceration by race and ethnicity).

revoke supervised release as retribution for the conduct that violated the supervised-release conditions, the Court leaves intact a practice that undermines the program's rehabilitative aims and risks exacerbating the racial disparities plaguing criminal supervision. *Esteras* thus reinforces carceral logic rather than curtails it, offering only the appearance of progress while continuing to enable courts to revoke supervised release retributively and reincarcerate defendants.

This Essay proceeds in three parts. Part I provides a brief history of Congress's intent in creating supervised release, demonstrating the significance of what the Court neglected to address in *Esteras*. Part II demonstrates the impact of what *Esteras* left intact: trial courts responding retributively to defendants' violating conduct and thus imposing carceral logic on supervised release. This Part also identifies the racial disparities prevalent in criminal supervision and how *Esteras* risks amplifying them. Part III considers an approach the Court could take when deciding an inevitable future challenge to retributive revocation that aligns with Congress's rehabilitative goals. It also recommends actions that federal judges can adopt to help curb retributive revocations and advance the rehabilitative aim of supervised release.

I. THE REHABILITATIVE AIMS OF SUPERVISED RELEASE

This Part demonstrates Congress's rehabilitative aims in creating federal supervised release through highlighting the legislative history of the 1984 Sentencing Reform Act (SRA)[38] that established the program as well as the statutory text that Congress enacted. The law's history and text show that lawmakers enacted supervised release to ease defendants' reintegration into society following incarceration and facilitate rehabilitation.[39] The focus here is primarily on the legislative history given the rich source material relative to the limited text in the statute.

To further the supervised-release law's rehabilitative aims, it did not initially include procedures for the revocation of supervision.[40] Instead, if a defendant violated the conditions of supervised release and the conduct constituted a new offense, the government could file criminal charges.[41] If the violating conduct did not constitute a criminal offense, the judge did not have the authority to send the defendant back to prison.[42] For particularly serious violations, the judge

38. Pub. L. No. 98-473, 98 Stat. 1987.

39. *See* United States v. Trotter, 321 F. Supp. 3d 337, 339 (E.D.N.Y. 2018).

40. *See* S. REP. NO. 98-225, at 125 (1983).

41. *Id.*

42. *Id.*

could initiate criminal-contempt proceedings against the defendant.[43] Because minor violations did not carry carceral consequences, the focus of supervised release remained rehabilitative. This brief period of revocation-free supervised release helps demonstrate that lawmakers were principally focused on providing rehabilitative services to defendants following incarceration and not on imposing carceral retribution.

Supervised release was a brief bright spot in the otherwise bleak carceral landscape born out of the War on Drugs. Launched in the 1970s, the War on Drugs was a decades-long federal campaign aimed at reducing the use, possession, and distribution of illegal narcotics. Lawmakers did not attack the factors that contributed to people engaging in drug-related criminal conduct, such as a lack of affordable housing, mental healthcare, and other social services. Instead, they waged war directly on people accused of drug-related conduct. Their weapons of choice were policing, surveillance, and incarceration. This misplaced focus on law enforcement and punitive criminal penalties rather than life-affirming alternatives exemplifies carceral logic: the belief that safety, order, and justice are best achieved through control, containment, and punishment. Although framed as a public-safety and health initiative, the War on Drugs resulted in an expansion of the carceral state and incarceration, both of which rendered generational harm to Black people, leading to racial disparities in incarceration rates and lengthy prison sentences for conduct involving narcotics.[44]

Prior to the SRA and supervised release, federal courts relied on probation and parole to provide community supervision to people newly released from federal prisons.[45] Probation served as an alternative to incarceration for people convicted of less serious crimes, holding them accountable through supervision in the community.[46] For people convicted of more serious crimes and sentenced to prison, parole enabled them to obtain early release and continue supervision in the community for the time left on the original sentence.[47] Releasing people from prison early assumed prison rehabilitated people during their incarceration, yet prison proved unreliable in this regard.[48] Parole also contributed to indeterminate sentencing, whereby people convicted of similar conduct under similar circumstances and with similar histories ended up serving different

43. *Id.*

44. *See* JAMES FORMAN, JR., LOCKING UP OUR OWN 17-18, 204-05 (2017) (discussing these harms).

45. *See* Doherty, *supra* note 29, at 995-97.

46. *Id.* at 986.

47. *Id.* at 991-95 (noting widespread criticism of federal parole given the broad discretion afforded parole boards and officers, which could produce indeterminant sentences).

48. *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974).

lengths of time in prison.[49] By the early 1980s, lawmakers sought to move away from indeterminate sentences and parole, and toward determinate sentences and structured supervision.[50]

These desires culminated in the 1984 passage of the SRA, which replaced parole with supervised release. Probation remained in effect. Parole could result in unpredictable sentence lengths and inconsistent services for people released from federal prison. Under the SRA, the "[p]rison sentences imposed [were meant to] represent the actual time to be served," providing notice and predictability to both defendants and the public.[51] The law also allowed federal officials to tailor post-release services to defendants who needed them. Before the SRA, officials would impose parole supervision on any defendant released more than 180 days before the expiration of their sentence.[52] This failed to "assure that the prisoner who . . . need[ed] post-release supervision . . . received it, [and failed to] prevent . . . resources from being wasted on . . . [those] who d[id] not need them."[53] The SRA also established the U.S. Sentencing Commission, which created sentencing guidelines that limited federal judges' discretion when imposing criminal sentences.[54] Lawmakers believed "the guidelines system [would be] better able than the parole system to achieve fairness and certainty in sentencing."[55] Most importantly, it would allow for determinate sentencing, providing notice and predictability.

According to the SRA, courts could tailor supervised release to an individual defendant, meaning judges could impose it and set conditions for those who needed it.[56] When Congress first instituted supervised release, the law did not contain provisions allowing for revocation.[57] Lawmakers expressly rejected them.[58] A principal reason was because supervised release was "exclusively based" on "the rehabilitation theory" of punishment.[59] If a defendant violated

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49. *See* S. REP. NO. 98-225, at 38 (1983).

50. *See* Doherty, *supra* note 29, at 991.

51. S. REP. NO. 98-225, at 56.

52. *Id.* at 56-57.

53. *Id.* at 57.

54. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §§ 5A1.1, 5D1.1-2 (U.S. SENT'G COMM'N 1990).

55. S. REP. NO. 98-225, at 56.

56. *See id.* at 123 ("[T]he question whether the defendant will be supervised following . . . imprisonment is dependent on whether the judge concludes that he needs supervision, rather than on the question whether a particular amount of his term of imprisonment remains.").

57. *Id.* at 125 (stating that "the term of supervised release is not subject to revocation for a violation").

58. *Id.* at 58 (considering revocation procedures under the old Parole Commission system and rejecting them under the new supervised-release system).

59. *Id.*

supervision conditions and the violation constituted a new offense, the government could file new charges.[60] The court could also hold the defendant in contempt.[61] Criminal contempt required a jury trial for sentences exceeding six months, the government to prove beyond a reasonable doubt that the defendant violated a lawful court order at trial, and other procedural protections.[62] However, the law did not provide a process for minor violations because the lawmakers did "not believe that a minor violation of a condition of supervised release should result in a resentencing."[63] This was all to preserve the rehabilitative nature of the program. It was to go into effect for crimes committed after November 1, 1987.[64]

The initial rehabilitative aims that led Congress to pass the SRA proved short lived once political and public perceptions of crime and drug use began to shift in the mid-1980s, truncating supervised release's laudable goals. Congress passed the SRA during President Reagan's first term (1981-1984).[65] By the time Reagan sought reelection in 1984, society's desire to punish people for possessing, using, and distributing controlled substances had increased.[66] Two years after establishing supervised release, Congress passed the Anti-Drug Abuse Act of 1986 (ADAA), introducing stiff criminal penalties for certain illegal narcotics.[67] After signing the bill into law, Reagan remarked that "[t]he American people want their government to get tough and go on the offensive" with drug users, "[a]nd that's exactly what we intend, with more ferocity tha[n] ever before."[68]

The ADAA was like the tail wagging the dog, whereby Congress's punitive desire to address certain narcotics fundamentally altered federal sentencing for all types of criminal conduct. Before the rehabilitative version of supervised release could go into effect, the ADAA added provisions impacting supervision. In 1985, Senator Strom Thurmond of South Carolina introduced the concept of

60. *Id.* at 125.

61. *Id.*

62. *See* Doherty, *supra* note 29, at 1000.

63. S. REP. NO. 98-225, at 125.

64. *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.1 (U.S. SENT'G COMM'N 1987) (indicating November 1, 1987, as the enactment date).

65. *See* Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2544 (2010).

66. *See id.* at 2544-47.

67. *Id.* at 2534.

68. Gerald M. Boyd, *Reagan Signs Anti-Drug Measure; Hopes for "Drug-Free Generation,"* N.Y. TIMES, Oct. 28, 1986, at B19.

revocation.[69] When drafting the ADAA, lawmakers inserted a single paragraph into the supervised-release statute, allowing a court to revoke supervision "if it finds by a preponderance of the evidence that the person violated a condition of supervised release."[70]

Criminal-law scholar Fiona Doherty remarked that Congress seemed to not give the supervised-release addition much consideration,[71] with lawmakers referring to it as one of many "miscellaneous technical amendments."[72] However, the addition converted supervision into something materially different. Supervision quickly lost its rehabilitative promise under the ADAA, which introduced revocation and reincarceration as coercive enforcement tools. The ADAA also mandated terms of supervised release for defendants convicted of certain drug crimes.[73]

This punitive about-face from lawmakers, shortly after Congress enacted supervised release, casts doubt on whether lawmakers sought to promote rehabilitation when they initially passed the law. Appreciating the dramatic impact crack cocaine had on law and society in the 1980s is one way to understand the turnabout. Appearing in the early 1980s, crack cocaine wreaked havoc on urban, under-resourced communities given its low cost, ready availability, and highly addictive qualities.[74] Crack introduced "unprecedented carnage" and violence into these communities, both from the hands of those who distributed it and those who used it.[75] As legal scholar James Forman, Jr. noted, in a three-year span in the mid-1980s the percentage of arrestees in D.C. who tested positive for cocaine quadrupled "with virtually every user having ingested the drug as crack."[76] Black people were also more likely to be involved in crack use and distribution, with one Black newspaper describing it as "the most serious threat [Black people] have faced since the end of slavery."[77] Lawmakers responded to growing fears surrounding crack abuse with laws that harshly punished those who used and

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69. United States v. Trotter, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018). *See generally id.* (detailing the legislative history of the Anti-Drug Abuse Act of 1986).

70. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207, 3207-6 to -7.

71. *See* Doherty, *supra* note 29, at 1001.

72. § 1006, 100 Stat. at 3207-6 to -7.

73. *See id.* at 3207-6.

74. *See* FORMAN, *supra* note 44, at 23-24, 157 (noting the emergence, attributes, and impact of crack cocaine).

75. *Id.* at 155.

76. *Id.* at 157.

77. Editorial, *The War Goes On*, L.A. SENTINEL, Mar. 24, 1988, at A6.

sold the drug.[78] Combined with the lack of empathy that society extends to Black people,[79] the advent of crack and its racialization as Black help explain how lawmakers could introduce supervised release as a rehabilitative program in 1984 and then transform it into a punitive program just two years later with passage of the ADAA.

The new punitive, carceral response to defendants' violating conduct fundamentally altered supervised release. Violations now come in two forms, either: (1) based on a defendant engaging in unlawful conduct, in violation of state or federal law; or (2) disobeying a court-imposed condition of supervision.[80] The latter violations are called technical violations because they constitute otherwise-lawful conduct,[81] whereas the former involve an alleged (as with an arrest) or actual (as with a conviction) violation of the law. Revocation proceedings only require the government to prove that a defendant violated the conditions of release by a preponderance of the evidence.[82] This is a lower burden of proof than is required for criminal contempt or for a new criminal violation, both of which necessitate proof beyond a reasonable doubt.

In these ways, supervised release enables the government to circumvent criminal procedural protections and still secure the defendant's incarceration.[83] For instance, the government could have charged Mr. Esteras with a new crime — felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), requiring proof beyond a reasonable doubt.[84] Instead, the judge held a revocation hearing, requiring the government to prove by a preponderance of the evidence that Mr. Esteras violated the conditions of release.[85] Further, a judge can revoke supervision and reincarcerate a defendant for a technical violation, such as "refus[ing] to comply with drug testing."[86] Other common examples of technical violations include failure to report to a probation officer or failure to pay a fine. Upon revocation, a judge can impose a prison sentence equal to the defendant's original

78. *See* FORMAN, *supra* note 44, at 164 (considering racial disparities in sentencing resulting from crimes involving crack cocaine).

79. *See* Levinson et al., *supra* note 35, at 839.

80. See Doherty, supra note 29, at 1003.

81. *See* United States v. Winfield, 665 F.3d 107, 109 (4th Cir. 2012) (defining "technical violations" as "charges not related to the commission of state offenses").

82. *See* 18 U.S.C. § 3583(e)(3) (2024).

83. *See* Eric S. Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORN. L. REV. 1375, 1375 (2023) (noting the lack of procedural protections afforded defendants in revocation proceedings, including no jury trial).

84. *See* 18 U.S.C. § 922(g)(1) (2024).

85. *See* United States v. Esteras, 88 F.4th 1163, 1165 (6th Cir. 2023); 18 U.S.C. § 3583(e)(3) (2024).

86. 18 U.S.C. § 3583(d), (g)(3) (2024).

term of supervised release,[87] which depending on the original criminal conviction could be up to ten years.[88]

In addition to this rich legislative history revealing Congress's rehabilitative aims behind supervised release, the statutory text demonstrates Congress's intent to take retribution off the table. The supervised-release statute, 18 U.S.C. § 3583(e), cross-references the federal-sentencing statute, 18 U.S.C. § 3553(a), which specifies a list of factors on which judges can rely in their initial sentencings.[89] These factors include the "nature and circumstance[e]" of the underlying conviction, the "history and characteristics" of the defendant, "deterrence," public safety, rehabilitation, and others.[90] The revocation statute excludes from consideration the subsection referencing retribution, 18 U.S.C. § 3553(a)(2)(A), which specifies that the sentence must "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense."[91] The interpretive canon *expressio unius est exclusio alterius*, meaning "expressing one item of [an] associated group or series excludes another left unmentioned,"[92] supports the inference that Congress intended to exclude the retributive factors, 18 U.S.C. § 3553(a)(2)(A), from judges' consideration when sentencing defendants for violating supervision.

Notwithstanding the legislative history and statutory text, when Edgardo Esteras requested Supreme Court review, the revocation process had transformed his supervised release into a punitive extension of his underlying criminal conviction.

Take Brian Broadfield's case as another example of how this occurs. Broadfield was serving time in federal prison for drug manufacturing.[93] In that case, decided months before *Esteras*, a judge revoked Broadfield's supervised release based on a theory of retribution, that is, because of his "breach of trust" in violating the conditions of the release.[94] Broadfield began serving an eight-year term of supervised release following thirteen years of incarceration for the drug

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87. *See id.* § 3583(e)(3).

88. *See Federal Offenders Sentenced to Supervised Release*, U.S. SENT'G COMM'N 4-6 (July 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf [https://perma.cc/M7S4-KY4P] (noting that some drug-trafficking offenses carry a mandatory term of ten years of supervised release).

89. 18 U.S.C. § 3583(e) (2024) (specifying that judges may rely upon the factors set forth in 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)).

90. *Id.* § 3553(a)(1), (a)(2)(B)-(D), (a)(4)-(a)(7).

91. *Id.* §§ 3583(e), 3553(a)(2)(A).

92. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (citing United States v. Vonn, 535 U.S. 55, 65 (2002)).

93. United States v. Broadfield, No. 24-2075, 2025 WL 667522, at *1 (7th Cir. Mar. 3, 2025).

94. *Id.* at *2.

conviction.[95] Six months into the term, police arrested Broadfield for alleged domestic battery.[96] Things escalated, resulting in Broadfield resisting the officers; the officers using force to place him in a police car; and Broadfield attempting to remove the car's camera, breaking a phone at the county jail, and then urinating and defecating outside the toilet in his cell.[97] Broadfield also neglected to complete mental-health treatment, drank alcohol, and failed to report a change of address.[98]

At Broadfield's revocation hearing, the judge scolded him, "You not only struggled initially [when the officers tried to arrest you]. It took three or four officers to get you in the car. They had to use [pepper spray]."[99] The judge called the violations "very, very serious,"[100] describing Broadfield's conduct as "really bad,"[101] and then concluded that such behavior warranted sixteen months of reincarceration.[102] On appeal, Broadfield challenged the court's reliance on retribution for his violating conduct when deciding to revoke supervision and reincarcerate him.[103] However, the reviewing court found such reliance permissible and affirmed.[104] Judges, like the one in *Broadfield*, who revoke supervision as retribution for violating conditions of release, fail to adhere to the relevant statute.

To address Mr. Esteras's query about the permissible factors on which judges can rely, the Court looked toward the text-based canon of statutory interpretation mentioned above.[105] The Court explained that Congress's "enumerat[ion] . . . [of] most of the sentencing factors while omitting § 3553(a)(2)(A) raises a strong inference that courts may not consider that factor when deciding whether to revoke a term of supervised release."[106] Writing for the 7-2 majority, Justice Barrett held that trial judges may not consider retributive factors directed at the underlying crime when sentencing a defendant for

95. *Id.* at *1.

96. *Id.*

97. *Id.*

98. *Id.*

99. Brief and Required Short Appendix of Defendant-Appellant, Brian D. Broadfield, at 8, United States v. Broadfield, No. 24-2075, 2025 WL 667522 (7th Cir. Mar. 3, 2025), 2024 WL 4291176, at *8 [hereinafter Brief of Defendant-Appellant].

100. *Broadfield*, 2025 WL 667522, at *2.

101. *See* Brief of Defendant-Appellant, *supra* note 99, at 3.

102. *Broadfield*, 2025 WL 667522, at *2.

103. *Id.*

104. *Id.* at *2-3.

105. Esteras v. United States, 606 U.S. 185, 193-95 (2025).

106. *Id.* at 188.

violating supervised-release conditions. This conclusion, the Court continued, was "consistent with both the statutory structure and the role that supervised release plays in the sentencing process."[107]

Yet, the decision left a significant inquiry unaddressed: whether courts can consider retributive factors directed at the violating conduct when sentencing a defendant for violating supervised release. Concurring in part, Justice Sotomayor pointed out the majority's incomplete result, observing that the majority approached petitioners' "question differently," cabining the opinion to retribution vis-à-vis the underlying offense.[108]

II. RETRIBUTIVE REVOCATIONS AND ITS HARMS

The preceding Part excavated the legislative history and statutory text, demonstrating that the Court did not go far enough in *Esteras* when it failed to remove retribution completely from judges' consideration. This Part focuses on the normative impact of the Court's ruling: trial courts can continue to respond retributively to defendants' violating conduct when revoking supervised release, imposing a carceral logic on a program that was intended to be rehabilitative. It also surfaces a more insidious practice that could result from the decision: enabling judges to rely on retribution when revoking supervision risks amplifying existing racial disparities prevalent in criminal supervision. This could have a detrimental impact on racially marginalized defendants, specifically Black, Latino, and Native American individuals, given society's racialization of retribution.[109] With retribution still on the table for judicial consideration, racially marginalized defendants may experience higher revocation rates and longer terms of reincarceration. The Court had an opportunity to curb this risk in *Esteras*, but the decision stopped short.

In critiquing retributive revocation, this Essay is situated among a growing body of scholarship interrogating supervision. A couple of decades after Congress enacted supervised release, criminal scholars began questioning its utility.[110] Some condemn the indiscriminate way judges impose supervision

107. *Id.*

108. *Id.* at 204-06 (Sotomayor, J., concurring).

109. *See* Levinson et al., *supra* note 35, at 839.

110. *See* Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1015 (2013).

regardless of need,[111] while others reveal that supervision widens the carceral net.[112] The literature also denounces the lack of procedural due process afforded to defendants when facing revocation, which enables the government to circumvent traditional legal protections when seeking to reincarcerate a defendant.[113] Scholars have questioned whether judge-initiated revocations violate separation-of-powers principles,[114] whereas others fault the fact that revocation enables judges to reincarcerate someone based on conduct that does not necessarily constitute a crime and sentence people to terms longer than the underlying conviction required.[115] These are all worthy critiques.

Here, the focus is on how the Court's decision in *Esteras* continues to erode the rehabilitative aims of supervision and risks amplifying supervision's preexisting racial disparities. It is an extension of criminal-law scholar Jacob Schuman's work on the problematic role retribution plays in revocations.[116] Schuman examines theories of punishment in the context of supervised-release revocations, arguing that retribution is inappropriate based on the purpose of supervised release and that judicial reliance on retribution has played a key role in expanding the state's power to punish.[117]

This Essay applies these arguments to the Court's decision in *Esteras* and takes them a step further. The Court's ruling in *Esteras* gives the appearance that retribution is no longer a permissible factor on which judges can rely. Yet, the decision preserves judges' ability to respond retributively to defendants' violating conduct, undermining the rehabilitative aims of supervised release and further entrenching the racial disparities found within criminal supervision.

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

112. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 339-40 (2016).

113. Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. 297, 298 (2022).

114. *See* Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. 629, 633 (2025) ("When federal district judges revoke probation or supervised release, however, they become prosecutors in robes, collapsing the separation between executive and judicial powers.").

115. *See* Fish, *supra* note 83, at 1377 ("[U]nder current federal law, this cycle of supervised release, violation sentences, prison time, and more supervised release can continue forever for certain crimes." (citing United States v. Celestine, 905 F.2d 59, 60-61 (5th Cir. 1990))).

116. *See* Schuman, *supra* note 27, at 933 ("Even in enacting the revocation provision, Congress sought to constrain the courts by excluding retribution from the list of factors they could consider under § 3583(e)(3). Yet this attempt failed, as a majority of circuit courts and Supreme Court justices endorsed a 'primarily' retributive theory of revocation." (quoting U.S. SENT'G GUIDELINES MANUAL § 7A3(b) (U.S. SENT'G COMM'N 2018))).

117. *Id.*

Permitting judges to consider retribution when revoking supervision allows judges to respond punitively when sentencing the defendant. This can be especially detrimental when (and if) a judge views supervised release as a gift. Under this view, when a defendant violates the conditions of supervised release, a judge might perceive the defendant as squandering that gift and, thus, deserving of punishment. *Esteras* allows this practice to continue. For example, when revoking the supervised release of a defendant in Illinois, one judge explained: "[Y]ou've got to pay the consequence . . . . You have to pay your debt to this Court and to what's right and to your failure to accept your good fortune."[118] The judge continued, "when fortune—whether we call it God or what, when fortune gives you a chance . . . you've gotta take it. And for your failure to do that, there's gotta be a consequence."[119] Although the reviewing court vacated the sentence and remanded the case, the decision was not based on the trial judge's retributive admonition.[120]

Though this Essay focuses on federal supervised release and revocation, all states operate some form of community supervision following a person's release from prison.[121] The term supervised release is most closely associated with the federal program, whereas, depending on the state, it is sometimes referred to as community supervision or community corrections. At any given time, almost three million people are on probation, while about eight hundred thousand people are on parole, having been released from prison early.[122] Like the federal program, state-imposed community supervision often fails to provide people with a meaningful rehabilitative off-ramp following incarceration.[123] Instead, given the onerous conditions to which those on community supervision must adhere and the lack of support those on supervision receive, it serves as an on-ramp to reincarceration, ensnaring people in an endless carceral cycle.[124] About one-third of defendants on supervised release violate the conditions and are reincarcerated.[125]

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118. United States v. Shaw, 39 F.4th 450, 460 (7th Cir. 2022).

119. *Id.*

120. *Id.* at 453 (reversing and remanding the case based on the judge's lengthening of the defendant's prison time to promote rehabilitation).

121. *See* Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (May 2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023.html [https://perma.cc/RYS2-KJTT] (compiling community-supervision data for all fifty states and the District of Columbia).

122. *See id.*

123. Klingele, *supra* note 110, at 1018–20.

124. *Id.*

125. *See Federal Offenders Sentenced to Supervised Release*, *supra* note 88, at 4.

Importantly, state supervision can serve as a barometer for the federal program when considering the demographic disparities of supervision. There remains a lack of data on federal revocation proceedings.[126] The federal government first ordered data collection in 2022, when President Biden instructed the Department of Justice to disaggregate by demographic the number of people who had experienced revocation, modification, or reinstatement of supervised release.[127] It is unclear whether the Trump Administration continued to collect such information.[128]

Existing research shows that marginalized defendants — people of color, people from under-resourced backgrounds, and people navigating mental illness and addiction — have the most difficulty meeting the conditions of supervised release.[129] Supervised-release conditions can include drug testing, mandatory fees, and housing requirements. Such requirements tend to disadvantage marginalized defendants, many of whom face systemic barriers like indigency, unstable housing, and limited access to mental-health treatment and healthcare.[130] Those on supervised release must also refrain from reengaging in criminal conduct. Yet, discriminatory policing can result in defendants of color violating supervision at higher rates given their increased contact with law enforcement.[131]

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126. Stefan R. Underhill, *Supervised Release Needs Rehabilitation*, 10 VA. J. CRIM. L. 1, 13 (2024).

127. *See* Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32957 (May 25, 2022) ("Within 90 days of the date of this order and annually thereafter, and after appropriate consultation with the Administrative Office of the United States Courts, the United States Sentencing Commission, and the Federal Defender Service, the Attorney General shall coordinate with the DOJ Reentry Coordination Council and the DOJ Civil Rights Division to publish a report.").

128. *See* Caroline Medina, Naomi Goldberg & Meeta Anand, *Disappearing Data: Why We Must Stop Trump's Attempts to Erase Our Communities*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Feb. 20, 2025), https://civilrights.org/blog/disappearing-data-why-we-must-stop-trumps-attempts-to-erase-our-communities [https://perma.cc/42WD-GF9X] ("Over the last several weeks, we have seen a strategic effort by the Trump administration to remove commonly used datasets and resources that document economic, social, and health disparities faced by millions of people.").

129. *See* Emily Widra, *One Size Fits None: How 'Standard Conditions' of Probation Set People Up to Fail*, PRISON POL'Y INITIATIVE (Oct. 2024), https://www.prisonpolicy.org/reports/probation_conditions.html [https://perma.cc/AB9L-KQ53].

130. *See* Allison Frankel, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, HUM. RTS. WATCH & ACLU 153 (July 2020), https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states [https://perma.cc/GQ9C-ZLYU] ("Our research shows that many violations result from social and economic disadvantages, including poverty, housing insecurity, problematic drug use, mental health conditions, and racial bias. In most cases, these factors are present in combination.").

131. *Id.* at 180-88; *see also* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 127-31 (2017) (demonstrating that Black Americans have disproportionate "front-end" contact with police,

These factors combine to increase the likelihood that marginalized defendants, including people of color, will violate the conditions of release. Thus, supervision morphs into a near-inevitable path back to prison for those least able to comply with the conditions of release. With *Esteras*, judges can then respond retributively to defendants' violations, exercising discretion to determine the length of reincarceration. Given the racial construction of retribution, these decisions can have an especially detrimental impact on racially marginalized defendants.

Based on available data, the racial disparities in community supervision at the state level appear more pronounced than at the federal level. Relevant data does not yet exist to compare demographics information for people on federal supervised release.[132] Moreover, there are many more people under state supervision relative to federal supervision. Approximately 110,000 people are serving a term of federal supervised release,[133] whereas over three million people are under state correctional supervision.[134] And "[n]ationwide as of 2016, one in every eighty-one white people were under supervision, compared with one in every twenty-three Black people."[135] In some jurisdictions, the disparity is even starker. If state data are any indication, the federal disparities are likely sharp. For example, in Wisconsin in 2017, Black men were under supervision at a rate five times higher than for white men, and Native American men at a rate four times higher than white men.[136] As of 2014, Wisconsin had the greatest racial disparities in incarceration rates compared to the rest of the nation.[137]

These disparities extend to supervision revocations. Data from the Wisconsin Department of Corrections reveal that in 2017, Black people comprised 42%

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who "routinely force interactions with African Americans," leading to "back-end" police violence).

132. *See* Underhill, *supra* note 126, at 12-14.

133. *See Table E-2—Federal Probation System Statistical Tables for the Federal Judiciary*, U.S. CTS. (June 30, 2024), https://www.uscourts.gov/data-news/data-tables/2024/06/30/statistical-tables-federal-judiciary/e-2 [https://perma.cc/Z7GT-P9MY]; *see also Number of Offenders on Federal Supervised Release Hits an All-Time High*, PEW CHARITABLE TRS. (2017), https://www.pew.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high [https://perma.cc/5TCV-ABM4] ("The number of offenders on federal supervised release nearly tripled between 1995 and 2015, reaching an all-time high of approximately 115,000.").

134. *See supra* notes 121-122 and accompanying text.

135. Frankel, *supra* note 130, at 38.

136. Jarred Willams, Vincent Schiraldi & Kendra Bradner, *The Wisconsin Community Corrections Story*, COLUM. UNIV. JUST. LAB 18 (Jan. 2019), https://justicelab.columbia.edu/sites/justicelab.columbia.edu/files/content/Wisconsin%20Community%20Corrections%20Story%20final%20online%20copy.pdf [https://perma.cc/Z7PN-F6MC].

137. Frankel, *supra* note 130, at 150.

of those incarcerated for revocations, even though they made up only 25% of the supervision population and 6% of the state's population.[138] Black people are also incarcerated for technical violations at two times the rate of white people, comprising 42% of those who are incarcerated for technical violations.[139] Courts revoke supervision for Native Americans based on technical violations at 1.7 times the rate of white people.[140]

Many people struggle to find housing after incarceration. As with the below-mentioned example involving a technical violation, the terms of supervised release can make securing housing even more difficult. For racially marginalized defendants, these difficulties are compounded because they often have inequitable access to resources and services, which can prevent their compliance with supervision.

In one case, as a condition of supervised release for a defendant convicted of aggravated sexual abuse, a judge prohibited the defendant from having unauthorized contact with anyone under the age of eighteen.[141] However, the defendant resided with his girlfriend, which brought him into contact with his girlfriend's thirteen-year-old son, who also resided in the home.[142] The court found that fact constituted a violation warranting the defendant's arrest and revocation of supervision.[143] Despite the defendant's argument that the violation was "inadvertent" and "minor," the judge sentenced the defendant to an above-the-guideline-range sentence of twelve-months imprisonment.[144]

In *Esteras*, the Court left retribution partially intact, enabling courts to rely on retribution when sentencing defendants for noncompliance with the conditions of supervision. As demonstrated above, this can detrimentally impact racially marginalized defendants. The law affords judges discretion, particularly involving alleged technical violations, which can activate racialized notions of retribution when judges determine an appropriate sentence for a defendant who has failed to comply with the conditions of supervision. The Court had the opportunity to ameliorate these impacts and remove retribution from consideration, but it failed to do so.

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138. Williams et al., *supra* note 136, at 18, 24.

139. *Id.* at 18.

140. *Id.*

141. *See* United States v. Crenshaw, 315 F. App'x 166, 167 (11th Cir. 2008).

142. *Id.* at 168.

143. *Id.* at 169-71.

144. *Id.*

III. EXTRACTING RETRIBUTION FROM REVOCATIONS

This final Part considers an inevitable future challenge to retributive revocation given that the Court left it unaddressed as it relates to defendants' violating conduct. The Court could simply extend its reasoning in *Esteras*, which would align with Congress's rehabilitative goals established in Part I and ameliorate the harmful racialized impacts of retributive revocation discussed in Part II. In addition, this Part also recommends actions that federal judges can take in the meantime to help curb retributive revocations and advance the rehabilitative aims of supervised release.

A. Extending Esteras *to Violating Conduct*

The Court should extend *Esteras* when it next has the opportunity because it declined to address whether trial judges can consider retribution for a defendant's post-release conduct when revoking supervised release.[145] The result may have been a compromise, necessary for the majority to obtain sufficient votes. The Court's most recent case referring to the supervised-release statute's omission of Section 3553(a)(2)(A) was in 2022 with *Concepcion v. United States*.[146] There, the Court mentioned in dicta that "Congress expressly precluded district courts from considering the need for retribution" in sentencing defendants for violating supervision.[147] Although the composition of the Court has changed since *Concepcion*, with Justice Jackson replacing Justice Breyer, the Justices' votes may shed light on why the Court only partially prohibited retribution from supervised-release revocations in *Esteras*.

In *Concepcion*, the Court considered the permissible factors on which a district court could rely when sentencing a defendant under the First Step Act, a 2018 law authorizing courts to reduce prison sentences for defendants convicted of certain crack-cocaine crimes.[148] For guidance on interpreting Congress's intent with sentencing considerations, the Court looked to the supervised-release statute, noting that "Congress has expressly precluded district courts from considering the need for retribution."[149] The mention of supervised release was brief, but the takeaway was clear: when it comes to sentencing, Congress uses express language to guide district courts and/or relies on omissions to limit

145. Esteras v. United States, 606 U.S. 185, 194 n.5 (2025).

146. 597 U.S. 481 (2022).

147. *Id.* at 494.

148. *Id.* at 486.

149. *Id.* at 494 (first citing 18 U.S.C. § 3583(c) (2024); and then citing Tapia v. United States, 564 U.S. 319, 326 (2011)).

district courts.[150] In a 5-4 decision, the Court held that trial judges may consider intervening changes to the law and changes of fact when adjudicating a First Step Act motion.[151] Justice Sotomayor wrote for the majority, joined by Justices Thomas, Breyer, Kagan, and Gorsuch.

Justice Kavanaugh filed a dissenting opinion, joined by Chief Justice Roberts and Justices Alito and Barrett. They disagreed with the Court's conclusion, finding that trial courts should determine a sentence as if "the lower crack-cocaine sentencing ranges had been in effect back at the time of the original sentencing."[152] The dissent's focus on connecting punishment to the original conviction offers a clue as to how in *Esteras*, Roberts, Barrett, and Kavanaugh joined the majority. In *Concepcion*, these three Justices believed that any reduction in punishment should be tethered to what was known at the time of the original conviction and not unrelated intervening changes in law and fact.[153] In *Esteras*, the three Justices may have similarly reasoned that imposing a sentence for the defendant's violating conduct should not relate back to the original conviction; it should be tethered to the conduct that resulted in the violation.[154] So, even though the revocation statute omitted retribution from consideration, any reliance on retribution should not relate back to the original crime; if anything, a judge can relate it to the violating conduct.[155] It seems this split application of retribution is what secured the necessary votes in *Esteras*.

While *Concepcion* may help explain the Court's vote in *Esteras*, the decision creates uncertainty for judges navigating revocation hearings. Lacking clear guidance on whether courts can rely on retribution when sentencing a defendant for violating the conditions of supervision, some lower courts may continue to do so. Those lower courts that do can point to the Court's decision to "take no position on whether" such reliance related to the defendant's violating conduct "is a permissible consideration."[156] Justice Jackson warned in a separate concurrence that the majority's opinion invites "hairsplitting," prohibiting judges from responding retributively to the defendant's underlying crime but putting retribution back on the table for violating conduct—a regime she called "entirely impractical" for judges to implement.[157] Other judges will follow the Court's directive that "Congress's decision to exclude [retribution] from § 3583(e)'s list of

150. *Id.* at 495.

151. *Id.* at 485, 487.

152. *Id.* at 502-03 (Kavanaugh, J., dissenting).

153. *Id.* at 503-04.

154. Esteras v. United States, 606 U.S. 185, 193-94, 200-01 (2025).

155. *Id.* at 193-95, 200.

156. *Id.* at 194 n.5.

157. *Id.* at 207 (Jackson, J., concurring).

sentencing factors means that district courts cannot consider [retribution] when deciding whether to revoke supervised release" and stick to the factors enumerated in Section 3583(e).[158]

When it comes to considering retribution vis-à-vis defendants' violating conduct, the Court's decision is as clear as mud. It creates the possibility that trial judges will rely on different considerations depending on their understanding of *Esteras* when sentencing a defendant for violating supervision. *Esteras* allows judges to either rely on the express sentencing factors listed in Section 3583(e), which excludes retribution, or rely on retribution as it relates to the violating conduct.[159] Given the inextricable link between race and retribution,[160] judges in the latter camp who opt to respond retributively to violations may view racially marginalized defendants as more deserving of incarceration and less deserving of leniency and mercy. This could lead to a disparity in revocation rates and sentence lengths.

Because judges can rely on different considerations when sentencing defendants for supervision violations, the question this Essay addresses will inevitably return to the Court for clarity and guidance. In *Esteras*, the Court could have prevented a subsequent petition by merely extending its reasoning to retribution as it relates to violating conduct. Justice Sotomayor explained as much in her concurrence, which Justice Jackson joined. Sotomayor wrote, "As the Court holds today, the supervised-release statute does not permit consideration of § 3553(a)(2)(A)[, meaning] courts may consider only the remaining eight enumerated factors, none of which contain any reference to retribution."[161] Sotomayor chastised the majority for incorrectly framing petitioner's question "as one about retribution for the original offense" and failing to "decide[] whether the supervised-release statute precludes courts from exacting retribution for the defendant's supervised-release violation."[162] In light of the statutory text and legislative history, Sotomayor believes "the answer to that question is straightforward."[163] She would have gone further than the majority to hold that judges'

158. *Id.* at 197 (majority opinion).

159. *See id.* at 205-06 (Sotomayor, J., concurring) (describing the majority opinion's ambiguous guidance to trial judges when revoking supervised release).

160. *See* Levinson et al., *supra* note 35, at 871-83 (finding that Americans associate concepts of retribution with Black people and concepts of mercy with white people, and that the stronger a person's anti-Black bias is, the more likely they are to harbor retributivist views).

161. *Esteras*, 606 U.S. at 205 (Sotomayor, J., concurring).

162. *Id.*

163. *Id.*

consideration of retribution should be "out of bounds" as it relates to "either a supervised-release violation or the underlying offense."[164]

Extending the Court's reasoning in *Esteras* to defendants' violating conduct would require a future petitioner to frame the question presented to address explicitly whether judges can consider Section 3553(a)(2)(A) factors vis-à-vis defendants' violating conduct when revoking supervised release. For such a case to reach the Court, a court of appeals would need to have affirmed a lower-court order where the trial judge relied on retribution for the defendant's violating conduct when revoking supervision. This scenario is most likely to occur in the five circuits where judges were relying on Section 3553(a)(2)(A) factors in revocation proceedings prior to *Esteras*. This includes the U.S. Courts of Appeals for the First, Second, Third, Sixth, and Seventh Circuits.[165] The inevitability of a judge relying on retribution for a defendant's violating conduct is high given the number of federal defendants on supervised release,[166] and the high percentage of annual revocations (nearly thirty percent).[167]

Waiting for an ideal test case takes time, and during that time, hundreds, if not thousands, of individuals may experience retributive revocation directed at their violating conduct. Until retribution and revocation come back before the Court, there are steps federal trial judges can take to advance Congress's initial rehabilitative aims in enacting supervised release. These efforts are identified below.

B. Using Discretionary Authority for Rehabilitative Ends

Trial courts have tremendous discretion related to supervised release. Judges have the authority to impose supervised release, set conditions beyond what the law requires, determine the length of supervision, initiate a revocation hearing, decide whether to revoke release, and determine how long a defendant is sentenced for violating the conditions of release.[168] They also have the power to

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164. *Id.* at 206.

165. Petition for a Writ of Certiorari at 13, *Esteras*, 606 U.S. 185 (No. 23-7483) (citing DAVE S. SIDHU, CONG. RSCH. SERV., LSB10929, SUPREME COURT: RETRIBUTION TIED TO THE ORIGINAL OFFENSE CANNOT FACTOR INTO SUPERVISED RELEASE REVOCATION DECISIONS 1 (2025)).

166. *See* U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 3 (2020) (noting that just over 130,000 people were on federal supervised release between 2013 and 2017, and an average of 16.9% of defendants violated supervision).

167. *See Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes*, U.S. CTS. (June 14, 2022), https://www.uscourts.gov/data-news/judiciary-news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes [https://perma.cc/7F5N-G452].

168. *See* 18 U.S.C. § 3583(a), (d), (e) (2024).

terminate supervised release early.[169] Schuman aptly refers to judges as "prosecutors in robes."[170] With this awesome authority, judges can opt to exercise their discretion in ways that further align with Congress's rehabilitative aims. Although *Esteras* inserted uncertainty into the factors appropriate for consideration in revocation decisions, the Court was clear that Congress's intent was to exclude retribution "when deciding whether to revoke supervised release."[171] Until the Court offers further guidance, trial judges can continue to exercise their discretion to advance rehabilitation when navigating supervised release.

In 2018, Judge Weinstein of the U.S. District Court for the Eastern District of New York provided a blueprint for exercising such judicial discretion. He issued an opinion in response to the government's report that a defendant, Tyran Trotter, violated the terms of supervised release.[172] According to the government, Mr. Trotter used marijuana and failed to comply with drug-treatment orders.[173] Weinstein used the case as an opportunity to examine the history, purpose, and utility of supervised release.[174] Applying that examination to Mr. Trotter's case, Weinstein altered his approach to supervised release.[175] For future cases, Weinstein determined he would impose shorter terms of supervision, consider the appropriateness of conditions, terminate release early, and decline to reincarcerate defendants who engaged in habitual marijuana use.[176]

Although the law mandates some aspects of supervised release, Judge Weinstein recognized the discretionary authority he possessed. Instead of revoking Mr. Trotter's supervised release and reincarcerating him, Weinstein terminated Mr. Trotter's supervision, concluding that "supervision would not serve the rehabilitative goal of supervised release."[177] The supervised-release statute empowers judges to terminate release early if certain conditions are met, including serving one year of release and if the court "is satisfied that such action is warranted by the [defendant's] conduct . . . and the interest of justice."[178] In the

169. *See id.* § 3583(e); *see also* Jacob Schuman, *Terminating Supervision Early*, 62 AM. CRIM. L. REV. 261, 261 (2025) (discussing the history and legal developments of early termination of supervised release).

170. *See* Schuman, *supra* note 114, at 633.

171. Esteras v. United States, 606 U.S. 185, 197 (2025).

172. *See* United States v. Trotter, 321 F. Supp. 3d 337, 337 (E.D.N.Y. 2018).

173. *Id.* at 342.

174. *Id.* at 339.

175. *Id.*

176. *Id.*

177. *Id.* at 365.

178. 18 U.S.C. § 3583(e)(1) (2024).

wake of *Esteras*, district judges can exercise their discretionary authority, adopt Weinstein's approach, and advance the rehabilitative goals of supervision.

This rehabilitative shift from some members of the federal judiciary reflects an increased awareness that policing, surveillance, and incarceration cannot solve social problems, reduce criminal conduct, nor increase public safety.[179] Judges in the U.S. District Court for the Southern District of New York focus on imposing conditions that facilitate rehabilitation, such as mental-health therapy and drug counseling to address the underlying issues that would otherwise contribute to the defendant reengaging in criminal conduct or otherwise violating supervision.[180] Conditions like these allow defendants the opportunity to engage in meaningful self-improvement and increase the likelihood of defendants successfully completing supervision.

Reducing criminal conduct and rehabilitating people who have engaged in such conduct requires a more nuanced, individualized, and thoughtful approach. There is often a significant lag between when a judge first imposes supervision (when sentencing a defendant for the underlying crime) and when supervised release begins (upon completion of the prison term).[181] During these intervening years, the rehabilitative needs of a defendant are likely to have changed. Narrowly tailored rehabilitative conditions contrast sharply with cumbersome obstacles, such as location-restriction conditions or association conditions, which defendants can easily violate if they are in a restricted place or with a restricted person.[182] Judges can use their discretion to modify supervision conditions to fit more adequately the needs of defendants returning to society.[183] The statutory language of supervised release contains the tools necessary to facilitate

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179. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1199-1207 (2015) (discussing the inefficacy of policing and incarceration at addressing social problems and reducing crime).

180. *See* Richard M. Berman, *Court-Involved Supervised Release: A Call to Action*, 108 JUDICATURE 43, 46 (2025).

181. *See, e.g.*, United States v. Esteras, 88 F.4th 1163, 1165 (6th Cir. 2023) (noting that the judge sentenced Esteras to twenty-seven months in prison, which he served, before supervised release began).

182. *See Trotter*, 321 F. Supp. 3d at 351-57 (listing various conditions, including those that limit the people with whom a defendant can associate and limit where the defendant can reside and impose a curfew).

183. *See id.* at 359 (citing 18 U.S.C. § 3583(e)(2)) (noting that judges have discretion to modify or reduce conditions of supervised release at any time during supervision). *See generally* Richard M. Berman, *Court Involved Supervised Release Update*, U.S. CTS. (Apr. 19, 2022), https://www.nysd.uscourts.gov/sites/default/files/2022-05/Supervised%20Release%20%28April%202022%20Update%29%20_1.pdf [https://perma.cc/UZE3-HMMR] (demonstrating that district judges are positioned to help supervisees through court-involved supervision).

rehabilitation, yet judges underutilize them. Federal judges can follow Judge Weinstein's lead, and together they can curb punitive reincarceration and help facilitate meaningful rehabilitation.

CONCLUSION

In *Esteras*, the Court had the opportunity to rule definitively about the appropriateness of retribution in sentencing defendants for violating the conditions of supervised release. Based on the legislative history and the statutory text, it is clear that Congress intended supervised release to provide a rehabilitative pathway for people reentering society from federal prison. However, the Court stopped short, reframing petitioners' question and providing an artificially narrow response. After *Esteras*, judges can still punish defendants for disobeying and disrespecting their authority when and if a defendant violates the conditions of supervised release. The decision risks solidifying supervised release's transformation into an extension of punitive carcerality—a mechanism not for easing reintegration, but for reincarceration and punishment.

In the aftermath of *Esteras* and until the Court revisits retribution and revocation, district judges can exercise their discretion to eliminate retribution and advance Congress's rehabilitative aims. Rather than rely on retribution to sentence Broadfield above the guidelines when he violated supervision, the judge could have approached Broadfield's post-release supervision differently. At Broadfield's sentencing for his underlying conviction, the judge imposed an eight-year supervision term, including imposing conditions.[184] Yet, Broadfield's supervision did not begin until thirteen years later upon his release from prison.[185] At that time, the judge, in conjunction with federal probation, could have reassessed Broadfield to ensure that the previously imposed conditions were appropriate to facilitate rehabilitation, and if not, the judge could have modified them. Defendants who are enrolled in mental-health and drug treatment and who have secured employment tend to fare better than those who have not.[186] Judges should prioritize conditions like these rather than draconian obstacles that can easily result in violations. Until the Court extends *Esteras*, the supervised-release law gives district judges the power to actualize Congress's rehabilitative goals and they should exercise that power.

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184. Brief for the United States at 6-8, United States v. Broadfield, No. 24-2075, 2025 WL 667522 (7th Cir. Mar. 3, 2025), 2024 WL 4520780, at *6-8 (indicating that upon release from prison for his underlying crime, the conditions of Broadfield's supervision included meeting with his probation officer, abstaining from drugs and alcohol, submitting to alcohol and drug testing, and abstaining from criminal conduct).

185. *See Broadfield*, 2025 WL 667522, at *1.

186. *See* Berman, *supra* note 180, at 46.

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