NOTE: POLICING PAROLE: THE CONSTITUTIONAL LIMITS OF BACK-END SENTENCING

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INTRODUCTION

Modern sentencing jurisprudence and punishment theory have largely overlooked issues raised by parole supervision and revocation. Yet parole is an integral dimension of the criminal justice system; today, nearly eighty percent of all prisoners are released into the community under some form of parole supervision.[1] Importantly, parole supervision not only places conditions on a parolee's liberty, it also provides administrative agents of the criminal justice system—not judges or juries—the opportunity to re-incarcerate the parolee. Parole revocation has the effect of retroactively imposing longer prison terms and periods under community supervision for the conviction offense. This form of sentencing—labeled by some as "back-end sentencing" to reflect its placement within the criminal justice system as well as its limited exposure to public and judicial scrutiny—has gained wide popularity in the last two decades.[2] Between 1980 and 2000, when the overall prison population increased fourfold, the parole population returned to prison increased sevenfold.[3]

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1. AMY L. SOLOMON, VERA KACHNOWSKI & AVINASH BHATI, URBAN INST., DOES PAROLE WORK?: ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES 1 (2005), http://www.urban.org/UploadedPDF/311156_Does_Parole_Work.pdf.

2. *See* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 47-48 (2005).

3. Jeremy Travis & Kirsten Christiansen, *Failed Reentry: The Unique Challenges of Back-end Sentencing*, 13 GEO. J. ON POVERTY L. & POL'Y 249, 250 (2006).

An analysis of the purposes and policy of sentencing and punishment—deterrence, incapacitation, rehabilitation, and retribution—has yet to be applied to the parole revocation context. Incarceration as a result of a parole violation is not understood as a form of punishment in and of itself, or even as a sentencing enhancement. Instead, it is viewed as a reinstatement of the original sentence.[4] Yet characterizing re-incarceration for parole violations in this way reflects an under-inclusive and over-simplified understanding of the parole revocation process as well as punishment more generally. Parole revocation that results in re-incarceration or other restrictions on a parolee's liberty is designed to punish the parolee for the *new* violation—*not* the underlying conviction, despite the fact that it is the conviction offense that establishes the authority of parole administrators to revoke parole and re-incarcerate. Moreover, the current practice of parole revocations and returns to prison fundamentally alters the original sentence imposed by the judge and supported by the facts found by the jury. Parole violations affect not only the period of incarceration but also the duration of parole supervision, and therefore may ultimately increase the duration of custodial or community supervision beyond the scope of the sentence originally conceived of by the judge, or may retroactively impose the maximum sentence. Instead, as Jeremy Travis has suggested, it is our deeper impulse to create distinctions between us and them—the demonization of criminals—that supports an understanding of parole revocation only in terms of the original conviction.[5] Such an understanding thereby justifies additional punishment in the absence of public scrutiny and judicial oversight.

Travis characterizes the parole revocation process as a system of sentencing, which he has labeled back-end sentencing. He acknowledges that "the process of adjudicating parole violations is recognized as flowing from the original convictions and sentence."[6] However, he argues that "the conceptual and operational similarities between the two systems are . . . so compelling that . . . there should be little hesitation to call the process of adjudicating parole violations a form of sentencing."[7] These similarities between front-end and back-end sentencing include: state enforcement agencies to detect violations of rules and laws; arrest and detention for those suspected of infractions; a neutral adjudicative entity (judge and jury or parole judge); an opportunity to present a defense through an adversarial process; and a determination of guilt and the imposition of sanctions, which can include the deprivation of liberty. Travis'

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4. JOHN C. RUNDA, EDWARD E. RHINE & ROBERT E. WETTER, ASS'N OF PAROLING AUTHORITIES, THE PRACTICE OF PAROLE BOARDS (1994).

5. Jeremy Travis, Keynote Address at the Stanford Law School Symposium on Back-End Sentencing and Technical Parole Violations 5 (Nov. 4, 2006), *available at* http://www.jjay.cuny.edu/extra/speeches/stanfordspeech.pdf.

6. *Id.*

7. *Id.*

understanding of parole revocation as a sentencing regime supports the underlying premise of this Note's inquiry—that recent sentencing jurisprudence should be applied to parole revocation hearings and back-end sentencing more generally.[8]

In a recent and important line of cases, the United States Supreme Court breathed new life into the Sixth Amendment right to a jury trial, interpreting it to bar any consideration of facts legally essential to punishment that are not pleaded and found by a jury beyond a reasonable doubt. In *Apprendi v. New Jersey*,[9] the Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *Blakely v. Washington*,[10] the Supreme Court explained that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant."[11] Similarly, in *United States v. Booker*,[12] the Supreme Court again reaffirmed its holding in *Apprendi*: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[13] And the Court revisited this issue just two years later in *Cunningham v. California*.[14] Again citing *Apprendi* and *Blakely*, the Court held that California's Determinate Sentencing Law violates a defendant's right to a jury trial to the extent that it permits a trial court to impose an upper term, even within the statutory maximum, based on facts found by the court rather than by a jury.

Blakely has been described as a revolution in the criminal justice system given its "potential to impact every case in which a defendant is convicted of a crime and subject to punishment."[15] The Court's theory of sentencing in these cases is grounded not only in an expansive role for the jury in determining punishment for criminal defendants—but also in a broadly defined concept of punishment, which I argue includes back-end sentencing practices. In addition to the *Blakely* principle—that only a jury's findings can support the imposition of

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8. Back-end sentencing more generally refers to the punishment or additional sanctions imposed on offenders through the parole revocation process.

9. 530 U.S. 466 (2000).

10. 542 U.S. 296 (2004).

11. *Id.* at 303.

12. 543 U.S. 220 (2005).

13. *Id.* at 244.

14. 549 U.S. 270 (2007).

15. Douglas A. Berman, *The Roots and Realities of* Blakely, 19-WTR CRIM. JUST. 5, 5 (2005); s*ee also* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307 (2007).

punishment—the Court has also advanced a broader due process norm that has significant implications for who has authority to affect, enhance, or modify a convicted offender's sentence.[16] This norm reflects the spirit of *Blakely*.

The goal of this Note is to explore the implications of *Blakely*'s animating principle for parole supervision—both in the context of parole revocation proceedings as well as in back-end sentencing more generally. The focus of this Note is California's parole system, both because parole supervision is mandatory for nearly every released state prisoner in California, and because California relies heavily on re-incarceration to sanction parole violations. In the first part of this Note, I briefly describe how parole supervision is administered in the state of California, outlining the ways in which parole is revoked and examining trends in revocation over the past thirty years.

In the second part of the paper, I apply the *Blakely* principle to parole revocation hearings, exploring whether this principle requires factual findings by a jury beyond a reasonable doubt to revoke parole and return parolees to prison. Next, I apply the *Blakely* principle and the spirit of *Blakely* more broadly to back-end sentencing. I explore whether the imposition of maximum sentences and increased custodial and community supervision periods that result from the parole revocation process is aligned with the due process norms and central jury role in punishment that *Blakely* promotes.

Finally, I offer a framework for future empirical analysis in light of these questions. In so doing, I hope to encourage research in this area to calculate the impact that parole revocation and back-end sentencing have not only on the criminal justice system at large, but also on individual offenders who are shuffled through the system's revolving door. Such measurements will hopefully expand the national dialogue around *Blakely* and sentencing jurisprudence in the area of parole.

PAROLE IN CALIFORNIA

Parole supervision is a component of the vast majority of criminal sentences in most states.[17] As such, it functions as an integral part of corrections and more broadly of the criminal justice system. Parole supervision aims to enhance public safety at the critical moment of a prisoner's transition back into free society.[18] Supervision in theory deters new crime with enhanced surveillance and monitoring; it also supports the offender's reintegration into the community by providing links to social services, health care, housing, and other

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16. Laura I. Appleman, *Rediscovering Retribution: Understanding Punishment Theory After* Blakely, 18 FED. SENT'G REP. 247, 247-49 (2006).

17. *See* SOLOMON, ET AL., *supra* note 1, at 1.

18. *See* TRAVIS, *supra* note 2, at 87-89.

immediate needs that prisoners face upon release. At year-end 2007, nearly 825,000 adult men and women were under parole supervision in the United States,[19] nearly four times the number on parole in 1980.[20] And of those on parole in 2007, roughly 183,000 returned to prison, with nearly seventy-one percent of those returning due to parole revocation.[21]

California is the subject of this Note's inquiry because nearly every state prisoner is released to parole supervision, as mandated by law.[22] California's parole population has increased tenfold since 1980, and today nearly one in every five parolees in the nation lives in California.[23] On any given day, California supervises roughly 120,000 parolees, meanwhile six out of ten admissions to California prisons are returning parolees.[24] In fact, California's parole population now grows at a faster rate than its prison population—eight percent in 2007 for parole compared to only 0.4 percent for prison.[25]

Typically, when the state releases an individual from prison and onto parole, his period of supervision is assigned, along with conditions of his supervision. The period of parole supervision is mandated by the state's penal code, and extends between one and three years (for those serving determinate sentences for crimes occurring on or after January 1, 1979), with a maximum period of five years for certain crimes.[26]

If parole is revoked and the parolee serves a prison term for the revocation,

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19. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2007, at 4 (2008), http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf.

20. TIMOTHY A. HUGHES, ET. AL., DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990-2000, at 2 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf.

21. GLAZE & BONCZAR, *supra* note 19, at 8.

22. The Board of Prison Terms has the authority to waive the parole period, though this is extremely rare. In addition, some state prisoners serve lifetime sentences without the possibility of parole, and others die while in prison. *See* JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS (2006), *available at* http://ucicorrections.seweb.uci.edu/pdf/rpt_Petersilia_CPRC_blulin.pdf; s*ee also* STEVEN FAMA ET AL., THE CALIFORNIA STATE PRISONERS HANDBOOK: A COMPREHENSIVE PRACTICAL GUIDE TO PRISON AND PAROLE LAW 349 (3d ed. 2001).

23. LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES 84 (2003), *available at* http://www.lhc.ca.gov/lhcdir/172/report172.pdf.

24. RYKEN GRATTET, JOAN PETERSILIA & JEFFREY LIN, PAROLE VIOLATORS AND REVOCATIONS IN CALIFORNIA 5 (2008), *available at* http://ucicorrections.seweb.uci.edu/-files/Parole%20Violations%20and%20Revocations%20in%20California.pdf.

25. JOAN PETERSILIA ET AL., MEETING THE CHALLENGES OF REHABILITATION IN CALIFORNIA'S PRISON AND PAROLE SYSTEM 15 (2007), *available at* http://ucicorrections.seweb.uci.edu/files/Rehabilitation%20Strike%20Team%20Report.pdf.

26. *See* CAL. PENAL CODE §§ 3000, 3000.1, 3001 & 3057 (West 2009) (providing one year (1.5 years max), three years (4 years max), and five years (7 years max) for determinant or non-life indeterminate and life sentences before January 1, 1979, with variation depending on the conviction offense); *see also* FAMA ET AL., *supra* note 22, at 350.

the time in custody does not count toward the supervision term originally assigned, and the parole discharge date is moved back.[27] Because the "clock stops" while incarcerated for a parole violation, parole supervision periods can stretch out for years for those parolees who serve multiple imprisonment terms for violations while never completing the supervision time they owed to the state prior to their re-incarceration.[28] "Offenders often call it 'doing a life sentence on the installment plan' since they go in and out, never able to formally discharge from parole supervision."[29] However, California statute does impose a maximum parole period—the period of time a parolee can legally be kept under parole supervision for the same conviction offense—regardless of the number of parole revocation imprisonment terms.[30]

With respect to parole conditions, state statutes prescribe general conditions that apply to all parolees, such as complying with parole agent instructions, not possessing a weapon, refraining from criminal activity, and not associating with convicted felons.[31] The individual parole agent assigned to the parolee's case also retains authority to impose additional conditions based on the commitment offense or facts particular to the parolee and his personal circumstances.[32]

In addition to having a large number of parolees, California revokes parole at a surprisingly high rate.[33] While nationally parole revocations have increased sixfold over the last twenty years, in California they have increased thirtyfold.[34] Parolees can violate their parole in one of two ways: either by being arrested for a new crime, or by violating one of their release conditions.[35] When the new crime results in a new conviction, parole is revoked (through a parole revocation hearing) and a new sentence is imposed (through front-end sentencing). These parole revocations are reported as new crimes. By contrast, where the new crime does not result in a new conviction, either because it was not

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27. *See* CAL. PENAL CODE § 3000(b)(5) ("Time during which parole is suspended because the prisoner has absconded or has been returned to custody as a parole violator shall not be credited toward any period of parole unless the prisoner is found not guilty of the parole violation.").

28. GRATTET ET AL., *supra* note 24, at 9.

29. *Id.*

30. *See* CAL. PENAL CODE § 3000(b)(5)(A) (four years for a three-year parole period); *Id.* at (B) (seven years for a five-year parole period); *Id.* at (b)(5)(C) (fifteen years for a ten-year period).

31. *See* CAL. CODE REGS. tit. 15, § 2512 (2004); Board of Prison Terms (BPT) Rules § 2512.

32. CAL. CODE REGS. tit. 15, § 2513 (2004).

33. JEREMY TRAVIS & SARAH LAWRENCE. URBAN INST., CALIFORNIA'S PAROLE EXPERIMENT 4-5 (2002), http://www.urban.org/UploadedPDF/CA_parole_exp.pdf.

34. GRATTET ET AL., *supra* note 24, at 6.

35. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 145 (2003).

prosecuted or because the parolee was found not guilty at trial, the new crime is treated as a technical or administrative criminal violation.[36] In such cases, as with technical violations relating to release conditions, the parole authority has the discretion to either overlook the violation or report it for a parole revocation hearing.[37] When the hearing results in parole revocation, it is reported as a technical violation.[38] In the absence of a new conviction and commitment, the parolee can be returned to prison for a period of up to twelve months and the parole supervision period upon release can be extended to forty-eight months, or eighty-four months, where the parolee was originally subject to a sixty-month supervision period.[39]

Two-thirds of parolees in 2006 returned to prison as a result of a parole violation or new offenses. California estimated that nearly 92,576 parole revocation assessments were conducted in fiscal year 2006, and 89,872 parolees were returned to prison, serving an average of four months.[40] Parole revocations have steadily increased over the last thirty years, as reflected in the increase in the overall prison population. Yet the increase in the rate of revocation is staggering—in 1976 only 2,233 parolees were returned to prison, accounting for roughly fifteen percent of the entire parolee population. This is compared to the 89,872 parolees returned to prison in 2006, accounting for roughly sixty percent of the parolee population. The parolee population returned to prison today is thus forty times what it was thirty years ago, and the rate of return has more than quadrupled (see Figure 1).

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36. In contrast to the burden of proof at a criminal trial—beyond a reasonable doubt—a parole hearing requires a much lower burden—preponderance of the evidence. *See* GRATTET ET AL., *supra* note 24, at 6.

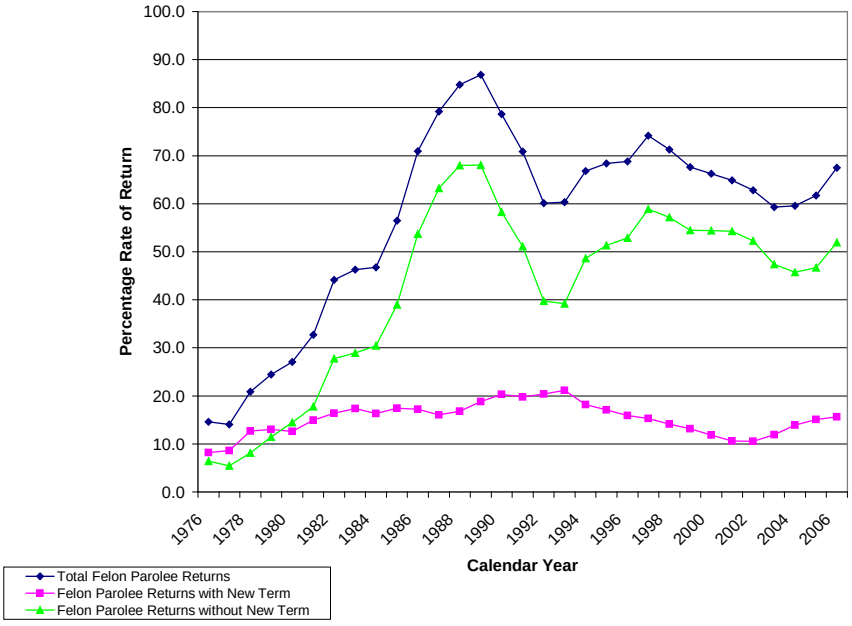
37. However, there are several violations where the parole agent has no discretion, and is required to report the violation to the BPH, and will virtually always result in parole revocation proceedings. *See* CAL. CODE REGS. tit. 15, § 2616(a)-(b) (2004).

38. JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST., BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA (2002), http://www.urban.org/UploadedPDF/310583_-Beyond_Prison_gates.pdf; *see also* JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS (2006), *available at* http://ucicorrections.seweb.uci.edu/pdf/rpt_Petersilia_CPRC_blulin.pdf, at 72-73.

39. CAL. PENAL CODE § 3057(a). Pursuant to § 3057(c), the parole authority may extend the confinement pursuant to parole revocation for a maximum of an additional twelve months for subsequent acts of misconduct committed by the parolee while confined pursuant to that parole revocation. *See also* GRATTET ET AL., *supra* note 24, at 52.

40. CAL. DEP'T OF CORR. AND REHAB., PAROLE VIOLATORS RELEASED FROM CUSTODY BY PRINCIPAL CHARGE CATEGORY FOR THE CALENDAR YEAR 2000 (2000). CAL. DEP'T OF CORR. AND REHAB., ADULT POPULATION PROJECTIONS, 2007-2012 (Spring 2007), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/S07Pub.pdf.

FIGURE 1: Rate of Felon Parolee Returns to California Prisons, 1976-2006[41]



While the explosive growth in parole revocations is undisputed, the proportion of overall parole revocations that are due to technical violations of parole, compared to new crimes, is less clear. According to the California Department of Corrections and Rehabilitation, in 2006 parolees returned to prison with a new commitment term (for a new offense) accounted for just under a quarter of all parolee returns to prison (twenty-three percent), while parolees returned to prison *without* a new commitment term—and thus for a technical violation—comprised over three-quarters of all parolee returns (seventy-seven percent).[42]

Yet a recent and comprehensive study examining every adult parolee in California during 2003 and 2004, conducted by Ryken Grattet, Joan Petersilia, and Jeffrey Lin, revealed that only thirty-five percent of all parole violations

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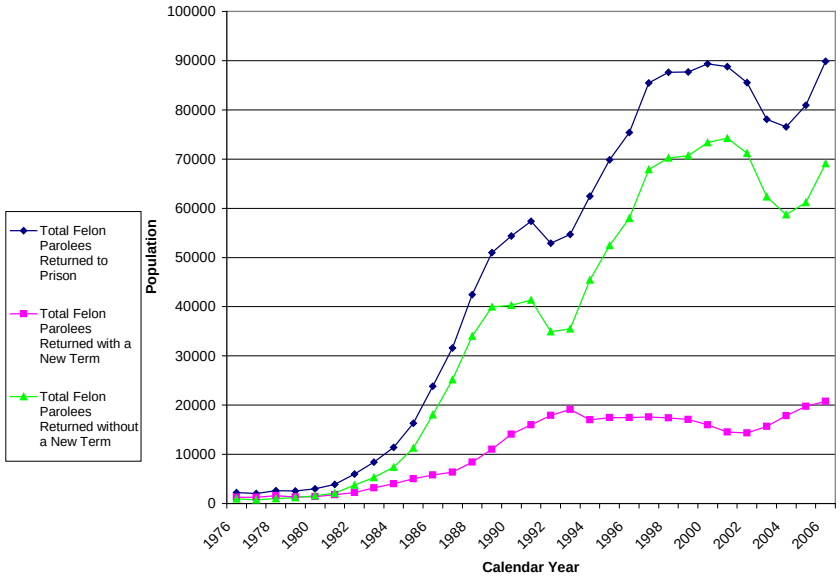
41. Data provided by the Division of Adult Parole Operations, CDCR, various years, *available at*, http://www.ucop.edu/cprc/documents/understand_ca_corrections.pdf. CA Dept of Corrections and Rehabilitation, *available at*: http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/PVRET2/PVRET2d2007.pdf. *See also* Petersilia, *supra* note 22.

42. CAL. DEP'T OF CORR. AND REHAB., RATE OF FELON PAROLEES RETURNED TO CALIFORNIA PRISONS: CALENDAR YEAR 2007, at 1 (2008), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/PVRET2/PVRET2d2007.pdf.

were truly technical violations (violations of parole conditions), while sixty-five percent were criminal violations (violations of the California Penal Code).[43] Such an underreporting of parolee criminal violations results from relying only on "new commitment term" to identify criminal violations, and is likely related to the steady increase in "technical violators" of parole over the last thirty years (see Figure 2).

FIGURE 2: Total Number of Felon Parolees Returned to California Prisons, 1976-2006[44]



The consequences of parole violations vary because in some cases new prosecutions are pursued for criminal behavior, while in others the parole authority relies on parole revocation hearings to sanction the same behavior. These hearings require a substantially lower burden of proof. Generally, the maximum re-incarceration term that the Board of Parole Hearings (hereinafter "parole board") can impose is one year, though this period can be extended for misconduct in prison during the revocation term.[45] In addition to one year in

43. *See* GRATTET ET AL., *supra* note 24, at 69. Criminal violation was defined as behavior alleged to violate the California Penal Code. See *id.*

44. Data provided by the Division of Adult Parole Operations, CDCR, various years. *See also* Petersilia, *supra* note 22.

45. The maximum applies to anyone whose original commitment offense was committed after January 1, 1979. *See* CAL. PENAL CODE § 3057(a); CAL. CODE REGS. tit. 15, §§ 2635.1, 2515. For parolees whose offense was committed on or before December 31, 1978,

prison, the parole board has the authority to extend the parolee's supervision period to forty-eight months, or eighty-four months where the parolee was originally subject to a five-year supervision period.[46] Table 1 illustrates the variation in incarceration periods for parole violations that constitute criminal activity, comparing the average time served by parolees who are prosecuted for the violation as a new crime with those who simply face parole revocation from the board for the same violation.

TABLE 1: Incarceration Period by Offense for Court vs. Board Return[47]

Offense	**Prosecution (Court) (in months)**	**Parole Revocation (Board) (in months)**
Homicide	67.5	9.9
Robbery	41.2	9.6
Assault and Battery	30.1	7.1
Sex Offenses	44.2	6.7
Burglary	26.3	6
Theft/Forgery	19.1	5.7
Drug Possession	16.2	4.3
Drug Sales/Manufacturing/Trafficking	25.3	5.7

In sum, the significance of parole in California cannot be overstated. A California prisoner released on parole has only a one in three chance of not returning to prison while under parole supervision. Yet, the policies and practices of the administration of parole supervision are largely unchecked because it takes place at the back-end of the criminal justice system, outside the purview of the judge and jury.

PAROLE REVOCATION HEARINGS IN LIGHT OF *BLAKELY*

Modern sentencing jurisprudence from a due process perspective suggests that parole revocation hearings should be subject to Sixth Amendment scrutiny under *Blakely*. However, under the traditional conception of parole revocation as a reinstatement of the original sentence, parole revocation hearings arguably pass constitutional muster. A jury's fact-finding beyond a reasonable doubt, in this view, supports both the original sentence and any reinstatement of the re-

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the maximum imprisonment term for revocation is six months. *See* CAL. PENAL CODE § 3057(a); CAL. CODE REGS. tit. 15, § 2635.1.

46. GRATTET ET AL., *supra* note 24, at 52.

47. Joan Petersilia & Ryan Fisher, Presentation at at the Stanford Law School Symposium on Back-End Sentencing and Technical Parole Violations: Empirical Analysis of Parole Violations: California 14 (Nov. 4, 2006), *available at* www.law.stanford.edu/display/images/dynamic/events_media/Back-end-Sentencing.ppt.

maining prison term under the original sentence that is triggered by a parole violation. Yet the traditional view is not consistent with the modern practice of parole revocation; its design is often to punish new criminal behavior rather than deprive the parolee of his reward of early release based on his failures to meet parole conditions. Under the current practice, the jury's original fact-finding is rarely a factor, and in most cases irrelevant, in determining whether a parole violation has occurred or in determining the appropriate sanction for such a violation. Nonetheless, this traditional conception of parole revocation has resulted in parole revocation hearings that are subject only to the constitutional minima of due process, and not the principles articulated in *Blakely*.

In 1972, the Supreme Court observed in *Morrissey v. Brewer* that parole is an "integral part of our penological system" and an "established variation on imprisonment of convicted criminals."[48] In this decision, the Court labeled parole a form of conditional liberty, and established minimal due process requirements for parole revocation assessments. The Court recognized that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others . . . . By whatever name, the liberty is valuable and . . . protect[ed] [under] the Fourteenth Amendment."[49]

The Court outlined the key procedural protections required for revocation proceedings: written notice of the alleged violation(s) and possible consequences in order to allow the parolee an opportunity to prepare and put on a defense[50]; disclosure of inculpatory evidence; right to present witnesses and documentary evidence; right to confront and cross-examine adverse witnesses; a neutral and detached hearing body; and a written statement of the decision as well as the evidence relied upon and reasons for revocation.[51]

In the years since *Morrissey* was decided, parole revocation has become the norm, and re-incarceration has become the principal means of sanctioning parolees for past and present misconduct; thus the constitutional adequacy of these procedural safeguards warrants reexamination. Each year in California, roughly 45,000 parole violation cases go through the parole revocation process

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48. 408 U.S. 471, 477 (1972).

49. *Id.* at 482.

50. *Id.* at 488-89; *see also* Rizzo v. Armstrong, 921 F.2d 855, 858 (9th Cir. 1990) (requiring the parole commission to exercise its discretion in deciding whether a parolee's street time should be forfeited); Vargas v. U.S. Parole Comm'n, 865 F.2d 191 (9th Cir. 1988) (requiring new hearing if parole commission failed to notify parolee of hearing date and provide him with information used against him); Vanes v. U.S. Parole Comm'n, 741 F.2d 1197 (9th Cir. 1984) (holding that due process requires written notice of alleged violations and the charges' possible consequences to allow a parolee time to prepare a defense and obtain mitigation evidence).

51. *Morrissey*, 408 U.S. at 488-89; *see also* FAMA ET AL., *supra* note 22 (collecting relevant California cases).

before the board.[52] At these hearings, the parole violation charges are sustained about eighty-five percent of the time.[53] It is not surprising, then, that two-thirds of the parolee population in California returns to prison.[54] It appears that the parole revocation hearing provides a mere facade of due process in California.

The failure of the due process safeguards to effectively regulate parole revocation hearings is especially disturbing given the evidence that parole in California is not merely a form of administrative regulation but is itself punishment within the meaning of the Constitution. California state law requires that all prisoners serve a period of parole supervision upon release, and this period is considered a type of custody that is a part of any criminal sentence.[55] Parole is thus not a privilege or reward in California; instead, parole is a mandatory element of the sentence, and parolees are still considered to be under the legal custody of the California Department of Corrections and Rehabilitation.[56] Furthermore, the Supreme Court has made clear that any increased period of incarceration is constitutionally significant, noting in *Glover v. United States* that "our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."[57] Being subject to enhanced surveillance de facto imposes a heightened period of exposure to and risk of contact with the criminal justice system. Given that the consequence of parole revocation is additional incarceration and community surveillance, which notably is not credited toward time served under the original parole supervision period, parole itself and any revocation of parole must be viewed as punishment.

Understanding parole in this way—as a form of punishment in and of itself—is important in assessing the significance of the parole revocation hearing. A prison inmate and a parolee both face restrictions on their liberty, but parole subjects an individual to additional punishment based on passive conduct, while incarceration does not. When an individual is incarcerated, only active misconduct will result in additional incarceration or punishment. By contrast, a parolee's liberty is constrained both by the imposition of obligations, or posi-

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52. GRATTET ET AL., *supra* note 24, at 30.

53. *Id.*

54. CAL. DEP'T OF CORR. AND REHAB., *supra* note 42, at 1.

55. In 1976, California adopted a determinate sentencing regime that today subjects almost eighty-five percent of the inmate population to determinate sentences. These inmates are automatically released to mandatory supervision periods after they serve their statutorily imposed incarceration periods. For the few inmates who still fall under the indeterminate sentencing regime, those serving life sentences with the possibility of parole for heinous offenses, in addition to third-strike inmates, none of whom are yet eligible for parole to date, the BPH retains discretion to grant parole. *See* Penal Code § 3000. A prisoner with a determinate term will be released on parole when the number of actual days served, plus any time credits earned, equals the sentence imposed by the court.

56. *See* CAL. PENAL CODE § 3056 (West 2009).

57. 531 U.S. 198, 203 (2001).

tive behaviors and activities in which the parolee must engage (e.g., drug treatment or counseling), and restrictions on negative behaviors or activities (e.g., not possessing a weapon or associating with convicted felons). Thus both active *and* passive conduct can bring about punishment in the parole context.

For example, a parolee who misses a scheduled meeting with his parole agent because he is employed and risks losing his job if he takes off time for the meeting, is in violation of parole. Yet losing his job may also place him in violation if maintaining gainful employment is a condition of his parole. Or alternatively, a parolee who must attend weekly Alcoholics Anonymous meetings as a condition of parole is in violation if he misses a meeting because he or a family member has a medical emergency. In both examples, the violations are the result of the parolee's omission or failure to fulfill the condition. Regardless, the parolee faces re-incarceration for up to twelve months, which will not be credited toward the parole supervision period he must serve once he is released onto parole again, in addition to an extension of his parole supervision period. Had the individual stayed in prison rather than been released to parole, he would not have faced the possibility of this punishment. Had the government been required to prove that the alleged violation occurred beyond a reasonable doubt before a jury, perhaps the jury would not have imposed the punishment.

In addition to the punishment that can, and in most cases will, result from a parole revocation hearing, the nature of these proceedings also suggests that they should be subject to the *Blakely* principle. As Laura Appleman has observed, these hearings "frequently serve as the functional equivalent of the original sentencing proceeding, sometimes increasing the length and type of a convicted offenders' punishment."[58] California's penal code authorizes the parole authority to use criteria outside of facts found at trial by the jury or judge in order to determine whether a violation has occurred and what sanctions to impose.[59] Notably, the parole authority retains discretion to consider any circumstances relating to the violation or offenses of conviction, including crimes that did not result in conviction, as well as any other factors it deems relevant.

According to the California Department of Corrections and Rehabilitation, parole boards are authorized in parole revocation hearings to determine whether a parolee has violated *any law or condition of parole* by a preponderance of the

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58. Appleman, *supra* note 15, at 1308.

59. *See* CAL. PENAL CODE § 3041 (West 2009) ("The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime.").

evidence.[60] Thus parole revocation hearings involve factual determinations of guilt for new violations either of law or parole conditions. This is particularly significant where the factual determination is based on a new criminal offense not subject to front-end prosecution. As discussed in the previous Part, in twenty-three percent of all revocations, the parolee was prosecuted by the state and convicted of a new crime, returning to prison with a new sentence. In these cases, the parole revocation hearing is a procedural formality given that the new conviction—subject to the *Blakely* principle at the front-end—also supports the factual determination of guilt at the parole revocation hearing.

Importantly, however, the remaining seventy-seven percent of revocations are for technical violations, yet seventy-five percent of these revocations are for new criminal offenses where the state elected not to prosecute or where the parolee was found innocent of the crime at trial.[61] Despite being classified as "technical violations" of parole, they are in fact alleged criminal violations of the California Penal Code. In fact, nearly fifteen percent of these violations are for serious and violent crimes—including homicide, rape, and aggravated assault. As a result, these "technical violations" are determinations of guilt for violations of criminal law in the absence of state prosecution and conviction.[62] Yet these determinations only require findings by a preponderance of the evidence. Also worth noting, the parole judge who makes these determinations is only required to have a degree from a four-year college or similar institution, with no legal credential or training required. Further, the parole judge has complete discretion to impose the sanction he deems appropriate, which in most cases is incarceration.

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60. *See* Cal. Dep't of Corr. & Rehab. Website, Parole Revocation Hearings, http://www.cdcr.ca.gov/Divisions_Boards/BOPH/parole_revocation_hearings.html (last visited Feb. 22, 2009) ("Parole revocation hearings determine whether a preponderance level of evidence is present to show a good cause finding that the parolee has violated any law or condition of parole.").

61. *See* CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS AND PAROLEES 2000 tbl. 47 (2000) [hereinafter CAL. PRISONERS & PAROLEES 2000], http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2000.pdf. These figures refer to the percentage of revocations that are classified as "administrative criminal violations." Thus they are classified as technical violations and not new criminal violations (where the parolee receives a new conviction and prison term for the new offense through the front-end sentencing system). *But see* GRATTET ET AL., *supra* note 24, at 69. (Petersilia's study revealed that 65 percent of all parole violations (not only parole revocations) are criminal violations.).

62. In 2000, the last year for which the CDCR maintained this data, 61,675 parolees were returned to prison for administrative violations. Yet, more than 75% of these parolees were returned for administrative *criminal* violations. A shocking 13% of these administrative criminal violations were for serious and violent offenses—including homicide and rape. *See* CAL. PRISONERS AND PAROLEES 2000, *supra* note 61, at tbl. 47; *see also* GRATTET ET AL., *supra* note 24, at 69 (Petersilia's recent findings appear consistent, with 10% of these violations for the most serious crimes, including murder, rape and aggravated assault.).

Even Douglas Berman's narrow characterization of the *Blakely* principle—that juries must determine offense conduct and not offender characteristics—is implicated in light of the procedural and substantive realities of these hearings. Berman describes the outer boundaries of the *Blakely* principle in the following way:

> The jury trial right should be understood to concern offense conduct and not offender characteristics because the state defines "crimes" and accuses and prosecutes based on what persons do and not based on who they are. When the law ties punishment consequences to specific conduct—such as the amount of money or drugs involved in the offense, or whether and how the defendant used a weapon, or whether the offense caused bodily harm to a victim—the state has defined what specific conduct it believes merits criminal sanction. The jury trial right in turn guarantees that a defendant can demand that a jury determine whether the defendant in fact did that specific conduct the state seeks to punish.[63]

Thus because parole revocation hearings punish behavior that either violates parole conditions or criminal laws, the *Blakely* principle would suggest that factual determinations regarding the alleged violation should be determined by a jury beyond a reasonable doubt because a punishment is imposed for the violation itself and not the underlying conviction. Instead, administrative agents—parole judges who are not required to possess any legal credentials—make these factual determinations, and in eighty-five percent of cases, they determine not only that a violation has occurred, but that incarceration is the appropriate sanction. This is fundamentally at odds with the *Blakely* principle.

In theory, the original conviction authorizes not only the conditional liberty to which parolees are subject, but it also supports the more limited due process that parolees receive in parole revocation proceedings. But given that parole revocation determinations are largely the result of findings of new criminal offenses entirely unrelated to the original conviction, coupled with sentencing enhancements to the original sentence that parole violators face—both in terms of increased periods of incarceration and supervision—these hearings should not escape scrutiny under the *Blakely* principle. Factual determinations of guilt for new criminal offenses that authorize re-incarceration and extended supervision periods should be submitted to a jury and proved beyond a reasonable doubt.

Finally, while the conception of parole as a reinstatement of the original sentence has historically permitted minimal due process safeguards for parole revocation hearings, the modern practice of parole revocation requires *Blakely*'s application. This is because parole revocation is not being used to punish parolees for squandering the reward they received when released early from

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63. Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENT'G REP. 89 (2004).

prison. In California, parole supervision is mandatory for everyone upon release, and is thereby not a reward. In addition, when the state returns parolees to prison for a parole violation, it is often because law enforcement or corrections authorities believe they have committed a new criminal offense, yet lack the evidence or resources to prosecute on the front-end. These criminals are then shuffled through the back-end, where incarceration is virtually a guaranteed response with little judicial oversight and a minimal burden of proof and due process safeguards. The *Blakely* problem is that using parole in this way—to deprive a person of his liberty and enhance his sentence because the state suspects he has committed a new crime—requires fact-finding by a jury that supports the re-incarceration. Relying on the fiction that the state is simply reinstating the parolee's original sentence while in practice using parole revocation to punish new crimes does not square with the spirit of *Blakely*. Further, such use of back-end sentencing to substitute front-end sentencing and evade front-end due process safeguards undercuts the very purpose of providing such constitutional protections for those who face deprivation of their liberty at the hands of the state.

PRINCIPLES OF *BLAKELY* IN THE BACK-END SENTENCING CONTEXT

Parole revocations in California have arguably become a back-door administrative means of imposing enhanced sentences on California criminals. Yet modern sentencing jurisprudence suggests that retroactive imposition of enhanced penalties oversteps constitutional bounds. The Supreme Court's decisions in *Blakely* and *Cunningham* articulate that when "a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority."[64] Both the principle and spirit of *Blakely* raise serious doubts about the validity of front- and back-end sentencing in California.

The question remains in the parole context whether the parole board exceeds its proper authority, which is administrative and not judicial, in effectively extending an offender's incarceration and supervision periods from the minimum to maximum sentence imposed by the trial court based upon new offenses for which the inmate was neither convicted nor pled guilty, as well as any other factors the parole authority deems relevant. Precisely because the facts that support a modification to the sentence—either to the period of incarceration or parole supervision—have not been found beyond a reasonable doubt by a jury at the original trial, back-end sentences fall outside the facts contemplated by the judge and supported by the jury, in violation of the *Blakely* prin-

64. Berman, *supra* note 15, at 10 (quoting Blakely v. Washington, 542 U.S. 296, 304 (2004)).

ciple.

As Laura Appleman has observed, given that back-end sentencing and parole have the "potential to enhance an offender's sentence and a lack of jury input, the only body constitutionally permitted to increase an offender's punishment,"[65] the cornerstone principles of *Blakely* are implicated. In addition, Stephanos Bibas has described *Blakely* as "a ringing defense of our adversarial system of justice and [the] jury's populist role."[66] Under this view of *Blakely*, the Court aims to ensure that punishment is fairly imposed by adding a procedural requirement to criminal sentencing via the jury box.

Applied in the back-end sentencing context, the *Blakely* decision should be interpreted to prohibit the parole authority from extending an inmate's incarceration or supervision period based upon offenses for which the inmate was not convicted. In *Blakely*, the Supreme Court reiterated its holding in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[67] In *Cunningham*, the Court elaborated on the meaning of "statutory maximum" and more generally on punishment for purposes of this constitutional inquiry. The Court noted that it was irrelevant that Blakely's sentence was within the statutory maximum, reiterating that "Blakely could not have been sentenced above the standard range absent an additional fact. . . . It did not matter that Blakely's sentence, though outside the standard range, was within the 10-year maximum."[68] The Court held that "the middle term prescribed under California law, and not the upper term, is the relevant statutory maximum."[69] The Court ultimately concluded that California's sentencing scheme was unconstitutional because it permitted judges to find facts by a preponderance of the evidence that thereby authorized the imposition of the upper term.[70]

Similarly, the parole board in the context of back-end sentencing is functionally committing the same unconstitutional offense as the judge in *Cunningham*. The parole authority can retroactively impose the maximum incarceration and parole supervision terms on the parolee via the parole revocation process, and can do so based on facts found only by a preponderance of the evidence outside the purview of judicial or jury scrutiny. This is problematic for two principal reasons, both of which make back-end sentencing subject to the

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65. Appleman, *supra* note 15, at 1342.

66. Stephanos Bibas, *The* Blakely *Earthquake Exposes the Procedure/Substance Fault Line*, 17 FED. SENT'G REP. 258, 258 (2005).

67. *Blakely*, 542 U.S. at 301 (2004) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

68. Cunningham v. California, 549 U.S. 270 (2007).

69. *Id.* at 858.

70. *Id.*

Blakely principle.

First, in California, revocation terms effectively modify the original sentence, rather than simply reinstate it. Parole authorizes retroactive sentencing enhancements that are based on conduct and offenses well outside the boundaries of the original conviction. Yet it relies on the original conviction to authorize such enhancements. For example, determinations of parole eligibility are clearly not subject to the *Blakely* principle because where parole is denied, the prisoner must serve the entire duration of his sentence behind bars. Importantly, this does not extend or enhance the prisoner's original sentence beyond the maximum; it simply requires that the entire sentence be served in prison. In addition, these determinations are based largely on the facts of the underlying conviction. By contrast, parole revocation terms effectively *increase* the incarceration period that the offender, who was already granted parole release, would otherwise serve. Importantly, the additional incarceration period for a parole violation—up to twelve months—is not credited toward the parole supervision term that the parolee must still serve upon release. In addition, the parole board has authority to extend the original parole supervision period to as much as forty-eight months or in some cases eighty-four months, despite the initial statutory maximum of thirty-six months and sixty months, respectively. Thus the revocation term *adds* a custodial period onto the offender's remaining supervision period and extends the supervision period itself, thereby enhancing or modifying the original sentence, rather than actually reinstating the original term.

Further, a new offense is nearly always the basis for the revocation term, and not the facts of the underlying conviction. Two-thirds of all California parolees return to prison for a parole violation; the vast majority of these violations are for conduct or offenses that are entirely unrelated to the original conviction. Thus while the factual determinations made by a jury support the original sentence, these same findings do not serve as the basis for the re-incarceration and thus should not authorize what are effectively sentencing enhancements.

Second, because parole supervision is a dimension of the original sentence, facts relating to the parole supervision period, conditions, and revocation sanctions are legally essential to the punishment, and should thus be submitted to the jury. As a component of every state prisoner's sentence, parole should not be viewed as an in-prison reward or privilege. Instead, parole supervision, which imposes obligations and restrictions on the parolee's liberty, should be considered a form of punishment that is part and parcel of the original sentence. Further, because the default response to a parole violation is re-incarceration, which must be served in addition to the parole supervision period, revocation terms should be viewed as a form of back-end sentencing enhancement. Thus,

excluding the judge and jury from the parole revocation process and the imposition of sanctions undermines their role at front-end sentencing.[71] Instead, judges and juries should be given the opportunity to consider facts related not only to the period of supervision but also to supervision conditions that will expose the offender to revocation as well as sanctions imposed for revocation.

Therefore, the *Blakely* principle suggests that the unfettered discretion of the parole authority to impose back-end sentencing enhancements is not only improper, but an unconstitutional exercise of state power.[72] Instead, either the facts of the violation should be submitted to a jury and proved beyond a reasonable doubt, or the judge and jury should be given the opportunity at the original sentencing to consider facts that would support back-end sentencing enhancements. This clearly resonates with one of Justice Scalia's overarching concerns in *Blakely*:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors,' rather than a lone employee of the State.[73]

The scenario Justice Scalia feared is precisely what takes place in back-end sentencing. Parolees who serve revocation terms are deprived of their liberty based on the factual finding of a single, unqualified administrative agent of the state. Such a result sharply conflicts with the *Blakely* principle.

In addition to *Blakely*'s animating principle, there is a broader normative principle operating in *Apprendi* and *Blakely*—the spirit of *Blakely*—that is also implicated in back-end sentencing. In *Apprendi*, it was evident that a due process norm also provided the basis for requiring greater procedural protections in determining facts that form the basis for criminal punishment. The Court argued that "due process and associated jury protections" extend to determinations related to sentence length, and not simply to findings of guilt or

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71. The Ohio Supreme Court examined this issue in 2005 in *Eubank v. Ohio Adult Parole Auth.*, No. OSAP-274, 2005 WL 2008683 (Ohio Aug. 23, 2005), holding that *Blakely* did not apply to the parole context or back-end sentencing but was only applicable to the trial court's initial sentencing.

72. *See* Appleman, *supra* note 15, at 1369-72. Appleman suggests that the practically unadulterated discretion and authority that the parole authority wields, coupled with the minimal due process at parole revocation proceedings, implicates the *Blakely* principle in the context of back-end sentencing. She submits that a *Blakely* violation occurs where power is transferred from the jury to the parole officer in making factual determinations that effectively increase punishment. The violation occurs, she argues, where parole boards, as administrative bodies lacking in legal training, dole out additional punishment with minimal legal protections for the parolee. *Id.* at 1372-76.

73. *Blakely*, 542 U.S. at 313-14.

innocence.[74] The Court looked to *Mullaney v. Wilbur*[75] for this lesson. In *Mullaney*, the Court invalidated a state statute that placed the burden on the defendant to rebut a statutory presumption of greater culpability in order to secure a reduced sentence. The Court reasoned that criminal law "is concerned not only with guilt or innocence in the abstract" but also with the consequences of a guilty verdict.[76] Ultimately, the Court rejected such methods of circumventing procedural protections by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."[77]

The Supreme Court also appealed to this due process norm in its recent decision in *Alabama v. Shelton*,[78] suggesting that events that occur at the back-end but nonetheless affect punishment should be taken into account at the front-end. In *Shelton*, the Court held that a probationer's suspended sentence could not be imposed without the full panoply of procedural rights and protections, specifically his Sixth Amendment right to counsel, at the front-end prosecution. This is because the sentence *could*, at the back-end, "end up in the actual deprivation of a person's liberty."[79] The Court was persuaded that where deprivation of liberty is at stake, even if only a possibility at the back-end, all constitutional rights must be afforded at the front-end in order to lawfully impose such punishments.

The Court was particularly concerned with the nature of the probation revocation hearing, which it found to be informal, lacking in a right to counsel, and without any obligation to observe standard rules of evidence.[80] Further, the sole issue at the hearing was "whether the defendant breached the terms of probation," while the "validity or reliability of the underlying conviction is beyond attack."[81] Such a hearing, the Court concluded, "cannot compensate for the absence of trial counsel."[82] Ultimately, the Court found that front-end sentencing that forms the basis for back-end punishment is invalid without procedural safeguards at the front- or back-end. This broader concern echoes the spirit of *Blakely* as applied in the back-end sentencing context. Essentially the back-end imposition of punishment, if not subject to greater procedural protections, must be scrutinized by judges or juries at the front-end.

The Court's reliance on *Mullaney* in *Apprendi*, as well as its decision in

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74. Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).
75. 421 U.S. 684 (1975).
76. *Id.* at 697-98.
77. *Id*. at 698.
78. 535 U.S. 654 (2002).
79. *Id.* at 658.
80. *Id.* at 666.
81. *Id*.
82. *Id*. at 667.

Shelton, highlights the due process norm lurking beneath the surface of *Blakely*. *Blakely*'s central theme is essentially a call for greater procedural protections in the determination and imposition of punishment. At minimum, requiring greater due process in back-end sentencing is a natural extension of this spirit of *Blakely*. The back-end imposition of punishment without additional protections at the front-end violates the due process spirit of *Blakely* by depriving individuals of their liberty without subjecting either the process or punishment to any form of judicial scrutiny.

INSTITUTIONAL REMEDIES

The challenge of expanding *Blakely* to the parole context is the ensuing administrative inefficiency. Yet currently, the operation of parole supervision and revocation is relatively inefficient; it is not cost-effective to incur the high transaction costs and enhanced public safety risk associated with the "revolving door." Regardless, Justice Scalia reminded us in *Blakely* that:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. . . . There is not one shred of doubt . . . about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.[83]

Thus administrative efficiency cannot override the goals of the criminal justice system.

However, there are possible institutional remedies for the *Blakely* problem in back-end sentencing. First, front-end sentencing should be re-conceptualized such that punishments imposed on the back-end are considered at this earlier stage. While the *Blakely* principle may require a greater role for the jury at the front-end or back-end, the spirit of *Blakely* may be satisfied with greater due process and procedural safeguards at the front-end. Re-configuring front-end sentencing in a way that provides the judge or jury with some degree of anticipatory control over the administration of back-end punishments will address many of the *Blakely* concerns.

One such front-end approach would involve expanding the role of the jury. Questions of fact that would justify the punishment of enhanced surveillance via a longer supervision period, along with particular conditions of supervision, should be submitted to the jury to consider at the time of the trial and initial sentencing. The parole authority has already developed a list of factors it considers in determining parole supervision conditions for parolees. Rather than rely on parole agents, these factors and the relevant facts of the offense and offender could be presented to the jury for consideration. This would allow the

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83. *Blakely*, 542 U.S. at 313.

jury to play a greater role in shaping every dimension of punishment from the outset. Alternatively, rather than provide juries with anticipatory control over back-end punishments at the front-end, juries could be involved in parole revocation hearings, such that the procedural safeguards in place at the front-end are also in place at the back-end. In particular, where the alleged parole violation involves a new offense, revocation hearings could require that facts with respect to the new offense as well as to the severity of the sanction be submitted to a jury.

A second approach, one that is arguably more practical and administratively feasible than an expanded role for the jury, entails bolstering the role of judges. Sufficiently addressing the due process spirit of *Blakely* does not require that all issues related to sentencing at the front- and back-end be submitted to the jury. But it does require judges to take greater ownership of criminal sentencing. Because parole supervision is a dimension of the criminal sentence, and revocation is a form of punishment, judges should have greater oversight in determining the duration and conditions of parole supervision, parole revocation process, and sanctions imposed for violations.

Under a front-end sentencing scheme, judges would be given the discretion to consider the conditions of parole that would subject the offender to revocation, to impose graduated sanctions for future parole violations, and to reduce the parole supervision period altogether at the initial sentencing. Prosecutors would be required to present and prove facts that would warrant a lengthier supervision period or additional parole conditions. Criminal defendants would also have the opportunity to present mitigating facts that would persuade the judge to reduce the supervision period, limit parole conditions, or modify the terms of the parole revocation process. In essence, bringing all forms of back-end punishment, including aspects of the revocation process, under the purview of judges, will ensure that every dimension of the criminal sentence receives judicial scrutiny. This, at least in theory, will serve to address the broad due process concern implicated in *Blakely*.

Alternatively, greater judicial ownership of criminal sentencing could also take place at the back-end. Under this approach, when the parolee is alleged to have violated parole, the case would be brought back in front of the sentencing judge. The judge, rather than the parole board, would determine whether a violation has occurred and what sanction, if any, is appropriate. In extreme cases, the judicial branch would also have the opportunity to scrutinize back-end sentencing practices and sanctions, finding perhaps that some sanctions violate constitutional or statutory protections, and respond with corrective measures.

Jeremy Travis strongly advocates this larger oversight role in back-end sentencing, both for the judicial and legislative branches. He argues that “the branches of government responsible for overseeing the exercise of the profound

power to deprive individuals of their liberty should step in to ensure that the system itself operates in ways consistent with notions of equal treatment."[84] Thus, in addition to expanding the role of judge and jury at the initial sentencing, the legislature could also intervene to establish criteria for parole violations and revocations, as has been the case in front-end sentencing policy. The legislature could create statutory requirements for imposing additional incarceration and supervision periods onto parolees' sentences. Further, it could develop more precise statutory requirements for the process of assigning parole conditions and alleging violations.

In addition, rather than rely solely on parole revocation hearings and re-incarceration, the legislature could develop ways to respond to parole violators with programming and social services that address the failed re-integration that often underlies the violation. Engaging alterative responses to parolees who violate supervision conditions has the potential to reduce recidivism and the rates of reentry failure, enhance public safety, significantly reduce costs for the criminal justice system and avoid the *Blakely* problem of back-end sentencing enhancements.[85] In addition, by responding to technical violators in a more effective way, the state can better allocate its resources to pursue the more serious criminal parole violations that should be prosecuted at the front-end, rather than channeled exclusively through the parole revocation process.

While none of these possible remedies necessarily completely cures the *Blakely* problem, they all certainly subject punishment, whether imposed at the front- or back-end, to greater scrutiny and process. At minimum, this scrutiny will curb the present unfettered discretion and authority of state agents to impose punishment at the back-end of the criminal justice system. And while all of the proposed remedies will be subject to criticism for their administrative feasibility, cost, and efficacy, the current system of back-end sentencing in California cannot stand. Any remedies that attempt to re-distribute discretion and authority to enhance sentences at the back-end to other institutional bodies—

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84. Travis, *supra* note 5, at 7.

85. States across the country, in particular Arkansas, Colorado, Nebraska, and Nevada, have made legislative reforms in response to the cost and overwhelming proportion of state prison admissions for which technical violators account. These reforms have created technical violator centers, capped the incarceration period for revocation terms for technical violators, and implemented graduated sanctions to replace incarceration for technical violators. These states have implemented policy changes that serve as the foundation for programmatic efforts. And these programs strive to reduce the likelihood of future recidivism and reduce the costs of corrections. To do so, the programs attempt to fill service gaps of parole violators' reintegration. Secondly, the programs provide an alternative to re-incarceration in state prison, either in a community-based facility or local jail. For a discussion and evaluation of various responses to technical violators, see PEGGY B. BURKE, CTR. FOR EFFECTIVE PUB. POLICY, POLICY-DRIVEN RESPONSES TO PROBATION AND PAROLE VIOLATIONS (1997), http://www.nicic.org/pubs/1997/013793.pdf.

the judge, jury, or legislature—will improve the injustice of the current system.

FRAMEWORK FOR FUTURE EMPIRICAL RESEARCH

While this Note begins to explore the implications of *Blakely* for parole revocation and sanctions in theory, we know very little empirically about the ways in which revocation terms ultimately impact a parolee's sentence with respect to total duration of incarceration and supervision. When a parolee violates his parole, his supervision period is interrupted and his incarceration period is modified in a way that we have not yet measured. For example, if the violation results in a return to prison, when he is released he still has the remainder of his original parole period to serve. In the event he was charged with misconduct while in prison, his incarceration period could have been extended, in addition to his supervision period. And, if he commits a new crime or again violates a condition of parole, the parole cycle is again interrupted.

Research to date has not accounted for the impact of these interruptions, both on the parole supervision period and on the parolee's imprisonment duration in relationship to the original term imposed. Yet we need to calculate the impact in order to appreciate the ways in which back-end sentencing functions to modify and enhance criminal sentences. Ideally, an initial longitudinal study that follows a diverse subset of the parole population, accounting for age, gender, ethnicity, criminal history, and current conviction offense, would reveal how parole ultimately affects the amount of time parolees spend behind bars and under supervision. Key questions might include:

- What is the average number of parole violations per offender per sentence across all parolees?
- What is the average incarceration period or supervision period enhancement imposed per parole violation?
- What is the average increase in the duration of total incarceration as a result of parole violations per offender per sentence?
- What is the average number of re-incarcerations as a result of parole violations per offender per sentence?
- How do these numbers differ between California, where incarceration is the automatic response for parole violations, and a state that uses graduated sanctions?
- Is there a difference in the number of returns to prisons for those who have previously had contact with the criminal justice system but are no longer on parole compared with those on parole?

Further studies might also investigate the ways in which churners—offenders who repeatedly return to prison for parole violations and new offenses—are impacted by elongated prison and supervision terms that result from back-end sentencing. By examining crucial transition points—prison ad-

mission, release onto parole supervision, parole revocation, and re-incarceration for a revocation term—as well as average sentence lengths and time served, researchers would be in a position to assess whether longer average sentences (as a result of parole revocations) or parole violation rates are associated (more or less strongly) with longer average time served in prison over the offender's lifetime.

These empirical inquiries are necessary to understand the role that back-end sentencing plays in shaping, modifying, and enhancing criminal sentences. In addition, they will shed light on the impact that parole supervision and revocation have on an offender's outcomes and criminal trajectory. And finally, they will enable us to identify the critical points in the criminal justice system where discretion and authority leave the entire system vulnerable to unfair, unjust, and unconstitutional sentencing practices.

CONCLUSION

Today, parole violators account for an enormous portion of the prison population—almost two-thirds of all prison admissions in California each year.[86] Clearly, parole revocation and sanctions have a tremendous impact on corrections, and more broadly on the state's criminal justice system. Not so transparent, however, are the back-end sentencing practices that have created this crisis in corrections. The lack of visibility, scrutiny, and oversight of the imposition of punishment at the back-end of the criminal justice system is surprising given the attention that front-end practices have received over the last several decades. Our lack of response to the sentencing practices—both at the front- and back-end—that permit the imposition of punishment in this fashion raises serious concerns with respect to how we conceptualize punishment and how we understand the place criminals occupy in our society.

Both the *Blakely* principle and the due process spirit of *Blakely* present a constitutional constraint on the state's current method of doling out punishment. Simply hiding parole revocation from the jury, judiciary, legislature, and society fails to satisfy the procedural protections that all criminal defendants are guaranteed when the state deprives an individual of his liberty. Thus, given the ways in which parole revocation and sanctions ultimately alter the offender's period of incarceration and supervision, we must re-conceptualize the significance, severity, and duration of the original sentences imposed, and explore ways to impact sentencing practices in California.

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86. GRATTET ET AL., *supra* note 24, at 6.