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## The Company of Scoundrels

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# The Company of Scoundrels

Ronald J. Bacigal\*

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One who would defend [certain constitutional rights] must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.<sup>1</sup>

### I. Introduction

My initial reaction to Brett Shockley’s Note, *Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*,<sup>2</sup> was to admire his courage. Not many people would undertake a discussion of possible injustice to child pornographers, who surely rank with terrorists and drug dealers as the most reviled and least sympathetic claimants for fair treatment. Shockley puts aside the moral condemnation these people deserve,<sup>3</sup> and focuses on the morality of procedure—the rule of law if you will—divorced from the worthiness, or lack

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1. *Kopf v. Skym*, 993 F.2d 374, 379–80 (4th Cir. 1993).

2. Brett M. Shockley, *Protecting Due Process from the PROTECT Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 WASH. & LEE L. REV. 353 (2010).

3. *See id.* at 388 (acknowledging that sex offenders deserve punishment).

thereof, of particular defendants. As students of criminal procedure come to learn, our most precious rights are sometimes invoked and defended by our worst citizens.<sup>4</sup> In the final tally, constitutional protections often flow from the intrinsic worth of proper procedure, aside from the worth of the people who ask for that procedure.

The other display of courage that gained my admiration was the willingness of a second-year law student to tackle two complex constitutional doctrines,<sup>5</sup> further complicated by seemingly inconsistent congressional enactments. When I grasped the full scope of Shockley's analysis, I mused as to why he had not tackled something easier like the abortion controversy or the full ramifications of death penalty law. If this "first edition" article by a young scholar is a predictor of the future, I can hardly wait for the sequel.

## II. *The Constitutionality of Current Law*

Shockley attempts to hook the government on the horns of a dilemma created by two constitutional doctrines: the double jeopardy provisions of the Fifth Amendment,<sup>6</sup> and the Due Process Clause as expounded in *Apprendi v. New Jersey*.<sup>7</sup> At its most fundamental level, the Double Jeopardy Clause prohibits multiple trials and multiple punishments for a single crime. When a convicted sex offender commits a second sexual offense, the simplest way to avoid double jeopardy problems is to say that the offender will be punished separately for two distinct crimes. Separate crimes and punishments could be the following: (1) the first offense warrants ten years imprisonment with the accompanying lifetime supervised release; and (2) the second offense warrants revocation of that supervised release and reincarceration for life.<sup>8</sup>

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4. See *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) ("It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.")

5. The Supreme Court referred to one of those doctrines—the prohibition against double jeopardy—as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

6. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .").

7. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

8. An actual conviction for a second offense would warrant a sentence of twenty years, but it is unlikely a prosecutor would seek such a conviction when revocation offers the option of lifetime incarceration. The benefit of obtaining an actual conviction, however, is the elimination of *Apprendi* problems because there would be no factual findings to be made at a revocation hearing. The government may "elect to rely solely upon a criminal conviction, without evidence of the related conduct, to establish the reasonable cause necessary to

This is a straightforward way to avoid double jeopardy problems, but in turn, this approach creates an *Apprendi* problem. If life imprisonment through revocation of supervised release is a separate and distinct punishment for a second crime, the defendant has been punished for that crime without according him a trial with full due process rights. In place of a full trial, the determination of whether or not the defendant committed a second sexual offense would be made in a revocation hearing without a jury and without holding the government to the proof beyond a reasonable doubt standard.

Some courts have avoided the *Apprendi* problem by holding that life imprisonment through revocation is not a second punishment, but is part of the original sentence for the first offense—an offense that was litigated at a trial where the defendant was accorded the full panoply of his due process rights.<sup>9</sup> But the price for solving the *Apprendi* problem in this manner is a resurrection of the double jeopardy problem. If the initial conviction justified both the original imprisonment for ten years and the potential for life imprisonment following revocation, has the defendant not been sentenced to two terms of incarceration? Shockley has no qualms about asserting that "supervised release defendants are subject to two punishments for one offense. This is in *clear contradiction* of the Court's mandate that the Double Jeopardy Clause 'protection applies both to successive punishments and to successive prosecutions for the same criminal offense.'"<sup>10</sup>

However, it is not as "clear" to me as it is to Shockley that there has been a violation of the prohibition against double jeopardy. There are instances when a single conviction may warrant multiple forms of punishment. For example, it is not a violation of double jeopardy when a court imposes both incarceration and a fine for one conviction. Not only is this not a violation of double jeopardy, but this familiar form of multiple punishment does not violate

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revocation, the 'bare fact' of such conviction clearly becomes the basis for the revocation order." *Resio v. Commonwealth*, 513 S.E.2d 892, 895 (Va. Ct. App. 1999). This, however, is a one-way street in the government's favor. An acquittal of the second offense does not bar subsequent revocation. *See, e.g., Marshall v. Commonwealth*, 116 S.E.2d 270, 274 (Va. 1960) (concluding that defendant's conduct, as proved in the trial in which a jury acquitted the defendant, may be used to support a revocation). At least in theory, the judge at the revocation hearing could make factual findings contrary to the prior findings of a jury that acquitted the defendant of the second offense. This would seem to create an *Apprendi* problem taken to the nth power.

9. *See, e.g., United States v. Work*, 409 F.3d 484, 489 (1st Cir. 2005) (describing a sentence as having "distinct aspects," including "the incarcerative term imposed for the crime of conviction . . . and the supervised release term applicable thereto"); Shockley, *supra* note 2, at 373–75 (discussing a number of similar holdings).

10. Shockley, *supra* note 2, at 382 (emphasis added and omitted) (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

*Apprendi* even though the necessity to pay the fine may hinge on resolution of additional future facts. For example, the government may collect fines only if the defendant is financially able to pay—debtors' prison is a thing of the past. Whether a defendant is incapable of paying the fines or simply refusing to pay—in which case the defendant may be punished once again for contempt of court—is a factual determination that will be made sometime after the initial conviction, and at a hearing where the defendant will not be accorded his full due process trial rights. At least to date, I am unaware of any successful double jeopardy or *Apprendi* challenges to this traditional coupling of incarceration and fines for a single offense.

Of course, imprisonment and a financial fine involve two distinct forms of punishment, whereas a court seems to double-up on a single form of punishment when it imposes both a ten-year sentence for the initial conviction and a life sentence if and when supervised release is subsequently revoked. But even in this situation, the Double Jeopardy Clause does not contain a per se prohibition of all multiple punishments. The prohibition against multiple punishments is merely a rule of statutory construction, and the Supreme Court has explained that "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."<sup>11</sup> *Missouri v. Hunter*<sup>12</sup> subsequently cautioned that the Double Jeopardy Clause does not require courts to negate clearly expressed legislative intent to impose multiple punishments.<sup>13</sup>

Thus, with respect to sentencing, double jeopardy analysis turns on whether Congress clearly expressed its intent to impose multiple punishments on repeat sex offenders. The operative word here is "clearly." I have questioned whether Shockley clearly demonstrated a violation of double jeopardy, but I also question whether Congress clearly has placed its punishment scheme beyond the coverage of the Double Jeopardy Clause.

Looking only at the statutory language itself, Congress seems to have expressed conflicting intents. A maximum punishment of ten years for a first offense and twenty years for a second offense seems to express the congressional view of the appropriate levels of punishment for repeat offenders.

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11. *Albernaz v. U.S.*, 450 U.S. 333, 344 (1981).

12. *Missouri v. Hunter*, 459 U.S. 359 (1983).

13. *Id.* at 366 ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."). The only constitutional limitation on the legislature's clear intent to inflict excessive punishment is the Eighth Amendment's Cruel and Unusual Punishment Clause. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (emphasis added)).

But the PROTECT Act<sup>14</sup> authorizes, and the Sentencing Guidelines encourage,<sup>15</sup> supervised release for life, thus subjecting repeat offenders to life imprisonment when that release is revoked.

At least on the surface, these congressional enactments lack the clarity of a unifying intent, and in fact appear contradictory. But I have not researched the legislative history of these statutes. Those who wish to pursue this issue must take up the task of examining legislative history and either refuting or substantiating Shockley's claim that "by allowing a steeper punishment for a second offense via the revocation process than that intended by Congress, the system undermines legislative intent."<sup>16</sup>

### III. The Wisdom of Current Policy

While the constitutionality of the current laws remains in doubt, there is less doubt surrounding Shockley's attack on the wisdom of what Congress and the courts have wrought. Putting aside constitutional considerations, he proposes three possible improvements to the current system.

#### A. Solution 1

The current approach relies on both a carrot and a stick. The carrot is that sexual offenders often suffer from psychological disorders not easily cured, therefore lengthy periods of supervised release offer a better chance for rehabilitation and a successful transition from prison to liberty. The stick is the threat of reincarceration for life when the terms of supervised release are violated by a second sexual offense. Solution 1 concludes that the punishment stick is too severe. Shockley proposes that life imprisonment be replaced by a maximum punishment of twenty-five years for repeat offenders: twenty years upon conviction of a second sexual offense and five years upon revocation of supervised release previously imposed for the first sexual offense.<sup>17</sup>

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14. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.).

15. U.S. SENTENCING GUIDELINES MANUAL § 5D1.2(b) (2009) ("If the instant offense of conviction is a sex offense . . . the statutory *maximum term* of supervised release is recommended." (emphasis added)).

16. Shockley, *supra* note 2, at 384.

17. *Id.* at 389–90.

He concedes that this solution solves none of the double jeopardy or *Apprendi* problems, but at least violations of the defendants' constitutional rights would be mitigated by a lesser term of imprisonment. The downside to this pragmatic solution is that the government appears to be saying that it may continue to violate constitutional doctrines so long as it reduces the actual incarceration time of those whose rights have been violated. The other downside is that a solution whose essence is a plea to lessen punishment of repeat sex offenders is unlikely to generate much public or political support.<sup>18</sup>

### B. Solution 2

Solution 2 advocates discarding the supervised release regime and returning to a parole scheme in the federal criminal justice system.<sup>19</sup> The main difference from the current system would be structural. "Whereas supervised release 'tacks on' a supervision period to be served once the full sentence has been completed, the parole system 'carves out' a period of supervision from the length of the original sentence."<sup>20</sup>

As the Fifth Circuit noted, this approach might pass constitutional muster because "probation is imposed instead of imprisonment, while supervised release is imposed after imprisonment."<sup>21</sup> In other words, only supervised release, not parole, adds a second punishment beyond the statutory maximum punishment for an offense. Solution 2, however, may unduly exalt form over substance because, regardless of whether the repeat offender faces revocation of parole or revocation of supervised release, he may wind up with very substantial periods of incarceration. In fact, Solution 2 transfers a large portion of a defendant's sentence from supervised release (with a threat of revocation) to additional incarceration before the defendant becomes eligible for parole. Increasing the time of initial incarceration heightens the monitoring of the offender, but it weakens the prime goal of supervised release—to aid offenders in their transition from prison to liberty. Shockley himself concedes that "a

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18. Characterizing Solution 1 as a plea for mercy on sex offenders may be a cheap political shot on my part. Solution 1 does offer a compromise reconciliation of both congressional intents: monitoring and oversight to promote successful rehabilitation, coupled with strong punitive measures for repeat offenders.

19. Federal supervised release replaced the federal parole system in 1987. See *Gozlon-Peretz v. United States*, 498 U.S. 395, 400–01 (1991) (noting the changes implemented by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 and 28 U.S.C.)).

20. Shockley, *supra* note 2, at 392.

21. *United States v. Perez-Macias*, 335 F.3d 421, 427 n.13 (5th Cir. 2003).

constitutional but ineffective scheme [Solution 2] is little better than an unconstitutional scheme [Solution 1]."<sup>22</sup>

### C. Solution 3

Solution 3 attempts to solve both the constitutional and policy problems surrounding supervised release. "Under this approach, defendants would be entitled to the same due process protections—specifically the reasonable doubt standard and right to a jury trial—at revocation hearings as they are at full-blown prosecutions."<sup>23</sup> Such an approach eliminates double jeopardy problems because revocation and reincarceration could be characterized as a second punishment for a second offense, not a doubling-up of the punishment for the initial crime. In turn, *Apprendi* issues are resolved by according defendants their full trial rights when determining whether they have committed a second offense.

The only downside to Solution 3 is the scope of its effect on the criminal justice system. Make no mistake, this is not a narrow correction for the constitutional and policy problems created by the current supervised release program. The fundamental premise of Solution 3 is that no one should be reincarcerated without affording them the same rights applicable at a full scale prosecution. This proposal thus constitutes a broadside attack upon all revocation hearings, whether the issue is revocation of supervised release, parole, probation, or suspended sentence. Such hearings traditionally have had a "due process light" approach. Under this approach, the defendant is entitled to some procedural protections, but is denied the right to trial by jury and the right to require the government to prove its case beyond a reasonable doubt. The criminal justice system would be fundamentally altered if defendants were accorded full trial rights at all post-sentencing hearings that might revoke their liberty and send them back to prison.

Such a fundamental change might well be a significant improvement, but the scope of this new and improved punishment system requires consideration of factors far beyond what Shockley has focused on in his Note. As one of Shockley's former professors, I can suggest (but no longer assign) that his next project be to extend his consideration of revocation hearings to cover all forms of post-sentence hearings where defendants face a loss of liberty.

None of Shockley's proposed solutions is perfect, but this does not lessen the impact of his attack upon the current system. His primary contribution has

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22. Shockley, *supra* note 2, at 393.

23. *Id.* at 394.

been to force Congress and the courts to reconsider the weaknesses and the inconsistencies of the current supervised release regime. Hopefully, Congress and the judiciary will utilize his analysis when formulating improvements to the current system.